A

TREATISE

ON THE

LAW OF EASEMENTS,

BY

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AND

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BARRISTERS AT LAW.

WITH AMERICAN NOTES,

BY

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TO

THE RIGHT HONORABLE

THOMAS, LORD DENMAN,

LORD CHIEF JUSTICE OF ENGLAND,

THIS WORK,

IS,

(WITH HIS LORDSHIP'S PERMISSION),

RESPECTFULLY DEDICATED,

BY

THE AUTHORS.

PREFACE.

THE want of a treatise upon those important rights known in the Law of England by the name of "Easements" has, it is believed, been sensibly felt by the Profession.

The length of time which has elapsed without any attempt having been made to supply this want affords a sufficient reason for the appearance of the present Essay. The difficulties which arise from the abstruseness and refinements incident to the subject, have been increased by the comparatively small number of decided Cases affording matter for defining and systematizing this branch of the law. Upon some points, indeed, there is no authority at all in the English Law;—of the decisions, some depend upon the circumstances of the particular case, and some are irreconcilable with each other.

Water-courses are the only class of Easements with regard to which the law has been settled with any degree of precision.

A desire to remedy an admitted defect led to passing of the Prescription Act—a statute, which has not only failed in effecting its particular object, but has introduced greater doubt and confusion than existed before its enactment. In fact, had it not been held, that the statute did not repeal the Common Law, many rights which have been enjoyed immemorially would have been put an end to by circumstances which never could have been intended to have that effect.

As in many other branches of the law of England, the earlier authorities upon the law of Easements appears to be based upon the Civil Law, modified, in some degree, probably, by a recognition of customs which existed among our Norman ancestors. The most remarkable instance of an adoption by the English Law from

this source is the doctrine known in the French law by the title of "Destination du pere de famille."

In the majority of cases, both ancient and modern, probably from a consideration of this being the origin of the law, recourse has been had for assistance to the Civil Law. It has, therefore, been considered that the utility of the work would be increased by the introduction of many of the provisions of that refined and elaborate system with respect to Prædial Servitudes, and the doctrine of Prescription; as well as some of the observations of Pardessus—an eminent French writer on Servitudes.

With the same view the authority of decisions in the American Courts has been called in aid upon the subject of water-courses—questions which the value of water as a moving power, and the frequent absence of ancient appropriation have often given rise to in the United States. In those judgments the law is considered with much care and research, and the rights of the parties settled with precision. The result of the authorities is stated by Chancellor Kent, in his well-known Commentaries, with his usual ability.

Upon many points, particularly upon the construction of the Prescription Act, the observations contained in the following pages are, in some degree, unsupported by direct authority. It has, however, been thought better to endeavor to open the law upon the doubts which presented themselves than to pass them over in silence.

Temple, July, 1839.

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TREATISE

ON THE

LAW OF EASEMENTS.

INTRODUCTION.

In addition to the ordinary rights of property, which are determined by the boundaries of a man's own soil, the law recognises the existence of certain rights accessorial to those general rights, to be exercised over the property of his neighbor, and therefore imposing a burthen upon him.

That branch of these accessorial rights which confers merely a convenience to be exercised over the neighboring land, without any participation in the profit of it, is called, by the law of England, Easements, as rights to the passage of light, air, and water. Those accessorial rights, which are accompanied with a participation in the profits of the neighboring soil, are called Profits a prendre, as rights of pasture, or of digging sand.

Both these classes are comprehended under the Servitudes of the civil law. In treating of prædial Sevitudes, no distinction is made between rights of this * nature whether accompanied or unaccompanied by a participa- *2 tion in the profits of the land (*a*).

The tenement to which the right is attached is called the dominant; that on which the burthen is imposed the servient tenement. The term servitude is used to express both the right and the obligation; the term easement generally expresses the right only.

The origin of some easements is as ancient as that of property—one tenement may be subjected to the convenience of another by the hand of nature itself—the inferior elevation of one in relation to the other, may subject it to the fall of water from the higher ground. A similar disposition may be produced by the act of man permanently changing their previous relation, and thus affixing to them qualities with which they were not originally invested—as where, by the erection of buildings, water is discharged upon the neighboring land, or light and air are received through a window. Other ease-

(*a*) Inter rusticorum prædiorum servitutes quidam computari recte putant, aquæ haustum, pecoris ad aquam adpulsum, jus pascendi, calcis coquendæ, arenæ fodiendæ.—I. §2. ff. de serv. præd.

ments create no apparent change in the condition of the two tenements, but exist only by a repetition of the acts of man, as rights of way.

"The origin of servitudes," says an eminent French writer, "is as ancient as that of property, of which they are a modification; by their natural disposition the inferior lands were placed in a species of dependence on those more elevated, and the first possessors of the soil recognised the indispensable necessity of such subjections. When the extension of cultivation brought men nearer together, and the want of a common defence formed *3 the first society, public *utility and safety led to the conviction, that it was necessary to restrict in certain cases rights legitimate in themselves, but the absolute exercise of which by individuals could not take place, without rendering some properties almost valueless. In a short time similar rights were stipulated for by private persons, as matter of utility, or even pleasure. Thus, from the disposition of nature, the wants of society, and the agreements of individuals, have originated prædial servitudes" (*a*).

By the law of England, the origin of rights of this kind is referred either to an express contract between the parties, or to a similar contract implied from their conduct—from the peculiar relation of the parties at the time they became possessed of their respective tenements, or from the long continued exercise of the right, from which a previous contract between them may be inferred.

In like manner, by the civil law, the origin of servitudes was referred to "Lex, natura loci, vetustas" (*b*), which last, as in the English law, for the prevention of litigation, was allowed to confer a valid title.

The number or modifications of rights of this kind may be infinite both in their extent and mode of enjoyment (*c*), as the convenience of man in using his property requires. "To descend now," says Lord Stair, "to the kinds of *4 servitudes, there may be as many as *there are ways whereby the liberty of a house or tenement may be restrained, in favor of another tenement; for liberty and servitude are contraries, and the abatement of the one is the being or enlarging of the other" (*d*).

(*a*) Pardessus, Traite des servitudes.—s: 1.

(*b*) In summa tria sunt per quæ inferior locus superiori servit. Lex, natura loci, vetustas, quæ semper pro lege habetur; minuendarum scilicet litium causa.—L. 2. ff. de aq. et aq. pl. arc. C. L. 2. ff. de longi temporis.

(*c*) Nullum est dubium, quin plures esse possint hujus generis servitutes, pro diversa ratione et habitantium necessitate.—Heineccius, El. J. C. Lib. 8. § 148.

(*d*) Institutes, Book 2, tit. 7.

PART I.

OF THE ACQUISITION OF EASEMENTS.

CHAPTER I.

OF THE ESSENTIAL QUALITIES OF AN EASEMENT.

An easement may be defined to be a privilege without profit, which the owner of one neighboring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged "to suffer or not to do" something on his own land, for the advantage of the dominant owner (*a*).

The essential qualities of easements may be thus distinguished:—

1st. Easements are incorporeal.

2nd. They are imposed upon corporeal property.

3rd. They confer no right to a participation in the profits arising from it.

4th. They must be imposed for the benefit of corporeal property.

5th. There must be two distinct tenements—the dominant, to which the right belongs; and the servient, upon which the obligation is imposed.

6th. By the civil law, it was also riquired that the cause must be perpetual.

* Sect. 1.—*Easements are incorporeal.* *6

"A right of way, or right of passage, for water, where it does not create an interest in the land, is an incorporeal right, and stands upon the same footing with other incorporeal rights" (*b*).

Considered with regard to the servient tenement, an easement is but a charge or obligation, curtailing the ordinary rights of property (*c*):—with re-

(*a*) Termes de la Ley, tit. Easements.

Servitus est, jus in re aliena alteri constitutum, quo dominus, quod huic alteri commodum sit, aliquid aut pati in suo, aut in suo non facere, cogitur.—Vinnius, ad Inst. lib. 2. tit. 3.

(*b*) *Per Curiam* in *Hewlins* v. *Shippam*, 5 B. & Cr. 221; S. C. 7 D. & R. 783.

Servitutes prædiorum rusticorum, etiamsi corporibus accedunt, incorporales tamen sunt.—L. 14. ff. de serv.

(*c*) Pertinent enim ad libera tenementa jura sicut et corpora, jura sive servitutes, diversis respectibus: jura autem sive libertates dici poterunt ratione tenementorum quibus debentur; servitutes vero ratione tenementorum a quibus debentur. Bracton, lib. 4, fol. 221.

gard to the dominant tenement, it is a right accessorial to these ordinary rights, constituting, in both cases, a new quality impressed upon the respective heritages (*a*).

SECT. 2.—*Easements are imposed upon corporeal Property, and not upon the Person of the Owner of it.*

The right conferred by an easement attaches upon the soil of the servient tenement; the utmost extent of the obligation imposed upon the owner being, not to alter the state of it, so as to interfere with the enjoyment of the easement (*b*) by the dominant.

*7 * The obligation upon him is in fact negative—to suffer or not to do —ceasing altogether upon his ceasing to be the owner of the servient heritage (*c*); and passing with the servient heritage, upon its transfer, to each successive proprietor (*d*).

So completely is this the case, that, if any disturbance of an easement has taken place previous to a transfer of the servient heritage, although such tortious act would give a right of action against the former owner, his successor is also liable if he allows it to continue (*e*).

SECT. 3.—*Easements confer no right to a participation in the Profits of the servient Tenement.*

Easements are specifically distinguished from other incorporeal heredita-

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(*a*) Quid aliud sunt jura prædiorum quam prædia qualiter se habentia? Ut bonitas, salubritas, amplitudo.—L. 86. ff. de v. s.

(*b*) *Taylor* v. *Whitehead*, 2 Doug. 749: and see *Pomfret* v. *Ricroft*, 1 Saund. 322: *Bullard* v. *Harrison*, 4 M. & S. 387.—Vide post, Incidents of Easements.

In omnibus servitutibus refectio ad eum pertinet qui sibi servitutem asserit, non ad eum cujus res servit.—L. 6. § 2. ff. si serv. vind.

(*c*) Aio esse jus, quo dominus aliquid pati in suo, aut in suo non facere, cogitur, ex natura omnium servitutum; pati in suo, puta re sua utentem, fruentem, per fundum suum euntem, agentem, aquamve ducentem, tignum in ædes suas immittentem; non facere, veluti altius non ædificare, in suo non ponere quod luminibus ædium nostrarum aut prospectui officiat, &c. Plane enim ita servitus constitui non potest, ut quis aliquid cogatur facere in suo; puta viridaria aut arbores prospectus nostri causa tollere, &c., obligatio hæc erit, non servitus constituta; et ideo, prædio alienato, non sequetur actio novum possessorem, ut fit ubi servitus constituta est; sed in eum, qui id facere promisit, hæredemque ejus, actio in personam dabitur.—Vinnius, ad Inst. lib. 2, tit. 3—L. 15. § 1. ff. de serv.

(*d*) Non ignorabis, si priores possessores, aquam duci per prædia prohibere jure non potuerint, cum eodem onere perferendæ servitutis, transire ad emptores eadem prædia posse.—C. L. 3. ff. de serv. et aq.

(*e*) *Penruddock's case*, 5 Rep. 101: and post, Remedies for Disturbance.

ments, by the absence of all right to participate in the profits of the soil charged with them.

The right to receive air, light, or water, passing across a neighbor's land, may be claimed as an easement,* because the property in them re- *8
mains common; but the right to take "something out of the soil" is a profit a prendre, and not an easement (*a*).

The servitude of the civil law had a much wider signification: comprehending, in addition to the easements proper of the English law, many rights which in it fall under the division of profits a prendre (*b*).

SECT. 4.—*Easements must be imposed for the beneficial Enjoyment of real corporeal Property.*

An easement, as such, can only be claimed as accessory to a tenement. This position was recognized as law, by the judges, in a very early case (*c*), "Suppose," said Shars, J., "I grant to you a way over my land to a certain mill, and you are not seised of this mill at the time, but you purchase it afterwards: notwithstanding I disturb you in this way afterwards, you shall not have assize, though you may have a writ of covenant." To which it was replied, "In your case it is no marvel to me, although no assize lies, inasmuch as he had not the frank tenement to which he claimed to have (dut avoir) the way, at the time the way was granted to him, and therefore he could not have had assize if he had been disturbed at the time when the grant was made; and as he could not then have assize, * the purchase of the frank tene- *9
ment afterwards would not enable him to maintain this action."

"Nullus hujusmodi servitutes," says Bracton, "constituere potest, nisi ille, qui fundum habet et tenementum; quia prædiorum, aliud liberum, aliud servituti suppositum (*d*).

"Et ita pertinent servitutes alicui fundo ex constitutione sive ex impositione de voluntate dominorum" (*e*).

(*a*) *Manning* v. *Wasdale*, 5 Adol. & Ellis, 764; S. C. 1 Nev. & P. 172: *Blewett* v. *Tregoning*, 3 Ad. & Ellis, 554; S. C. 5 Nev. & Man. 308: *Bailey* v. *Appleyard*, 3 Nev. & Per. 257.

(*b*) Inter rusticorum prædiorum servitutes, quidam computari recte putant, aquæ haustum, pecoris ad aquam appulsum, jus pascendi, calcis coquendæ, arenæ fodiendæ.—I. § 2. ff. de serv. præd.

(*c*) 21 Ed. 3, 2, pl. 5. —

(*d*) Lib. 4, f. 220.

(*e*) Idem. f. 221.

Quoties nec hominum, nec prædiorum, servitutes sunt, quia nihil vicinorum interest, non valet; veluti ne per fundum tuum eas, aut ibi consistes, et ideo si mihi concedas jus tibi non esse fundo tuo uti, frui, nihil agitur; aliter atque si concedas mihi jus tibi non esse in fundo tuo aquam quærere, minuendæ meæ aquæ gratia.—L. 15. ff. de serv.

Easements must be imposed for the beneficial Enjoyment of corporeal Property.

Thus it has been recently intimated on high authority, that a plea to turn cattle on land generally, without stating for what purpose, is bad (*a*). Probably, however, in the English as in the civil law, the grant of an easement in respect of a house about to be purchased, or built, by the grantee, would enure as such.

By the civil law, although it was clearly established that a servitude could be acquired only by the proprietor of the heritage to be benefited by it (*b*); yet where, at the date of the grant, there was an intention to erect the building to which the servitude was to be attached, the right so conferred was valid (*c*).

It followed from this rule that every servitude must be productive of advantage to the dominant tenement. A mere restriction upon the rights of the
*10 servient * owner was invalid, if unaccompanied by any benefit to the dominant owner, or if such benefit were merely a personal one to him (*d*).

For the same reason no servitude could exist, unless the dominant and servient tenements were sufficiently near, to allow the one to receive a benefit from the subjection of the other (*e*).

The servitude when once acquired, passed with the heritage into the hands of each successive owner (*f*).

Many personal rights, which, in their mode of enjoyment, bear a great re-

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(*a*) Per Littledale, J., *Bailey* v. *Appleyard*, 3 Nev. & Per. 257.

(*b*) Nemo enim potest servitutem acquirere, urbani vel rustici prædii, nisi qui habet prædium.—I. § 3. ff. de serv. præd.

(*c*) Futuro ædificio, quod nondum est, vel imponi vel acquiri servitus potest.—L. 23. § 1. ff. de serv. præd.

(*d*) Ut pomum decerpere liceat, et ut spatiari, et ut cœnare in aliena possimus, servitus imponi non potest.—L. 8. Ibid.

(*e*) Quod si ædes meæ a tuis ædibus tantum distant ut prospici non possint; aut medius mons earum conspectum auferat, servitus imponi non potest.—L. 38. ff. de serv. urb. præd.

Nemo enim propriis ædificiis servitutem imponere potest, nisi et is qui cedit, et is cui ceditur in conspectu habeant ea ædificia, ita ut officere alterum alteri potest.—L. 36. Ibid.

Neratius libris ex Plautio ait: nec haustum pecoris, nec appulsum, nec cretæ eximendæ, calcisque coquendæ, jus posse in alieno esse, nisi fundum vicinum habeat; et, hoc Proculum et Atilicinum existimasse, ait.—L. 5. § 1. ff. de serv. præd. rust.

In rusticis autem prædiis impedit servitutem medium prædium quod non servit. —L. 7. Ibid.

(*f*) Si fundus serviens, vel is cui servitus debetur, publicaretur, utroque casu durant servitutes; quia cum sua conditione quisque fundus publicaretur.—L. 23. § 2. ff. de serv. præd. rust.

Cum fundus fundo servit, vendito quoque fundo, servitutes sequuntur.—L. 12. ff. comm. præd.

(See *Wheelock* v. *Thayer*, 16 Pick. 68.)

semblance to easements, as, for instance, rights of way, may be conferred by actual grant, independently of the possession of any tenement by the grantee; but such rights, though valid between the contracting parties, do not possess the incidents of an easement. In case of disturbance of a personal right thus given, the remedy would appear to be upon the contract only.

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* Sect. 5. * 11

There must be two distinct tenements—the dominant, to which the right belongs—and the servient, upon which the obligation is imposed.

It is obvious, that if the dominant and servient tenements are the property of the same owner, the exercise of the right, which in other cases would be the subject of an easement, is, during the continuance of his ownership, one of the ordinary rights of property only, which he may vary or determine at pleasure, without in any way increasing or diminishing those rights.

It is therefore essential that the dominant and servient tenements should belong to different owners: immediately they become the property of the same person the inferior right of easement is merged in the higher title of ownership (*a*).

This principle is thus laid down by Bracton: "Nemini servire potest fundus suus proprius, quia prædiorum, aliud liberum, aliud servituti supposition" (*b*).

"Et talis dici poterit constitutio quadomus domui, rus ruri, fundus fundo, tenementum tenemento, subjungatur; et non tantum personæ per se, vel tenementum per se, sed uterque simul, tam tenementum, quam personæ" (*c*).

"A servitude is a charge imposed upon one heritage for the use and advantage of an heritage belonging to another proprietor" (*d*).

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* Sect. 6.—*By the Civil Law the causes of Easements must be perpetual.* * 12

It is not to be understood by this position that the civil law required the enjoyment of an easement to be continuous and necessarily perpetual, conditions which in many cases would be obviously impossible (*e*); but only that

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(*a*) *Holmes* v. *Goring*, 2 Bing. 83; S. C. 9 Moore, 166. Nulli enim res sua servit.—L. 26. ff. de serv. præd. Si quis ædes quæ suis ædibus servirent cum emisset, traditas sibi accepit, confusa sublataque servitus est.—L. 30. ff. de serv. præd. urb.

(*b*) Lib. 4, f. 220.

(*c*) Ibid. f. 221.

(*d*) Code Civil, art. 637.

(*e*) Tales sunt servitutes, ut non habeant certam continuamque possessionem; quia nemo tam continenter ire potest, ut nullo momento posse sio ejus interpellari videatur.—L. 14. ff. de serv.

the qualities thus impressed upon the dominant and servient tenements should be in their nature permanent, and such as were capable of continuing in their present condition for an indefinite period (*a*).

If from the nature of the servient tenement the enjoyment can only continue during a limited space of time, as where water is drawn from a mere artificial collection, no servitude was acquired (*b*).

The want of direct authority upon this point in the law of England, renders it difficult to determine to what extent this principle is admitted by it; and even in the civil law it is by no means easy to define the rule with precision; for though it is there laid down that nothing which depended upon the mere act of man (quod manu fit), as a discharge through an aperture in

* 13 * the wall of water used in washing the pavement, could constitute a servitude, it seems clear that a servitude might be acquired to discharge smoke and steam arising from hot baths, the use of which would obviously be of equally uncertain duration, and arising directly from the hand of man (*c*).

The rule laid down by Vinnius is "That a servitude has a perpetual cause where it is natural, though not constant, as rain water, which falls naturally, though not constantly; and that those servitudes which arise by the act of man have also a perpetual cause, if the tenement, or any part of it, has been adapted or prepared (parata) for its enjoyment, as the immission of smoke" (*d*).

It is obvious, however, that it is difficult to reconcile this rule with the instance above cited from the Digest, unless the aperture there mentioned be considered as made for a temporary purpose only.

Bracton appears to have recognised this as an essential element: after laying it down that a man may have an assize for disturbance of his "haustus aquæ" he continues,

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(*a*) Omnes servitutes prædiorum perpetuas causas habere debent; et ideo, neque ex lacu, neque ex stagno, concedi aquæ ductus potest.—L. 28. ff. de serv. urb. præd.

Servitus aquæ ducendæ, vel hauriendæ, nisi ex capite, vel ex fonte, constitui non potest.—L. 9. ff. de serv. præd. rust.

Stillicidii quoque immittendi, naturalis et perpetua causa esse debet.—L. 28. ff. de serv. urb. præd.

(*b*) Foramen in uno pariete conclavis vel triclinii quod esset proluendi pavimenti causa, id neque flumen esse, neque tempore acquiri, placuit. Hoc ita verum est si in eum locum nihil ex cælo aquæ veniat: neque enim perpetuam causam habet, quod manu fit; at quod ex cælo cadit, et si non assidue fit, ex naturali tamen causa fit, et ideo perpetuo fieri existimatur.—Ibid.

(*c*) Nam et in balneis inquit vaporibus, quum Quintilla cuniculum pergentem in Ursi Julii instruxisset, placuit, tales servitutes imponi.—L. 8. § 7. ff. si serv. vind.

(*d*) Perpetuum illis est quodcumque ex naturali causa oritur, etsi non sit assiduum, ut ecce, aqua pluvia ex naturali causa oritur etsi non assidue pluit; quod enim naturaliter fit, perpetuum videtur, licet non fiat assidue, ut defectio lunæ. Sed et quod ex facto nostro oritur, perpetuum habetur, si ejus causa prædium aut pars prædii parata est, ut fumi immissio.—Vinnius, ad Inst. lib. 2, tit 3.

Causes of Easements must be perpetual.

"Sed hoc (breve) non est de cisterna, quia cisterna non habet aquam perpetuam, nec aquam vivam, quia cisterna imbribus concipitur" (*a*).

There are many rights which in their mode of enjoyment * partake * 14 of the character of easements: as, however, the existence and validity of these rights depend upon some local custom, excluding the operation of the general rules of law (consuetudo tollit communem legem) (*b*), and as they are entirely independent of any express or implied agreement between the parties (*c*), they stand upon a different footing, and are not governed by the same principles as those which determine the boundaries of private easements (1).

(*a*) Lib. 4. ff. 233.

(*b*) Le case de Tanistry. Davis, 31 (*b*), 32 (*a*). Co. Litt. 33. b., 113. b. 1 Roll. Abr. Custom C. 558.

(*c*) *Blewitt* v. *Tregoning*, 3 Adol. & Ellis, 554.

(1) *Prescription-custom.*—In *Perley* v. *Langley*, 7 N. H. R. 233, it was held, that a custom for the inhabitants of a town to dig sand to mix with lime, from the land of an individual, was not good. It being an interest in land, the individual digging it must plead the right as a prescription in himself and his ancestors, or through the corporation and its predecessors.

A custom for the inhabitants of a certain place, or the owners of a certain close, to pass over the soil of another wherever it is most convenient to themselves, and least prejudicial to the owner, is void for uncertainty. 5 Pick. 485.

CHAPTER II.

SUBJECTS OF EASEMENTS.

Affirmative and Negative.

*From the civil law may be taken a practically useful division of *15 easements into two principal classes, which may be termed (*a*) affirmative and negative. Those coming under the head of affirmative easements, authorize the commission of acts which, in their very inception, are positively injurious to another—as a right of way across a neighbor's land, or a right to discharge water—every exercise of which rights may be the subject of an action. Negative easements are, consequentially injurious only—restricting the owner of the soil in the exercise of the natural rights of property—as where he is prevented building on his own land to the obstruction of ancient lights, or withdrawing water from an ancient mill stream. With respect to this latter class, it is evident that no cause of action can arise from their exercise, they can be opposed only by an obstruction to their enjoyment.

It has already been observed, that the number and variety of these rights is almost infinite, according to the exigencies of domestic convenience, or the *16 different *purposes to which land or buildings may be appropriated.

The English law furnishes the following instances of affirmative easements:—

Rights of way.

Right to discharge a stream of water, either in its natural state or changed in quantity or quality.

Right to discharge rain water by a spout or projecting eaves.

Right to support from neighboring wall.

Right to carry on an offensive trade.

Right to hang clothes on lines passing over the neighboring soil (*b*).

Right to bury in a particular vault (*c*).

The principal negative easements are:—

Right to receive a flow of water.

(*a*) Igitur servitus qualem hic intelligimus, est jus in re aliena alteri constitutum, quo dominus, quod huic alteri commodum sit, aliquid ant *pati in suo*, aut *in suo non facere*, cogitur.—Vinnius, ad Inst., lib. 2, tit. 3.

(*b*) *Drewel* v. *Towler*, 3 B. & Adol. 735.

(*c*) *Dawney* v. *Dee*, Cro. Jac. 604: *Bryan* v. *Whistler*, 8 B. & Cr. 288; S. C. 2 Man. & Ry. 318.

Continuous and Discontinuous.	Apparent and Non-apparent.
Right to receive light and air by ancient windows.	
Right to support of neighboring soil.	

Easements may also be divided into continuous and discontinuous, and into apparent and non-apparent.

"Continuous servitudes are those of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as a water-spout, or right to light and air.

"Discontinuous servitudes are those the enjoyment of which can only be had by the interference of man, as rights of way, or a right to draw water" (*a*),

"Apparent servitudes are those the existence of which is shown by external works (ouvrages exterieures), as a door, a window, a watercourse.

"Non-apparent servitudes are those which have no external sign of their existence" (*b*).

The leading division of prædial servitudes in the civil law, but which appears to afford no practically useful distinction in the English law, is into urban and rustic servitudes—the former including all servitudes relating to buildings wherever situated; the latter, all those relating to land uncovered by buildings, whether situated in town or country.

The rustic servitudes comprised rights of way and watercourses and rights to drive cattle to water (*c*); the urban servitudes comprehended all those which belonged to a building, as eaves-droppings, support of beams, rights to light (*d*).

(*a*) Code Civil, art. 688.

(*b*) Code Civil, art. 689.

(*c*) Porro autem ut prædia vel rustica sunt vel urbana, ita quoque et servitutes quæ iis inhærent, vel rusticæ sunt vel urbanæ. Prædia rustica sunt, loca ædificiis vacua, in urbe area, ruri ager; non enim loco, sed materie et genere, distinguuntur.—Vinnius, ad Inst. lib. 2, tit. 3.

Rusticorum prædiorum jura sunt hæc; iter, actus, via, aquæ ductus.—I. ff. de serv. præd.

Inter rusticorum prædiorum servitutes, quidam computari recte putant aquæ haustum, pecoris ad aquam appulsum, jus pascendi, calcis coquendæ, arenæ fodiendæ.—Ibid. § 2.

(*d*) Prædiorum urbanorum servitutes sunt hæ, quæ ædificiis inæhrent; ideo urbanorum prædiorum dictæ quoniam ædificia omnia urbana prædia appellamus, etsi in villa (in the country L. 211. ff. de v. s.) ædificata sint. Item urbanorum prædiorum servitutes sunt, ut vicinus onera vicini sustineat, ut in parietem ejus liceat vicino tignum immittere, ut stillicidium vel flumen recipiat quis in ædes suas, vel in aream, vel in cloacam, ne altius quis tollat ædes suas, ne luminibus vicini officiat.—Ibid. § 1.

Et denique projiciendi, protegendique.—L. 2. ff. de serv. præd. urb.

Jus cloacæ mittendæ servitus est.—L. 7. ff. de serv.

Est et hæc servitus ne prospectui officiatur.—L. 3. ff. si serv. vind.

CHAPTER III.

OF THE ACQUISITION OF EASEMENTS BY EXPRESS AGREEMENT.

Nature of the Agreement.

* The origin of every easement may be referred to an agreement, * 18 either express or implied, of an owner of the property to be subjected to it. The cases of express agreement are of comparatively rare occurrence, and present, for the most part, but little difficulty, as far, at least, as concerns the mere extent of the right so conferred. By far the greater proportion of easements rest on implied agreements, the terms and conditions of which can be collected only from the actual amount of employment proved to have been had.

Sect. 1.—*Nature of the Agreement.*

Whatever doubts may formerly have existed as to the creation of easements by express agreement, it seems to be now fully settled that, like all other incorporeal hereditaments, that can be created only by an instrument under seal.

"And here," says Lord Coke (*a*), "is implied a division of fee or inheritance; viz. into corporeal, as lands and tenements, which lie in livery comprehended in this word feoffment, and will pass by livery, by deed, or without deed; and * 19 incorporeal, * which lie in grant, which cannot pass by livery, but by deed, as advowsons, commons, &c.; and the deed of incorporeate inheritances doth equal the livery of corporeate. Grant, *concessio*, is properly of things incorporeate, which, as hath been said, cannot pass without deed."

"A license is not a grant, but may be recalled immediately, and so might this license the day after it was granted," said Lord Ellenborough in *The King* v. *The Inhabitants of Harrow on the Hill* (*b*). The license in this case was from the lord of the manor to build a cottage on the waste: the license had been executed, and the cottage inhabited by the licensee.

In *Hewlins* v. *Shippam* (*c*), where the question was, whether a right to a drain running through the adjoining land could be conferred by parol license, this point was very fully considered; and, in the elaborate judgment deliver-

(*a*) Co. Litt. 9. a.

(*b*) 4 M. & Sel. 565.

(*c*) 5 B. & Cr. 221; S. C. 7 D. & R. 783

ed by the court, it was decided, that such an interest can only be created by deed.

In *Cocker* v. *Cowper* (*a*), the plaintiff sued for the obstruction of a certain drain which had been originally constructed *at the plaintiff's expense*, on the defendant's land *by his consent verbally given*. After it had been so enjoyed for some time, the defendant obstructed the channel, so that the water was prevented running as before; and it was contended, on the part of the plaintiff, that the license so given having been acted upon could not be revoked by the defendant; but the court, without hearing the counsel for the *defendant, held that the plaintiff was clearly not entitled to recover:—"with regard to the question of license," the court said, "the case of *Hewlins* v. *Shippam* is decisive to show that an easement like this cannot be conferred except by deed, nor has the plaintiff acquired any other title to the water." "The mere entry into the close of another, and cutting a drain there, cannot confer a title." *20

Notwithstanding these positive authorities, questions of considerable difficulty and nicety have been raised as to the effect of a license; and it has been contended, "that a beneficial privilege in land may be granted without deed, and, notwithstanding the Statute of Frauds, without writing" (*b*) (2).

(*a*) 1 Cr. M. & Ros. 418.

(*b*) 7 Taunt. 384.

(2) *License.*—The entry of one man upon the lands of another, without his consent, is, *prima facie*, a trespass, and requires to be justified. In *Chapman* v. *Hartshorne*, 9 Conn. R. 564, defendant was employed as superintendant of a manufactory, but before the time had expired he was dismissed by notice in writing. He still persisted in entering upon the premises and endeavored to induce the workmen to obey him, and not the plaintiff. And judge Daggett charged the jury that the defendant was justified in doing so; for his contract gave him the right to enter and occupy as superintendant till the contract had expired, saying—When the plaintiff "bound himself, by contract, to pay the defendant for superintending his manufacturing establishment," he has given to him full authority to enter and occupy during the continuance of the contract. The jury found a verdict for defendant, but the Court granted a new trial, on the ground that defendant had no right to enter after he was dismissed; for the master has at all times the right to dismiss his servant, making himself responsible for the consequences, when he dismisses without cause.

Although a title to real estate cannot be created by parol, yet a parol license will always prevent the party giving it from sustaining an action of trespass; not that it gives a title, but because it shows that there has been no trespass. Thus, where the grantee at the time of the execution of the deed agreed that the grantor might enter upon the premises to remove certain property belonging to him: Held, that the former could not maintain trespass for entering in pursuance of such license. *Parsons* v. *Camp*, 11 Conn. R. 525. The act was done by the con-

Upon a review of the authorities, however, it would appear that this position cannot be considered as law; and that the utmost effect of a license is—that it may work the extinguishment of an existing easement—as where permission is given to a man to erect something on his own land which is incompatible with the continuance of some easement over it, to which the licenser was entitled.

"There is nothing unreasonable," says *Tindal*, C. J., in *Liggins* v. *Inge* (*a*), "in holding that a right which is gained by occupancy may be lost by abandonment."

The only exception to this general rule appears to be in the case of Copar-

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sent of the person, who claims he has been injured thereby; and he who consents cannot be considered as injured: *Volenti non fit injuria.*

A parol license to use water for a mill, where the enjoyment is preceded by the expenditure of money; and capital invested in improvements on the faith of it, has been considered sufficient to constitute the grantee a purchaser for valuable consideration, although no consideration in fact was paid. 14 S. & R. 267; 4 ib. 241. See also 5 Watts, 308. And although a license gives no title, it will prevent the party from sustaining an action of trespass; for the license shows that there has been no trespass, 11 Conn. 525.

One tenant in common may give a license to a third person to enter upon the land and take timber. *Baker* v. *Wheeler*, 8 Wend. 505.

A parol agreement for the erection of a dam upon the land of another in order to create a permanent water power for the use of mills, is void. *Mumford* v. *Whitney*, 15 Wend. 380; *Cook* v. *Stearns*, 11 Mass. 536. A permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not pass without writing, and is the very object provided for by the statute. By Parker C. J. 11 Mass. 536. It seems, however, to have been differently considered in *Rerick* v. *Kern*, 14 S. & R. 267, where a parol license to use water for a mill, where the enjoyment was preceded by the expenditure of money, was held to be a contract for the purchase for a valuable consideration, although no consideration was in fact paid for the license. See also 4 S. & R. 241.

A parol license to abut a dam upon the land of another, may be revoked at any time before the expenditure of money upon the faith of it. 5 Watts, 308.

The statute in New York provides that highways may be laid out by the *consent of the owner;* consequently the laying out is valid without writing. *Noyes* v. *Chapin*, 6 Wend. 461.

A license to cut timber from lands and to remove the same does not convey an interest in lands within the statute of frauds, or give any property in standing trees. *Kerr* v. *Connell*, Berton, 151. Such a license gives the licensee no right to timber cut within the described limits, by a stranger without authority, ib. Timber so cut remains the property of the owner of the land; but against every other person, the possession of the timber and the labor bestowed upon it give the maker, though a wrongdoer, the right to it. ib.

(*a*) 7 Bing. 693.

eeners; for, as "land, or other things, that lie in livery, may pass between them without deed, so also may incorporeal hereditaments which lie in grant" (*a*).

*In *Winter* v. *Brockwell* (*b*), the declaration stated, that the plaintiff *21 was entitled to an easement of a passage for light and air to his dwelling-house, through an ancient window, over an open space of land of the defendant, and that, by means of such open space, noisome smells from the defendant's house evaporated, without occasioning any nuisance to the occupier of the plaintiff's house, and that the defendant wrongfully erected a skylight above the plaintiff's ancient window, and covering the open space above mentioned, by means of which "the light and air were prevented entering the plaintiff's window and into his house, and noisome smells, arising from the adjoining house, were prevented from evaporating, and entered the plaintiff's dwelling-house." The defendant pleaded the general issue.

It appeared in evidence that the open space "which belonged to the defendant's house had been inclosed and covered by a skylight in the manner stated, *with the express consent and approbation* of the plaintiff, obtained before the inclosure was made, who also gave leave to have part of the framework nailed against his wall; some time after it was finished, the plaintiff objected to it, and gave notice to have it removed; but Lord Ellenborough was of opinion, that the license given by the plaintiff to erect the skylight, having been acted upon by the defendant and the expense incurred, could not be recalled, and the defendant made a wrongdoer, at least, not without putting him in the same situation as before, by offering to pay all the expenses which had been incurred in consequence of it. And, under this direction, the defendant obtained a verdict."

On a motion for a new trial, in support of which no *argument ap- *22 pears to have been advanced, his Lordship said, "That the point was new to him when it occurred at the trial, but he then thought it very unreasonable, that, after a party had been led to incur expense in consequence of having a license from another to do an act, and the license had been acted upon; that the other should be permitted to recal his license, and treat the first as a trespasser for having done that very act. That he had afterwards looked into the books upon this point, and found himself justified by the case of *Webb* v. *Paternoster* (*c*), where Haughton, J., lays down this rule, that a license executed is not countermandable, but only where it is executory. And here the license was executed."

It is to be observed, in this case, that the action was brought for the consequential injury only, and not for the trespass committed on the plaintiff's land by affixing the iron work to his wall, as to which no point appears to have

(*a*) *Johnson* v. *Wilson*, Willes, 253. Co. Litt. 169; 21 Ed. 3. 2.

(*b*) 8 East, 308.

(*c*) Palmer, 71; 2 Roll. Rep. 152; Poph. 151.

been made. The question arising on the Statute of Frauds, as to this being an interest in land, was, we are told in a note, "stated and overruled." The most important observation which suggests itself, is on the statement of the injury in the declaration; the complaint appears to have been twofold: that is to say, the plaintiff complained that his easement—his passage of light and air to his ancient window—was obstructed, and also that he had been deprived of a distinct right, which every owner of property possesses, without any prescription, and which can only be infringed upon by the acquisition of an easement on the part of his neighbor; viz. a right to enjoy his property

*23 * without being subject to any private nuisances, such as the noisome smells mentioned in this case. From the loose manner in which the case is reported, it is not easy to say whether the smells proceeded from the defendant's house, or from the house of a third party; in *Hewlins* v. *Shippam*, the latter was considered to have been the case. Nor does it appear from the statement of facts in the report, whether any such smells had actually been caused by the defendant, or whether, supposing any such smells to have been produced, evidence of a prescriptive right to make such a nuisance was adduced on the part of the defendant, the only injury alluded to in the judgment being the obstruction to the light and air. This case appears to have undergone very little consideration.

Fentiman v. *Smith*, (*a*) was an action brought for diverting a water course from the plaintiff's mill. The declaration stated the plaintiff's possession of a mill, and that by reason thereof he was entitled to the use and benefit of the water of a rivulet, which, until the interruption complained of flowed through a tunnel into another stream, whereon the plaintiff's mill was built; but that defendant cut a channel, and thereby diverted the water from running into the said tunnel, and so to the mill.

At the trial, it appeared that the tunnel was made in the defendant's land, and fixed into the ground with stone-work; that the defendant agreed for a guinea to let the plaintiff lay the tunnel, for the purpose of conveying the water to the mill; that defendant even assisted at the making of the tunnel,

*24 under the plaintiff's directions; but no conveyance was * made of the land to the plaintiff; the guinea was afterwards tendered to the defendant, but he refused to receive it, or to give his assent to the continuance of the tunnel, and made the obstruction complained of. A verdict having passed for the plaintiff, with leave to move or enter a nonsuit, in opposition to a rule obtained for this purpose, it was contended "that it was sufficient for the plaintiff, against a wrong doer, to declare upon his possession of the mill with the appurtenants;" but Lord *Ellenborough* said, "Such an allegation could not be sustained without showing that the *appurtenants* were *legally* such. Now here *the title to have the water flowing in the tunnel over the defendant's land*

(*a*) 4 East, 107.

could not pass, by parol license, without deed, and the plaintiff could not be entitled to it, as stated in the declaration, by reason of his possession of the mill; but he had it by the license of the defendant, or by contract with him; and if by license, it was revocable at any time. The enjoyment, with the defendant's assent, was not left as evidence to the jury to presume a grant, *but it was supposed that it gave a title in point of law, which it clearly did not.*"

This case is not only clear and positive in its language, but it derives additional importance as showing the construction that ought to be put upon any ambiguity of language occurring in a subsequent decision of the same learned judge in *Winter* v. *Brockwell;* as it can hardly be supposed, that if he had changed his opinion, and adopted a view quite contrary to that previously expressed by him, he would not have made some allusion to the case in which he had before given such a decided opinion.

The principal authority in support of the position—that a parol license, when executed, can pass an incorporeal * hereditament—is the case *25 of *Taylor* v. *Waters* (*a*). *Gibbs*, C. J., in delivering the judgment of the court in that case, said, "This was an action against the doorkeeper of the Opera House, for denying admission to the plaintiff, who was the holder of a silver ticket, purporting to give him an entrance into that theatre for twenty-one years. It was objected, that the right claimed was an interest in land, and being for more than three years, could not pass without a writing signed by the party, or his agent authorized in writing, and that W. Taylor was not so authorized by the trustees. And it was further insisted by the defendant, that such an interest could only pass by deed." "The answer given to these objections was, that this was not an interest in land, but a license irrevocable to permit the plaintiff to enjoy certain privileges thereon, and was not required to be in writing by the Statute of Frauds, though it extended beyond the term of three years, and, consequently, might be granted without a deed; and although W. Taylor had affected to grant this by deed, it may bind the trustees not as their deed, but as a license authorized by them. In support of this doctrine, the following cases are found:—*Webb* v. *Paternoster* (*b*), license to the plaintiff from Sir W. Plummer to lay a stack of hay on his land for a reasonable time; afterwards Sir W. Plummer leased the land, and the lessee turned in his cattle and ate the hay, for which this action was brought. The court held that such license was good, and could not be countermanded within a reasonable time; but that * more than a reasonable time had *26 elapsed, half-a-year, and therefore the license was at an end. This case was recognized and acted upon by Lord Ellenborough and the Court of King's Bench in *Winter* v. *Brockwell* (*c*). This shows that a beneficial license, to be exercised upon land, may be granted without deed, and cannot be counter-

(*a*) 7 Taunt. 384.

(*b*) Palm. 71; S. C. 2 Ro. Rep. 152; Poph. 151.

(*c*) 8 East, 308.

manded, at least after it has been acted upon; and this would, also, be sufficient to show that this is not such an interest in land as, by the statute of frauds, can only pass by writing; but if any doubt remained upon the latter point, it has been long ago expressly decided by the Court of King's Bench in the case of *Wood* v. *Lake* (*a*), better reported in a MSS. book of Mr. Justice Burrough, p. 36.—'License to stack coals on the defendant's close for seven years cannot be revoked at the end of three.' These cases abundantly prove that a license to enjoy a beneficial privilege on land may be granted without deed, and, notwithstanding the statute of frauds, without writing. What the plaintiff claims is a license of this description, and not an interest in the land. That it was in the ordinary course of management, to make such grants, appears from the plaintiff not having been disturbed by the trustees while they had possession for some years, at least in and after 1800. He is, therefore, entitled to exercise the license granted to him, and may maintain the present action against the defendant, who has disturbed him in it."

Assuming the right here claimed by the plaintiff to be an easement, it must be conceded that this case would be a direct authority for the position that an

27* *easement may be created by parol; it does not, however, rest on the foundation of any previous decision, except that in *Sayer*; the case of *Webb* v. *Paternoster* is in reality a mere dictum, as the court was not called upon to decide the question as to the validity of the license; and the case of *Winter* v. *Brockwell*, on which the Chief Justice seems principally to rely, is clearly no authority for the position it is here cited to support, as is shown by several subsequent cases, in which the judgment of Lord Ellenborough has been fully considered (*b*).

Thus, comparatively unsupported by any earlier authority, it is directly at variance with numerous recent decisions, in two of which the question has been most elaborately discussed.

In the case of *Hewlins* v. *Shippam* (*c*), for a valuable consideration given by the plaintiff to the defendant, he assented to the plaintiff's making a drain at his own expense in his (the defendant's) land. The plaintiff made his drain at a considerable expense. In an action brought against the defendant for afterwards stopping up the drain, Graham, B., was of opinion that the rights claimed under the license granted by the defendant to have the drain in the soil of another, was an uncertain interest in the land, within the first section of the Statute of Frauds; and not being granted by any instrument in writing, the plaintiff acquired under it a right at will only, which was determined by the defendant's stopping up the drain. He therefore directed a nonsuit, with leave to the plaintiff to move to enter a verdict.

(*a*) Sayer, 3.

(*b*) *Hewlins* v. *Shippam*, *Liggins* v. *Inge*, *Cocker* v. *Cooper*.

(*c*) 5 B. & Cr. 221; S. & C. 7 D. & R. 783.

*A rule having been obtained to set aside the non-suit, the court *28
upon argument discharged it. The elaborate judgment of the court, in which all the authorities are reviewed, was delivered by Bayley, J. "A right of way or a right of passage for water," said the learned Judge, "(where it does not create an interest in the land), is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), otherwise than by deed. *Terms de la Ley*, a book of great antiquity and accuracy, defines an easement to be a privilege that one neighbor hath of another by charter or prescription, without profit; and it instances, 'as a way or sink through his land, or such like.' In *Co. Litt.* 9. *a.*, Lord *Coke* distinguishes between corporeal things which lie in livery, and incorporeal which in grant, and cannot pass but by deed, as advowsons, commons, and it seems to be his opinion, that (except in certain specified cases), where livery is necessary as to the one, a deed is necessary as to the other. The same may be collected from the passage already cited from *Co. Litt.* 42. *a.* In *Co. Litt.* 169, the excepted case of parceners is mentioned, and there it is said, that though the common of estovers or pasture, or a corody, or a way lie in grant, they may, upon partition *between the parceners*, be *granted* without deed. So both *Littleton* and Lord *Coke* state, in the same part, that a rent may be granted in the case of parceners for owelty of partition without deed; and Lord *Coke* notices* that rents, commons, advowsons, and the like, that lie in grant, *29
though they cannot pass without deed, may be divided between parceners by parol without deed. Chattels, whether real or personal, may in general be granted without deed; *Shepherd's Touchstone*, 232; and in the case of things lying in livery, a demise thereof may be made for any number of years at common law without deed; but Lord *Coke*, in *Co. Litt.* 85. *a.*, makes a distinction between original chattels and chattels created out of a freehold lying in grant, that the former may pass without deed, the latter cannot be created or pass without it; and whether there is a distinction in this respect between chattel interests created out of freeholds lying in livery and freeholds lying in grant (which I think there is not), it is not necessary to decide, because this is the case of a freehold, not of a chattel interest. *Shepherd*, in his *Touchst.* 231, lays it down, that a license or liberty (amongst other things) cannot be created and annexed to an estate of inheritance or freehold without deed. In 2 *Roll's Abr.* 62, it is laid down that a thing lying merely in grant cannot pass without deed. In 9 *Co.* 9, it is said, arguendo, that tenant for life cannot *by word without deed* have the privilege of being dispunishable for waste; and that position is adopted in *Shepherd, Touchst.* p. 231. In *Gilbert's Law of Evidence*, p. 96., 6th edition, this is laid down: 'If a man shews title to a thing lying in grant, *he fails if the seal be torn off from his deed*; for a man cannot show a title to a thing lying in solemn agreement, but by solemn agreement; and there can be no solemn agreement without a seal, so that possession alone is not sufficient,

*30 *since the thing itself does not lie in possession but in agreement; therefore a man cannot claim a title to a watercourse *but by deed, and under seal.* *Bolton* v. *The Bishop of Carlisle* (*a*) is at variance with the position laid down by Lord Chief Baron *Gilbert*, that the party fails *if the seal be torn off the deed.* It was decided in that case, that, if the deed be destroyed, other evidence may be given to show that the thing was once granted. The general position, however, that a man cannot claim title to a thing lying in grant, but by deed, was not questioned in that case. In *Monk* v. *Butler* (*b*), where the plaintiff in replevin answered an avowry for damage feasant by a plea of license from a commoner who had right for twenty beasts, it was objected, that, if the commoner could license, he could not do so without deed; and of that opinion was the whole Court. In *Rumsey* v. *Rawson* (*c*) the objection to such a license on the account of its not being stated to be by deed, after verdict for the plaintiff on a collateral issue, was overruled, because the license was only to take the profit *unica vice*, and because no estate passed by it. Yet in a subsequent case of *Hoskins* v. *Robins* (*d*) a similar objection was overruled, not on the ground that a parol license would be sufficient, but on the ground that the objection to the mode of pleading the license was waived by an issue on a collateral point, and that after verdict on such issue it must be taken that the license was by deed; but, according to the report in *Saunders*, Hale, C. J., *31 and *the Court, seemed to be of opinion that the license could not be granted without deed. In *Harrison* v. *Parker* (*e*), where liberty and license, power and authority were granted to the plaintiff and his heirs to build a bridge across a river, from plaintiff's close to a close of Sir *George Warren*, and liberty and license to plaintiff to lay the foundations of one end on Sir *G.'s* close, the grant was by deed. And in *Fentiman* v. *Smith* (*f*), where the plaintiff claimed to have passage for water by a tunnel over defendant's land, Lord Ellenborough, lays it down distinctly: 'The title to have the water flow in the tunnel over defendant's land could not pass by parol license without deed.' Upon these authorities we are of opinion, that although a parol license might be an excuse for a trespass till such license were countermanded, that *a right and title* to have passage for the water, for a freehold interest, required a deed to create it; and that, as there has been no deed in this case, the present action, which is founded on a right and title, cannot be supported. The case of *Winter* v. *Brockwell*, (*b*) which was relied upon on the part of the plaintiff, appears clearly distinguishable from the present. All that the defendant there did, he did *upon his own land.* He claimed no right of easement upon the plaintiff's. The plaintiff claimed a right and easement against him, viz. the privilege of light and air through a parlor win-

(*a*) 2 H. Bl. 259. (*b*) Cro. Jac. 574. (*c*) 1 Vent. 18—25.
(*d*) 2 Vent. 123—163; 2 Saund. 327.
(*e*) 4 East, 107.
(*f*) 8 East, 309

dow, and a free passage for the smells of an adjoining house through defendant's area; and the only point decided there was, that, as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to * incur expense in making such obstruction, he could not retract that *32 consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. *Webb* v. *Paternoster (a)*, *Wood* v. *Lake (b)*, and *Taylor* v. *Waters (c)*, were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed. These, therefore, cannot be considered as authorities upon the point: and on these grounds, therefore—that the right claimed by the declaration is a freehold right; and that, if the thing claimed is to be considered as an easement, not an interest in the land, such a right cannot be created without deed—we are of opinion that the nonsuit was right, and that the rule ought to be discharged."

In *Bryan* v. *Whistler (d)* the right to be buried in a particular vault was held to be an easement capable of being created by deed only; and therefore a parol agreement not under seal was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of its validity. (3)

(a) Palm. 71; S. C. 2 Roll. Rep. 152, Poph; 151.

(b) Sayer, 3.

(c) 7 Taunt. 374.

(d) 8 B. & Cr 298; S. C. 2 Man. & Ry. 318.

(3) Licenses to do a particular act.—The case of *Prince* v. *Case*, 10 Conn. R. 375 decides, that a verbal license by an owner of land, to another to build a house on such land, gives no right to the land. Such a license is a mere personal privilege, and does not extend to his heirs or assigns. The rule is, that "a license does not extend but to him to whom it is given, and cannot be granted over. The *King* v. *Newton*, Bridg. 115. *Howes* v. *Ball*, 7 Barn. & Cres, 481. In the case of *Jackson* d. *Hull* v. *Babcock*, 4 J. R. 418, where one G. gave a license in writing to one H. to build a house about the pool at N. H., and occupied it during his necessity or pleasure, and H. built a small house, and occupied it 17 years, and then sold it to one C. Held, that H. had only a personal license to inhabit.

In *Prince* v. *Case*, *supra*. The Court say: "The plaintiff claims, that by putting the house upon the land of Case, by his consent, Prince remained the owner of it, with a right to have it remain there. It has been decided in Massachusetts and Maine, that the house or other building remains the property of him who placed it there, and is personal property in him. *Wells* v. *Bannister*, 4 Mass. Rep. 514. *Marcey* v. *Darling*, 8 Pick. 283. *Ashmund* v. *Williams*, 8 Pick. 402. 404. *Curry* v. *Com. Ins. Co.*, 10 Pick. 540. *Ricker* v. *Kelly*, 1 Greenl. 117. In these states, it will be remembered, that they have no court of chancery with ordinary chancery

Bradley v. Gill. Brown v. Windsor.

In an old case, which does not appear to have been adverted to in more recent decisions, it was held that a parol license could not confer an easement to carry on a noisy trade.

* In *Bradley* v. *Gill (a)*, the plaintiff brought an action on the case *33 for a nuisance occasioned by the recent erection of a smith's forge and shop, so near to the plaintiff's house, that the plaintiff and his family were disturbed by the noise of the defendant's business.

The defendant pleaded that he had carried on the trade of a blacksmith for twenty years, and that the plaintiff advised him to come and live in the said house and carry on his trade there, by reason whereof he came to the said house and built there a convenient room to erect a smith's forge, traversing the erection of any other smith's shop.

(a) 1 Lutw. 70.

powers. This court, however, in *Benedict* v. *Benedict*, 5 Day, 464. 467. seem to have adopted the ancient common law doctrine, that a fixed and permanant building erected upon another's land, even by his license, became his property; but if, in its nature and structure, it was capable of being removed, and a removal was contemplated by the parties, it was personal estate in the builder; and where the license was improperly revoked, resort must be had to a court of chancery. As the defendant in this case has not claimed the property in the building to be his, but has taken it down, and left the materials for the owner, it does not seem to be necessary for us to inquire whether the doctrine held in Massachusetts, or that adopted by a majority of this court in the case above cited; is correct. We need only inquire whether the plaintiff had a right to this building, the defendant was justifiable, under the circumstances of the case, in taking it down; in other words, whether the license to build, by Dudley Case, gave a right to Prince and his heirs and assigns, to keep this house in that place. Was it an interest assignable, transmissible to heirs, and liable to be requested for his debts?

The plaintiff takes the affirmative of this proposition. He says, it is a license executed, and therefore irrevocable. As a general rule, that proposition is correct. But it cannot be true, when some other principle of law is to be violated, by such a construction. Thus, if a man authorize another to take away a certain dam, by which his land is flooded, and it is done, no attempt to revoke or alter its effect can be available. But it does not follow from this, that if a license was given to erect the dam on the land of another, and continue it there forever, the license to continue it would be irrevocable. If it did, it would be in the face of the statute which requires all conveyances of an interest in lands to be in writing. For a license, by which this dam could be continued in this place forever, would be as effectual in that case as a deed for the same purpose; and no case has been cited that goes this length. In *Web* v. *Paternoster*, *Palm.* 71. where license was given to put a stack of hay upon land, it was held that it could not be countermanded, until after a reasonable time had elapsed. This was, however, before the statute of frauds. In *Winter* v. *Brockwell*, 8 East, 308, where Lord Ellenborough recognized this principle, the plaintiff permitted the defendant to create a sky-

The opinion of the court was, that the action lay, and that the plea was no answer to the declaration, and that the traverse was idle; but the defendant, by consent, had liberty to amend his plea.

In *Brown* v. *Windsor (a)* the action was brought for withdrawing support from the plaintiff's house; the evidence of right to the support claimed consisted in proof of a parol permission on the part of the then owner of the defendant's property to the plaintiff, to rest his building on a pine end wall standing thereon; under this permission the support had been enjoyed for 26 years. The plaintiff recovered; and it was afterwards objected that there could not be, by law, such an easement as the right to support for a house *in alieno solo;* but supposing that such an easement could be acquired, no objection whatever was made to the mode of its acquisition; nor was any question raised as to whether an enjoyment, commencing under a license, would confer an easement. The decision of the court cannot, therefore, be considered as an authority * upon this subject; nor does it appear to have ever been treated * 34 as such in the later decisions of the courts upon this point.

In *Liggins* v. *Inge (b)* it appeared that the predecessor of the plaintiff, who was entitled to a flow of water to his mill, over the defendants' land, by a pa-

(a) 1 Cr. & J. 20.

(b) 7 Bing. 682; S. C. 5 M. & P. 712.

light over his own premises, through which the plaintiff claimed a right to air and light; and Lord Ellenborough held, that it was not countermanded, at least without placing the party in the situation in which he was before. In *Taylor* v. *Waters*, 7 Taun. 374. it was held, that a ticket to the defendant and his assignees, for twenty-one years, to visit the theatre, was not on interest in lands within the statute; and a case is there cited, (*Wood* v. *Lake*, Sayer 3. S. C. Burrough's MSS. p. 36.) that a license to stack coals on land for seven years, cannot be revoked in three. The case of *Liggins* v. *Inge*, 7 Bingh, 682. was also cited. The parties were both mill-owners on the same stream. The defendant cut down a bank on his own land and erected a weir, by consent of the plaintiff's father, by which the water was diverted from the plaintiff's mill. Finding an injury to result, notice was given to the defendant to raise the bank as before, and a suit was brought. The court held, that as the plaintiff's father had in effect consented to this diversion of the water, he must be considered as having abandoned his right to have the water flow in that course, and could not complain. In these cases, it was held, that no interest was conveyed in the land; and in the last case, the court intimate a very decided opinion, that if that was attempted, the conveyance would be void. In one case, it is said, that Lord Mansfield ruled, that if a man stood by, and saw another build on his land, he could not sustain an action of ejectment. 5 Term Rep. 556. This, however, has been sanctioned, it is believed, by no other judge. In *Matts* v. *Hawkins*, 5 Taunt. 23. Gibbs, J. doubted it; and it was holden, by the court of King's Bench, that where a license was granted to erect a cottage, on land of the Lord, and it was actually erected, this was not a license, but a grant which might be recalled immediately, a mere permission to occupy. The *King* v.

rol license, authorised the defendants to cut down and lower a bank, and to erect a weir upon their own land, the effect of which was to divert into another channel the water which was requisite for the working of the plaintiff's mill; subsequently, the plaintiff complained to the defendants of the injurious effects of the weir, and called upon them to restore the bank to its ancient height, and to remove the weir; and, upon a refusal on the part of the defendants to do this, an action was brought. *Tindal*, C. J., in his judgment enters fully into the question of the validity of parol licenses:—

"It will be unnecessary, on the present occasion, to consider more than one of the questions which have been argued at the bar, *viz.* whether the present action, upon the facts stated in the award of the arbitrator, is maintainable against the defendants.

"The action is, in point of form, an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the plaintiff's mill in the manner it had been formerly accustomed to do. It appeared in evidence before the arbitrator, that the bank of the river which

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Horndon-on-the-hill, 4 Man. & Selw. 562. And we know it is every day's practice, in such cases, to resort to a court of equity for redress, which would be entirely unnecessary, if Lord Mansfield's opinion was considered as law. And in the case of *Benedict* v. *Benedict*, 5 Day 469. Judge Swift says, in such case the only remedy of the purchaser is in equity.

This subject is treated by Parker, Ch. J., in the case of *Cook* v. *Stearns*, 11 Mass. Rep. 533, 538. in a most satisfactory manner. "Licenses to do a particular act," says he, "do not, in any degree, trench upon the policy of the law, which requires that bargains respecting the tittle or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanant right to hold another's land, for a particular purpose, and to enter upon it, at all times, without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by the statute."

Mr. Ch. J. Williams concludes his Judgment of the court in *Prince* v. *Case supra*, by saying:—"Here, Prince, the father, not only sold to the plaintiff, but both he and Case are dead; and unless this is an interest assignable or transmissible to heirs, it is extinguished. If the right was then extinguished, perhaps no notice to remove the building was necessary. But if it was, the ejectment which has been brought, the recovery under it, and the possession taken, are sufficient notice that the defendant meant to resume his rights. More than a year after possession was taken under the ejectment had elapsed, and the plaintiff did not remove the building. This surely was a reasonable time; and the defendant had as good a right to take away the building from his premises as in the case of *Web* v. *Paternoster*, before cited, he had a right to turn his cattle into a field where he had allowed the plaintiff to stack his hay, and a reasonable time had elapsed for him to take it away. Palm. 71.

had been cut down, was the soil of the defendants, and that the same had been * cut down and lowered, and the weir erected, and the water thereby * 35 diverted by them, the defendants, and at their expense, in the year 1822, under a parol license to them given for that purpose by the plaintiff's father, the then owner of the mill; and that, in the year 1827, the plaintiff's father represented to the defendants, that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition, with which requisition the defendants had refused to comply.

"The question, therefore, is, whether such non-compliance, and the keeping the weir in the same state after, and notwithstanding the countermand of the license, is such a wrong done on the part of the defendants as to make them liable to this action.

"The argument on the part of the plaintiff has been, that such parol license is, in its nature, countermandable at any time, at the pleasure of the party who gave it; that, to hold otherwise, would be to allow to a parol license the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff's mill; which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all

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"The remaining question is, has he done this in a reasonable and proper manner? The house might have been worth more to the plaintiff, had it been removed without taking it to pieces; but the plaintiff had provided no place for it; and surely the defendant was not bound to provide one, nor could he be bound to incur that expense.

"It is not shown, that the defendant has been guilty of any wanton destruction of the property, or any unnecessary injury in taking it down. If not, and he had a right to remove it, it is not easy to see upon what principle he can be liable for any damages. Had he interfered with an attempt of the plaintiff to remove the building, a different question would have arisen. But as the plaintiff neglected, for so long a period, to make this attempt, the defendant was justified in removing it himself."

Sale of growing crop, not within statute of frauds. In *Sainsbury* v. *Matthews*, 4 M. & W. 343, the defendant in June agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2*s*. per sack, the plaintiff to have them at digging up time (in October,) and to find diggers: Held, that this was not a contract for the sale of an interest in land, within the fourth section of the statute of frauds. *Sainsbury* v. *Matthews*, 4 M. & W. 343.

A license to be exercised upon land, may be granted without writing; it is not within the statute of frauds. *Woodbury* v. *Parshley*, 7 N. H. R. 237.

Trespass Lease.—A temporary interest is sufficient to maintain an action of trespass, provided it is an exclusive interest. Thus, when an outgoing tenant, after the determination of his lease, has the right to enter upon the land to take away growing crops. Held, that this was not sufficient for him to maintain trespass against a succeeding tenant, who enters to seed the land, before the crop comes to maturity. *Dorsey* v. *Eagle*, 7 G. & J. 321.

events, would be determinable at the will of the grantor, since the statute of frauds, as being "an interest in, to, or out of lands, tenements, and hereditaments."

"If it were necessary to hold, that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shown to have passed from the plaintiff's father to the defendants under the license, in order to justify the continuance of the weir in its * original state, the difficulty * above suggested would undoubtedly follow; for, it cannot be denied, that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant, as an incorporeal hereditament, and not by a parol license. But we think the operation and effect of the license, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the license, although such license is countermanded: and, consequently, that they are not liable to an action as wrongdoers, for persisting in such refusal.

"The parol license, as it is stated in the award of the arbitrator, was a license to cut down and lower the bank, and to erect the weir. Strictly speaking, if the license was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of such acts, it must be taken, that the object and effect of such license was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations. We do not, however, consider the object, and still less the effect, of the parol license, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the * 37 plaintiff's father, * that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition.

"Water flowing in a stream, it is well settled, by the law of *England*, is *publici juris*. By the *Roman* law, running water, light, and air, were considered as some of those things which had the name of *res communes*, and which were defined, "things, the property of which belong to no person, but the use to all." And, by the law of *England*, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so

much as he thus appropriates, against any other. *Bealey* v. *Shaw (a)*. And it seems consistent with the same principle, that the water, after it has been so made subservient to private uses by appropriation, should again become *publici juris* by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return: could it be held * that the owner of other land adjoining the stream might not *38 erect a mill and employ the water so relinquished: or that he could be compellable to pull down his mill, if the former mill owner should afterwards change his determination, and wish to rebuild his own? In such a case, it would undoubtedly be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but, that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill, for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, that is, if he had licensed the other party to erect a mill, the same inference must follow with greater certainty. Or, suppose *A.* authorizes *B.*, by express license, to build a house on *B.'s* own land, close adjoining to some of the windows of *A.'s* house, so as to intercept part of the light; could he afterwards compel *B.* to pull the house down again, simply by giving notice that he countermanded the license? Still further, this is not a license to do acts which consist in repetition, as, to walk in a park, to use a carriage way, to fish in the waters of another, or the like: which license if countermanded, the party is but in the same situation as he was before it was granted: but this is a license to construct a work, which is attended with expense to the party using the license; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a license to do something, that in its own nature * seems intended to be permanent and continuing; and it was the fault of *39. the party himself, if he meant to reserve the power of revoking such license, after it was carried into effect, that he did not expressly reserve that right when he granted the license, or limit it as to duration. Indeed, the person who authorizes the weir to be erected, becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.

"Upon principle, therefore, we think the license, in the present case, after it was executed, was not countermandable by the person who gave it; and, consequently, that the present action cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter* v. *Brockwell* (*b*), which rests on the judgment in *Webb* v. *Paternoster* (*c*). We see no reason

(*a*) 6 East, 208. (*b*) 8 East, 308. (*c*) Palmer, 71; S. C. 2 Rol. Rep. 152; Poph. 151.

to doubt the authority of that case, confirmed, as it has since been, by the case of *Taylor* v. *Waters* (*a*) in this court, and recognized as law in the judgment of Mr. Justice *Bayley* in the case of *Hewlins* v. *Shippam*, in the Court of King's Bench.

In *Cocker* v. *Cowper* the doctrine laid down in *Hewlins* v. *Shippam* was fully recognized (*b*). In that case an action was brought for stopping up a water course. It appeared from the award of the arbitrator, that the channel in question consisted of a drain and tunnel, which had been constructed in the defendant's land by the plaintiff, in the year 1815, with the verbal consent of the then tenant and of the defendant, and that the water had flowed through

*40 it up to the year 1833, when, * upon the plaintiff's refusal to pay for the use of the water, the defendant diverted the channel. The Court of Exchequer were clearly of opinion, that the plaintiff was not entitled to recover. 'With regard to the question of license," said the court, "the case of *Hewlins* v. *Shippam* is decisive to show that an easement, like this, cannot be conferred unless by deed" (*c*).

In *Bridges* v. *Blanchard* (*d*) this point was raised in argument, but not decided by the court, as it appeared that no license had, in fact, been given.

In the recent case of *Wallis* v. *Harrison & others* (*e*) an action was brought by the reversioner, for digging up the soil and making embankments and a railway over land in the occupation of his tenant. The defendant, among other pleas, pleaded, "that before the close, in which &c., became the plaintiff's property, the Dean and Chapter of Durham being seised in fee of the said close agreed with the defendants that they should have license, liberty, power, and authority to enter upon the said close, and to form, make, and maintain certain roads, &c.; and that the said Dean and Chapter should ratify and confirm the same to the defendants; and that before the plaintiff had any interest in the said close, the said Dean and Chapter gave and delivered to the defendants at their request possession of the said way-leave, &c. over which the said roads now are, and at the said time when &c. had been constructed, with leave, license, authority, and power, to the defendants to enter and set out the same; whereupon, before &c., they entered and set out the same:" the plea then alleged an indenture by which the Dean and Chapter

*41 "granted * and demised, and granted, ratified, and confirmed unto the defendants such full liberty, &c.; and averred that the defendants, by virtue of such leave, &c. and such indenture, had made the road, and unavoidably committed the said trespasses." To this plea the plaintiff demurred, on the ground "that the right of making the road was a matter which lay in grant, and could only be conferred by deed and not by parol, and the deed mention-

(*a*) 7 Taunt. 383; S. C. 2 Marsh. 560. (*b*) 1 Cr. M. & Ros. 418.
(*c*) See also *Bryan* v. *Whistler*, 8 B. & Cr. 298.
(*d*) 1 Adol. & Ellis, 536.
(*e*) 4 M. & W. 538.

ed in the plea, as it appeared on oyer, did not amount to a confirmation of any prior license by deed. The Court held the plea to be bad, as such a license might be countermanded at any time by the owner of the land who granted it, and at all events could not be binding on his transferee.

Lord *Abinger*, C. B., said, in delivering judgment, "Then, treating it as a plea of license, I think it is bad on general demurrer, because a mere parol license to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. I never heard it supposed, that if a man out of kindness to a neighbor allows him to pass over his land, the transferee of that land is bound to do so likewise. But it is said that the defendant should have had notice of the transfer. This is new law to me. A person is bound to know who is the owner of the land upon which he does that which, prima facie, is a trespass. Even if this were not so, I think the defendants ought, in excuse of their trespass, to have pleaded the fact that they had no notice of the transfer. It is true it would be the assertion of a negative, but I think this would be one of those cases where, to make a title or excuse good, a negative should be shown on the pleadings, even if the proof of the *affirmative might be on *42
the opposite party. As to the case of *Webb* v. *Paternoster*, the grant of the license to put the haystack on the premises was in fact a grant of the occupation by the haystack, and the party might be considered in possession of that part of the land which the haystack occupied, and that might be granted by parol." And *Parke*, Baron, added, "Then, with regard to the license, the plea is bad in substance. We are not called upon in this case to consider, whether a license to create or make a railroad, granted by a former owner of the soil, is countermandable after expense has been incurred by the licensee, which was the question in *Winter* v. *Brockwell*; for it is not alleged that there has been any expense incurred in consequence of the license, and therefore it remains executory; and I take it to be clear, that a parol executory license is countermandable at any time; and if the owner of land grants to another a license to go over or do any act upon his close, and then conveys away that close, there is an end to the license; for it is an authority only with respect to the soil of the grantor; and if the close ceases to be his soil, the authority is instantly gone. *Webb* v. *Paternoster* is very distinguishable from this case, for there the license was executed, by putting the stack of hay on the land; the plaintiffs there had a sort of interest against the licensor and his assigns; but a license executory is a simple authority excusing trespasses on the close of the grantor, as long as it is his, and the license is uncountermanded, but ceases the moment the property passes to another."

The result of the decided cases appears to be this—that a man may, in some cases, by parol license, *relinquish a right which he has acquired in *43
addition to the ordinary rights of property, and thus restore his own and his neighbor's property to their original and natural condition; but he cannot, by

such means, impose any burthen upon land in derogation of such ordinary rights of property—as, for instance, a parol license will be valid for building a wall in front of his ancient windows, while a similar permission to turn a spout on his land from a neighboring house will be invalid and revocable; but it should seem, in order that a parol license should have this effect, the act licensed should be executed, and the necessary consequence of such execution should be, *per se*, the extinguishment of the right; for the cases do not appear to furnish any authority for saying, that where the extinguishment of an easement would depend upon a repetition of the licensed acts, a parol license would be sufficient to effect it; and, indeed, where the acts from their nature lie in repetition, such license could not be executed.

As to the case of *Taylor* v. *Waters*, not only are its general positions overruled by the more recent decisions of *Hewlins* v. *Shippam* and *Cocker* v. *Cowper*, but it is in itself open to the objection of depending upon the two cases already adverted to, and on a total misconception of the case of *Winter* v. *Brockwell*. *Gibbs*, C. J. evidently overlooks the important distinction between a license to do a thing upon a man's own land and a license to do something on the land of the licenser: the latter was the case then before him; whereas *Winter* v. *Brockwell* was the former.

"*Winter* v. *Brockwell*," said *Bayley*, J., in delivering the judgment of the *44 court in *Hewlins* v. *Shippam*, "was *not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which, *but for an easement of the plaintiff's*, such grantee would have had a clear right to use it."

The whole current of decisions is in favor of the view here taken, with the exception of *Taylor* v. *Waters*, and the earlier cases of *Webb* v. *Paternoster* and *Wood* v. *Lake*, relied upon by the C. J. *Gibbs* in his judgment. In *Webb* v. *Paternoster* a parol license had been given to the plaintiff to lay a stack of hay on the land of the defendant's lessee for a reasonable time; the lessee turned his cattle upon the land, and for this the action was brought. The decision of the court in favor of the defendant went on the ground, that a reasonable time had expired; and the observations of the court were, consequently, altogether extrajudicial. In *Wood* v. *Lake* a parol license was given to stack coals on defendant's land for seven years, and the Court of King's Bench held that such license could not be revoked at the end of three years. It seems impossible to reconcile either the dictum in *Webb* v. *Paternoster* or the decision of the court in *Wood* v. *Lake*, with the more recent decision of the Court of King's Bench in *The King* v. *Horndon on the Hill* (*a*), in which a settlement was claimed in respect of a cottage built on the waste of the manor by the parol license of the lord. It was there urged in argument, "that it was unreasonable, that, after a party has been led to incur expense in consequence of having obtained a license from another, that the other should be permitted

(*a*) 4 M. & Sel. 562.

to recall his license, and treat him as a trespasser;* for which reason *45
it was laid down, that a license executed is not countermandable, but only when it is executory." But Lord *Ellenborough* said, "A license is not a grant, but may be recalled immediately; and so might this license the day after it was granted."

But, indeed, authority is hardly necessary to countervail these two cases, as in neither, as was observed by the Court of King's Bench in *Hewlins* v. *Shippam*, does it appear that the objection was taken—that the right lay in grant, and therefore could not pass without deed; in addition to which it may be observed, that the case in Sayer is of doubtful authority *(a)*. Mr. Starkie *(b)* observes, "that the interest conferred in this case amounted to a lease, inasmuch as the party was to have the sole use of that part of the close on which he was to stack his coals."

In *Wallis* v. *Harrison* Mr. Baron *Parke* adverted to *Winter* v. *Brockwell* as an authority for the position, that "where a license has been executed, and expense incurred by the licensee in so doing, it would not be countermandable, although the easement was to be enjoyed in the land of the licenser:" a position which, as already seen, that case does not support. This point was not judicially before the court in *Wallis* v. *Harrison*; nor were the cases of *Hewlins*, v. *Shippam* and *Cocker* v. *Cowper* alluded to; in both of which the license was held to be revocable, although it had been executed, and expense incurred by the licensee, acting under the express permission of the owner of the soil.

* This doctrine, that an easement may be extinguished by an executed *46
authority to a man to do an act on his own land, the necessary consequence of which will be such extinguishment, coincides with the provision of the civil law:—"If I have the right of discharging my eaves' droppings into your area, and I authorize you to build in this area, I lose my right of discharge; and so, if I have a right of way over your property, and I authorize you to do any thing in the place over which my right of way exists, I lose my right of way." *(c)*

Sect. 2—*Construction of Instruments.*

Easements may be granted either separately, and apart from any conveyance of the dominant tenement, or they may be included in a conveyance of it.

But few cases are to be found in the books of a grant of an easement, *per*

(a) Sugden's Vend. & P. 80, 9th ed.

(b) Evid. vol. 2, p. 342, n. f.

(c) Si stillicidii immittendi jus habeam in aream tuam, et permisero jus tibi in ea area ædificandi, stillicidii immittendi jus amitto; et similiter si per tuum fundum via mihi debeatur, et permisero tibi in eo loco per quem via mihi debetur, aliquid facere, amitto jus viæ.—L. 8. ff. Quem serv. amit.

se; it is obvious, however, that, in all instances of this kind, the precise words of the instrument itself must determine the extent of the right created.

A covenant, or other instrument under seal, clearly evincing the intention of the parties, may operate as a grant (*a*).

So a man may claim a way by grant, as if A. grants that B. shall have a way through his close (*b*).

*47 * Easements, in general, bear a strong resemblance to covenants running with the land, both express and implied.

Upon a grant or covenant conferring an easement, the successive owners of the dominant estate, who, in the case of an ordinary covenant, would, at common law, be strangers to the contract, become entitled to the benefit of the rights conferred, and may sue for a violation of them.

Where the dominant tenement itself is conveyed, whether in fee or for any less estate, it should seem that all rights which the conveying party enjoyed, by virtue of, and as appendant to, his estate, as against third parties, pass with it (*c*).

Questions of greater difficulty arise where there has been a unity of ownership, and where, consequently, all easements have been merged in the general rights of property (*d*).

Where such easements are in their nature continuous and apparent, they pass upon a severance of the tenements, by implication of law, without any words of new grant or conveyance (*e*).

The same observation applies to easements, commonly called "of necessity" (*f*).

Other easements, such as ordinary rights of way, will not pass upon a sev-
*48 erance of the tenements, unless * the owner "uses language to show that he intended to create the easement *de novo*" (*g*).

General words, such as "appertaining, belonging," &c., have been held in numerous instances, both with regard to rights of common and way, to be insufficient to pass the right upon a severance of the tenements: but a conveyance, containing the words, "used, occupied, and enjoyed," has been held to be sufficient (*h*).

(*a*) *Holmes* v. *Seller*, 3 Levinz, 305.

(*b*) Com. Dig. Chimin. D. (3); see, also, *Senhouse* v. *Christian*, 1 T. R. 560; *Gerard* v. *Cooke*, 2 Bos. & Pul. N. R. 109.

(*c*) 11 H 6. 22. pl. 19; 2 Rolle Abr. 60, pl. 1; *Beandely* v. *Brook*, Cro. Jac. 189; *Fentiman* v. *Smith*, 4 East, 107.

(*d*) *Morris* v. *Edgington*, 3 Taunt. 24.

(*e*) This subject will be further considered in Chapter 3, § 2. (*f*) Post.

(*g*) Per *Bayley*, B., in *Barlow* v. *Rhodes*, 1 Cr. & Mee. 448.

(*h*) *Bradshaw* v. *Eyre*, Cro. Eliz. 570: *Worledg* v. *Kingwil*, Id. 794: *Grymes* v. *Peacock*, 1 Bulstrode, 17: *Saundeys* v. *Oliff*, Moore, 467: *Staple* v. *Haydon*, 6

What words sufficient.

Indeed, these words are as much a description of the thing granted, as if the way had been set out by its termini; in either case, it would be a matter to be ascertained by parol evidence, what was comprised by the description (*a*) (4).

Mod. 1: *Whalley* v. *Thompson*, 1 Bos. & P. 371: *Clements* v. *Lambert*, 1 Taunt. 205: *Kooystra* v. *Lucas*, 5 B. & Ald. 835: *Harding* v. *Wilson*, 2 B. & Cr. 100; S. C. 3 D. & R. 287; *Barlow* v. *Rhodes*, 1 Cr. & Mee. 439: *Plant* v. *James*, 5 B. & Adol. 791; S. C. 2 Nev. & Man. 517.

(*a*) Phillips & Amos on Evidence, 8th ed. 732.

(4) *Boundaries.*—It has been said in reference to boundaries on the highway, that if land is conveyed, bounded on a highway, the soil and freehold to the centre of the highway will pass. 3 K. Com. 349. But this is denied in 11 Pick. 213.

The appropriation of private property for public uses is in violation of natural right; consequently the power of the legislature is limited to the public necessity, and cannot appropriate private property to private use. 11 Wend. 149.

The right of passage over a highway is but a servitude or easement; and trespass lies for any exclusive appropriation of the soil. *Gidney* v. *Earl*, 12 Wend. 98.

A grant of land situated east and north of a particular stream of water, was held to fix the boundary at the centre of the stream; the grantor owning the land through which the stream flowed. *Morrison* v. *Keen*, 3 Greenl. 474.

A corporation which has a charter for the erection of a toll-bridge across a river, have only an easement in the land upon which the bridge stands; consequently have no right to take land at the side of the bridge for a toll house. 5 Greenl. 62.

Grant with appurtenances.—Under the grant of a thing, whatever is parcel of it, or of the essence of it, or necessary to its beneficial use and enjoyment, or in common intendment is included in it, passes to the grantee. In common sense and in legal interpretation, a mill does not mean merely the building, in which the business is carried on, but includes the site, dam, and other things annexed to the freehold, necessary for its beneficial enjoyment. It was therefore held, in the case of *Whitney* v. *Olney*, 3 Mason, 280, where a testator by his will in devising his estate to his children C. C. Olney and N. Olney says,—"*Excepting the Brown George paper-mill and appurtenances.*"—adding:—"Further it is my will, that my said sons, Christopher and Nathaniel, shall have and possess my *two paper-mills, namely, the Rising Sun and the Brown George*, so called; and I devise the same to them as tenants in common in equal shares during the times of their natural life, together with all the machinery and *appurtenances* to said mills at the time of my decease." The question was what passed by the devise of a moiety of the Brown George paper-mill. The Court held, that the land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it passed by force of the word "mill." Story, J. My opinion is, that by the devise of the mill and its appurtenances all the land under the mill, and necessary for the use of it, and commonly used with it, passed to the devisees. The exception of the Brown George paper-mill and appurtenances, in the devise to Nathaniel G. Olney, is not an exception of the mere building, but of the land under and appertaining to, and

used with, the mill. Whatever was saved by the exception, passed by the subsequent devise of the mill. I do not proceed upon the ground, that the land was a mere appurtenance to the mill; but that it was parcel thereof. It is true, that land cannot strictly be appurtenant to land so as to pass under the term "appurtenances: 1. But where the intention is clearly expressed, that land should pass under that name, the law will give effect to the grant, notwithstanding the misnomer. Thus, where it was averred in pleading, that certain land was appertaining to a messuage; the court held, that in point of law it could not be appurtenant to the messuage; but that it was nevertheless well in a grant, because it shall be intended to mean such land as is usually occupied with the messuage or lying with the messuage; and therefore a demise of a messuage "with the lands to the same appertaining," is good to pass such lands as were usually occupied, used, or lying with the messuage. 2. If this be so in grant, the law will construe the words still more favorably in a devise. Therefore in *Booeher* v. *Samford* (Cro. Eliz. 113), it was held, that lands usually occupied with a house, though at a distance from it, might well pass by a devise of it, as a tenement with its appurtenances, in which H. dwelleth in E. 3. In these cases the lands pass, not as appurtenances, but as parcel of the granted or devised premises, upon the intention of the parties collected from the instrument, and explained by reference to the facts.

"But in the present case I lay no stress whatsoever upon the words in the devise, "with the appurtenances." The land under the mill and adjacent thereto, so far as necessary to its use, and commonly used with it, passed by force of the word "mill." It is not necessary, in order to pass lands, that they should be specially designated by that name. A grant of a messuage conveys all the land within the curtilage thereof; so the grant of a house. 4. The only ground, upon which a doubt could be entertained, is a dictum in Lord Chief Baron Comyn's Digest, (Grant, E. 9.) where he says, "by the grant of a mill *cum pertinentiis* the close where the mill is, or the kiln there, does not pass without more;" and for this he cites 1 Sid. 211. 1 Lev. 131, which are different reports of the same case. The case itself does not support any such doctrine. The question there was, not whether the land, on which the mill stood, passed under a grant of the mills with the appurtenances, but whether a kiln on another part of the close passed under the word "appurtenances." And the court held, that it did not, "for by the grant of a messuage or lands *cum pertinentiis* any other land or thing cannot pass, though by the words *cum terris pertinentibus*, it would. And Windham J. said if all the matter had been found, and that the kiln was necessary for the use of the mill, and without which it could not be useful, the kiln had passed as part of the mill, though not as appurtenances. In the English translation of Levinz's Reports, by Sergeant Salkeld, there is an error, which probably led to the mistake." He adds —"The case is much more fully and accurately reported in 1 Keble R. 736, where the facts are stated as found on a special verdict. O. was seized of a manor and messuage, and a close, and having two mills on the west side, and of a kiln, which he newly erected on the other side; then by metes and bounds he divided the close, and enfeoffed the plaintiff of the west part of the close, and the mills with the appurtenances; afterwards he assigned the other part of the close with the manor to the defendant; and "whether to these ancient mills, the kiln will, and being severed, pass as appurtenant, having been enjoyed and used" with them,

was the question. The Court held, that it did not. Keeling C. J. said, "It passeth not, being neither found necessary, or belonging to the mill." Windham J. said, that the special verdict was short, and that it did not appear, that it was a kiln purposely erected for the use of the mill, "in which case it would have been parcel." And in substance this is the same as may be gathered from the brief note in 1 Siderfin. So that the case, when examined, proceeds upon a principle recognising that, which has been adopted by this Court.

"A right to the road and landing to haul logs as has been customary," was held to convey only an easement. *Hasty* v. *Johnson*, 3 Greenl. 282; *Thompson* v. *Proprietors of And. bridge*, 5 ib. 62.

Where a deed conveyed to S., *his heirs and assigns forever*, four acres of land, with the building and implements and appurtenances thereon and thereunto belonging, for carrying on the fulling business—"Granting also *to said S.*, by these presents, the same privileges reserved to myself and *my heirs*, in a deed of land sold to A. R. &c." "Giving and granting *to said S.*, by these presents, the privilege of supplying himself, for the use of said mills, with water, at all times, from the saw-mill pond, whenever it is wanted for carrying on his business, provided the same is not unnecessarily used or wasted; said S. to have free ingress and egress through the road laid out across or through the grantor's land to the public highway." And then followed the *habendum*, by which the granted premises and appurtenances were to be held by the said *S., his heirs and assigns forever, to his and their proper use and behoof.* Held, that the privilege of taking water from the saw-mill pond extended not merely to himself personally, but also to his heirs and assigns; it appearing that the water had always been so used; and was in fact appurtenant thereto and essential to its enjoyment. *Miller* v. *Scofield*, 12 Conn. R. 335. Although it be not the office of the *habendum* to enlarge *the subject matter of the grant;* yet the words "to have and to hold," were held often to enlarge the *estate* conveyed in the granting part of the deed.

The grant of a factory, such as a cotton factory, its machinery passes, whether affixed to the freehold or not; the machinery being necessary to its beneficial enjoyment. *Farrar* v. *Stackpole*, 6 Greenl. 154. So, the conveyance of a mill has been held to include not merely the building and its fixtures, but also any easement, such as a head of water which has been accustomed to be used with it. *Blake* v. *Clark*, ib. 436. In *Stevens* v. *Morse*, 5 ib. 26, it was held, that the town could not convey any right to flow for benefit of a mill, as against private property.

A reservation in a conveyance "of the grist-mill now on said falls, with the right of maintaining the same, was held to amount only to a right to the use of the mill while it is in a condition to operate. *Howard* v. *Wadsworth*, 3 ib. 471.

A reservation in a conveyance of a water privilege was in these words—"Except when the water should be insufficient to carry the grantor's mill and a cotton factory, that might be erected with not more than 5000 spindles,"—Held, that the instrument was not to be so construed as to limit the use of the water to a cotton factory, but the intention of the parties was merely to specify the quantity of water reserved.

In *Wetmore* v. *White*, 2 Caines' R. 87, it was held, that if the owners of land on different sides of the river agree to build mills on the land of one and to divert

the whole water thereto, this amounted to an appropriation of the water, so that a release by one of his right to the mill will pass his right to the water also as incident.

In *Grant* v. *Chase & al.*, 17 Mass. R. 443, the action was trespass *quare*, &c.; and the defendants justified under a right of way over the plaintiff's land, to a pump, &c. thereon, as appurtenant to their own messuage adjoining. In one plea, it was alleged that the right, was in one C. who conveyed to defendants: and in another they allege a right by prescription. Verdict for the defendants. The court, Jackson, J. held, that the easements in question would not pass by deed "with all the privileges and appurtenances thereto belonging," unless they were parcel of the premises conveyed or necessarily annexed and appendant to them: (The sugar house estate). This is not like a conveyance of a manor, a messuage, or farm, and known by a certain name, and including sundry distinct tenements, buildings or fields, which have been used with the principal thing, and reputed parcel of; and which would pass under the general name of the manor, messuage, &c. This is a conveyance of a specific piece of land, carved out of a larger piece held by the grantor, and described by metes and bounds. In such a case nothing could pass, as parcel of the granted premises, but what is included in the boundaries expressed in the deed; at least none of the remaining part held by the grantor. Neither could these easements pass as appurtenant, under the general clause relating to privileges and appurtenances. It does not appear that the way and other privileges were ever used and claimed, before E. became seized of both houses. If they had existed before that time, the right would have been extinguished by the unity of possession in E. Vin. Abr. extinguishment C.: *Whalley* v. *Thompson & al.* 1 B. & P. 371. The latter strongly resembles the present. The exceptions are of things appendant to the granted premises, and which are naturally or necessarily annexed to them. Such is the case of a natural water-course, and perhaps of an artificial conduct, running to the granted premises through other land of the grantor. The case of lights also, in a house or other building, come within the same exception (12 Mass. 157.) So, when a way is strictly a way of necessity. But the way here was not annexed to the sugar-house estate by any natural or legal necessity. The privilege and way therefore did not pass by the terms of the deed. If there has been such a user as to estop the plaintiff from denying it, the defendants must show it.

Lex Loci.—If the waters flow to a mill in another state, and the use becomes annexed to it, the use and the title are to be governed by the laws of the state in which the mill is situated. In *Slack* v. *Walcott*, 3 Mason. 508, which was a proceeding in equity to establish the title to the use of water for the plaintiff's mill, Story, J.; "The mill in controversy is situated in Massachusetts; the river, the use of whose waters is claimed as appurtenant to the mill, is the boundary of the two states, and the waters, therefore, partly flow in each state. The right, however, is not a distinct right to the water, as *terra aqua cooperta*, or a distinct corporeal hereditament, but as an incident to the mill, and attached to the realty. It passes by a grant of the mill, and has no independent existence. It is not real estate situated in Rhode Island. It is an incorporeal hereditament annexed to a freehold in Massachusetts. And a conveyance of the mill, good by the laws of the state, where the mill is situated, conveys all the appurtenances.

Lex Loci.

"The wrong done by stopping the flow of the water by an obstruction or drain in Rhode Island is an injury done to the mill itself in Massachusetts. In a just sense, the wrong may be said to be done in both states, like the analogous case of an injury to land lying in one county by an act done in another county? The devisee is entitled to the remedy also by the laws of Massachusetts as the owner of the mill. His title, when unimpeachable by the law of Massachusetts, does not by the general principles of public law require any new probate in Rhode Island. It could receive no new validity from such probate. It could lose none without it. Suppose an ancient house situate on the boundary line of a state, and a person in the adjacent state obstructs its ancient lights was real estate in the adjacent state? And if the title were derived by grant, or by will, would it be contended, that a registry of the deed or a probate of the will would be necessary in each state before any redress could be obtained by the owner? If necessary at all, it would be equally so, whether the suit were brought in one state or the other. In such a case, if the law respecting grants or wills were different in the different states, a purchaser might rightfully succeed to the property of the house, but lose its ancient privileges. The public law, which declares, that the title to real estate can pass only according to the law of the place, where it is situated, supposes the thing to be tangible and fixed, and the situs clearly intraterritorial. But where is the situs of an incorporeal right? The right to flowing water is no more real estate, than the right to flowing air or light. The very nature of these things forbids durable, fixed, and absolute, territorial possession. It is true, that a state has jurisdiction over the waters of the rivers, which flow within its boundaries, and may by its laws regulate the title, enjoyment, and use of them awhile, and so long as they flow within its boundaries. But its authority stops here; the right to the use of the same waters, when they flow beyond its boundaries, is not within its control. The title is not acquired under the laws of such state. If the waters flow to a mill in another state, and the use becomes annexed to it, the use and the title are exclusively to be governed by the laws of the latter state. What authority has Rhode Island to control the water, which flows to a mill in Massachusetts? The right to the use of such water, whether it be deemed real or personal estate, is a right exercised under the jurisdiction of Massachusetts, and is to be governed by its laws. Rhode Island might indeed refuse to recognize in her courts the title to such property, unless it passed in some special manner prescribed by her laws. And so she might the title to lands in Massachusetts coming incidentally in question in her Courts. But this would not change such title, or give the state a right to annul it. It would be a refusal of that national comity and justice, which the civilized world is accustomed to allow for great public purposes of policy and convenience. Beyond this the authority would have no operation. There is no pretence to say, that Rhode Island has as yet legislated to such an extent. Her laws for the probate of foreign wills go no farther, than to provide for such cases, where they affect property lying or being within the state."

CHAPTER V.

EASEMENTS BY IMPLIED GRANT.

Severance of tenements. Destination du pere de famille.

*49 *The implication of the grant of an easement may arise in two ways : 1st, Upon the severance of an heritage by its owner into two or more parts, and, 2dly, by prescription.

Upon the severance of an heritage a grant will be implied, 1st, of all those continuous and apparent easements which have in fact been used by the owner during the unity, though they have had no legal existence as easements : and 2dly, of all those easements without which the enjoyment of the severed portions could not be fully had.

Sect. 1.—*Disposition of the Owner of Two Tenements.*

The latter class are usually termed easements of necessity ; the former mode of acquiring a right it is proposed to call—Disposition of the owner of two tenements,—which phrase is adopted as expressing the same origin of title as that which is designated by the French law "Destination du pere de famille," with the incidents to which, as defined by the Code Civile, the English law upon this subject apppears to agree.

"By the 'destination du pere de famille' is understood the disposition or arrangement which the proprietor of several heritages (fonds) has made for *50 their *respective use. Sometimes one heritage receives a benefit from another, without being in return subjected to an inconvenience which could amount to a species of compensation ; sometimes this service is reciprocal : but these differences do not in any way change the nature or effect of this distribution. If afterwards these heritages should become the property of different owners, whether by alienation or division amongst his heirs, the service which the one derived from the other, which was simple 'destination du pere de famille,' as long as the heritages belonged to the same owner, becomes a servitude as soon as they pass into the hands of the different proprietors (*a*)."

(*a*) Pardessus Traite des Servitudes, s. 288.

Disposition of owner of two tenements.

Cases of this nature, which have come under the consideration of our courts, have generally been treated as arising from the application of the rule, that "no man can derogate from his own grant." This maxim, however, although consistent with the doctrine stated, is insufficient to account for the principle that the obligation is imposed equally on the grantee and the grantor.

There may be instances in which easements would arise, on the severance of tenements, from the operation of the former principle only—where, however, there is no "apparent sign of servitude," but, unless the easement be presumed, the grantor would in fact derogate from his own grant.

An easement is a quality superadded to the usual rights and as it were passing the ordinary bounds of property; and with the exception of those easements the enjoyment of which depends upon an actual interference of man at each time of enjoyment, as of a right of way, it is attended with a permanent alteration of *the two heritages affected by it, showing that one is *51 benefited and the other burdened by the easement in question. This permanent quality affecting the two heritages is sometimes affixed by nature itself, as in the case of water "which holds its natural course," and as it is observed by *Brudenell* in 12 H. 8., "*natura sua descendit*" (*a*); sometimes it is artificially affixed, as by the erection of a roof or the placing of a gutter throwing the rain water on the neighbor's land.

To clothe with right this permanent alteration of the qualities of two heritages, the consent of the owner of the servient tenement in the manner appointed by law is necessary; but where the land benefited and the land burthened belong to the same owner, he may change the qualities of its several parts at his will, and his express volition evidenced by his acts must at least be as effectual to impress a new quality upon his inheritance as the implied consent arising from his long continued acquiescence.

The only opposition to the current of authority, that this disposition is binding equally on the grantor and grantee, and the parties claiming under them respectively, is a dictum of Lord *Holt*, in the case of *Tenant* v. *Goodwin* (*b*), as reported by Lord Raymond: "As to the case of *Palmer* and *Fletcher*," said Lord *Holt*, "if indeed the builder of the house sells the *house*, with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house; and as *he* cannot do it, so neither can his vendee. But if he had sold the vacant piece of ground and kept the house, without reserving the benefit of *the lights, the vendee might build *52 against his house. But in the other case, where he sells the house, the vacant piece of ground is by that grant charged with the lights." The report of the same case by Salkeld (*c*), who was himself counsel in the cause, is silent as to any such dictum; and from the report in 6 Mod. 314, it would seem that the

(*a*) *Shury* v. *Piggott*, Popham, 170, per Whitlocke, C. J.

(*b*) 2 Lord Raym. 1093.

(*c*) Vol. 1, 360.

court only expressed a doubt on the point. "If he had sold the vacant ground without reserving the benefit of the lights, the court doubted in that case that the vendee might build so as to stop the lights of the vendor, because he had parted with the ground without reserving the benefit of the lights; for that case differs from that of *Palmer* v. *Fletcher*." This opinion of Lord *Holt*, if indeed it can be treated as such, was probably founded on the civil law, whereas the doctrine of the English law was apparently of French origin. The Code Civile in this respect merely recognized an ancient provision of the French law (*a*).

The doctrine, that both parties are equally bound to respect the disposition of the property, derives additional weight from its coincidence with the analogous case of easements commonly called of necessity, which, it is quite clear, are equally implied in favor of both parties.

It is true, that, strictly speaking, a man cannot subject one part of his property to another by an easement, for no man can have an easement in his own property, but he obtains the same object by the exercise of another right, the general right of property; but he has not the less thereby permanently altered the quality of the two parts of his heritage; and if, after the annexation of peculiar qualities, he alien one part of his heritage, it seems but reasonable, if

53* the alterations* thus made are palpable and manifest, that a purchaser should take the land burthened or benefited, as the case may be, by the qualities which the previous owner had undoubtedly the right to attach to it.

This reasoning applies to those easements only which are attended by some alteration which is in its nature obvious and permanent; or, in technical language, to those easements only which are apparent and continuous; understanding by apparent signs not those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. There is no reason why a purchaser should not exercise the same degree of caution in ascertaining what easements his projected purchase is liable to in favor of his vendor, as well as in favor of other adjoining owners.

"The destination du pere de famille" confers a title (vaut titre) to servitudes which are apparent and continuous (*b*) If the proprietor of two heritages, between which there exists an apparent sign (signe apparent) of servitude, disposes of one of the heritages without any stipulation (convention) being contained in the contract respecting the servitude, it continues to exist actively or passively in favor of the heritage alienated or upon it" (*c*).

"It is obvious," says Pardessus, "that this disposition (etat des lieux), which, from a simple destination du pere de famille, thus changes itself into a servitude, must not be a momentary change for the sake of some temporary con-

(*a*) Pothier, Coutume d'Orleans. Introduction au titre XIII.

(*b*) Code Civile, art. 692.

(*c*) Code Civile, art. 694.

venience, it is scarcely possible to suppose in the absence of express agreement that a party would have desired to preserve a right which served only for purposes purely personal, or mere pleasure. The *parties are *54
presumed to have been desirous of preserving those servitudes only which are evidently necessary" (*a*).

The cases in which it has been held that easements of this nature are not extinguished by unity of ownership, unless the party has availed himself of his rights of property to destroy the external mark of the easement, as by cutting a spout, or removing the eaves of a house, are authorities in support of this doctrine.

The easement as such can in no case exist during the unity of ownership; and if the owner might at any moment determine the easement by altering the relative disposition of the parts of his tenement *inter se*, what difference can it make whether he has suffered things to continue as they were previous to the union, or whether he has made one portion of his estate subject to the convenience of another by some express act done during the union—in either case he has acted by virtue of his general rights of property.

Unless it can be said that it makes a difference, that in the one case previous to the union a valid easement had been constituted, it is difficult to see on what ground any distinction can be contended for between the cases; but in a case on the subject, the authority of which has been frequently recognized, it is clear that no such right existed before the union, and that what was in fact a wrongful act, a nuisance, before the union, ceased to be so and was clothed with a legal title upon a subsequent separation (*b*). The earliest case directly in point upon this subject, and one which is repeatedly cited, and upon which great reliance is placed in subsequent cases, was decided in the 11 H. 7; and although *an attempt was made in argument in some *55
of the later cases to distinguish it as a case of custom, the authority attached to it by the judges shows that they did not consider its applicability as at all restricted on that ground:—

One *William Coppy* brought an action on the case against *J. de B.*, and counted that according to the custom of London, where there were two tenements adjoining, and one had a gutter running over the tenement of the other, the other cannot stop it, though it be on his own land; and counted how he had a tenement and the defendant another tenement adjoining. The defendant's counsel said, "We say that since the time of memory one A. was seised of both tenements, and enfeoffed the plaintiff of the one and defendant of the other." To which it was replied, "This is not a good plea, for the defendant seeks to defeat the custom by reason of an unity of possession since the time of memory; and that he cannot do in this case, for such a custom, that one shall have a gutter running in another man's land is a custom solemnly bind-

(*a*) Pardessus, ubi supra. Ante, p. 11.

(*b*) *Robins* v. *Barnes*, Hobart 131; post, 57.

ing the land, and this is not extinct by unity of possession; as if the lord of a seigniory purchase lands held in gavelkind, the custom is not thereby extinguished, but both his sons shall inherit the lands, for the custom solemnly bindeth the lands." *Townshend* said, "If a man purchase land of which he hath the rent, the rent is gone by the unity of possession, because a man cannot have a rent from himself; but if a man hath a tenement from which a gutter runneth into the tenement of another, even though he purchase the other tenement, the gutter remains, and is as necessary as it was before." To this it was objected by the defendant's counsel, "That he who was the owner *56 of the two tenements might have *destroyed the gutter; and that if he had done so, and then made several feoffments of the two tenements, the gutter could not have revived." To which it was replied, "If that were so, you might have pleaded such destruction specially, and it would have raised a good issue." 11 H. 7, 25, pl. 6.

The case of warren, relied upon as illustrating the argument of the existence of an easement notwithstanding the unity is as follows, 35 H. 6, 55, pl. 1:—

An action of trespass was brought for hunting in the plaintiff's warren and carrying away his hares and rabbits. The defendant pleaded in abatement, that the place where &c. was the manor of D., in which manor the plaintiff had nothing, except as joint tenant with two others. On demurrer, judgment of respondeat ouster was given. The objection to the plea was, that although the plaintiff was but a joint tenant of the land, he might still be sole owner of the warren; and that, as it did not appear by the plea whether he was so or not, and a plea in abatement to be good must be "bon a cesun comon entent," the plea was bad. A man, it is there said, may have warren either by grant of the king in his own land, or by prescription in the lands of another. Common and rent are not like a warren, for if one has a certain rent issuing out of land, and he purchase the land, the rent is gone; and the same law of a common, for a man cannot pay rent to himself or have common on his own land; but one may have warren either in the land of another man or his own, for it is not issuing out of the land, neither is it payable; but it is, as has been said, realty and privilege in the land, and nothing else.

In *Nicholas* v. *Chamberlain* (*a*), which was an action of *trespass, *57 "it was held by all the court upon demurrer, that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary and quasi appendant thereunto: and he shall have liberty by law to dig in the land for amending the pipes or making them new as the case requires. So it is if lessee for years of an house and land erect a conduit upon the land, and after

(*a*) Cro. Jac. 121.

the term determines the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one and the land to another, the vendee shall have the conduit and the pipes and liberty to amend them. But, by *Popham*, if the lessee erects such a conduit, and afterwards the lessor, during the lease, sells the house to one, and the land, wherein the conduit is, to another, and after the lease determines he who hath the land wherein the conduit is may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance, nor made one by the occupation or usage of them together by him who had the inheritance. So it is if a disseisor of an house and land erects such a conduit, and the disseisee re-enter, not taking connsance of any such erection nor using it, but presently after his re-entry sells the house to one and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit: but in the principal case, by reason of the mispleading therein, there was not any judgment given."

The case of *Robins* v. *Barnes* (*a*) is thus reported in * Rolle:—"If *58
A. is seised in fee of a house which hath certain windows by prescription, and B. hath another house close adjoining to that, and B. *tortiously* erects a structure on his own frank tenement, which overhangs the house of A. and thereby stops his light, and afterwards B. purchase in fee the house of A., and afterwards grant by lease to C. the house which was the house of A., C. has no remedy to abate this nuisance; for by the unity of possession the prescription for the windows was extinct; being that C. ought to take that in such plight as it was at the time of the grant made to him, *for the unity purges the tort*, both being in the hand of one person who might deal with it at his pleasure."

"So it is if B. afterwards pull down his house and rebuild it in the same manner as it was before, so that he does not make it overhang more than it did at the time of the grant to C.; but if he causes it to overhang more than before, an action lies for C. to have this remedied, for it is a new tort."

In the report in Hobart the court agreed: "That though one of the houses had been built overhanging the other wrongfully before they came into one hand, yet after, when they came both into the hand of Allen, that wrong was now purged, so that *if the houses came afterwards into several hands, yet neither party could complain of a wrong before.*" It is to be observed, that in this case the action was brought not only for disturbing the easement of ancient light, but also for an infringement of the common law rights of property, by making a roof overhanging the plaintiff's soil; and the decision is not only an authority for the position, that the abstinence of the owner of the united tenements from removing the obstruction to the windows was an *extinguish- *59
ment of the prescriptive right to the light, but also that by his permitting the overhanging roof to continue, and severing the tenements in that condition,

(*a*) Rolle abr. tit. Extinguishment, D. 936, pl. 7: S. C., Hobart, 131.

the encroachment of the overhanging roof, though tortious at the time the tenements first became his property, was legalized.

In *Shury* v. *Piggott* (*a*) an action was brought for obstructing a stream of water running over the defendant's land,to a pool of the plaintiff's, situate in a close which was part of the plaintiff's rectory. The defendant pleaded that the land over which the water ran, and the plaintiff's close, were both part and parcel of the manor of Markham, and that King Henry VIII. being seised of the said manor in his demesne as of fee, granted the land over which the water ran to one under whom the defendant claimed; and the question was, whether the unity of ownership in the king had extinguished the easement.

For the plaintiff it was argued, that the easement was not extinct, because it was a thing of necessity, and though a rent and a way may be extinguished by unity, the easement had a separate and distinct existence; and it was likened to the case of warren, or a right to drive beasts to pasture in a forest, which rights are not extinguished by unity. So also of a gutter, which, like a watercourse, has a separate existence.

On the other side it was argued, that it was extinct by unity, because it was a charge on the soil of another, as a right of way or inclosure, both of which have been held to be extinguished by unity; and although the custom of gavelkind is not extinguished by * purchase of the seigniory, yet it * 60 is otherwise of a prescription, which follows the estate in the land and the person.

It was resolved by the whole court, that the watercourse was not extinguished, but *Doddridge*, J., said, "That a way, if it were of convenience (voy de ease) is extinguished, but not a way of necessity." And so it was the opinion of *Topham*, C. J., in the Lady *Brown's* case: "If a man hath a stream of water which runneth in a leaden pipe, and he buys the land where the pipe is, and cuts the pipe and destroys it, the watercourse is extinct, because he thereby declares his intention and purpose that he does not wish to enjoy them together, viz. the watercourse and the land." *Doddridge*, J., argued that a fence should be extinguished by unity, because it is not of necessity, and put this case: "A man having a mill and a watercourse over his land, sells a portion of the land over which the watercourse runs; in such a case by necessity the watercourse remaineth to the vendor, and the vendee cannot stop it." *Whitlocke*, C. J., (*b*) said, "A way or common shall be extinguished, because they are part of the profits of the land, and the same law is of fishings also; but in our case the watercourse doth not begin by consent of parties nor by prescription, but *ex jure naturæ*, and therefore shall not be extinguished by unity. A warren is not extinguished by unity, because a man may have a warren in his own

(*a*) Palmer, 444; S. C. Popham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; W. Jones, 145.

(*b*) Popham, 170.

land; and in the case 11 H. 7, the gutter was not extinguished only by the unity of possession; but there also appeareth in the case that the pipes were destroyed, whereby it could not be revived." *61

*In *Cox* v. *Matthews* (*a*), which was an action for stopping lights, an exception was taken to the declaration, because it did not state the plaintiff's house to be ancient. *Hale* said, "That if a man builds a house upon his own ground, he that hath the contiguous ground may build upon it also, though he doth thereby stop the lights of the other house; for *cujus est solum ejus est usque ad cœlum*, and this holds unless there be a custom to the contrary, as in London. But in an action for stopping of his light, a man need not declare of an ancient house; for if a man should build an house on his own ground, and then grant the house to A., and grant certain land adjoining to B., B. could not build to the stopping of its lights in that case."

In *Palmer* v. *Fletcher* (*b*), which was an action on the case for stopping lights, it appeared that a man erected a house on his own land, and afterwards sold the house to one and the land adjoining to another, who obstructed the lights of the house; and it was resolved, "that though it was a new passage, yet no person who claimed the land by purchase, under the builder, could obstruct the lights any more than the builder himself could, who could not derogate from his own grant, for the windows were a necessary and essential part of the house." *Kelynge*, J., said, suppose the land had been sold first, and the house after, the vendor of the land might stop the lights. *Twysden*, J., to the contrary, said, whether the land be sold first or afterwards, the vendee of the land cannot stop the lights of the house * in the hands of the vendor or his * 62 assignees, an dcited a case to be so adjudged; but all agreed that a stranger, having lands adjoining to a messuage newly erected, may stop the lights, for the building of any man on his lands cannot hinder his neighbor from doing what he will with his own land; otherwise, if the messuage be ancient, so that he has gained a right to the lights by prescription. And, afterwards, a like judgment was given between the same parties, for erecting a building on another part of the lands purchased, whereby the lights of another new messuage were obstructed (5).

(*a*) Ventris, 237, 239; S. C. 3 Keble, 133, as to a point of pleading only.

(*b*) 1 Levinz, 122; 1 Siderfin, 167;] 1 Keble, 153, 625, 794, nom. *Palmer* v *Flessier*.

(5) In *Story* v. *Odin*, 12 Mass. R. 157, the town of Boston sold the plaintiff a lot on which he erected a building; about twelve years subsequent the defendant purchased the adjoining lot and erected a building thereon so as to obstruct the air and light to the plaintiff's house. And it was held, that the plaintiff might maintain his action on the case for darkening his lights without declaring that the house is an ancient one, or that the plaintiff is entitled by prescription to the easement; and the plaintiff might, if it had been necessary to his case, have proved such ancient right under the declaration. "But," added the Court, "the plain-

Disposition of owner, &c. Peyton v. Mayor of London. Canham v. Fiske.

In *Peyton* v. *Mayor of London* (*a*), which was an action for withdrawing support by pulling down an adjoining house, the declaration contained no allegation of any right to support, or of any fact from which that right might be inferred in law; it, therefore, was unnecessary to decide what the result would have been had the two houses originally belonged to the same owner. Lord *Tenterden*, in delivering judgment, alludes to such a state of facts, apparently inclining to favor the existence of such a right, if there had been at some former time a unity of the ownership of the two houses.

In *Canham* v *Fiske* (*b*) the plaintiff purchased a garden, through which ran a stream of water, from a person who was also the owner of an adjoining field, in which the spring supplying the stream took its rise; the defendant having bought the field, diverted the stream, after the plaintiff had used the water for about 19 years. At the trial, the learned judge was of opinion, that as, at the

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tiff's right of action in this case, does not depend upon the antiquity of the building; and we have not found it necessary to consider what would be the effect of facts reported in that respect, nor what length of time would be necessary to give him such right as against a *stranger*. The plaintiff might have maintained his action for such a nuisance immediately after his purchase, as well as after a lapse of twenty or forty years."

If a house be sold with all the lights belonging to it, and it is intended to build upon the adjoining ground belonging to the same owner, so as to interfere with the lights, a right so to build should be expressly reserved; it will not do to describe the house as abutting on building ground belonging to the seller. 9 Bing. 305.

Where there is a dispute between two purchasers at a sale, who have obtained their conveyances, as to which a wall, for example, belongs, a hand bill advertising the properties for sale, which was circulated in the sale room before and at the time of sale, and was seen by the party against whom it is sought to be used, or his agent who bought for him, is admissible in evidence to prove that the wall was reputed to belong to the property of the purchaser. *Murley* v. *M'Dermott*, 3 Nev. & Per. 356.

The mere exhibition of the plan of a new street, at the time of the sale of a piece of ground to build a house in the line of the intended street, does not amount to an implied contract to execute the improvements exhibited on the plan where the written contract is silent on that head. Sug. on Vend. 47—10th ed.

In describing an estate the particulars and plans should be so framed as to convey clear information to the ordinary class of persons who frequent sales by auction, and they would only become a snare to the purchaser, if, after the bidder has been misled by them, the seller should be able to avail himself of expressions which none but lawyers could understand. Therefore, where the existence of a way was not sufficiently described to make it clear to persons of ordinary vigilance and caution, it was held not to be binding upon the bidder. *Dykes* v. *Blake*, 4 Bing. N. C. 463.

(*a*) 9 B. & Cr. 736. (*b*) 2 Cr. & Jer. 126.

time of the plaintiff's purchase, the two closes were the property of the same owner, * the unity of ownership destroyed the prescriptive right, and, * 63 consequently, nonsuited the plaintiff. The Court of Exchequer granted a new trial. Lord *Lyndhurst* observed, "The plaintiff bought the land with the water upon it; and if the conveyance were silent as to the water, still the water would pass by the grant of the land." "If the conveyance had been produced, and had been silent as to the water, still the conveyance would have passed the water which flowed over the land. Are we to assume that the water was excepted out of the conveyance merely because the conveyance was not produced?" And *Bayley*, B., added, "If I build a house, and, having land surrounding it, sell the house, I cannot, afterwards, stop the lights of that house. By selling the house I sell the easement. The land is purchased with the water running upon it, and the conveyance passes the land with the easements existing at the time."

In *Swansborough* v. *Coventry* (*a*) the plaintiff and defendant purchased ad-

"In a case not reported, and of which I have not any note, but in which I was counsel, the case, writing from recollection, arose in regard to some of the houses on the east side of the Old Steyne at Brighton, the owner of which claimed to be entitled under the covenant from a former owner to have certain ground behind those houses, and which fronted south on St. James's street, and which had become vested in assignees of the covenantor, remain unbuilt upon, and the bill was for an injunction to restrain the further erection of houses then considerably advanced from being finished. Lord Eldon refused the injunction on the ground that the plaintiffs came too late, as they were aware from the first that the houses were being erected, but no doubt was entertained of the power of the Court to enforce such a covenant by injunction, and either an injunction was granted against erecting any building on the remaining frontage, or the parties acquiesced in the opinion expressed, and desisted from doing so, and the ground, when I last saw it, was still unbuilt upon, although it had been intended before the bill was filed to cover the whole of the frontage with houses." Sugden on Vend. 499, 500.

In the late case of *Keppell* v. *Bailey*, 2 Myl. & Kee. 517, the opinion of the Court was expressed against such a covenant running with the land at law, and also against the liability of an assignee to the covenant in equity, although he bought with notice of the covenant, but the judgment depended upon other points.

Nuisance.—If a nuisance be created, and a man purchases the premises with the nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if after the reversion is purchased, the nuisance be created by the occupier, the reversioner incurs no liability; yet, in such a case, if there was only a tenancy from year to year, or any short period, and the landlord chose to renew the tenancy after the tenant had created the nuisance, that would make the landlord liable. He is not to let the land with the nuisance upon it. *The King* v. *Pedly*, 1 Adol. & Ell. 827.

(*a*) 9 Bing. 305; S. C. 2 M. & Scott, 362.

joining ancient houses from the same vendors, that of the defendant obstructing the ancient windows of the plaintiff's house on the ground floor; the defendant having pulled down this building erected a new one, so as to obstruct other windows in the plaintiff's house, and for this obstruction the action was brought. The decision of the case did not turn upon the fact, that both houses were ancient, but upon the established rule, that "no man shall derogate from his own grant." "It is well established by the decided cases," says *Tindal, C. J.*, "that where the same person possesses a house having the actual use and enjoyment of certain lights, and also possesses the adjoining land,

*64 *and sells the house to another person, although the lights be new he cannot, nor can any one who claims under him, build upon the adjoining land, so as to obstruct or interrupt the enjoyment of those lights." "The sales to the plaintiff and defendant being sales by the same vendor, and taking place at one and the same time, we think the rights of the parties are brought within the application of the general rule of law."

In *Riviere* v. *Bower* (*a*) the plaintiff was proprietor of a house, which he had divided into two tenements, one of which he demised to the defendant, retaining the other in his own occupation; the defendant obstructed a window which the plaintiff had made in his own house shortly before the demise to the defendant. On the part of the defendant it was objected, that the action did not lie unless the window was ancient. Lord *Tenterden* held, "That the action was maintainable against a possessor holding as tenant for an obstruction to a window existing in the landlord's house at the time of the demise, although of recent construction, and that although there was no stipulation at the time of the demise against the obstruction."

In *Coutts* v. *Gorham* (*b*), which was an action for obstructing lights, it appeared that one Hall was the owner of two adjoining houses, each of which had certain ancient windows. In 1800, he made a lease of one of these houses for 21 years, determinable on lives, of which lease the defendant was assignee; and in November, 1809, the defendant took a new lease of the same house for 21 years. The windows of the other house had been altered, and

*65 placed in a different *situation, at a period (as it appeared) within 20 years before the obstruction complained of; but the jury found the alteration to have taken place previous to the lease to the plaintiff in May, 1809. *Tindal, C. J.*, said, "If the windows were in existence at the time of the lease to the plaintiff, he is entitled to recover. Hall, who executed the lease when the windows were there, could not himself obstruct them afterwards; and, if so, he could not convey to any other possessor a right to do so."—"It is true that the defendant had an existing term at the time, and his interest in that term would not be affected by Hall's lease; but he surrendered that term by operation of law, when he accepted a new lease from Hall."—"The defendant's new lease was derived out of Hall's reversion, and Hall's reversion was sub-

(*a*) 1 Ry. & Moo. 24. (*b*) Moo. & Malkin, 396.

ject to the rights already granted by him to the plaintiff. Assuming then that the windows were made within 20 years, but before the lease made to Coutts, Gorham's present interest is derived from the same lessor at a subsequent period, and is therefore subject to the rights which Coutts already had against his lessor, and, consequently, to that of his having the windows in question free from any obstruction."

The case of *Compton* v. *Richards* (*a*) differs from the authorities already cited, by reason of the easement, for the disturbance of which the action was brought, not being in existence at the time of executing the instrument, under which the right was held to arise.

The house in question was one of a range of buildings, called the Royal York Crescent, at Clifton; the Crescent had been commenced in 1791, but, in consequence of the failure of the original owner, passed into *various *66 hands, and a part, comprising the houses of the plaintiff and defendant, was put up for auction in 1810; the defendant purchased No. 14; the plaintiff, in 1812, took a lease of No. 13 from the party who purchased it at the sale.

By one of the conditions of sale, the buildings, according to a plan of the Crescent produced at the sale, were to be completed within two years from that time, which period had elapsed previous to the granting the lease of No. 13 to the plaintiff. After the expiration of the two years, the defendant erected an additional room at the back of his house, one side of the room being formed by elevating the wall which separated the gardens of Nos. 13 and 14, the effect of which was to diminish the quantity of light previously admitted through the plaintiff's windows. It appeared, that, at the time of the sale, although the houses were unfinished, yet the spaces intended for the windows in question were actually opened in the walls: the plan produced at the sale showed the situation and number of the windows intended for each house. There was no stipulation as to the height to which the garden walls might be raised; but other buildings, in the same direction, were expressly limited to the height of 20 feet.

At the trial, before *Graham*, B., the learned judge nonsuited the plaintiff, giving him leave to move to enter a verdict.

A rule having been obtained, which the court made absolute, it was argued in support of it, that the rights of both parties were clearly pointed out at the time of the sale by the common vendor, which was admitted by *Thompson*, C. B., to be "tantamount to an express agreement that such rights should not be *obstructed." The spaces too, it was further argued, intended for the *67 windows being actually opened, the purchaser was fully aware what he was going to buy, as the exterior sufficiently exhibited to him what he would be entitled to enjoy.

Thompson, C. B., in delivering judgment, said, "This purchase must be taken to have been subject to certain conditions at the time of sale, and as *these unfinished houses were at that time so far built as that the openings*, which

(*a*) 1 Price, 27.

were intended to be supplied with windows, were sufficiently visible as they then stood, we must recognise an implied condition, that nothing would afterwards be done by which those windows might be obstructed; and the purchasers must have taken subject to what then appeared.

"The case of *Palmer* v. *Fletcher* (*a*) is strong and clear, and has been often quoted, and the effect of that case is, that where a man sells a house, he shall not afterwards be permitted to disturb the rights which appertain to it; and the windows of this house being opened at the time, necessarily imported their non-obstruction."—"It is sufficient for the purpose of maintaining this action, if the erection of any building on the wall be the doing of an act whereby the plaintiff has sustained a derogation of any right which he acquired by his purchase. If so, it is what the original owner could not have done; and all lessees claiming under him are equally bound by the transfer.

*68 *Wood*, B., said, "I consider Dr. Compton claiming *here a right by grant, and when this house was granted to Auriol (the plaintiff's lessor), he became grantee of every thing necessary to its enjoyment, as much as if it had been said at the time, that no one should obstruct the light which it then enjoyed."

Where, however, the easement is of such a nature as to have no separate and distinct existence during the continuance of the unity of ownership, there, upon the severance, no such consequences will ensue,

In 11 H. 4. 5, pl. 12, Hank demanded of Huls—"If a man has a way appendant to his frank tenement to go over the land of another, if he purchase the land in which he has the way, and afterwards the same land in which he had the way passes into strange hands, if he shall still have the way or not." Huls says, "He shall have it and use it, for that a way is more necessary to a man than any other appendant; but if it had been common appendant, it would have been extinct *in perpetuum*." Hank: "In this regard I don't see any diversity, for without having pasture for any beasts my land cannot be (gayne); so one is as necessary as the other." Culpepper: "The unity of possession in the one case, as well as the other, extinguishes every thing." Hank: "A man cannot have any appendancy in his own soil; and when he purchases the land in which he has the way, the way is no longer appendant, for he may make what ways he pleases in his own soil, though he had not any there before, by reason of the property which he has in the soil, by which

*69 the *appendancy is extinct; and if the appendancy be extinct, and the appendancy is the reason of the title, *ergo*, the way is gone for ever."

In *Shury* v. *Pigott* (*b*) it is laid down that all ways of convenience are extinguished by unity of possession, but not ways of necessity.

So in *Tyrringham's case* (*c*) it was resolved, that unity of possession of the land to which &c., and of the whole land in which &c., makes extinguish-

(*a*) 1 Levinz, 122. (*b*) 3 Buls. 339. (*c*) 4 Reports, 38.

ment of common appendant; "when a man has as high and perdurable an estate as well in the land as in the rent, common, or other profit issuing out of the same land, there the rent, common, and profit, is extinct; and therewith agrees 24 E. 3. 25" (*a*)

In Dyer, 295 (*b*), it is doubted whether, where two men were seised of adjoining closes (one being bound to repair the fence between them), and the close becomes the owner of both, and remove the fence, the prescription was destroyed, or revived upon the lands descending, at his death, to his daughters as coparceners.

In *Shury* v. *Pigott* it is clearly laid down, that the right to have the fence kept up is extinguished by unity of ownership; and this seems now to be distinctly settled (*c*).

The current of authority in the civil law is in favor of the position, that all servitudes, indiscriminately, were extinguished by unity of ownership, and that none were revived by a subsequent severance, except *possibly *70
those of necessity (*d*); and although it was competent to the owner of two tenements, on alienating one of them, to impose a servitude upon it, for the benefit of the one he still retained, or *vice versa* (*e*); and such imposition, even though, in terms, binding on the person of the possessor only, would, nevertheless, bind the servient tenement, into whose ever hands the two tenements respectively might pass (*f*); yet, unless the precise nature of the servitude was specified upon alienation, no obligation whatever was imposed: the gen-

(*a*) 11 H. 7. 25, p. 26.

(*b*) Palmer, 444.

(*c*) *Boyle* v. *Tamlyn*, 6 B. & C. 337.

(*d*) Marcellus respondit, qui binas ædes habebat, si alteras legavit, non dubium est quin hæres (alias) possit altius tollendo obscurare lumina legatarum ædium; non autem (semper) simile estitineris argumentum: quia sine accessu nullum est fructus legatum: habitare autem potest et ædibus obscuratis.—L. 10. ff. de serv. præd. urb.

(*e*) Duorum prædiorum dominus, si alterum ea lege tibi dederit, ut id prædium, quod datur, serviat ei quod ipse retinet, vel contra: jure imposita servitus intelligitur.—L. 3. ff. comm. præd.

(*f*) Cum fundo, quem ex duobus retinuit venditor, aquæ ducendæ servitus imposita sit, empto prædio quæsita servitus distractum denuo prædium sequitur; nec ad rem pertinet, quod stipulatio, qua pœnam promitti placuit, ad personam emptoris, si ei forte frui non licuisset, relata est.—L. 36. ff. de serv. præd. rust.

In tradendis unis ædibus ab eo qui binas habet, species servitutis exprimenda est: ne si generaliter servire dictum erit, aut nihil valeat quia incertum sit quæ servitus excepta sit, aut omnis servitus imponi debeat.—L. 7. ff. comm. præd.

Si cum duas haberem insulas duobus eodem momento tradidero, videndum est, an servitus alterutris imposita valeat: quia alienis quidem ædibus nec imponi nec adquiri servitus potest; sed, ante traditionem peractam suis magis acquirit vel imponit is qui tradit, ideoque valebit servitus.—L. 8. Ibid.

eral expression, "*quibus est servitus utique est*," was binding as to strangers only; and even the general reservation, that the alienated tenement "should be servient," appears to have been insufficient to prevent the vendee from disturbing the servitudes of his vendor.

*71 It would appear, however, that the insertion of the *clause, "*quibus est servitus utique est*," would in such a case prevent the purchaser of one tenement from disturbing a manifestly existing servitude of the other, supposing the owner to alienate both at the same time (*a*). On the other hand, there is one passage in the Digest which distinctly recognises the principle of the disposition by the owner of two tenements (*b*) (6).

(*a*) Quidquid venditor servitutis nomine sibi recipere vult, nominatim recipi oportet. Nam illa generalis receptio, "quibus est servitus utique est," ad extraneos pertinet, ipsi nihil prospicit venditori ad jura ejus conservanda. Nulla enim habuit, quia nemo ipse sibi servitutem debet. Quinimo, et si debita fuit servitus, deinde dominium rei servientis pervenit ad me, consequenter dicitur extingui servitutem.—L. 10. ff. comm. præd.

(*b*) Binas quis ædes habebat una contignatione tectas; utrasque diversis legavit. Dixi—ex regione cujusque domini fore tigna; nec ullam invicem habituros actionem, jus non esse immissum habere. Nec interest, pure utrisque, an sub conditione alteri ædes legatæ sint.—L. 36. ff. de serv. præd. urb.

(6) *Dedication of Ways in a City.*—In the case of *Livingston* v. *The Mayor, &c. of New York*, 8 Wend. 85, a distinction is taken between grants of property in the country and of city lots. The application of the general doctrine of a right of way as it exists in the country are not correct when applied to city lots. The true rule as to the latter is, that the purchaser of any lot upon any given plot belonging to the same proprietor, whereupon his ground is laid out into streets, is exempted from assessments to pay for any street laid down upon the lands of such proprietor. The recognition of the plan, laying out his land into streets, is a dedication of the streets to be taken for public use whenever the city corporation shall open them. *Wyman* v. *The Mayor, &c. of New York*, 11 Wend. 486. Such circumstances amount to an immediate dedication of the streets, unless, as in the case of *Underwood* v. *Stuyvesant*, 19 John. R. 186, the streets laid out depend on a contingency or are contrary to some local law. The vendor has no interest remaining, except the nominal fee in front of his adjoining ground not disposed of. The case of *Seventeenth street*, 1 Wend. 262, decides that the conveyance of lots bounded upon streets which had not been opened by the corporation, but which were in fact open, gave to the purchasers a right of way over those streets, and that when the corporation adopted those streets and instituted proceedings for opening the same according to law, the former proprietor was not entitled to compensation for any thing but the naked fee, subject to the easement, and therefore that the compensation should be nominal. The implied contract is this: "I engage to give the ground for the streets according to the map, upon condition that the corporation shall ratify it." By Pratt, J. 19 J. R. 186. In *Lewis street*, 2 Wend. 472, the principle was settled, that the purchaser of a lot bounded upon

Sect. 2.—*Easements of Necessity.*

Another class of easements acquired by implied grant are those which are usually termed "Easements of Necessity," though they might with more correctness be called—Easements incident to some act of the Owners of the Dominant and Servient Tenements, without which the intention of the parties to the severance cannot be carried into effect.

The easement called a Way of Necessity is, in reality, only a single species of this class, and is necessary "only in a partial sense, as being a necessary

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streets not yet opened, are not subject to any assessment for opening such streets. The case of *Wyman* v. *The Mayor, &c. of New York*, *supra*, seems to rest on the principle of *immediate dedication*.

"The principles of law in relation to opening streets in the city of New York having been recently adjudicated in this court, and so clearly and correctly illustrated by the Chief Justice of the Supreme Court, in the case of Lewis and Seventeenth streets, I consider it unnecessary to refer to many authorities on the subject. I will only advert to one case lately decided in the Supreme Court of the United States: *White* v. *The City of Cincinnati*, 6 Peters' R. 432. This case and the case of Ridge and Attorney Streets presented the coincidence of two cases depending at the same time in different and distant tribunals, involving the same question, and resulting in the same decision. It is the most recent case reported, in which the doctrine of dedication of streets and public squares is ably and fully discussed. The Court say, "Dedications must be considered in reference to the use for which they are made; and in a town or city, streets require a more enlarged right over the ground, to carry into effect the purposes intended, than may be necessary for highways in the country." "Dedications do not always rest upon length of possession, for in the case 3 Bingham, 447, the question left to the jury was whether the thoroughfare had been used with the assent of the owner of the soil, and not for what length of time. A parol dedication is good, and generally the only one made: and although there is no grantee to take, it vests in the public, and is different from ordinary grants, and is construed upon principles to suit the nature of the case; they are similar to the case where a man lays out a street or highway over his own land, where there is no grantee of the easement, yet it takes effect as a grant to the public use, who have the right of passage through, not the absolute property." The fee, as appears to be well settled, remains in the owner of the soil, or the owners on each side *ad filum viæ*, to whom the original owner may have passed the freehold. The fee of the road passes to the successive owners of the lots in fee, fronting on the street or road, as appurtenant to their grants, and necessary to the enjoyment of the freehold. 1 Burr. 145. 2 Coke, 705. 15 Johns. R. 447. 6 Mass. R. 454. 3 Mason, 280. 1 Day's R. 103. But the easement or right of way always remains in the public. On the first point, therefore, I am of opinion that there was an immediate dedication of Fifth street, and that lapse of time was not necessary to be shown in a case of this kind." See *Wyman* v. *Mayor, &c. of N. Y.* 11 Wend. 486.

incident" (*a*) to the instrument creating the estate to which the easement is appendant.

*72 *Thus, in *Liford's case* (*b*), where a lessor excepted all trees of a certain age growing on the estate demised, and the lessee brought an action of trespass against certain parties claiming under the lessor, for entering upon the lands to see the condition of the trees: it was resolved by the whole court, that, "when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him and them who would buy, power as incident to the exception, to enter and show the trees to those who would have them, for without sight none would buy, and without entry they could not see them; as in 9 H. 6. 29 b. A man seised of a house in a borough, &c., deviseable, devised it to a woman in tail, and if the woman died without issue, that his executor might sell and dispose of it for his soul; in that case the executor might, by the law, enter into the house to see if it was well repaired or not, to the intent to know at what value the reversion is to be sold. Quod fuit concessum per totam curiam. The law gives power to him who ought to repair a bridge to enter into the land, and to him who has a conduit on the land of another to enter into the land to mend it, when occasion requires; as it is resolved 9 E. 4. 35 a. So it is agreed in 2 R. 2. Bar. f. 237. If I grant you my trees in my wood, you may come with carts over my land to carry the wood. Lex est cuicunque aliquis quid concedit, concedere videtur et id, sine quo res ipsa esse non potuit; and this is a maxim in law."

From this, as well as other authorities, it appears that the inference of law arises equally whether the easement is incident to a grant or a reservation.

*73 *Easements of this nature are thus described in Rolle's Abridgment:—

"If I have a field inclosed by my own land on all sides, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant.

"And the grantor shall assign the way where he can best spare it.

"So, too, if the close aliened be not entirely inclosed by my land, but partly by the land of strangers; for he cannot go over the land of strangers (*c*)." Quære.

The chapter of Rolle, in which these sections occur, is headed—"In what case one thing shall pass by grant of another—Incidents"—and the first pl. is, "The grant of a thing passes every thing included therein, without which the thing granted could not be had:" pl. 16, is "If a man grant or reserve wood, that implies liberty to take and carry it away;" thus evidently treating it as a necessary implication of the intention of the grantor, as in the case of all other incidents which the law attaches to grants.

(*a*) 1 Wms. Saund. 323 (n).

(*b*) 11 Reports, 52. *Davey* v. *Askwith*, Hobart, 234.

(*c*) 2 Rolle, Abr. tit. Graunt. Z. pl. 17, 18. 1 Wms. Saund. 323 (n).

Presumed grant, &c. Jordan v. Attwood. Packer v. Welsted. Dutton v. Taylor.

The general rule is thus stated by Serjeant Williams: "Where a man, having a close surrounded with his own land, grants the close to another in fee, for life or years, the grantee shall have a way to the close over the grantor's land, as incident to the grant, for without it he cannot derive any benefit from the grant. So it is where he grants the land and reserves the close to himself (*a*)" (7).

In *Jordan* v. *Attwood* (*b*) the defendant was seised of *a messuage *74 which had a way appendant to it over a certain close; it appears to be admitted in the argument, that there was no other way to the house; this close the defendant bought, and afterwards enfeoffed the plaintiff thereof, making no reservation of the way; and the present action was brought for the defendant continuing to use the way. The judges differed in opinion, some holding that the way was not extinguished; others, that it was the defendant's own folly not to have reserved it; but judgment was given for the defendant. But it is stated in 2 Lut. 111, that, on searching the roll in this case, it was found that judgment was given for the plaintiff.

In *Packer* v. *Welsted* (*c*) there was a special verdict, finding "that there were three parcels of land, and the necessary and private way was out of the first into the second, and out of the two first into the third parcel. J. S. purchased the three parcels, and then aliened the two first to J. N.: and the question was, if he shall have a way over the two first parcels to his third parcel. The jurors also found, that the alienation was by feoffment, and that there was no other way to come at the land not aliened but over the other land."

After two arguments, the court gave judgment for the defendant, "that he might take a convenient way without permission (sans le gree) of the plaintiff, and the law would then adjudge whether such way were convenient and sufficient, or otherwise." *Glyn*, C. J., observed, "That it could not properly be called a right of way (before the alienation), because no man could have such right in his own soil; but that, *as the jurors had found the way to be *75 of necessity, it would remain, for it would be not only a private inconvenience, but also to the prejudice of the public weal, that the land should be fresh and unoccupied."

In *Dutton* v. *Taylor* (*d*), which was an action of trespass q. c. f., the defendant justified as tenant to one R. Cleadon, who was seised *simul et semel* of two closes, the only road to the second from an ancient highway being across the

(*a*) 2 Rolle, Abr. tit. Graunt. Z. pl. 17, 18. 1 Wms. Saund. 323 (n).
(*b*) Owen, 121. (*c*) 2 Siderfin, 39—111.
(*d*) 2 Lut. 1487: *Buckley* v. *Coles*, 5 Taunt. 311.

(7) *Way of Necessity.*—A grantee of land has a convenient way of *some part* of the grantor's land, when the land of the latter surrounds the land granted. But the fact that a person has no right of way except over the defendant's land, is not of itself sufficient to give him a right of way from necessity. *Brice* v. *Randall*, 7 G. & J. 349.

first close; this latter close Cleadon sold to one Astbury, but still continued to use the way across it, although there was no reservation of any right of way in the deed of conveyance.

It was objected, the law would not imply any reservation by the vendor where none was expressed. Sed non allocatur. "For it is apparent by the plea, that it is a way of necessity, and it is *pro bono publico* that the land should not be unoccupied."

In *Howton* v. *Frearson* (*a*) the court held, that a way of necessity over the grantor's land would equally be implied as incident to a grant, though the granting party was a trustee: but Lord *Kenyon* expressed doubts as to the correctness of the general principle laid down in the case above cited.

Ways of necessity, of a different kind, are mentioned by *Doddridge*, J., in *Shury* v. *Piggott* (*b*),—ways "to the church or to market."

Under this head, likewise, come easements incident to the rights which a party has in virtue of his office, as a right of entry in the parson to take away

*76 his tithes; *Payne* v. *Brighen* (*c*); and, also, a right to make the grass into hay on the land where it grew (*d*).

It would seem, from an observation of *Mansfield*, C. J., in *Morris* v. *Edgington* (*e*), that although in these cases there might exist some other mode of access, yet, if the way claimed "was necessary for the most convenient enjoyment" of the thing demised, it would be a way of necessity.

In an anonymous case (*f*), it is said, per Curiam, "If a man, either by grant or prescription, have a right to wreck thrown upon another's land, of necessary consequence, he has a right to a way over the same land to take it."

And again, in *The Queen* v. *Inhabitants of Chuworth* (*g*), by *Holt*, C. J., "If one have land adjoining on a navigable river, every one that uses that river has, if occasion be, a right to a way by the bank of the water over that land, or farther in, if necessary."

This general right to tow along the banks of navigable rivers is denied in *Ball* v. *Herbert* (*h*), unless founded either on statute or custom.

"On selling two closes," it is said in Keble (*i*), "and keeping the middle, I shall have a way against my own grant, although I may enter by another as convenient."

In *Clark* v. *Cagge* (*j*) upon demurrer, the case was—"The one sells land, and afterwards the vendee, by reason thereof, claims a way over part of the

*77 plaintiff's *land, there being no other convenient way adjoining, and whether this was a lawful claim was the question; and resolved without argument, that the way remained, and that he might well justify the using thereof, because it is a thing of necessity; for otherwise he could not have any profit of

(*a*) 8 T. R. 50. (*b*) 3 Bulstrode, 340. (*c*) 2 Lutw. 1313; S. C. 3 Leon. 228.
(*d*) 1 Rolle, Abr. Dismes, X. pl. 23. (*e*) 3 Taunt. 28. (*f*) 6 Mod. 149.
(*g*) Ibid. 163, C. (*h*) 3 T. R. 253. (*i*) Per Foster, J., in *Palmer* v. *Flessier*, 1 Keble, 553.
(*j*) Cro. Jac. 169.

his land. Et e converso—If a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any land thereto but through one of those which he sold, although he reserved not any way, yet he shall have it as reserved unto him by the law: and there is not any extinguishment of a way by having both lands."

The concluding observation evidently refers to the kind of way here spoken of—a way of necessity: but whether it does or not is immaterial to the authority of the case, which did not turn upon any question of extinguishment, but upon the new title implied by law.

The accessorial right which the law thus confers is to be measured by the nature of the grant or reservation to which it is incident, and it has been held to cease when it is no longer required, in order to render such grant or reservation effectual.

Thus, in *Lord Davey* v. *Askwith* (*a*), where an action of waste was brought against the defendant for felling oak trees. The only question was—whether the lessor by leasing coal mines did, by implication of law, give power to the lessee to fell timber for the use of the coal mines. It was agreed that the grant of a thing did carry all things included, without which the thing granted could not be had. But this case was adjudged *una voce* against the defendant; for it must be understood* of things incident and directly necessary. *78 Thus, if I give you the fish in my waters, you may fish with nets, but you may not cut the banks to lay the waters dry. If I grant or reserve woods, it implies a liberty to take and carry them away.

In *Wiseman* v. *Denham* (*b*) the plaintiff declared that there was a custom for every parishioner to pay to the parson the sixteenth cheese, as tithe for cheese, on a certain day, and that he tendered to the parson (obtulit) a certain number, being the fifteenth of what he made; that the parson refused to receive them, and suffered them to remain in the plaintiff's house for half a year, doing damage to him, &c. After verdict for the plaintiff, it was moved in arrest of judgment, that no action would lie; but the court were of opinion, that such an action was maintainable.

If a parishioner duly sets out his tithe of hay, and requires the parson to carry it away, but he doth not do so in convenient time, whereby the grass where the hay lay is spoilt, an action on the case lies against the parson (*c*).

In *Holmes* v. *Goring* (*d*) the defendant having been previously entitled to a

(*a*) Hobart, 234.

(*b*) Palmer, 341—381; vide etiam *Shepcott* v. *Mudford*, 1 Lord Ray. 187: *South* v. *Joncs*, 1 Strange, 245; 1 Rolle Rep. 172, 420.

(*c*) Rolle Abr. Action on the case. N. fol. 36.

(*d*) 2 Bing. 76; S. C. 9 Moore, 166.

way of necessity over certain closes, purchased these closes, together with certain other pieces of land adjoining the close to which the way of necessity led: he subsequently sold two of the closes over which the way of necessity had *79 been used, together with some portions of the land adjoining, *which prevented his having access over his own land to those closes to which the right of way had originally been enjoyed. These portions had, however, been repurchased by him long before the present action was brought, at which time he could have had as convenient access over his own land as over that occupied by the plaintiff.

The question to be decided was, whether the way of necessity—which was admitted to have existed when the defendant sold the close now occupied by the plaintiff—was defeated by the fact, that, by a subsequent purchase, he was enabled to approach the close to which, &c. over his own land; the defendant contending that the necessity of the way was to be considered with reference to the condition of the property at the time of the sale of the two closes.

The Court held that the way of necessity ceased as soon as the defendant had any other means of access to the close to which it led. "A way of necessity," said *Best*, C. J., (citing Serjeant Williams's note to Saunders), "when the nature of it is considered, will be found to be nothing else than a way by grant; but a grant of no more than the circumstances which raise the implication of necessity require should pass. If it were otherwise, this inconvenience might follow, that a party might retain a way over one thousand yards of another's land, when, by a subsequent purchase, he might reach his destination by passing over one hundred yards of his own. A grant, therefore, arising out of the implication of necessity cannot be carried further than the necessity of the case requires, and this principle consists with all the cases which have been decided." *Park*, J., added, "From all the authorities referred to, it is clear that when a* way is claimed by necessity, it is a good answer to show 80* that there is another way which the party may use.

Burrough J., expressed his opinion to be, "That there must be a necessity continuing up to the time of the trespass justified under it."

The opinion here expressed by *Burrough*, J., appears to be in accordance with the decision of the court of K. B. in *Reynolds* v. *Edwards* (*a*): the defendant's lessor had a prescriptive right of way over the plaintiff's land to a close which was encircled by land of the plaintiff. Twenty-four years before the action was brought, the plaintiff stopped up the old way and opened a different one, which latter, after being used by the defendant's lessor during that period, the plaintiff also stopped up, and brought the present action of trespass for the use of it by the defendant, and his removal of a gate erected across it by the plaintiff. The court held that the new way could not be claimed as a way of necessity, as it did not appear "that there was no other way, but only that there was no other passage open," and that as the plea set

(*a*) Willes, 282.

forth a right of way by prescription, which the plaintiff had admitted by demurring to the plea, that was sufficient to prevent the defendant being entitled to this as a way of necessity. That it was, in fact, but a way of sufferance, and upon the plaintiff determining his will by erecting the gate, the defendant should have had recourse to his old right.

The case of *Buckley* v. *Coles* (*a*) appears from the facts as stated in the report to be somewhat at variance with * the doctrine above laid down, as *81 during the time in which there was a unity of the whole property there appeared to have been another approach to the close, to which &c. besides the previously existing way of necessity, and as this new approach existed at the time of severance, the former necessity must, of course, have ceased. There appears, however, to be some confusion in the facts, as the jury expressly found, that at the time of the trespass for which the action was brought, there existed no other way but the one claimed by the defendant.

Dallas, J., said, "the question on the issue is, whether there was any other way. The evidence on the defendant's side is, that there was no other way. The plaintiff meets it by evidence that there was another way, though not quite so convenient; and the jury have had it before them and have disaffirmed the existence of any other way."

It is, therefore, in fact, an authority to the same effect as the case of *Holmes* v. *Goring* above cited.

In *James* v. *Dods* (*b*) the Court of Exchequer held that a rector, though entitled to the use of whatever roads existed on the farm for the purpose of carrying away his tithes, had no right, except by express grant or prescription, to prevent the occupier from making such alterations as were advantageous to his land, though the accustomed road was thereby stopped up, provided such alterations were made *bona fide*, and not with any vexatious intention towards the tithe-owner.

Lord *Lyndhurst*, C. B., said—"In this case there was no evidence to establish a right of way by prescription or grant; and there is no evidence to show that the farmer ever carried his nine-tenths by the way claimed. *The *82 tithe-owner has a right to the same road as the farmer uses to carry his nine-tenths; and it appears to me, that, if the farmer, acting completely *bona fide*, alters the line of road to his farm, he has a right to do so, and the parson must use the substituted road, and has no remedy except under a prescription or grant. If there were such a right as is here claimed by the plaintiff, it would prevent the farmer from altering the road in the slightest degree, and it is not pretended that he may not make a slight deviation Now here, there was no evidence that the farmer ever did use the way for the purpose of carrying away his nine-tenths; and the evidence of user by the parson is limited to two or three instances. It does not appear to me that there was any thing to prevent the defendant acting *bona fide* from setting out another way for the

(*a*) 5 Taunt. 311. (*b*) 2 Cr. & Mee. 266. Vide cases there cited.

convenient management of the farm. Here the defendant *bona fide* stopped up the old way and set out another; and the plaintiff has, therefore, no right to use the old way. The action, therefore, cannot be sustained." *Bayley*, B.—"This action is founded on the supposition that the plaintiff has a right of way, in the use of which he has been obstructed. There is no doubt that a tithe-owner has a right to use the way from time to time used by the occupier for the purpose of carrying off his nine-tenths. Originally, I should say, that the parson's right was to follow the farmer's road to his homestead, and thence to get to the road towards the parsonage. He may have a further right; and it is suggested that he has the right to use all the roads used for the cultivation of the farm. I will not say that he has it not, but that right results from

*83 the farmer's * conduct and management of the farm, and is co-extensive with the usage for the purposes of cultivation, and does not put an end to the farmer's right to stop up the road. There may be a right by grant or by prescription, which presupposes a grant by the owner of the inheritance, to which the owner or occupier cannot act in opposition; but, if no such right exists, it seems to me that the tithe-owner is not entitled to use a way, merely because it is most convenient to himself, or because the occupier, for his own convenience, has sometimes used it. Here, there was no evidence to establish such claim of right. The manner in which the way was used by the landowner furnished no evidence, as it appeared that the opening had been made for purposes of his own, and that his tenant had been in the habit of driving his cattle that way into the road, and three or four times the tithe-owner used it; which might be either because he had leave to use it, or because it was one of the roads used by the farmer. The only question then for us to consider is—whether, in point of law, the circumstance of the way having been used by the farmer a considerable time, gives the tithe- owner a right to keep it open. I am of opinion that it does not."

In the cases already cited the expression frequently occurs, that ways of convenience are extinguished by unity of possession, but ways of necessity are not. It appears, however, to be more correct, as well as more in accordance with the general principles of the law of easements, as recognised both by the English and Civil law, to consider all easements, whether of convenience or necessity, as extinguished by unity, but that, upon any subsequent

*84 severance, easements which * previous to such unity were easements of necessity, are granted anew in the same manner that any other easement which would be held by law to pass as incident to the grant.

Had there been a unity from time immemorial, the law would clearly imply a right of way as incident to a grant, if there existed no other means of such grant taking effect. Why, then, should this anomaly of non-extinguishment be held to be law, when the same result can be obtained from the ordinary principles regulating other easements of the same class?

In none of the numerous cases, in which the question of extinguishment has been discussed, has it been laid down that the *same* right revived upon the

severance of the tenements which existed previous to the unity. The utmost extent to which the judges go, is to say that *a* right of way revives, because the new grant would otherwise be inoperative. Where a party died seised of certain lands and a mill, which descended to his two daughters as coparceners, it was held that an agreement by parol between them, on making partition, that a way should be used to the mill as during the lifetime of their father, was binding on them (*a*). Broke, in his Abridgment (*b*), says, "The way is revived; *tamen videtur* that it is a new way (nouvel chimine).

It is clearly settled, on all the authorities, that, *during the unity*, no way or easement can *exist* in the land (*c*).

The language of *Best*, C. J., in *Holmes* v. *Goring* (*d*) fully supports the doctrine above stated, that all ways are extinguished by unity of ownership; and that ways * of necessity are in reality new easements incident to the *85
grant or reservation. "If I have four fields, and grant away two of them over which I have been accustomed to pass, the law will presume that I reserve a right of way to those which I retain. But what right? The same as existed before? No; *the old right is extinguished* and the new way arises out of the necessity of the thing. It has been argued that the new grant operates as a prevention of the extinguishment of the old right of way, but there is not a single case which bears out that proposition, or which does not imply the contrary. By the grant a new way is created, and that way is limited by necessity."

Serjeant *Williams* says, "Where a man, having a close surrounded by his own land, grants the close to another, the grantee shall have a way to the close over the grantor's land, as incident to the grant. What way is it the grantee shall have? Not the old, but a new way, limited by the necessity." In *Clark* v. *Cogge* (*e*) the Court says that "although the grantor in such a case reserve not a way, it shall be reserved for him by law; that is, not the old way, but a new way of necessity, if he hath not any other way." In *Jordan* v. *Attwood* (*f*), *Popham*, C. J., says, "If a man has three fields adjoining, and makes a feoffment of the middle field, the feoffee shall have *a* way (not the way) to this through the other close."

(*a*) 21 Ed. 3. 2; S. C. 21; Ass. pl.
(*b*) Tit. Extinguishment, fol. 15.
(*c*) *Morris* v. *Edgington*, 3 Taunt. 24.
(*d*) 2 Bing. 83.
(*e*) Cro. Jac. 170.
(*f*) Owen, 121.

CHAPTER V.

TITLE TO EASEMENTS BY PRESCRIPTION.

Definition of Prescription.	Possession.	Legal possession.

* 86 * Prescription may be defined to be—A title acquired by possession had during the time and in the manner fixed by law. "Prescriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis" (*a*). After the lapse of the requisite period the law adds the rights of property to that which before was possession only (*b*).

"Things corporeal can alone be susceptible of possession (*c*)—things incorporeal, that is to say, those '*quæ in jure consistunt*,' are not in fact susceptible of possession, strictly and properly so called; but they are susceptible of a quasi possession, '*jura non possidentur sed quasi possidentur*.' This quasi possession consists in the enjoyment of the right by him to whom it belongs. Thus, I am considered to have the quasi possession of a right of servitude when I do on the neigboring heritage, in the sight and with the knowledge of the proprietor of that heritage, those acts which my right of servitude entitles me to do. This quasi possession is susceptible of the same qualities and defects as possession properly so called (*d*)."

* 87 * To constitute a legal possession there must be not only a corporeal detention, or that quasi detention which, according to the nature of the right, is equivalent to it, but there must be also the intention to act as owner (*e*).

Thus, no legal possession is acquired by a man walking across the land of his friend (*f*), or using a private way, thinking it to be a public one (*g*); or unless he would do the act in defiance of opposition (*h*).

(*a*) Co. Litt. 113. b.

(*b*) Usucapio est adjectio dominii per continuationem possessionis temporis lege definiti.—L. 3. ff. de usurp.

(*c*) Possideri autem possunt quæ sunt corporalia.—L. 39. ff. de acq. poss.

(*d*) Pothier, tom. 4, p. 580—Traite de la Loi Civile Francaise.

(*e*) Apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.—L. 3. § 1. de acq. vel amit. poss.

(*f*) Qui jure familiaritatis amici fundum ingreditur non videtur possidere, quia non eo animo ingressus est ut possideat, licet corpore in fundo sit.—L. 41. Ibid.

(*g*) Servitute usus non videtur, nisi is qui suo jure uti se credidit; ideoque si quis pro via publica vel pro alterius servitute usus sit, nec interdictum nec actio utiliter competit.—L. 25. ff. quem. serv. amit.

(*h*) Si per fundum tuum nec vi nec clam nec precario commeavit aliquis, non

Possession must be uninterrupted. What is an interruption by dominant owner.

From the very definition of Prescription, an enjoyment, in order to confer a title, must have been uninterrpted both as to the manner and during the time required by law. It is not to be understood by this expression that the enjoyment of an easement must necessarily be unintermittent; although, in a great variety of cases, it would obviously be so; as in the case of windows, or rights to water. In those easements which require the repeated acts of man for their enjoyment, as rights of way (*a*), it would appear to be sufficient if the user is of such a nature, and takes place at such intervals, as to afford an indication to the owner of the servient tenement that a right is claimed against him—* an indication that would not be afforded by a mere * 88
accidental or occasional exercise (*b*).

The continuity of enjoyment may be broken either by the cessation to use, or by the enjoyment not being had in the proper manner.

"An enjoyment of an easement for one week," said Mr. Baron *Parke*, in the *Monmouthshire Canal Company* v. *Hereford* (*c*), "and a cessation to enjoy it during the next week, would confer no right."

So, where the enjoyment has been had under permission asked from time to time, which, upon each occasion, amounts to an admission that the asker had then no right. Indeed the very mode in which this enjoyment, under constantly renewed permission, operates in defeating the previous user, is, that it breaks the continuity of the enjoyment (*d*); and it is expressly laid down by the Court of King's Bench in their judgment in the case of *Tickle* v. *Brown* (*e*), that the breaking of the continuity is inconsistent with the enjoyment during the periods of either twenty or forty years, and that for that reason evidence of the breaking of such continuity is admissible on the traverse of the enjoyment.

The interruption here spoken of is that arising from the act of the party claiming the right. The interruption of a right claimed under the statute by any act of the servient owner will be considered hereafter (*f*).

The mode of acquiring a title to an easement by prescription may be considered with respect—

*1st.—To the length of time during which the enjoyment must con- *89
tinue.

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tamen tanquam id suo jure faceret, sed, si prohiberetur, non facturus; inutile est ei interdictum de itinere actuque; nam ut hoc interdictum competat jus fundi possedisse oportet.—L. 7. ff. de itinere actuque privato.

(*a*) Nemo enim tam perpetuo tam continenter ire potest, ut nullo momento possessio ejus interpellari videatur.—L. 14. ff. de serv.

(*b*) Per Curiam in *Bartlett* v. *Downes*, 3 B. & Cr. 621.

(*c*) 1 Cr. M. & Ros. 614.

(*d*) Ibid. per Lord Lyndhurst.

(*e*) 4 Adol. & Ellis, 383; *Beesley* v. *Clark*, 2 Bing. N. C. 705.

(*f*) Post—Qualities of enjoyment.

2d.—To the persons against and by whom the enjoyment must be had.
3d.—To the qualities of that enjoyment.

Sect. 1.—*The Length of Time during which the Enjoyment must be had.*

By the common law an enjoyment to confer a title to an easement must have continued during a period co-extensive with the memory of man; or, in legal phrase, "during time whereof the memory of man runneth not to the contrary." To this expression a definite meaning was originally attached, as comprising the period elapsed since the year 1189. "Now, 'time of memory,'" says Blackstone, "has long ago been used and ascertained by the law to commence from the reign of Richard the First" (*a*)—a period adopted by analogy to the stat. 3 Ed. 1, c. 29, which fixed that as the date for alleging seisin in a real action. When the shorter time of sixty years was fixed for a writ of right, and fifty years for a possessory action by 38 H. 8, it has been said that a similar extension of the statute was not made by the courts of law, and that the time of prescription for incorporeal rights remained as before (*b*). It is difficult to see upon what ground this distinction could have been made, as the enacting words of the two statutes are almost identical in expression, and the latter has been considered only as an addition to the former, restricting the period of prescription to sixty years before the action brought, and making no other alteration.

The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment during a shorter time raised a presumption that such enjoyment had existed for the necessary period (*c*)—where, however, the actual origin of the enjoyment was shown to have been of more recent date than the time of prescription, the right in earlier cases was held to be defeated.

Thus, in *Bury* v. *Pope* (*d*), "It was agreed by all the justices, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and the lights have continued by the space of thirty or forty years; yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action, for it was his folly to build his house so near to the other's land,—and it was adjudged accordingly."

This doctrine appears to have been held down to the passing of the Statute of Limitations, 21 Jac. 1, c. 16.

(*a*) 2 & 3 W. 4, c. 71, s. 1.
(*b*) 1st Report of Real Property Commissioners, p. 51.
(*c*) *Jenkins* v. *Harvey*, 1 Cr. M. & Ros. 894.
(*d*) Cro. Eliz. 118.

Before the Prescription Act.

The period of the first year of Richard I. was adopted as the commencement of legal memory by an equitable extension of the statute, which fixed that as the period in which the demandant in a writ of right must have alleged seisin.

"But when, by the Statute of Limitations, 3 Ed. 1, *c. 29, the seisin *91 in a writ of right was limited to the time of Rich. I., so that none could count of an older seisin, this writ being the highest writ; it was taken to be also within the equity of the statute, that though a man might prove the contrary of a thing of which prescription was made, still, this should not destroy the prescription, if the proof were of a thing beyond the time of limitation. For it was reasonable that the inquiry in a prescription should be limited as well as in a writ of right, being lower than that, for it was very hard to put juries to inquire of things so old" (*a*).

Following out this doctrine, the courts, upon the fixing of a shorter period of limitation in possessory actions, ought to have diminished the length of enjoyment, from which a prescriptive right might be inferred, in all like actions to the period of twenty years, fixed by statute 21 Jac. 1.

The opinion of Mr. Serjeant Williams, supported by high authority, appears to have been—"That *an action on the case*, being a possessory action, was considered by the courts to be in the nature of an ejectment; and as no one can recover in ejectment, unless he or those under whom he claims have been in possession within twenty years, or rather as an adverse uninterrupted possession by another for twenty years is a bar to an ejectment, so an uninterrupted possession of an easement for the same time is considered as a bar to an action on the case, which has for its object, in common with an ejectment, the object of the possession, or, at least the dispossessing the defendant of it."—"From the case of *Holcroft* v. *Heel* it seems necessarily to follow, that where *a person has used and enjoyed an easement for twenty years and *92 upwards, though it was a wrongful use at first, he thereby gains such a right, that, if he is disturbed in the enjoyment of it, he may maintain an action on the case for a disturbance; and it is no answer to show that the plaintiff originally obtained the use and possession of it by usurpation and wrong (*b*)."

There appears, therefore, some reason to doubt the correctness of the generally received opinion, that the equitable analogy above mentioned was not extended to the more recent statutes, 32 Hen. 8, and 21 Jac. 1, as well as to the earlier statute of Edw. 1. The only direct authority against this extension appears to be the opinion of Sir R. Broke, as given in his reading on the statute of 32 H. 8, which is not stated to be founded on any decided case, while it is expressly laid down in Broke's Abridgment, that 32 H. 8, "entirely repealed the ancient Statute of Limitations, and that it extended equally with the former statutes to copyholds as well as to freeholds; for the new statute is, that

(*a*) 2 Roll. Abr. tit. Prescription, 269, fol. 14.

(*b*) 2 Wms. Saund. 175 a.

a man shall not make prescription, title, or claim, &c.; and those who claim by copy make prescription, title, and claim, &c.; also the plaints are in nature and form of a writ of our Lord the King at common law, &c., and those writs which have been brought at common law are ruled by the new limitation, and therefore the plaints of copyhold shall be of the same nature and form" (*a*).

In the case of *Bury* v. *Pope*, above cited, which was decided during the period which intervened between the passing of the two statutes of Hen. 8 and

*93 Jac. 1, *sufficient time had not elapsed to confer a title by the former statute, even supposing the equitable analogy to have existed. *Whitter* v. *Crompton* (*b*), which appears to be the only case decided expressly upon the statute of 32 H. 8, and which is at the most but a doubtful authority, turned upon the point that a *formedon*, having been given since the passing of the statute of Westminster, was not within the 32 H. 8, which was but a mere continuation of it; and ultimately the case appears to have been compromised.

The opinion of Mr. Serjeant Williams is in accordance with the expression of Lord *Mansfield*, "That an incorporeal right, which, if existing, must be in constant use, ought to be decided by analogy to the Statute of Limitations" (*c*).

"The several Statutes of Limitation," said *Abbott*, C. J., "being all *in pari materia*, ought to receive a uniform construction, notwithstanding any slight variation of phrase, the object and intention being the same" (*d*).

The view of Serjeant Williams above cited is however at variance with the generally received opinions upon this subject: but, although the courts refused in form to shorten the time of legal memory by analogy to the later statutes of limitation, they obviated the inconvenience which must have arisen from allowing long enjoyment to be defeated by showing that it had not had a uniform existence during the whole period required, by introducing a new kind of title by presumption of a grant made and lost in modern times.

*94 *And on this ground although it appeared that a right of way had been extinguished by unity of possession (*e*), or even by an Act of Parliament (*f*), it has been held that a title might be obtained by an enjoyment for twenty years.

(*a*) Tit. Limitations, fol. 2.

(*b*) 3 Dyer, 278 a.

(*c*) 2 Evans' Pothier 136.

(*d*) *Murray* v. *E. I. Company*, 5 B. & Ald. 215; see also *Tolson* v. *Kaye*, 6 B. Moore, 558, per *Dallas*, C. J.

(*e*) *Keymer* v. *Summers*, 3 T. R. 157; Bull. N. P. 74.

(*f*) *Campbell* v. *Wilson*, 3 East, 294; see also *Mayor of Hull* v. *Horner*, Cowp. 102; *Eldridge* v. *Knott*, Ibid. 215; *Lady Dartmouth* v. *Roberts*, 16 East, 338; *Holcroft* v. *Heel*, 1 Bos. & Pul. 400; *Livett* v. *Wilson*, 3 Bing. 115; *Doe* d. *Fenwick* v. *Reed*, 5 B. & Ald. 232; *Codling* v. *Johnson*, 9 B. & Cr. 933.

Before the Prescription Act.	Modern lost grant.

In a recent case, where windows were shown to have existed twenty years, it was held that proof that they did not exist twenty-two years before the obstruction, was insufficient to defeat an action (*a*).

This was in reality prescription shortened in analogy to the limitation of the 21 Jac. 1., and introduced into the law under a new name, for "the law allows prescription only in supply of the loss of a grant; and therefore every prescription pre-supposes a grant to have existed" (*b*).

The introduction of this doctrine was attended with considerable opposition; and it was contended, that, to sustain a claim founded upon such a lost grant, the jury must actually believe in its existence, as, at all events, they must find it as a fact, though they did not believe it (*c*).

The practical distinction was, that, where the claim was by prescription, the length of enjoyment constituted a title; where, on the other hand, the right was claimed by "lost grant," the long enjoyment afforded *but a pre- *95
sumption of title; and whether such presumption was conclusive for the purpose for which it was adduced, was a point open to a certain degree of doubt.

Though the evidence of enjoyment, which has been already adverted to, was in theory presumptive evidence only of prescription, yet it was in practice and effect conclusive (*d*); and it is apprehended, that if a jury had disregarded the recommendation of a judge, "that such evidence warranted the presumption of a grant," the court would have directed a new trial *toties quoties* (*e*).

But, although this principle was clearly recognized in numerous decisions, yet doubts and difficulties still arose from the vague and uncertain language frequently made use of by judges in leaving these questions to the jury—enjoyment being sometimes treated as affording a conclusive presumption—while at others such user was only considered to be "cogent evidence" of prescription (*f*), the presumption of which judges were in the habit of recommending juries to adopt.

"It has not unfrequently happened," says a modern writer, "that the same presumption has been spoken of by some judges as a rule of law, whilst by others it has been treated merely as fit to be recommended to a jury, or as one which a jury might properly make" (*g*).

This mode of carrying out the policy of the law, by the intervention of a jury, has been strongly objected to. A distinguished writer has observed:—

*"The practice of requiring juries in any case to be mere passive instruments in finding facts upon their oaths, in the existence of which the court *96

(*a*) *Penwarden* v. *Ching*, 1 Moo. & Mal. 400.

(*b*) 2 Blackstone, 165, citing *Potter* v. *North*, 1 Ventris, 387.

(*c*) 2 Evans' Pothier, 136.

(*d*) See per *Parke*, B., in *Bright* v. *Walker*, 1 Cr. M. & Ros. 217.

(*e*) See per *Alderson*, B., in *Jenkins* v. *Harvey*, 1 Cr. M. & Ros. 894.

(*f*) *Rex* v. *Jolliffe*, 2 B. & Cr. 54.

(*g*) 1 Phillips & Amos, on Evidence, 8th edit. 460.

itself did not believe, although now established, is of singular origin. The effect is indirectly to establish an artificial presumption, which, for want either of inclination or authority, could not be established and applied directly. It seems very difficult to say why such presumptions should not at once have been established as mere presumptions of law, to be applied to the facts by the courts, without the aid of a jury. That course would certainly have been more simple; and any objection as to the want of authority would apply with equal, if not superior, force to the establishing such presumptions indirectly through the medium of a jury" (*a*).

"Notwithstanding the admission of the presumptions," says the same learned author, "which appear now to be established, and necessary rules of law, this branch of jurisprudence cannot but be considered as imperfect and inartificial, more especially if it be contrasted with the labored distinctions of the Roman law upon the same subject. The presumption being one of law, arising out of the fact of continued and adverse possession unrebutted, ought, as a rule of law, to be applied whenever the facts to which it is applicable arise; and yet, unless the jury strain their consciences so far as to find a grant, in the actual existence of which the court itself may not believe, the rule of law is inapplicable; in other words, the rule is useless, unless the jury, upon the

*97 *recommendation of the court, find a fact, which, in all human possibility, never existed, and which is perfectly unconnected with the real merits of the case; surely, so heavy a tax upon the consciences and good sense of juries, which they are called on to incur for the sake of administering substantial justice, ought to be removed by the assistance of the legislature" (*b*).

The stat. 2 & 3 W. 4, c. 71, (commonly called the Prescription Act) "was intended," said Mr. Baron *Parke*, "to accomplish this object, by shortening in effect the period of prescription, and making that possession a bar or title of itself, which was so before only by the intervention of a jury" (*c*).

This act, however, contains enactments much more extensive than would be necessary for the attainment of this object merely; and it certainly is to be lamented that its provisions were not more carefully framed, and that a more comprehensive view was not taken of the whole of this most important branch of our law. It deserves to share, in common with too many of our statutes, in the reproach, that it is couched in terms so obscure, and that many of the clauses are so carelessly drawn, that it is extremely difficult to understand what was the intention of the legislature.

It is of the utmost importance to ascertain what the law really was upon the subject of titles by prescription at the time of passing the recent statute, as it appears to be admitted, that the statute, although it has given some increased facilities to a party claiming an easement, has not superseded the

(*a*) 2 Stark. on Evid. 675.

(*b*) 2 Starkie Ev. 669.

(*c*) *Bright* v. *Walker*, 1 Cr. M. & Ros. 217.

common law, but *allowed him an election, to proceed either under *98
the statute or according to the common law (*a*).

Supposing this to be so, there appears no more reason for supposing that the title by lost grant is put an end to by the statute than that the title by prescription is abrogated by it; indeed, as far as the preamble may be permitted to afford an indication of the objects of the statute, it would seem that the principal motive for passing the statute was in order to obviate the difficulty which arose from showing the actual commencement of an enjoyment within the time of legal memory.

The statute (2 & 3 Will. 4, c. 71), is as follows:—"*An Act for shortening the Time of Prescription in certain cases.*—Whereas the expression 'Time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except *such matters and things as are herein specially pro- *99
vided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

"Sect. 2. and be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before men-

(*a*) See post—Extinguishment of Easements.

tioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at

*100 any time prior to such period of twenty * years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

"Sect. 3. And be it further enacted, That when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and defeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

"Sect. 4. And be it further enacted, That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

"Sect. 5. And be it further enacted, That in all actions upon the case and

*101 other pleadings, wherein the party * claiming may now by law alledge his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not

be received in evidence on any general traverse or denial of such allegation.

"Sect. 6. And be it further enacted, That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favor or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

*"Sect. 7. Provided also, That the time during which any person *102 otherwise capable of resisting any claim to any of the matters before mention, ed shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

"Sect. 8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

"Sect. 9. And be it further enacted, That this act shall not extend to Scotland or Ireland.

"Sect. 10. And be it further enacted, That this act shall commence and take effect on the first day of Michaelmas term now next ensuing."

With the exception of the right to light, two distinct periods of user with respect to easements are specified* by the recent Prescription Act. *103 As far as concerns the shorter period fixed—an enjoyment for twenty years—the statute seems to be merely a declaration in accordance with the law as it before stood (*a*), it enacting only that the right should not be defeated by showing the commencement of such user to have been within the time of legal memory; but allowing such user to be defeated in any other way by which its effect might previously have been destroyed.

The enactment as to the longer period of forty years materially restricts the common law modes of defeating the effect of user of an easement, declaring that user for that time shall give an absolute and indefeasible right (*b*), notwithstanding any personal disability on the part of the owner of the ser-

(*a*) Vide ante, p. 93. (*b*) Sect. 2.

vient inheritance (*a*), unless it shall appear that the same was enjoyed under some consent or agreement by deed or writing.

In all cases in which an easement is claimed under the statute by user, such user must be shown to have existed during the requisite periods immediately preceding the commencement of some suit or action wherein the claim or matter to which such period may relate shall come in question (*b*).

Where, however, the servient tenement, upon, over, or from which any such way, or other convenient watercourse, or use of water, shall have been or shall be claimed or derived, has been held during the whole or any part of the forty years, "under any term of life or any term of years exceeding three
*104 years from *the granting thereof," "the time of the enjoyment" "during the continuance of such term shall be excluded in the computation," provided that the claim to the easement founded on the user shall be resisted by the reversioner within three years after the determination of such term (*c*).

The peculiar language of this section (s. 8) must be observed. It is not in terms extended to every description of easement as in the 2d section, but is confined "to a way or other convenient watercourse or use of water." "No doubt," said *Parke*, B., in *Wright* v. *Williams* (*d*) "there is a mistake in the 8th section, probably a miscopying in the insertion of the word 'convenient,' instead of 'easement.'" If the word easement were substituted, as suggested by the learned judge, the language of the two sections would be identical.

No case has yet arisen in which the courts have been called upon to decide whether effect could be given to the presumed intention of the legislature, or whether the exemption must be strictly confined to the two kinds of easement mentioned in the statute (*e*). It may, however, be suggested, that by reading "convenience" instead of "convenient," a word which in the old books is synonymous with easement, the language would be sufficient to give effect to the intentions of the framers of the statute, without any violent perversion of the words.

*105 After an enjoyment of forty years, the extent of the *exemption contained in the 8th section appears to amount to this:—The period during which the owner of the servient inheritance has not been "valens agere," in consequence of the existence of a lease for life or for more than three years, is altogether excluded in the computation of the time during which the user has been enjoyed, provided he contests the claim within three years after the lease expires; so that if the first twenty of the forty years' user were had at a time when the servient tenement was not so held under lease, the owner of

(*a*) Sect. 7. (*b*) Sect. 8.

(*c*) *Wright* v. *Williams*, 1 M. & W. 77; *Onley* v. *Gardiner*, 4 M. & W. 496; *Richards* v. *Fry*, 3 Nev. & P. 67; *Jones* v. *Price*, 3 Bing. N. C. 52; 3 Scott, 376.

(*d*) 1 M. & W. 77.

(*e*) See *Lyde* v. *Bernard*, 1 M. & W. 101, observations of the judges upon the word "upon," in stat. 9 Geo. 4, c. 14, s. 6; and *Wright* v. *Williams*, 1 M. & W. 77.

such tenement would be barred, even though he brought his action within the three years from the expiration of the lease: and it would also seem that for the same reason he would equally be barred, though the tenement had been held during the first eighteen and the last two years of the forty without lease, the tenement being held on lease during the intervening period of twenty years; the time of user during the leases is simply to be excluded, and there appears to be nothing to prevent the tacking together of the two periods of eighteen and two years, during which there has been a valid user. This point, it is true, has not yet arisen; but the case appears to be exempted from the rule requiring twenty years' enjoyment next before action brought, by the express enactment of the statute—that the time during which the property was so held on lease shall be excluded from the computation of the period of forty years. If this be not so, and the words of the statute must in all cases be construed literally, the mere intervention of a lease for three years of the servient tenement might prevent the dominant owner from proving his right to an easement which he had enjoyed from time immemorial.

*Supposing, then, that the period during which the servient tene- *106
ment has been so in lease is simply to be excluded in the computation of the time, and to be considered in law as though it had never been, a further question arises, whether the user, during the remaining twenty years, when there was no such demise, can be defeated as in ordinary cases; for instance, by showing that the owner of the inheritance was during the whole or part of that time under a disability. By the 7th section, the provision in favor of disabilities does not apply to the cases "where the right or claim is declared to be absolute and indefeasible;" and it may be urged, that the policy of the law is, after so long an enjoyment, to clothe such user with the legal right without allowing the general object to be defeated by too minute provisions. To this, however, it may be replied, that if the period of the subsistence of the lease is to be excluded, the reversioner does not obtain complete protection unless he stands in the same position to all intents and purposes as he would do in the ordinary case of an user of twenty years, when the servient tenement was not under lease; and the words of the 7th section of the statute may be satisfied by supposing it to mean only, that, in the computation of the period of forty years, for the purpose of throwing upon the owner of the inheritance the onus of showing that he was under the particular disability of a reversioner, no time of general disability is to be deducted; but that the fact of his being a reversioner being once established, and the question, therefore, then being, whether there has been a valid user of twenty years, that must be decided as if it stood completely abstracted from the time during which the servient tenement was in lease; * or that, in other words, in comput- *107
ing the period of forty years, disability shall never be deducted—in computing that of twenty years, always.

With regard to light, by the 3rd section, twenty years' uninterrupted en-

joyment confers an absolute and indefeasible right, with the single exception of the case in which such enjoyment was had under a written agreement. The 8th section of the statute does not in terms apply to the easement of light, and the only period of time there mentioned is "forty years;" so that, even supposing the courts should hold that section to apply to easements in general, it would still be a question whether light could be included in it. This would depend upon whether the period of forty years could be taken to be synonymous with the period in which these rights became absolute, subject to the proviso contained in that section.

An opinion seems, on one occasion, to have been expressed, that, before the statute, a license might be presumed from a length of user insufficient to raise the presumption or grant, so as to justify the exercise of an affirmative easement until such license was countermanded (*a*). This doctrine, however, appears to be now abrogated by the section which enacts, That no presumption shall be made in favor of any claim from the exercise or enjoyment of the thing claimed during a shorter period than that specified by the statute (*b*).

The period of prescription fixed by the civil law was ten years where the party sought to be charged was present, and twenty where he was absent.

*108 * By the French Code Civile thirty years' user is sufficient to confer a title to all those easements which are from their nature, susceptible of being claimed by prescription (*c*) (8).

(*a*) *Doe* d. *Foley*, v. *Wilson*, 11 East, 56. (*b*) Sect. 6.

(*c*) Pardessus Traite des Servitudes, 424.

(8) *By prescription;—or the length of time during which the enjoyment must be had.* —A grant is presumed from 20 years uninterrupted use of water at a certain height. But if for twenty years, the defendants have raised their water but five feet; and afterwards they raise it six feet, by the same dam; and the additional foot injures the plaintiffs, they are entitled to recover damages. *Stiles* v. *Hooker*, 7 Cowen, 266. Twenty years having expired since the erection of a dam, a grant will be presumed of a right to continue the dam to the height of the original dam, and to raise the water as high as it stood for twenty years. *Baldwin v. Calkins*, 10 Wend. 167.

Use and enjoyment of a town road for twenty years, and perhaps for a shorter period may make the town liable to repair a road. *Todd* v. *Rome*, 2 Greenl. 55; but it has since been held, that ten years is not sufficient for that purpose. *Estes* v. *Troy*, 5 ib. 368.

A grant will be presumed of a part of a public square or street, from length of time; so far as to bar an indictment for a nuisance. *Commonwealth* v. *Alburger* 1 Whart. R. 469.

Prescription.—An easement for the public in the land of an individual is a real franchise holden by the state for the benefit of all the citizens. By Parsons, C. J. 5 Mass. 125. The ancient sense of the word prescription supposes a grant, and therefore it is, that the use or possession, on which it is founded, must be adverse, or of a nature to indicate that it is claimed as a right. 14 Mass. 49. It was

SECT. 2.—*The Persons against and by whom the Enjoyment must be had.*

As it is essential to the existence of an easement, that one tenement should be made subject to the convenience of another, and as the right to the easement can exist only in respect of such tenement, the continued user by which the easement is to be acquired must be by a person in possession of the dominant tenement; and as such user is only evidence of a previous grant—and as the right claimed is in its nature not one of a temporary kind, but one which permanently affects the rights of property in the servient tenement—it follows that such grant can only have been legally made by a party capable of imposing such a permanent burthen upon the property—that is, the owner of an estate of inheritance (*a*); and therefore, in order that such user may confer an easement, the owner of the servient inheritance must have known that the easement was enjoyed, and also have been in a situation to interfere with and obstruct its exercise, had he been so disposed; his abstaining from interference will then be construed as an acquiescence (*b*). Contra non valentem agere non currit præscriptio.

The want of acquiescence of the owner of the *inheritance of the *109
neighboring tenement may, it should seem, be inferred either from the circumstance, that he is not in possession, or from the nature of the enjoyment of the right, it being, in truth and in fact, out of the view and knowledge of such neighboring owner, though he be in possession. With respect to the former question an important point arises, whether, if the knowledge in fact of the owner of the inheritance of the hostile enjoyment of an easement be shown, he is bound by it. And this is a question which seems to be unsettled by the Prescription Act at all events except in cases within the 8th clause. Cases decided before that act certainly lay down, that if knowledge in fact of the reversioner be shown, he would be bound; but in one of the cases a learned judge (*c*) took a distinction between two divisions of easements, expressing an opinion to the effect, that an enjoyment of a negative easement would not

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therefore held, that the continued use of the way and bridge by the plaintiff's father and himself for more than 20 years, the keeping up and repairing of the bridge, and the passing of the river in the same place in a boat when the bridge was down, was sufficient to show a continuity of possession to warrant the presumption of a grant. *Hill* v. *Crosby*, 2 Pick. 466; 2 id 421. See 2 Conn. R. 610, where it was held, that the possession to be attended with this consequence, must be adverse, and this fact was for the jury. 2 Conn. 610.

(*a*) 11 East, 372. (*b*) *Gray* v. *Bond*, 2 Brod. & Bing. 667; 5 J. B. Moo. 527.

(*c*) Per *Le Blanc*, J., in *Daniel* v. *North*, 11 East, 372; and semble also by *Park*, J., in *Gray* v. *Bond*, 2 B. & B. 667; 5 J. B. Moo. 535.

bind the reversioner, unless his knowledge were positively shown, though it would be otherwise of an affirmative easement.

If, then, it be taken as law, that a reversioner can be bound by his knowledge in fact of an user enjoyed during the time his land is in the possession of a tenant, as his acquiescence in such cases is inferred from his offering no opposition, it would seem that he must have, by law, some valid mode of preventing the right from vesting by the continuance of the user. With respect to a negative easement, it is clear the exercise of such a right gives no right of action to any person; and even as to some positive easements, such as a right of way, it is doubtful whether the reversioner could maintain an ac-

*110 tion (*a*); and, during the continuance* of the tenancy, he may be unable either to interrupt the enjoyment, or to compel his tenant to do so: unless, therefore, some positive act, as a notice, intimating his dissent, be sufficient to obviate the effect of the user giving a right, he would not be brought into the condition of a *valens agere*, without which the prescription ought not to run against him.

Bracton, treating of the qualities of a possession necessary to confer a right, appears to consider that such notices, at all events, if followed up by an action as soon as the party is in a condition to bring one, will amount to an interruption.

"Continuam dico ita quod non sit interrupta; interrumpi enim poterit multis modis sine violentia adhibita, per denuntiationem et impetrationem diligentem, et diligentem prosequutionem, et per talem interruptionem, nunquam acquirit possidens ex tempore liberum tenementum" (*b*).

And in speaking of this precise case—of a particular estate existing in the servient tenement during the user of the easement, he seems to be clearly of opinion that such a prohibition will be sufficient to preserve his right.

"Si autem fuerit seisina clandestina, scilicet in absentia dominorum vel illis ignorantibus, et si scirent essent prohibituri, licet hoc fiat de concensu vel dissimulatione ballivorum, valere non debet" (*c*).

In the recent case of *Arkwright* v. *Gell* (*d*), great stress was laid by the Court upon the difficulty, on the part of the servient owner, of resisting the enjoyment.

*111 *"But though," says Mr. Serjeant Williams, "an uninterrupted possession for twenty years or upwards should be a bar in an action on the case, yet the rule must ever be taken with this qualification, that the possession was with the acquiescence of him who was seised of an estate *of inheritance*. For if a tenant for term of years, or life, permits another to enjoy an easement on his estate for twenty years, or upwards, without interruption,

(*a*) Per *Le Blanc*, J., in *Daniel* v. *North*, 11 East, 372; and semble also by *Park*, J., in *Gray* v. *Bond*, 2 B. & B. 667; 5 J. B. Moo. 535.

(*b*) Lib. 2, f. 51 b.

(*c*) Lib. 4, f. 221.

(*d*) Post, Chap. 6.

and then the particular estate determines, such user will not affect him who has the inheritance in reversion or remainder; but when it vests in possession he may dispute the right to the easement, and the length of possession will be no answer to his claim. Thus, where A. being tenant for life, with a power to make a jointure, which he afterwards executed, gave license to B. in 1747, to erect a wear on the river T. in A.'s soil, for the purpose of watering B.'s meadows, and then A. died, and the jointress entered and continued seised down to the year 1799, when the tenant of A.'s farm diverted the water of the river from the wear; upon which the tenant of B.'s farm brought an action on the case for diverting the water; it was held by the Court of K. B. that the uninterrupted possession of the wear for so many years with acquiescence of the particular tenants for life, did not affect him who had the inheritance in reversion; but as the Court entertained some doubt of the fact of the license, and as the verdict for the plaintiff would not conclude the rights of the parties, they did not think it right to disturb the verdict: but the Court was of opinion upon the point of *law* as above stated" (*a*).

*In *Daniel* v. *North* (*b*), which was an action for obstructing an- *112
cient lights, it appeared that the premises on which the obstruction was erected had been occupied, during twenty years, by a tenant at will, and there was no evidence that the owner of those premises was aware of such enjoyment.

Lord *Ellenborough* observed, on the argument for a new trial, "How can such a presumption be raised against the landlord, without showing that he knew of the fact when he was not in possession, and received no immediate injury from it at the time." In delivering his judgment his Lordship said, "The foundation of presuming a grant against any party is, that the exercise of the adverse right on which such presumption is founded was against a party capable of making the grant; and that cannot be presumed against him, unless there were some probable means of his knowing what was done against him; and it cannot be laid down as a rule of law, that the enjoyment of the plaintiff's windows during the occupation of the opposite premises by a tenant, though for twenty years, without the knowledge of the landlord, will bind the latter, and there is no evidence stated in the report from whence his knowledge should be presumed."

So in *Barber* v. *Richardson* (*c*), where lights had been enjoyed for more than twenty years contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under the stat. 55 G. 3, c. 144, it was held, that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for *life, *113
could not grant the easement, and therefore no valid grant could be presumed.

(*a*) 2 Wms. Saund. 175 d.

(*b*) 4 B. & Ald. 579: see, also, *Runcorn* v. *Doe* dem. *Cooper*, 5 B. & Cr. 696; 8 Dowl. & R. 450.

(*c*) 11 East, 372.

Persons against whom enjoyment is valid.

The cases above cited were decided before the passing of the recent statute 3 & 4 W. 4, c. 71, and it is important to observe that the law with regard to the easement of window lights under that statute stands upon an entirely different footing from that applicable to all other easements, at all events, with regard to its acquisition.

By the statute, twenty years' enjoyment of the access of light to a house or building, without interruption, confers an absolute and indefeasible right, unless such user was had under some written agreement. No provision appears to be made for the circumstance of the premises upon which the restriction is to be imposed, having been during the whole, or any part of the time, in the possession of a tenant—for the ignorance or acquiescence of the landlord —or even for cases in which it may have been absolutely impossible for him to have interfered at any time during the twenty years.

The cases, therefore, of ancient windows above cited are, now, at least of doubtful application; but as the statute does not appear to have made any material alteration in the law as applicable to the user of other easements for a period of twenty years, these decisions are at all events authorities in the case of all those rights to which, before the passing of the statute, the law of light was analogous (*a*).

"During the period of a tenancy for life, the exercise of an easement will not affect the fee. In order to do that, there must have been that period of enjoyment against the owner of the fee" (*b*).

*114 *With regard to all easements, except light, the law as to the servient tenement not being in the possession of the owner of the inheritance, where knowledge in fact on his part can be shown, would appear to be the same as before the statute. But where the servient tenement "upon, over, or from which any way, or other convenient watercourse, or use of water" is claimed, has been held under any term of years exceeding three years from the granting thereof, the user during the continuance of such term is excluded in the computation (*c*), provided the owner asserts his rights within three years after the expiration of the term.

In *Bright* v. *Walker* (*d*), where an action was by one lessee of the Bishop of Worcester against another lessee, for obstructing a way, the evidence of the right consisted of an user for twenty years, during which time the land of the defendant had been in lease for lives, the Court of Exchequer held, that the plaintiff had gained no right by such user against the Bishop or any other person. But no evidence was given, nor was the question in any way raised of the knowledge or acquiescence of the Bishop.

(*a*) See *Wall* v *Nixon*, 3 Smith, 316.

(*b*) Per Curiam in *Bright* v. *Walker*, 1 Cr. Mee. & Ros. 222.

(*c*) Both of the period of 20 and 40 years. Per Cur. in *Bright* v. *Walker*, 1 Cr M. & Ros. 211.

(*d*) 1 Cr. M. & Ros. 211.

Persons against whom enjoyment is valid.

Upon the point how far the reversioner is bound by an enjoyment had during the continuance of a particular estate, two questions of great doubt and difficulty have been introduced by the statute:—

1st. Supposing the reversioner, being aware of the fact, from time to time gives a parol or written notice of his dissent to the enjoyment of the easement, any active interference on his part being prevented by the existence of the particular estate—

2d. Supposing the reversioner to be in total ignorance* of any *115 such enjoyment having been had during the continuance of the particular estate, and in consequence of such ignorance not to have availed himself of the exception in his favor contained in the statute—

In either of these cases would a valid right to an easement be acquired?

At all events, if the user of any easement had actually commenced before the property over which it was claimed passed into the possession of the lessee, the mere fact of such tenancy having continued during a period of twenty years will not, it seems, be sufficient to defeat the right acquired by the lapse of time, unless it be also shown that the landlord, up to the time of granting the lease, was in ignorance that any such right was claimed. Thus, where a house was proved to have been built thirty-eight years, during the whole of which time there had been windows towards the adjoining premises, and these premises had belonged for a number of years to a family residing at a distance, none of whom were proved to have ever seen them, and they had been occupied by the same tenant during the last twenty years—the Court held, that, after such a long enjoyment, the windows must be considered ancient windows, and that the plaintiff was consequently entitled to recover for their obstruction (*a*). *Bayley*, J., in his judgment says, "The right is proved to have existed for thirty-eight years: the commencement of it is not shown. It is possible that the premises both of the plaintiff and defendant once belonged to the same person, and that he conferred on the plaintiff, and those under whom she claims, a right to have the windows free from obstruction. *Daniel* v. *North* has been relied* on to show that the tenancy re- *116 butted the prescription of a grant, but this is a very different case. Here tenancy was shown to have existed for twenty years, but the origin of the plaintiff's right was not traced." And *Littledale*, J., adds, "It was proved that the windows had existed for thirty-eight years, and the tenancy for twenty. How the land was occupied for eighteen years before that time did not appear. I think that quite sufficient to found the presumption of a grant."

As the claim of an easement is in derogation of the ordinary rights of property, it lies upon the party asserting such claim in opposition to common right, in all cases to support his case by evidence. In *Cross* v. *Lewis*, the absence of any evidence as to the earlier state of the windows was indeed held to operate in favor of the plaintiff—the party claiming the easement;—but the substantial proof, viz. of the user for a period of twenty years, had already

(*a*) *Cross* v. *Lewis*, 2 B. & Cr. 686; *S. C.* 4 D. & R. 234.

been given by the claimant; and this unrebutted by any evidence to take the case out of the ordinary rule, was of course sufficient to establish the easement.

From the observations of the learned judge in the above case, it would appear, that, provided the existence of the easement prior to the commencement of the tenancy was shown, and a sufficient length of enjoyment had taken place to afford evidence of a grant, the burthen of proof would be thrown upon the owner of the land sought to be made liable to the easement; and unless he could show such previous user to have taken place without his knowledge, the right to the easement would be established (*a*).

* 117 Indeed it should seem from this case that proof of * enjoyment for twenty years was in all cases *prima facie* evidence of a title, which must be rebutted by the owner of the servient tenement.

With respect to the party against whom the right is to be established, as a grant from the owner of the servient tenement is to be presumed, disability on his part to execute such a grant will exclude the presumption which would otherwise arise from user during the continuance of such disability.

By the recent statute, in all cases of computing the twenty years' user, except in the case of light, the time during which the servient owner may have been an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit to dispute the right, afterwards abated by the death of any party, may have been pending, is excluded. No provision is made for the case of a party being beyond the seas during the whole or any part of the period of prescription.

Before the passing of the statute, an enjoyment of an easement for twenty years would have been evidence from which a jury might have found a non-existing grant from the owner of the particular estate, which would have been binding on him, although it could not affect the rights of the reversioner; but it was held in the case of *Bright* v. *Walker*, that since the statute no such modified right to an easement can exist. To be valid against any, it must be valid against all who have any estate in the land.

"The important question," said Mr. Baron *Parke*, in *Bright* v. *Walker* (*b*), "is, whether this enjoyment, as it cannot give a title against all persons having

* 118 estates in the *locus in quo*, gives a title as against the lessee * and the defendants claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but, upon the fullest consideration, we think that no title at all is gained by an user which does not give a valid title against all, and permanently affect the see. Before the statute, this possession would indeed have been evidence to support a plea or claim by a non-existing grant from the termor in the *locus in quo*, to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to

(*a*) See *Gray* v. *Bond*, 2 Brod. & Bing. 667; 5 J. B. Moo. 527.

(*b*) 1 C. M. & R. 220. *Monmouth Canal Company* v. *Harwood*, Id. 614.

state a grant by an owner in fee to an owner in fee. But, since the statute, such a qualified right, we think, is not given by an enjoyment for twenty years. For, in the first place, the statute is "for the shortening the time of *prescription;*" and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. And, in the next place, the statute nowhere contains any intimation that there may be different classes of rights, qualified and absolute—valid as to some persons, and invalid as to others. From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no good title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good as against any one, and, therefore, not against the defendant."

*In this instance the enjoyment had continued during twenty years only. Where, however, the full period of forty years has elapsed, as that would confer a right to the easement, subject to the condition only that the reversioner interfered within three years after the determination of the particular estate, as in the cases of conditional estates, a valid right is given as against all the world until by the happening of the condition the estate is defeated. *119

"The enjoyment of the right during forty years," said the Court in *Wright* v. *Williams* (*a*), "alleged in the pleas, being admitted, the replications, which state only an existing tenancy for life, are no answer; for the time of a tenancy for life in a person who might otherwise be capable of resisting the claim, though excluded by the 7th section from the computation of the shorter period of twenty years *absolutely*, is, by the 8th section, excluded from the computation of the longer period of forty years *conditionally* only; that is, provided the reversioner expectant on the determination of the term for life shall, within three years (that is, probably, *before* the end of three years), after such determination, resist the right; and it does not appear that the plaintiff is entitled to the reversion *expectant on that lease*, though it is averred that he has a reversion expectant on the determination of the interest of the tenant in possession. The tenancy for the life of Lord Dinorben, the *cestui que vie*, is therefore not to be excluded, on these pleadings, from the period of forty years; and, such period being complete, the defendant is entitled to an indefeasible right to the easement claimed."

*If the judicial opinion which has been expressed, that the Prescription Act has not superseded the common law, is correct, the point upon which *Bright* v. *Walker* turned should have been decided otherwise. In fact, if that case had been a correct exposition of the law, no length of enjoyment could have conferred an easement during the existence of a particular estate. *120

(*a*) 1 M. & W. 100

Persons to whom user will give an easement. Nec vi, nec clam, nec precario.

The enjoyment of half a century might be defeated by the very person who had permitted the enjoyment.

Although the user by which it is sought to acquire an easement must be that of the party in possession of the dominant tenement, yet any user under a claim of right in respect of such tenement will be in contemplation of law user by such possessor. Hence it appears that there is no disability of any kind to destroy the effect of such user; unless, indeed, the extreme case adverted to in the civil law be supposed—of the only user being by a person not having the use of reason, in which case no right was acquired, the intention to assert a right not existing. This was illustrated by the instance of putting something into the hand of a man when asleep (*a*).

User by an infant capable of understanding what he was doing was sufficient to acquire the servitude. So also was user by a tenant or servant, even without the owner's knowledge (*b*).

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*121 *Sect. 3.—*Qualities of the Enjoyment.*

In order that the enjoyment, which is the quasi possession of an easement, may confer a right to it by length of time, it must have been open, peaceable, and "as of right."

The effect of the enjoyment being to raise the presumption of a consent on the part of the owner of the servient tenement, it is obvious that no such inference of consent can be drawn, unless it be shown that he was aware of the user, and, being so aware, made no attempt to interfere with its exercise. Still less can such consent be implied, but rather the contrary, where he has contested the right to the user, or where in consequence of such opposition an interruption in the user has actually taken place. Even supposing these defects of the user not to exist, still the effect of the user would be destroyed if it were shown that it took place by the express permission of the owner of the servient tenement, for in such a case the user would not have been had with the intention of acquiring or exercising a right. The presumption, how-

(*a*) Furiosus et pupillus sine tutoris auctoritate non potest incipere possidere: quia affectionem tenendi non habent, licet maxime corpore suo rem contingant: sicuti si quis dormienti aliquid in manu ponat. Sed pupillus tutore auctore incipiet possidere. Ofilius quidem et Nerva filius, etiam sine tutoris auctoritate possidere incipere posse pupillum aiunt; eam enim rem facti, non juris esse: quæ sententia recipi potest, si ejus ætatis sint ut intellectum capiant.—L. 1. § 3. ff. de adq. vel amit. poss.

(*b*) Is cujus colonus, aut hospes, aut quis alius iter ad fundum fecit; usus videtur itinere, vel actu, vel via, et idcirco interdictum habebit; etiam si ignoravit cujus fundus esset, per quem iret, retinere eum servitutem.—L. 1. § 7. ff. de itinere.

ever, is, that a party enjoying an easement acted under a claim of right until the contrary is shown (*a*).

The civil law expressed the essential qualities of the user, by the clear and concise rule that it should be "nec vi, nec clam, nec precario" (*b*).

The doctrine of the law of England, as cited by Lord *Coke*, from *122 Bracton, exactly agrees with the civil law. The possession must be long, continuous, and peaceable. Long, that is, "during the time required by law; continuous, that is, uninterrupted by any lawful impediment; and peaceful, because, if it be contentious, and the opposition be on good grounds, the party will be in the same condition as at the beginning of his enjoyment. There must be "longus usus nec per vim, nec clam, nec precario (*c*). Transferuntur dominia sine titulo et traditione, scilicet per longam, continuam, et pacificam possessionem; longam i. e. per spatium temporis, per legem definitum; continuam dico, ita quod non sit legitime interrupta; pacificam dico, quia si contentiosa fuerit idem erit quod prius, si contentio fuerit justa; ut si verus dominus statim, cum intrusor, vel disseisor ingressus fuerit seisinam, nitatur tales viribus repellere et expellere, licet id quod inceperit perducere non possit ad effectum, dum tamen cum defecerit, diligens sit ad impetrandum et prosequendum; longus usus nec per vim, nec clam, nec precario, &c."

The enjoyment must be peaceable.

At common law any acts of interruption or opposition, from which a jury might infer that the enjoyment was not rightful, were sufficient to defeat the effect of the enjoyment, the question being, whether, under all the facts of the case, such enjoyment had been had under a concession of right.

By the statute it is enacted that nothing shall be deemed to be an interruption, unless it shall be submitted to, or acquiesced in, for the space of a year after *the party interrupted shall have notice thereof, and of the per- *123 son making or authorizing the same.

It is certainly by no means clear what the precise intention of the legislature was; but it appears hardly possible that it should have been intended to confer a right by user during the prescribed period, however "contentious" or "litigious" such user may have been (*d*). In the recent case of *Bailey* v. *Appleyard* (*e*), the erection of a rail by the owner of the servient tenement within the shorter period of the statutory prescription was held sufficient to prevent the acquisition of the right; and it was decided that it was incumbent on the plaintiff to prove an enjoyment not interrupted, every interruption being presumed to be hostile until the contrary was shown. It does not appear from the report that in this instance the interruption was acquiesced in, or even continued for a year.

(*a*) *Campbell* v. *Wilson*, 3 East, 300.

(*b*) C. L. 1. ff. de serv. L. 10. ff. si serv. vind.

(*c*) Co. Litt. 113. b.; Bracton, lib. 2, f. 51.

(*d*) See *Wright* v. *Williams*, 1 M. & W. 100. (*e*) 3 Nev. & P. 257.

Nec vi, nec clam, nec precario. Qualities of the enjoyment.

By the Civil law any enjoyment was said to be forcible to which opposition was offered, either by word or deed, by the owner of the servient tenement (*a*).

The enjoyment must be open.

The user of an easement may be secret, either from the mode in which a party enjoys it, or from the nature of the easement itself.

*124 *Instances of the former kind are where the right is exercised by stealth, or in the night (*b*).

Instances of the latter kind occur where a claim is made to an extraordinary degree of support to a house from the neighboring soil, in consequence of an excavation on the party's own land, not visible to the neighbor (*c*).

A consideration of this rule would, it appears, afford an answer in the affirmative to the question incidentally raised upon the case of *Dodd* v. *Holme* (*d*), —whether, in order to acquire a right to support for a house by antiquity of possession, it must originally have been built with that degree of strength and coherence, which may reasonably be expected to be found in a well-built house—for as there might be nothing in the external appearance of the house to give notice to the owner of the adjoining land, that the weakness with which it was built caused it to require a greater degree of support from his soil than a well-built house would have required, and *quoad* such additional support the enjoyment would have been secret, no presumption of a grant of it on his part could be implied.

The same reasoning would also apply to the case of an ancient house, originally well built, becoming weaker from the want of proper repair. A man believing there were no minerals on his own land might be willing to subject

*125 *it to the easement of support for a well-built house, which would diminish the value of his property only in the event of his wishing to mine in

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(*a*) Vi factum videri, Quintus Mucius scripsit, si quis contra quam prohiberetur, fecerit; et mihi videtur plena esse Quinti Mucii definitio. Sed et si quis jactu vel minimi lapilli prohibitus facere, perseveravit facere, hunc quoque vi fecisse videri, Pædius et Pomponius scribunt, eoque jure utimur.—L. 1. § 5, 6. ff. quod vi aut clam.

Prohibitus autem intelligitur quolibet prohibentis actu, id est, vel dicentis se prohibere, vel manum opponentis, lapillumve jactantis prohibendi gratia.—Ibid. L. 20. § 1.

(*b*) Itaque clam nanciscitur possessionem, qui futuram controversiam metuens, ignorante eo quem metuit, furtive in possessionem ingreditur.—L. 6. ff. de adq. vel amit. poss.

Talis usus non valebit cum sit clandestinus, et idem erit si nocturnus.—Bracton, lib. 2, f. 52.

Aut in absentia domini.—Ibid. Lib. 4, f. 220.

See *Dawson* v. *Duke of Norfolk*, 1 Price, 246.

(*c*) *Partridge* v. *Scott*, 3 M. & W. 220.

(*d*) 1 Adol. & Ellis, 493; 3 Nev. & Man. 739.

it, although he would refuse to restrict himself from digging a foundation for any building he might require; which would possibly be the case were he bound to afford the support necessary to sustain a rickety and ill-built edifice.

This reasoning also applies to the claim of support from adjoining houses.

By the Civil law, it was sufficient to vitiate the user, if, from the acts of the party, an intention of concealment could be inferred (*a*). This intention might be deduced from the manner in which the act was done, and the Digest contains a variety of instances in which such an intention was inferred from the facts (*b*).

The enjoyment must be as of right.

Enjoyment had under a license or permission from the owner of the servient tenement, as has been already remarked, confers no right to the easement. Each renewal of the license rebuts the presumption which would otherwise arise, that such enjoyment was had under a claim of right to the easement (*c*).

Any admission, whether verbal or otherwise, that the enjoyment had been had by permission of the owner of the servient tenement was sufficient, before the recent statute, to prevent the acquisition of the right, however long such enjoyment might have continued. * "Si autem," says Bracton, *126 "(seisina) precaria fuerit et de gratia, quæ tempestive revocari possit vel intempestive, ex longo tempore non acquiritur jus" (*d*).

By the statute a distinction is made as to the effect of a parol license in those cases in which the right is declared to be absolute and indefeasible, and those in which there is no such provision. In the former instance, although the enjoyment commenced by permission, yet after it has continued during the requisite period (forty years in general, and twenty in the case of lights), the right cannot be invalidated, except by proof that the easement "was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

The latter case is not affected by the statute.

The "precarious enjoyment" of the Civil law, by which, as has been already seen, no prescriptive right could be acquired, is identical with the permissive enjoyment of the English law (*e*).

(*a*) Idem Aristo putat, eum quoque clam facere, qui celandi animo habet eum quem prohibiturum se intellegerit, et id existimat, aut existimare debet, se prohibitum iri.—L. 3. § 8. ff. quod vi aut clam.

(*b*) L. 3. § 8. ff. quod vi aut clam—*passim*.

(*c*) *Monmouthshire Canal Co.* v. *Harford*, 1 Cr. M. & R. 614.

(*d*) Lib. 4, f. 21.

(*e*) Precarium est, quod precibus petenti utendum conceditur (tamdiu) quamdiu is, qui concessit, patitur.—L. 1. ff. de precario.

Veluti si me precario rogaveris, ut per fundum meum ire, vel agere tibi liceat, vel ut in tectum, vel in aream ædium mearum stillicidium vel tignum in parietem immissum habeas.—Ibid. L. 3.

Qualities of the enjoyment. Interruption by servient owner under the statute.

For the same reason, that the enjoyment must be such as to afford evidence of the acknowledgment of the right to an easement as such, by the owner of the servient tenement, no right is acquired by the enjoyment of an easement which has been had during the time of a unity of possession of the dominant and servient tenements; and it has been decided in a recent case, that, in computing the period of twenty years' enjoyment "next before the action
*127 brought," * under the statute, not only must the time during which the unity continued be excluded, but that the operation of the unity is to suspend the process of acquisition while it lasted, and to destroy altogether the effect of the previous user, by breaking the continuity of the enjoyment (*a*).

A claim under the statute to an easement by enjoyment during the periods therein specified may be conclusively rebutted, and the user shown not to have been as of right, by evidence of a breach of the continuity of possession by an act of interruption on the part of the servient owner acquiesced in for a year after notice (s. 4).

In delivering the judgment of the Court of Exchequer, in *Bright* v. *Walker*, in which the qualities of an enjoyment necessary to clothe it with right by lapse of time were considered, Mr. Baron *Parke* said (*b*), "In order to establish a right of way, and to bring the case within this section (2d), it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right;' for that is the form in which by section 5 such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would
*128 be acquired, because it was not enjoyed *'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed 'as of right,' the easement, but the soil itself. So it must have been enjoyed without *interruption*. Again, such claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and, therefore, it may be answered by proof of a grant, or of a license, written or parol, for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised."

The authority of this case, and the doctrines laid down by the Court, were fully recognised in *The Monmouthshire Canal Company* v. *Harford* (*c*), and *Tickle* v. *Brown* (*d*) (9).

(*a*) *Onley* v. *Gardiner*, 4 M. & W. 496. (*b*) 1 Cr. M. & Ros. 219.
(*c*) 1 Cr. M. & Ros. 614. (*d*) 4 Adol. & Ellis, 369.
(9) Per Cur. Story, J. "In respect to incorporeal hereditaments and ease-

ments, such as ways and water privileges, the rule of law is well established, that an uninterrupted possession and use for twenty years si *prima facie*, and if unexplained, conclusive, evidence of a right; and under circumstances, courts of law will entertain the presumption of a grant, even from a shorter period of enjoyment. The Hon. Judge referred to *Saund.* v. *Newman*, 1 B. & A. 258; *Balston* v. *Benstead*, 1 Campb. 463; *Bealy* v. *Shaw*, 6 East, 208; 12 Veasey, 266; *Hawke* v. *Bacon*, 2 Taunt. 155; *Gaietly* v. *Bethune*, 14 Mass. Rep. 49; *Hoffman* v. *Savage*, 15 ib. 132; *Strout* v. *Berry*, 7 ib. 385; *Wright* v. *Howard*, 1 Sim. & Stuart's Rep. 190, 203. A right thus acquired by user, may in like manner be lost by disuser; in other words, the discontinuance of the use for a long period, affords a presumption of the extinguishment of the right." *Hazard* v. *Robins*, 3 Mason, 272.

An adverse enjoyment for 20 years establishes a right to an easement, though the party against whom it is claimed may have suffered no actual damage from such enjoyment; for he might have maintained an action for the invasion of his right without proof of actual damage. *Bolivar Manuf. Co.* v. *Neponset M. Co.*, 16 Pick. 241.

CHAPTER VI.

THE ACQUISITON OF PARTICULAR EASEMENTS BY PRESCRIPTION.

Easement ex jure naturæ. No prescription against prescription.

SECT. 1.—*Rights of Water.*

*129 * RUNNING water is the subject of easements of several kinds. The right to receive a flow of water, and transmit it in its accustomed course, may be called a Natural Easement: the right to interfere with the accustomed course, either by penning it back upon the land above, or transmitting it altered in quality or quantity, may be called an Artificial Easement.

The natural easements, above mentioned, appear to partake, in some degree, of the character of rights of property. The right to have a stream run in its accustomed course is, however, called an Easement, and is capable, like other easements, of being claimed, and, in fact, is usually claimed by prescription; the right to interfere with this natural course, by altering the quality or quantity of the water, is also called an Easement, and is claimable by prescription, although it is a perfectly well-established principle, that there can be no prescription against a prescription.

"When a man has a lawful easement or profit by prescription, from time whereof &c., another custom, which is also from time whereof &c., cannot

*130 take it away; for the one custom is as ancient as the other; as, * if one has a way over the land of A. to his freehold by prescription, from time whereof &c., A. cannot allege a prescription or custom to stop the said way" (*a*).

The difficulty here suggested may arise on a point of pleading. If a man declare for a disturbance of the course of a stream, would it be a good plea to justify the diversion in virtue of an easement so to do; or would the proper mode be merely to traverse the plaintiff's right, giving the easement in evidence under the traverse?

In *Wright* v. *Williams* (*b*) the former course was adopted; but as the plaintiff there pleaded over, this objection could not be taken on the argument.

If, however, the right to have water run in its accustomed course is an easement, the latter would appear to be the correct mode of pleading (*c*); and

(*a*) *Aldred's* case, 9 Rep. 58 b. (*b*) 1 M. & W. 77.

(*c*) *Murgatroyd* v. *Lloyd*, Carthew, 116; *Brown* v. *Best*, 1 Wilson, 174

therefore an artificial easement would appear to bear a double aspect—first, it destroys, *pro tanto*, the natural easement, of the flow of the water in its accustomed course; and, secondly, it confers a new right, the disturbance of which gives a good right of action against all the world.

Bracton appears to consider the obligation to respect the natural course of a flowing stream as a duty imposed by law; and that, unless justified by an easement, a man has no more right to divert the course of a stream than to discharge water upon his neighbor's land: "Item a jure imponitur servitus prædio vicinorum; * scilicet ne quis stagnum suum altius tollat, per *131 quod tenementum vicini submergatur; item ne faciat fossam in suo per quam aquam vicini divertat, vel per quod ad alveum suum pristinum reverti non possit in toto vel in parte" (*a*) (10).

(*a*) Bracton, lib. 4, f. 221.

(10) Where the owner of one half of a stream builds his dam across the river, this is considered an invasion of the rights of the owner on the other side, although the latter does not then use the water. *Bliss* v. *Rice*, 17 Pick. 23.

In the case of *Howell* v. *M'Coy*, 3 Rawle, 256, per Cur. Huston, J. It is a principle of the common law, that the erection of any thing in the upper part of a stream of water, which poisons, corrupts, or renders it offensive and unwholesome, is actionable. And this principle not only stands with reason, but is supported by unquestionable authority, ancient and modern. It has long since been adjudged, that he who has a fishery, may maintain an action against a person for erecting a dye-house; 9 Rep. 59; Co. Litt. 200, b.; Angell on Water-courses, 59; App. 17, *Bealy* v. *Shaw*, et al. And if a glover sets up a lime-pit, and corrupts the water, an action lies; Angell on Water-courses, 60; 13 Hen. 2, b. 6. The maxim is, *sic utere tuo ut ne lædas alienum*. These positions are recognised by all the writers on the common law, nor have they ever been disputed or denied, in any adjudged case, so far as my researches have extended. The erection of a tan-yard comes within the operation of the same principles, provided it has the effect of which the plaintiffs complain, corrupting and rendering unwholesome, the water in the stream below, used for distillation, or for culinary or domestic purposes. The general rule of law is, that every man has a right to have the advantage of a flow of water, in his own land, without diminution, or alteration in quantity or quality. Nor are we to be understood, as saying, that there can be no diminution or alteration whatever, as that would be denying a valuable use of the water. The use of it must be such as not to be injurious to the other proprietors. Each riparian owner has a right to the reasonable use of the stream, which of course will be judged with regard to public convenience, and the general good. The limitation of these principles, is, either where the appropriation has been for a period of twenty years, which the law deems a presumption of right, or it arises from contract.

The case of *Crooker* v. *Bragg*, 10 Wend. 260, decides that a person through whose farm a stream naturally flows is entitled to have the whole pass through it, though he may not require the whole or any part of it for the use of machinery. The Court say—"The doctrine of Ld. Ellenborough in 6 East, 214, referred to

Judgment of Story, J.

In the Courts of the United States, which recognise and profess to be guided by the principles of the English law, this point has received much fuller consideration than in the reported decisions of the English Courts. In an elaborate judgment of Mr. Justice *Story*, this right to have a stream flow on in its accustomed course is laid down to be a right universally incident to the property in the adjoining land, a right which can only be interfered with by the acquisition of an easement; and the ordinary rights of the owners of the adjacent land to the natural flow of the stream, are distinguished with great precision from the acquisitions in derogation of the common rights made by an exclusive appropriation of the water.

"*Prima facie* (*a*), every proprietor upon each bank of a river is entitled to the land covered with water, in front of his bank, to the middle thread of the stream; or, as it is commonly expressed, *ad medium filum aquæ*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to

* 132 use the water to the prejudice of another. It is wholly * immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows, for that would be to deny any valuable use of it. There may be, and there must be allowed to all, of that which is common, a reasonable use. The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors, or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, perfectly consistent with the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a

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and approved by Judge Thompson in *Palmer* v. *Mulligan*, 3 Caines, 315, is in accordance with these views."

The owner of land above a natural spring has no right to excavate his land so as to injure the owners of land below, who have a right to the use of the said spring and the water running from it. *Smith* v. *Adams*, 6 Paige, 435.

(*a*) *Tyler* v. *Wilkinson*, 4 Mason, U. S. R. 397.

reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private *rights. The max- *133
im is applied, *sic utere tuo ut alienum non lædas.*

"But of a thing common by nature, there may be an appropriation by general consent, or grant. Mere priority of occupation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the one already acquired. But our law awards to the riparian proprietors the right to the use in common, as one incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now this may be either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say, of a grant or right—for I very much doubt whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant—is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to be law.

"With these two principles in view, the general rights of the plaintiffs cannot admit of much controversy. They are riparian proprietors, and, as such, are * entitled to the natural flow of the river without diminution to * 134
their injury. As owners of the lower dam, and the mills connected therewith, they had no rights beyond those of any other persons, who might have appropriated that portion of the stream to the use of their mills; that is, their rights are to be measured by the extent of their natural appropriation, and use of the water for a period, which the law deems a conclusive presumption in favor of rights of this nature. In their character as mill owners, they have no title to the flow of the stream beyond the water actually and legally appropriated by the mills; but in their character as riparian proprietors, they have annexed to their lands the general flow of the river, as far as it has not been already acquired by some prior and legally operative appropriation.

"No doubt, then, can exist as to the right of the plaintiffs to the surplus of the natural flow of the stream not yet appropriated. Their rights, as riparian proprietors, are general; and it is incumbent on the parties, who seek to narrow those rights, to establish, by competent proofs, their own title to divert and use the stream."

The negative easement of receiving water in its accustomed course, is that which is most frequently claimed under the general denomination of a water course.

No title by mere occupancy.

As an easement is something superadded to the ordinary rights of property, and it is incumbent on the claimant thus seeking to cast a burthen upon his *135 neighbor to prove his title to it, it is evidently essential * in order to determine in what manner and what amount of evidence shall be given to support the title, to ascertain strictly what are the bounds of the ordinary rights of property, and where the right claimed assumes that accessorial character which trenches upon the liberty of another. Thus, with reference to the question above alluded to, it becomes important to consider whether the right to receive the water is one of the ordinary incidents of the ownership of the soil, or an additional right claimed as an easement.

In discussing this question, a misconception appears to have taken place; the right to the corporeal thing, water itself, has been confounded with the incorporeal right to have the stream flow in its accustomed manner *(a)*. Upon this a further error was founded—that the first appropriator of water had a right to continue to divert the stream to the extent of such appropriation, no matter how injurious such diversion might be to the rights of parties who should afterwards seek to use the stream.

The question has been much debated—what nature of property existed by law, or could exist, in air, light, and water. It has been attempted to rest that right to the enjoyment of these elements upon the first occupancy of a common right. Thus, Blackstone, in his chapter on "Title by Occupancy," after remarking, that a property in goods and chattels might be acquired by occupancy—"the original and only primitive method of acquiring any property at all"—lays it down, that "the benefit of the elements—the light, the air, and *136 *the water,—can only be appropriated by occupancy. If I have an ancient window overlooking my neighbor's ground, he may not erect any blind to obstruct the light; but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall, for there the first occupancy is rather in him than in me. If my neighbor makes a tan-yard, and was to annoy, and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water, yet not so as to injure my neighbor's prior mill or his meadow, for he hath, by the first occupancy, acquired a property in the current" *(b)*.

The last two illustrations appear to be incorrect, and directly at variance with the later decisions upon this subject *(c)*.

Even if it be conceded that these elements are, by the law of England, still in common, and subject to be made property by occupancy, analogy to the rules which govern the acquisition of property by this means, points out

(a) *Mason* v. *Hill*, 5 B. & Adol. 19; 2 Nev. & M. 747.

(b) 2 Black. Com. 402.

(c) *Bliss* v. *Hall*, 6 Scott, 500 post; *Mason* v. *Hill*, 5 B. & Adol. 304, post.

No title by mere occupancy.

that the appropriation of a particular portion could give no right of property in more than that portion. The abstraction of a measure of water from a flowing stream to-day, can give no property in water which may possibly hereafter form part of the stream, but which is now on the mountains. The present reception of light by a window cannot give a prospective property in the light itself, which * will pass through the window to-morrow, and which * 137 has not yet emanated from the sun.

The right principle to be collected from the authorities appears to be—That continued beneficial enjoyment of a running stream is evidence of the right to have the stream run on in its accustomed course; and that no one can interfere with such accustomed course unless justified by an easement to do so.

The material question, therefore, is, what is such a beneficial enjoyment as to vest this right; whether the simple fact of the water running in an ancient channel to and through land, is sufficient to confer upon the owner of it this right to prevent his neighbor's interference; or whether there must be some more direct and tangible perception of the benefit of the water; and if so, whether a single act of such perception is sufficient; or whether such perception of benefit must be continued and repeated during such a period of time as would be requisite in general to confer an easement. Upon this latter branch of the question another point arises,—whether the act, or acts, of perception give a right to claim the benefit of the entire stream, or to such an extent only as may be sufficient to continue the enjoyment already had. Thus, for instance, if a stream runs through the lands of two neighboring proprietors, does that, *per se*, give the right to the owner of the lower land to have the stream flow on without interruption, and, consequently, to maintain an action against the proprietor above for any diversion of the water by him; or is it necessary that he must previously have used the water, as by means of a mill, or in some similar manner; and, * if so, must such usage have * 138 subsisted for the time required to give an easement: and further, if such mill requires only one half the usual supply of water of the stream, can he maintain an action for any diversion of the stream so long as sufficient water is left to turn his mill.

The authorities seem now clearly to have settled, that, if the stream be of sufficient antiquity, a single act of perception of the benefit of it is enough to give a right to the owner of the land to insist upon the stream running on in its accustomed course; at all events, to such an extent as may be necessary for the continuance of such enjoyment *(a)*.

As it cannot be denied that the right to have water run on in its accustomed course depends, in the absence of any express stipulation, upon antiquity of enjoyment, it follows, that a recent act of perception of the benefit of the

(*a*) *Bealey* v. *Shaw*, 6 East, 208: *Williams* v. *Morland*, 2 B. & Cr. 913; 4 Dowl & R. 583.

stream cannot in itself be sufficient to confer the easement; nor is it easy to see how the single act of perception can give such additional force to the evidence of the antiquity of the stream, as to make it afford a presumption of an easement, supposing the mere antiquity of the stream unaccompanied by proof of user, could not give rise to such a presumption.

This would seem to show that the right to the flow of water is quite independent of any such act of perception; but applying the well-known rule of law, that an action on the case cannot be maintained for a tortious act, unless

*139 the plaintiff shows some actual * damage resulting from such act to himself *(a)*, there is authority to the effect, that it is incumbent on the party complaining of the diversion of a stream, to show that he has sustained some damage thereby *(b)*; he must show that he has already applied the stream to some useful purpose, with which the diversion interferes (11).

Even supposing, however, this to be law, it is clear that every proprietor of land along the stream has, as soon as he has applied the water to a beneficial purpose, a right to maintain an action against any person who diverts it unless the person so diverting it has acquired a prescriptive right to do so; and that such action may be maintained for continuing the diversion, although it originally took place before any such beneficial application was made; as, for instance, if a party erects a mill, and thereby interferes with the course of a stream, he is liable to an action for such diversion at the suit of any proprietor of land lying lower down the stream, although the latter has applied the water to a beneficial purpose only one day before the time requisite to give the owner of the mill a prescriptive right to the water *(c)*.

If the mill, or other mode of occupation of the water, be ancient, no doubt exists upon the authorities as to the owner's right of action for any obstruction *(d)* (12). And the decisions appear equally clear for the more limited

*140 proposition, "That the application of a stream *to any useful purpose gives a right to have the stream run on in its accustomed course, as far, at least, as is necessary for such application." In *Cox* v. *Matthews* (*e*), it

(a) *Mason* v. *Hill*, 3 B. & Adol. 304; 2 Nev. & M. 747.

(b) *Williams* v. *Morland*, 2 B. & Cr. 913; 4 Dowl. & R. 583.

(c) *Bealey* v. *Shaw*, 6 East, 208: *Mason* v. *Hill*, 3 B. & Ad. 304; 2 Nev. &. M. 747.

(d) Comyns' Dig. Action on the case for a Nuisance.

(e) Ventris, 237. See also *Luttrel's case*, 4 Rep. 86.

(11) *Diversion of water, action for damages though but nominal.*—Where one wrongfully diverts water from the plaintiff's mill, the latter is entitled to maintain his action therefor to recover nominal damages, though no actual injury to the mill has been sustained. *Butman* v. *Hussey*, 3 Fairf. R. 407—16 Pick. 241.

(12) The owner of an ancient mill has the right to have the water flow to his mill even against an owner of land above; and if the latter diverts the water for the purpose of irrigating his land, the former may remove the obstruction if it prejudices the working his mill. *Colburn* v. *Richards* 13 Mass. 420.

No title by mere occupancy. Bealey v. Shaw.

is said by Lord *Hale*, "If a man has a water-course running through his ground and erects a mill upon it he may bring an action for diverting the stream and not say *antiquum molendinum;* and upon the evidence it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause, for otherwise he cannot justify it, though the mill be newly erected." In *Prescott* v. *Phillips (a)*, Mr. Serjeant *Adair* ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious, and that a possession of above nineteen years, which was shown in that case, was not sufficient."

In *Bealey* v. *Shaw* (*b*)' the mills and works of the plaintiff and defendant were situated on the banks of the river Irwell. The persons under whom the defendants claimed had an ancient weir across the stream, by means of which they had an easement to divert a certain quantity of water. The plaintiffs erected a mill lower down, to supply which he used the portion of water which remained undisturbed by the weir. After he had continued to do so for four years, the defendants enlarged their weir, in 1791, in such a manner as *to divert an additional quantity of water, to the injury of the *141] plaintiff's mill, and for this diversion the action was brought. At the trial of the cause, Mr. B. *Graham* considered "that the important period for the jury to attend to, as to the question of right, was in 1791, when it was clear that an increased quantity of water had been drawn by the defendants from the river by means of the then newly enlarged and deepened sluice, before which time the plaintiff's works had been erected, and he was in the enjoyment of so much of the water as had not been before appropriated by those under whom the defendants claim; that persons possessing lands on the banks of rivers had a right to the flow of water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use; that every such exclusive right was to be measured by the extent of its enjoyment, and if the defendants had in 1791 taken more water from the river than had

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Although no mill is actually in operation on an ancient mill-site, no person can erect another mill below so as to injure the site unless he shows an entire abandonment of the upper mill. *Hatch* v. *Dwight*. 17 ib 296.

The peaceable and exclusive use of water, under a claim of right for more than 20 years unexplained, is conclusive evidence of a right in the party so enjoying it. *Cook* v. *Hull*, 3 Pick. 269.

A diversion of the water which issues from the spring for irrigation, if continued for 20 years, will be presumptive evidence of a grant. *Smith* v. *Adams*. 6 Paige 435.

(*a*) Cited in *Bealey* v. *Shaw*, 6 East, 213, and recognised by the Court of K. B. in *Mason* v. *Hill*, 5 B. & Adol. 25; 2 Nev. & M. 747.

(*b*) 6 East, 208.

ever been done by themselves or those under whom they claimed, after the plaintiff had appropriated what was before left for himself, by means of which his works were injured, this was a damage to him, and the continuance by the defendants, who succeeded to the premises of the sluice so deepened and enlarged was a continuance of the injury for which the action lay." A verdict having been found for the plaintiff on this ruling, a new trial was moved for, on the ground that "the evidence of exclusive enjoyment by the defendants, and those from whom they claimed, to as much of the water as they had occasion for, increased from time to time, as more was wanted from 1794 downwards, was evidence to be left to the jury, of their exclusive

142 right to the whole of the river water; and that any other person erecting a mill afterwards on the same stream, must take it subject to the defendants' prior right to use the whole, and could not acquire an adverse title against it under twenty years' quiet enjoyment.")

The before-mentioned cases of *Cox* v. *Matthews* and *Prescott* v. *Phillips* were referred to in argument. Lord *Ellenborough*, in delivering his judgment, said, "I see no ground for disturbing the verdict. If the whole evidence were left to the jury, as stated by the learned judge, there can be no question upon it, and if the verdict had been for the defendant, it could not have been sustained. The general law as applied to this subject is, that, *independent of any partial enjoyment* used *to be had by another, every man had the right to have the advantage of a flow of water in his own land, without diminution or alteration;* but an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of various trades, yet if the occupation of the party so taking have existed for so long a time, that will raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right. Here it appears, from 1724 downwards, there has been a partial enjoyment of the water of the river by those occupying the defendants' premises, by means of a weir of a given height, and a sluice of given dimensions. In this state of things the plaintiff, in 1787, comes to a spot lower down the stream, and erects a weir, mill, and other works on his own land, and enjoys the rest of the water which the defendants had not been accustomed to divert, andt his he does for four years, without objection from any person.*

*143 Suppose the question had arisen, then, on that enjoyment by the plaintiff, of what I may say was less than his natural right, of a right abridged by the defendants' prior occupation of a part of the river for their own purposes, what objection could have been made to it? How could it have been shown that the occupiers of the defendants' premises were then in possession of *all* the water, when it is apparent that their use of it was not increased so as to deprive the plaintiff of the benefit of it till 1791, when they enlarged their works; and for the very purpose of appropriating to themselves more of the water, they enlarged their sluice." *Grose*, J., added, "The verdict is neither against law nor fact. The plaintiff had a right to all the water flowing over

his own estate, subject only to the easement which the defendants might have in it, in respect to the premises which they occupied higher up the river. To what extent did that go? It appears, prior to the year 1791, the occupiers of the defendants' premises exercised the right of having a weir in the river of a certain height, and diverting the water from the natural channel by means of a sluice of certain dimensions. The plaintiff, on the other hand, had a right to all the water coming over that wire which had not been carried off by such sluice. Then, to 1791, the persons under whom the defendants claim converted the sluice, which was before a narrow channel, into what some of the witnesses call a canal, made both wider and deeper than before, and thereby prevented the plaintiff from taking the water in the same manner that he had done for four years before, and as he was entitled to take it. By so doing they encroached on his right, and deprived him of a benefit which was attached *to his estate. It was an extension of a right before ex- *144
ercised by them, and a material injury to the plaintiff." *Lawrence*, J., commenced his judgment by saying, "I think the law was very correctly stated by the learned judge at the trial." *Le Blanc*, J., after recognizing the ruling of the learned judge who presided at the trial, continued, "The true rule is," "that after the erection of works and the appropriation by the owner of land of a certain quantity of the land flowing over it, if the proprietor of other land afterwards takes what remains; the first-mentioned owner—however he might, before such second appropriation, have taken to himself so much more—cannot do so afterwards."

The case of *Saunders* v. *Newman* (*a*) affords an instance of a natural easement of the affirmative kind—a right to discharge water upon the neighboring land lying lower down the stream. It appeared in evidence "that the plaintiff's mill was built upon the site of an ancient mill which had existed on that spot for the space of at least forty years before. In 1810 this old mill was burnt down, and the plaintiff then built the present mill, with a wheel of the same dimensions and on the same level with the former one. Since that period, however, he had erected a new wheel of different dimensions, requiring less water. The level of the water, however, continued the same. It was for an injury to this last wheel that an action was brought. The declaration stated the plaintiff's possession of a water-mill, and that the defendant was possessed of another mill and mill-pond; and that the water of a certain stream *from time immemorial had flowed, and still of right ought to flow, in *145
its usual channel under the mill of the plaintiff, and from thence into the mill and mill-pond of the defendant, and from the mill and mill-pond of the defendant in its usual channel, without being penned or forced back, so as to occasion any injury to the plaintiff's mill; yet the defendant wrongfully kept and continued a hatch-dam or mill-head belonging to his mill-pond raised to a much greater height than the same had theretofore been, while large quantities of

(*a*) 1 B. & Ald. 258. This action was tried in 1817

the water of the stream, which ought to have flowed and escaped out of the defendant's mill-pond in its usual channel below the same mill and away from the plaintiff's mill, was greatly prevented from so flowing and escaping, and by reason of such obstruction quantities of the water and stream were penned and forced back against the wheel of the plaintiff's mill, whereby he was prevented from working it. Upon these facts, *Burrough*, J., was of opinion, "That, as this was an action founded on the plaintiff's possession, and for an injury to that possession, and as he had not enjoyed his mill in the state in which it was when the injury was sustained for the space of twenty years, he was not entitled to recover; that if the mill had remained in the state in which it was when rebuilt in 1801, he would have been enabled to maintain his action for an injury, but he thought fit to alter it, and to make a new wheel so materially different from the former, that the evidence of his right was gone; and this being his own voluntary act, the learned judge thought that he could not maintain an action on the ground of

*146 possession, for he could only support it by a medium of proof, *not that this was the same wheel, but that if the old wheel had remained the acts of the defendant would have injured him in that state." The plaintiff having been nonsuited, it was contended, on showing cause against a rule for a new trial, that the plaintiff must show a prescriptive right to the mill, and 1 Rolle Abr. 107, pl. 16, was cited, where it was said, "If I have a mill by prescription, and another erect a new mill, and force back the water on my mill so as to do me an injury, I may have an action on the case." Lord *Ellenborough* said, in giving judgment, "The plaintiff in this case declared that he was possessed of a mill, and that the water has been used to flow in a particular manner. Now, if by any alteration lower down the stream the water be prevented from escaping as it has usually done, and that be to the prejudice of the owner of the mill, it seems to me to form the ground of an action against the party so obstructing the water. If, indeed, the plaintiff had stated in the declaration his right to be in respect of a mill of a given construction, the result might have been different; but in the present case there must be a new trial." *Bayley*, J., added, "I do not see how the alteration of the wheel can make any difference in this case, at least so far as to withdraw it from the consideration of the jury; it seems to me that all the allegations in the declaration were proved. The plaintiff proved that he was possessed of a mill, and that the water flowed from time immemorial in a particular channel, and that the defendant had obstructed it. The objection, therefore, if any, must be upon the record. If a person stops the current of a stream which has immemorially flowed in a

147 given direction, and thereby prejudices another, he subjects himself to an action." *Abbott*, J., said, "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time: the owner is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were,

that would stop all improvement in machinery. If, indeed, the alterations made from time to time prejudiced the right of the lower mill, the case would be different; but here the alteration is by no means injurious. The old wheel drew more water than the new one." *Holroyd*, J., after citing the judgment of *Le Blanc*, J., in *Bealey* v. *Shaw*, continued—"The defendant, therefore, had no right to use the water in this case after the erection of the plaintiff's mill in a different manner than it had been accustomed to be used before; for, at all events, by that act the plaintiff appropriated to himself the water flowing in that particular way. Now the water used to flow without the obstruction complained of. The defendant, therefore, can have no right to turn the water back upon the plaintiff's mill. The change of the wheel can make no difference, because, at the time it was done, it was certainly lawful for the plaintiff to make the alteration. Then, if that be so, the defendant by his subsequent act cannot deprive the plaintiff of an advantage, which he has already lawfully acquired."

The case of *Williams* v. *Morland* (*a*) has been supposed* to be some- *148
what at variance with the doctrine laid down in the cases already cited; but when viewed with the light thrown upon it by more recent decisions (*b*), it appears to present nothing inconsistent with the principle already laid down; though it may be conceded, that some of the expressions, made use of by the learned judges in that case are rather ambiguous. The declaration in that case stated, "That the plaintiff, by reason of a dwelling-house and land, &c., enjoyed the benefit and advantage of the water of a stream, called the Lee river, which ought to flow past the premises of the plaintiff, for supplying them with water; that the defendant erected a flood gate, and thereby prevented the water from running and flowing in its regular course, and caused the water of the stream to run in a different direction, and with increased violence and impetuosity against the banks of the plaintiff, and undermined, washed away, damaged, and destroyed them." There was a second more general count, which also charged the injury to be to the banks of the plaintiff. At the trial, before *Graham*, B., the jury found that no damage had been done to the plaintiff's banks, but that their bad condition was caused by the plaintiff's neglect to repair them; but the jury added, that they thought the defendant should not stop the water in summer time. It was then insisted, that the plaintiff was entitled, upon this finding, to a verdict, because the defendant had stopped the water from coming to the plaintiff's premises in the summer time. But the learned judge was of opinion, that, inasmuch as the plaintiff, in his *declaration, did not complain that he was deprived *149
of a supply of water, but that the natural course of the stream was altered, and that the water was caused to flow with greater impetuosity against his

(*a*) 2 B. & Cr. 710; 4 Dowl. & R. 583.

(*b*) See *Mason* v. *Hill*, 5 B. & Adol. 1; 2 Nev. & M. 747.

lands, whereby the banks were injured, and as the jury had found that the banks were not injured by such flowing of the water, the defendant was entitled to a verdict. Liberty, however, was given to the plaintiff to move to enter a verdict for him; but the rule *nisi* was discharged without hearing the defendant's counsel.

The true ground of the decision of the Court of King's Bench in this case appears to be that taken by the learned judge at Nisi Prius, viz. that the action was brought without reference to any easement at all, for an alleged wrongful act of the defendant in throwing back water on the plaintiff's land, and injuring his banks; a ground of action that totally failed in proof (*a*). The observations of the learned judges, as to the general law of flowing water, were totally uncalled for by the question then before the Court. "Flowing water," said *Bayley*, J., "is originally *publici juris*; so soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriated it, subject to that right; all the rest of the water remains *publici juris*."

In *Liggins* v. *Inge* (*b*), already cited, the precise question now treated of did not arise: the original right of the plaintiff to the flowing water was not denied, and the case turned entirely on the effect of a parol license. *In the judgments in *Williams* v. *Morland*, as well as in *Liggins* v. *Inge*, there are dicta to the effect, "that, by the law of England, the possessor who first appropriates any part of water flowing through his land to his own use, has a right to the use of so much as he then appropriates against any other:" but more recent decisions, in which all the authorities have been elaborately reviewed and considered, have established that this position is correct only if taken with the qualification, "that, by such appropriation, no greater right is claimed than to a flow of water in its usual and accustomed course;" it being clearly settled, that no appropriation, except for such a period as will confer an easement, can diminish the natural rights of other parties possessing lands along the course of the stream.

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"The right to the use of water," said Sir *J. Leach*, in *Wright* v. *Howard* (*c*), "rests upon clear an settled principles; prima facie, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water, which would

(*a*) See per Curiam in *Mason* v. *Hill*, 5 B. & Adol. 20; 2 Nev. & M. 747.

(*b*) 7 Bing. 682; 5 Moo. & P. 712.

(*c*) 1 Sim. & Stuart, 190

otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor who claims a right *either to *151 throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years." The learned Judge then added, "that an action will lie at any time within twenty years where injury happens to arise in consequence of the new purpose of the party to avail himself of his common right" (*a*).

The case of *Mason* v. *Hill* (*b*), which may be considered as having settled the law on this point, came twice before the Court of King's Bench, and on both occasions elaborate judgments were pronounced, both fully sanctioning the principle, "that if the owner of land adjoining a stream has once appropriated the water to a beneficial purpose, he may maintain an action against any person diverting it from its usual course, though such diversion be the continuation of an act done previous to that beneficial appropriation on his part, provided such diversion has not continued for a sufficient length of time to confer an easement."

The declaration stated, "that the plaintiff was lawfully possessed of a small manufactory and premises, and by reason thereof ought to have had and enjoyed the benefit and advantage of the water of a certain *stream, *152 which had been used to run and flow, and of right ought still to run and flow, to his mill, &c., in great purity and plenty, to supply the same with water for working, using, and enjoying the same, and for other necessary purposes; that the defendants, by a certain dam and obstructions across the stream above the plaintiff's premises, impounded, penned back, and stopped the water, and by pipes, stiles, &c., diverted it from the plaintiff's premises, and prevented it from flowing along the usual and proper course; and further, that the defendants injuriously heated, corrupted, and spoiled the water, so that it became of no use to the plaintiff, whereby he was prevented from using his mill and premises in so extensive and beneficial a manner as he otherwise would have done." At the trial before *Bosanquet*, J., the following appeared to be the facts of the case. "The plaintiff and the defendants had land contiguous to the stream; the land of the defendants being situate on a part of the stream above the land of the plaintiff. The stream acted as a sewer to part of the town of Newcastle under Lyne, and the water was consequently foul and muddy; it had been unprofitable to both parties until it was diverted by the defendants: this diversion took place in 1818, by the defendants erecting a weir or dam across the stream at the part contiguous to their own land. By

(*a*) *Rex* v. *Trafford*, 1 B. & Adol. 874; S. C. in error, 8 Bing. 204; 1 Moo. & Scott, 401; 2 Cr. & J. 265; which appears to have been compromised: *Menzies* v. *The Marquis of Breadalbane*, 3 Bligh, N. S. 414.

(*b*) 3 B. & Adol. 304; 5 B. & Adol. 1; 2 Nev. & M. 747.

means of this weir, and of channels and reservoirs made in their land, great part of the water was conveyed to certain buildings belonging to them at some distance from the weir, and there used as part of the supply of water necessary for a steam engine. About ten years after this diversion, the plaintiff *153 made a channel in his land * contiguous to the stream, for conveying the water to some buildings belonging to him at a little distance from the stream, for the purpose of some process of manufacture not previously carried on there. Some attempts at accommodation between the parties took place, but were ineffectual or unsatisfactory, and therefore the action was brought: the plaintiff's works were occasionally suspended for want of the water diverted by the defendants, and which, after it had been used by them, was suffered to pass away into a level below the plaintiff's works.

It was contended on the part of the defendants, that as they had first appropriated the use of the water in the sewer to beneficial purposes without injuring the plaintiff, they had acquired a right thereto, and were not answerable for the diversion; and *Williams* v. *Morland* was cited. The learned Judge acting upon that authority directed the jury to find a verdict for the defendants.

In the ensuing term a rule was obtained for a new trial, on the ground that the defendants, who had diverted the water, could acquire no right to have it flow in its new channel by mere appropriation without twenty years' unmolested enjoyment. Cause having been shown against the rule, the Court took time to consider their judgment, which was afterwards declared by Lord *Tenterden*. After stating the facts of the case, his Lordship proceeded, "In this state of things the present action was brought; and for the defendants it was insisted, that they, having first appropriated the water beneficially to their *154 use, at a time when the appropriation was not injurious to the *plaintiff, had a right to the water and to the use of it, notwithstanding the diversion had, by subsequent acts of the plaintiff, become injurious to him. The plaintiff, on the other hand, insisted that the defendants did not, nor could by law, acquire a right to the water by a diversion and enjoyment for a period short of twenty years. The several decisions and dicta of learned judges on this subject were quoted at the bar, and need not be repeated. It appears to have been held that a person could not complain of a diversion or obstruction of water, from which, at the time of his complaint, he suffered nothing; which seems to have been on the ground, that in such a case it was injuria sine damno. It is not now necessary to say whether such a principle should be admitted. The only decision upon a question like that in the present case, is the judgment of the present Master of the Rolls, then Vice-Chancelor, in the case of *Wright* v. *Howard* (*a*). This judgment is expressed in language so perspicuous and comprehensive, that I shall here quote it."

His Lordship then cited the judgment of the Master of the Rolls as above

(*a*) 1 Sim. & Stu. 190.

given (*a*), and concluded by saying, "We all agree in the judgment thus delivered; and upon the authority of that decision and the reasoning of the learned Judge, we are of opinion, that the defendants did not acquire a right by their appropriation against the use which the plaintiff afterwards sought to make of the water; and consequently the rule for a new trial must be made absolute."

On the second trial the jury found a special verdict, the substance of which is set out in the judgment of *the Court, which was delivered by *155 Lord *Denman*, C. J., after time had been taken by the Court to consider. After stating the pleadings, his Lordship proceeded as follows:—

"The substance of the special verdict is this:—The defendants' mill was erected in 1818; the plaintiff's in 1823, on a piece of land, the former owner and occupier of which had, for twenty years prior to 1818, appropriated the water of the stream and springs for watering his cattle and irrigating that land.

"At the time when the defendants' mill was erected, the then owner and occupier of the plaintiff's land gave a parol license to the defendants to make a dam, at a particular place above, where the *Sitchwell Tree* stood, and to take what water they pleased *from that point* to their mill, which water was so taken, and returned by pipes into the stream, above the spot where the plaintiff's mill was afterwards erected.

"In 1818 the defendants conducted part of the water of the *Over Canal Springs*, which had before flowed into the stream, into a reservoir for the use of their mill.

"After the plaintiff erected his mill, namely, in 1828, he appropriated to its use all the surplus water, viz. that which flowed over and through the dam; that from the *Over Canal Springs*, which was not conducted into the reservoir; and all from the *Sitchwell Spring* (which was another feeder of the brook); and also that which was returned by the defendants into the stream.

"In January 1829 the plaintiff demolished the dam at the *Sitchwell Spring*. The defendants erected a new dam lower down, and by means of it diverted from the *plaintiff's mill, at some times, *all* the stream, including all *156 the water so appropriated; at others, a part of it, and returned the remainder in a heated state into the stream.

"And the questions upon this special verdict are,—

"Whether the plaintiff is entitled to recover for the diversion of the whole water of the stream, or of any and what part of it, or for the heating of the part returned?

"That the plaintiff has a right to a verdict for the injury sustained by the abstraction *of the whole of the surplus water*, and by the abstraction of part and the heating of the remainder of that surplus water, does not admit of the least doubt. In any view of the law on this subject,—whether the right to

(*a*) Ante, p. 150.

the use of flowing water be in the first occupant, as the defendants allege, or in the possessor of the land through which it flows in its natural course, as is contended on the other side,—the plaintiff was entitled to this surplus, for he filled both characters; he was the first occupant of it, and the owner and occupier of the land through which it flowed. In this respect the case is exactly like that of *Bealey* v. *Shaw* (*a*).

"The learned counsel for the defendants argued, that inasmuch as the plaintiff pulled down the dam at the *Sitchwell Tree*, in consequence of which the new dam was erected, he must be considered as the author of the mischief, and has no right to complain of it. It is, however, quite impossible to sustain such a position. If the plaintiff committed a wrongful act in demolish-

*157 ing the dam, the defendants might have restored it, or * brought an action; they had no right to construct another at a different place, and by means of it abstract more water than the other did.

"The remaining questions are, whether the plaintiff can recover, in respect of the abstracting, or the injury by heating, of that portion of water which was before diverted by the license of the then owner and occupier of the plaintiff's field; and, secondly, in respect of that portion of the *Over Canal Springs* which was conveyed in 1818 to the defendants' reservoir; both of which portions have been at one time entirely, and at another partially abstracted, and in the latter case returned in a heated state into the brook: and we are of opinion that the plaintiff is entitled to recover in respect of both.

"As to the first of these portions, the defendants contend that the plaintiff has no right of action, because the former owner and occupier of his land gave an irrevocable license by parol to the defendants to divert so much water by the *Sitchwell Tree Dam:* and to prove that a parol license to divert water, which had been acted upon by the person to whom it was given, and expense occurred in consequence, is irrevocable, the case of *Liggins* v. *Inge* (*b*) was cited. But, admitting that the license to abstract the water at that particular point, and by means of that dam, was irrevocable, and therefore that the plaintiff was a wrongdoer in pulling the dam down, it by no means follows that the plaintiff is not to recover for an equal portion of water abstract-

*158 ed at a different place. In the first place, the license * is not general to take away *at any point*, but at *this* only; and in the second place, if the license had been general, to take away *at any place*, it would have been clearly revocable, except as to such places where it had been acted upon, and expense incurred (for it is on that ground only that such a license can be irrevocable); and as it was revoked before the last dam was erected, the defendants could not justify the abstraction of any portion of the water by virtue of the license at such dam.

"The last question is, whether the plaintiff ought to recover in respect of that portion of the water which was diverted from the *Over Canal Springs*,

(*a*) 6 East, 208. (*b*) 7 Bingh. 682; 5 Moo. & P. 712.

and collected in a tank in 1818. This was taken without license, and appropriated by the defendants to the use of their mills before any other appropriation, but has not been so appropriated for twenty years; and the point to be decided is, whether the defendants, by so doing, acquired any right to this against the plaintiff, through whose field it would otherwise have flowed in its natural course; and we are of opinion that they did not.

"This point might, perhaps, be disposed of in favor of the plaintiff, even admitting the law to be as contended for by the defendants, that the first occupant acquires a right to flowing water; for, by this special verdict, all the the water of the brook is found to have been appropriated by Ashley the father, and used for twenty years up to the year 1818, for watering his cattle and irrigating the field, now the plaintiff's. A right to use the water, thus acquired by occupancy, in right of the field, must have passed to the plaintiff, *and could not be lost by mere non-user from 1819 to 1829; and the *159 total or partial abstraction of the water may be an injury to such a right in point of law, though no actual damage is found by the jury to have been sustained in that respect. But we do not wish to rest a judgment for the plaintiff on this narrow ground. We think it much better to discuss, and, as far as we are able, to settle the principle on which rights of this nature depend.

"The proposition for which the plaintiff contends is, that the possessor of land, through which a natural stream runs, has a right to the advantages of that stream flowing in its natural course, and to use it when he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above and below—that neither can any proprietor above diminish the quantity, or injure the quality of water, which would otherwise descend, nor can any proprietor below throw back the water without his license or grant:—and that, whether the loss, by diversion, of the general benefit of such a stream be or be not such an injury in point of law, as to sustain an action without some special damage, yet, as soon as the proprietor of the land has applied it to some purpose of utility, or is prevented from so doing by the diversion, he has a right to action against the person diverting.

"The proposition of the defendants is, that the right to flowing water is publici juris, and that the first person who can get possession of the stream, and apply it to a useful purpose, has a good title to it against all the world, *including* the proprietor of the land below, who *has no right of ac- *160 tion against him, unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and in default of his having done so, may altogether deprive him of the benefit of the water.

"In deciding this question, we might content ourselves by referring to, and relying on, the judgment of this Court in this case, on the motion for a new trial (*a*); but as the point is of importance, and the form in which it is now again presented to us, leads to a belief that it will be carried to a court of error, we think it right to give the reasons for our judgment more at large.

(*a*) 3 B. & Ad. 304.

"The position, that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer: and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. *The Earl of Rutland* v. *Bowler* (*a*). But it is a very different question, whether he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied, and deprive him of it altogether by anticipating him in its applica-

*161 tion to a useful purpose. If this *be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall within its limits, might at any time be taken away; and by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another.

"We think, that this proposition has originated in a mistaken view of the principles, laid down in the decided cases of *Bealey* v. *Shaw* (*b*), *Saunders* v. *Newman* (*c*), *Williams* v. *Morland* (*d*). It appears to us also, that the doctrine of Blackstone and the dicta of learned judges, both in some of those cases, and in that of *Cox* v. *Matthews* (*e*), have been misconceived.

"In the case of *Bealey* v. *Shaw*, the point decided was, that the owner of land through which a natural stream ran, (which was diminished in quantity by having been in part appropriated to the use of works above, for twenty years and more, without objection), might, after erecting a mill on his own land, maintain an action against the proprietor of those works, for an injury to that mill, by a further subsequent diversion of the water. This decision is in exact accordance with the proposition contended for by the plaintiff, that the owner of the land *through which* the stream flows, may, as soon as he has converted it to a purpose producing benefit to himself, maintain an action

*162 against the owner of the land above, for a subsequent *act, by which that benefit is diminished; and it does not in any degree support the position, that the first occupant of a stream of water has a right to it *against* the proprietor of land below. Lord *Ellenborough* distinctly lays down the rule of law to be, that, 'independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water *in his own land*, without diminution or alteration. But an adverse right may exist, founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exer-

(*a*) Palmer, 290. (*b*) 6 East, 208. (*c*) 1 B. & A. 258.
(*d*) 2 B. & C. 913. (*e*) 1 Ventr. 137.

cise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream, subject to such adverse right.' Mr. Justice *Lawrence* confirms the opinion of Mr. Baron *Graham* on the trial, that, 'persons possessing lands on the banks of rivers, had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use.' Mr. Justice *Le Blanc*, in his judgment, says as follows:—'The true rule is, that, after the erection of works, and the appropriation, by the owner of land, of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains, the first-mentioned owner, *however he might, before such second appropriation, have taken to himself so much more*, cannot do so afterwards;' and this expression, in which, in truth, that learned judge cannot be considered as giving any opinion upon the effect of a prior appropriation, is the only part of the case, which has any tendency *to support the doctrine *163 contended for by the defendants.

"The case of *Saunders* v. *Newman* (*a*) is no authority upon this question, and is cited only to show, that Mr. Justice *Holroyd* quotes the opinion of *Le Blanc*, J., above-mentioned; and he confirms it, so far as this, that the plaintiff, by erecting his new mill, appropriated to himself the water in its then state, and had a right of action for any subsequent alteration, to the prejudice of his mill; about which there is no question.

"The last and principal authority cited is that of *Williams* v. *Morland* (*b*).

"The case itself decides no more than this: that the plaintiff, having in his declaration complained that the defendants had, by a floodgate across the stream above, prevented the water from running in its regular course through the plaintiff's land, and caused it to flow with increased force and impetuosity, and thereby undermined and damaged the plaintiff's banks, could not recover, the jury having found that no *such* damage was sustained. The judgments of all the judges proceed upon this ground; though there are some observations made by my brother *Bayley*, which would seem at first sight to favor the proposition contended for by the defendants.

"These observations are, that 'flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment* of the water, does so in derogation of the primi- *164 tive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right ought to show that he is prevented from having water which he has *acquired* a right to use for some beneficial purpose (*c*).'

"The dictum of Lord Chief Justice *Tindal* in *Liggins* v. *Inge* (*d*) is to this

(*a*) 1 B. & A. 258.
(*b*) 2 B. & C. 910.
(*c*) 2 B. & C. 913.
(*d*) 7 Bing. 692.

effect:—'Water flowing in a stream, it is well settled by the law of *England*, is *publici juris*. By the *Roman* law, running water, light, and air, were considered as some of those things which were res communes, and which were defined, things, the property of which belongs to no person, but the use to all. And by the law of *England*, the person who first appropriates any part of this water *flowing through his land* to his own use, has the right to the use of so much as he then appropriates, against *any other*;' and for that he cites *Bealey* v. *Shaw and Others* (*a*), which case, however, is no authority for this position, as far as relates to the owner of the land below; and probably, therefore, the Lord Chief Justice intended the expression 'any other' to apply only to those who diverted or obstructed the stream. To these dicta may be added the passage from Blackstone's Commentaries, vol. ii. p. 14:—'There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common, being such wherein nothing but an usufructuary property is capable of being had; and therefore

*165 they still belong to the first occupant, during the *time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such, also, are the generality of those animals which are said to be feræ naturæ, or of a wild and untameable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.'

"And, 2 Blackstone's Commentaries, p. 18. "Water is a moveable wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary property therein; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it."

"None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is publici juris is deduced, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate a natural stream to a useful purpose, has a title against the owner of land below, and may deprive him of the benefit of the natural flow of water.

"The *Roman* law is (2 Inst. tit. 1, s. 1,) as follows:—'Et quidem naturali jure, communia sunt omnium hæc: aer, aqua profluens, et mare, et per hoc

*166 littora *maris.' It is worthy of remark, that Fleta, enumerating the res communes, omits 'aqua profluens,' Lib. iii., ch. 1. Vinnius, in his commentary on the Institutes, explains the meaning of the text,—'Communia sunt, quæ, a natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium perve-

(*a*) 6 East, 208.

nerunt: Huc pertinent præcipue aer et mare, quæ cum propter immensitatem, tum propter usum, quem in commune omnibus debent, jure gentium divisa non sunt, sed relicta in suo jure et esse primævo, ideoque nec dividi potuerunt. Item aqua profluens, hoc est aqua jugis, quæ vel ab imbribus collecta, vel e venis terræ scaturiens, perpetuum fluxum agit, flumenque aut rivum perennem facit. Postremo propter mare, etiam littora maris. In hisce rebus duo sunt, quæ jure naturali omnibus competunt. Primum communis omnium est harum rerum usus, ad quem natura comparatæ sunt: tum siquid earum rerum per naturam occupari potest, id eatenus occupantis fit, quatenus ea occupatione usus ille promiscuus non læditur.' And he proceeds to describe the use of water, 'aqua profluens *ad lavandum et potandum unicuique jure naturali concessa.*'

"The law as to rivers is, 'flumina autem omnia et portus *publica* sunt, ideoque jus piscandi omnibus commune est in portu fluminibusque.' And Vinnius, in his commentary on this last passage, says, 'unicuique licet in *flumine publico* navigare et piscari.' And he proceeds to distinguish between a river and its water: the former being, as it were, a perpetual body, and under the dominion of those in whose territories it is contained; the latter being continually changing, and incapable, whilst it is there, of becoming the subject of property, like the air and sea.

"* In the Digest, book 43, tit. 13, in public rivers, whether navigable *167
or not, it appears that every one was forbidden to lower the water or narrow the course of the stream, or in any way to alter it, to the prejudice of those who dwelt near. Tit. 12 distinguishes between public and private rivers; and in section 4, it is said, that private rivers in no way differ from any other private place.

"From these authorities, it seems that the *Roman* law considered running water, not as a *bonum vacans* in which any one might acquire a property; but as public or common, *in this sense only*, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only.

"We think that no other interpretation ought to be put upon the passage in Blackstone; and that the dicta of the learned Judges above referred to, in which water is said to be publici juris, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor as far as we know, in the *Roman* law, (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein.

"It remains to observe upon one case which was cited for the defendants (*Cox* v. *Matthews* (*a*), in* which Lord *Hale* said, 'if a man hath a wa- *168

(*a*) 1 Ventr. 237.

tercourse running through his ground and erects a mill upon it, he may bring his action for diverting the stream, and not say, antiquum molendinum; and upon the evidence, it will appear whether the defendant hath ground through which the stream runs before the plaintiff's, and that *he used to turn* the stream as he saw cause; for *otherwise* he cannot justify it, though the mill be newly erected.' What is said by Lord *Hale* is perfectly consistent with the proposition insisted upon by the plaintiff; and the defendants in the supposed case would have no right to divert unless they had gained it by prescription (which is the meaning of Lord *Hale*), or, according to the modern doctrine, until the presumption of a grant had arisen.

"And this view of the case accords with the law, as laid down by Serjeant *Adair*, Chief Justice of Chester, in *Prescott* v. *Phillips* (*a*), and by Lord *Ellenborough* in *Bealey* v. *Shaw* (*b*), and by the Master of the Rolls in his luminous judgment in *Howard* v. *Wright* (*c*.)

"We are, therefore, clearly of opinion, that the plaintiff is entitled to recover in respect of the abstracting of the water taken from the *Over Canal Springs*, as well as the other injuries complained of; and for which damages have been assessed by the jury.

"As to the right to recover for the injury sustained, by the water being returned in a heated state, there can be no question.

"Whether he could have maintained an action *before* he had constructed his mill, or applied the water of the stream to some profitable purpose, we need not decide. It may be proper, however, to refer to two cases not

* 169 * cited in the argument. In *Palmer* v. *Keblethwaite* (*d*) the declaration merely stated that the water, used and ought to run to the plaintiff's mill; and Lord *Holt* said, 'Suppose a water-course run to my ground, and I have no use for it, and one upon another ground divert it before it comes to mine, will an action lie? Is not this the same? Must you not lay some use for it? But you will speak to it again.' In the report of the same case in Skinner, 65., *Pollexfen*, in argument, said he *took* it to be a clear case that, the stream being the plaintiff's, the defendant could not divert it, and so held the Court, that an action had lain for diverting the stream, though no mill had been erected. The final result of that case does not appear in the books, and the roll has been searched for in vain.

"In *Glynne* v. *Nicholas* (*e*) a similar question was raised, which appears from the report of the same case in Comberbatch, p. 43, to have been decided *for the plaintiff.*

"It must not, therefore, be considered as clear that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown.

(*a*) Cited, 6 East, 213. (*b*) 6 East, 208. (*c*) 1 Sim. & Stu. 190.
(*d*) 1 Show. 64. (*e*) 2 Show. 507.

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"But be that as it may, the plaintiff in this case, who has sustained actual damage, is entitled to the judgment of the Court" (13).

It has already been observed, that no additional evidence of the right of a party to a flow of water could be derived from the mere fact of his having recently appropriated it to a beneficial purpose; but "it appears to have been held, that a person could not complain of a * diversion or obstruction *170 of water, from which, at the time of his complaint, he suffered nothing, which

(13) *Riparian property.*—The case of *King* v. *Tiffany*, 9 Conn. R. 162 decides, that the owners of an upper mill have a right to have the water flow off over their land and from their mill as it had been accustomed to flow; and that, if they suffered from such interruption by others, they might recover, although they had not used the water precisely in that manner, for fifteen years. In *Buddington* v. *Bradley*, 10 ib. 213, the relative situation of the parties was reversed. The proprietors of the banks and mills below, claim, not that the water is set back upon them, but that it is kept from them, and not suffered to flow as formerly. The defendant says, true; but if you had not altered your race-way, or taken away your reservoir, this would not have hurt you; (if you had not lowered your hammer wheel, it would not have hurt you.) But the Court said:—If the alterations made, in the former case, by the plaintffs, did not justify the defendants, neither can the alterations made by the plaintiffs (in the present case), justify the defendant. The only distinction that exists between the case of *King* v. *Tiffany* and this (*Buddington* v. *Bradley*,) is, that by the report of that case, it does not appear, that the plaintiffs altered the flowing of the water at all, as they have done in this. It was apparent, however, in the former case, that by lowering their hammer-wheel, they changed their use of the water; they passed it in a different manner from what they had been accustomed to do. Of course, their claim was not founded upon their enjoyment of it, in a particular manner. The Court in both cases decided, that the plaintiffs, by the use they had made of the water, lost none of their natural rights. The plaintiffs claimed, that they had a right to have the water flow as it had been used to flow upon their own site. The obstruction of the natural course of a stream, is always done at the risk of being answerable in damages to him who sustains a loss thereby. The inquiries, then, are, has the defendant obstructed the natural flow of the water; and have the plaintiffs sustained an injury thereby? The defendant, indeed, may protect himself in the obstruction, by an enjoyment for a certain time; but without that, he can have no defence. In *Buddington* v. *Bradley*, *supra*, it appeared, that the plaintiffs, who owned the land through which the water course passed, had, for upwards of fifteen years, used the water for their mill, by diverting it from its natural course, through a race-way to their mill. The defendant, the owner of the land above, afterwards erected on his own land, above the mill of the plaintiff, a dam and mill, which obstructed the natural flow of the water, to the injury of the plaintiffs: Held, that defendant was liable, although it appeared that plaintiffs had recently varied the use of the water by disusing the reservoir, whereby more water was required for their mill; the jury having found the injury to the plaintiffs.

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seems to have been on the ground that in such a case it is *injuria sine damno (a)*."

"In order to entitle himself to recover," said *Holroyd*, J., in *Williams* v. *Morland (b)*, "the plaintiff should show the loss of some benefit, or the deterioration of the value of the premises;" and *Littledale*, J., in the same case, laid it down as law, that "water is of that peculiar nature, that it is not sufficient to allege in a declaration that the defendant prevented the water from flowing to the plaintiff's premises, the plaintiff must state an actual damage accruing

(*a*) Per Curiam, *Mason* v. *Hill*, 3 B. & Adol. 312. (*a*) 2 B. & Cr. 915.

Williams, J.:—"It seems to me, that the argument for the defendant, confounds the natural rights of the riparian proprietor with the acquired right of the person who has enjoyed the water in a particular manner of a certain time—fifteen years in this state, twenty in England. The latter acquires a right, by continued enjoyment, the extent of which is measured by the extent of the enjoyment. But the riparian proprietor has annexed to his lands the general flow of the stream, so far as it has not been actually acquired, by some prior and legally operative appropriation. Per Story, J. in *Tyler & al.* v. *Wilkinson & al.* 4 Mason, 403. And such proprietor has naturally an equal right to the use of the water which flows in the stream adjacent to his land, as it was wont to flow, without diminution or alteration. 3 Kent's Com. 439. (2d ed.) And in *Shury* v. *Piggot*, 3 Bulstr. 339. Whitlock, J. says, that a water-course begins *ex jure naturæ*, and having taken a course naturally, it cannot be diverted. And Hale, Ch. J. says, in *Cox* v. *Matthews*, 1 Vent. 237. that "if a man has a water-course running through his ground, and erects a mill upon it, he may bring his action for diverting the stream, and not say *antiquum Molendinum;* and upon the evidence it will appear, whether the defendant hath ground through which the stream runs before the plaintiff's, and that he used to turn the stream as he saw cause; for otherwise he cannot justify it, though the mill be newly erected." And Story, J., in the case before cited, says: "In their character of mill-owners, they have no title to the flow of the stream, beyond the water actually and legally appropriated to the mills; but in their character of riparian proprietors, they have annexed to their lands the general flow of the river, so far as it had not been already acquired by some prior and legally operative appropriation." 4 Mason, 403.

"In this case, the plaintiffs have a right to have the water come to them in its natural and accustomed course, not by their artificial channel or into their artificial reservoir, but to flow within its banks, through their lands, as it was wont to flow. This right they claim, not as mill-owners, but as riparian proprietors. The defendant objects, that the plaintiffs have not used the water, in the same manner as they now use it. The answer to that is, that the plaintiffs' right to the water does not depend upon their use of it, or their prior occupancy, but upon their natural right to have it flow as it has been accustomed to flow. Their damages may depend upon their application of it: not, however, upon their general past application, but upon their application when it was interrupted. On the contrary, as the defendants claim to interrupt the natural flow of the water, they must show a

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from the want of the water—the mere right to use the water does not give a party such a property in the new water, constantly coming, as to make a diversion or obstruction of the water *per se* give him any right of action."

Whether the principle expressed in these *dicta* is well-founded, seems to be, at the least, very doubtful. Lord *Tenterden*, in delivering the judgment of the Court in *Mason* v. *Hill*, above alluded to, says, "It is not necessary to say

use for fifteen years or more, to justify them in their claim. Thus in *Beale* v. *Shaw & al.* 6 East, 208. the suit was brought in 1799. The plaintiff's works were erected in 1787. The defendants' works were ancient; but the particular cause of damage existed only since 1791; and yet the plaintiff recovered. And Lord Ellenborough says: "Independent of any particular enjoyment used to be had by another, every man has a right to the advantage of a flow of water in his own land, without diminution or alteration." And Grose, J. says: "The plaintiff had a right to all the water flowing over his own estate, subject only to the easement the defendants might have" acquired. And in a recent case, that of *Mason* v. *Hill & al.* 3 Barn. & Adolp. 304, the plaintiff and defendants having lands contiguous, the defendants being above, in 1818, the defendants, by a weir or dam, diverted the water from its natural course. About ten years after, the plaintiff made a channel in his own land, contiguous to the stream, for some manufacturing purposes not previously carried on there. Lord Tenterden cited, with approbation, *Wright* v. *Howard*, 1 Sim. & Stu. 190. and added: "We are all of opinion that the defendants did not acquire a right, by their appropriation, against the use which the plaintiff afterwards sought to make of the water."

"No action will lie," says Williams, J. in *King* v. *Tiffany*, *supra*, but by him who sustains an actual injury; but it will lie at any time within the fifteen or twenty years, when the injury happens to arise in consequence of a new purpose of the party to avail himself of his common right. There, defendant owned an ancient mill below the mill of plaintiff, and both mills had been erected long enough to be considered as entitled to have the water flow as it had been accustomed to flow; afterwards in 1818 defendant raised his dam higher than it ever had been before, thereby setting the water back to plaintiff's mill, but not so as to produce any injury, until 6 years subsequent, when plaintiff lowered his water wheel and at the same time making it larger, in consequence of such new purpose of the plaintiff such back water then began to injure the plaintiff: Held, that the plaintiff was entitled to recover, saying,—Each had a right to vary its use, so long as thereby the others were not injured, and no longer, unless they so continued to use it for fifteen years. The defendants did vary their use of it, and in less than fifteen years it did affect the plaintiffs. They now only ask, that the water shall flow as it has been accustomed to flow; and I do not see upon what principle the defendants may interpose to prevent it. Neither party shall so use it as to prevent its flowing in the accustomed manner, without an actual grant, or such a continued enjoyment, as is evidence of it."

The doctrine here settled seems to go to the extent, that one having obtained by use, (fifteen years in Connecticut, but 20 years in other states,) a special privilege to water, may vary that use, and if obstructed in his new and varied use of it, may recover in damages for such obstruction.

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whether such a principle should be admitted;" and it has been seen, that the Court of King's Bench, in their elaborate judgment on that case, the second time it came before them, appear to have guarded themselves from being supposed to favor such a doctrine, or rather to have purposely expressed their doubts of its correctness. "It must not, therefore, be considered as clear," says Lord *Denman*, in concluding the judgment, after citing the cases of *Pal-*

* 171 * *mer* v. *Kibblethwaite (a)* and *Glynne* v. *Nicholas (b)*, "that an occupier of land may not recover for the loss of the general benefit of the water, without a special use or special damage shown."

Even if the necessity of some act of appropriation be admitted, the attempt to apply a stream of water to some beneficial purpose must be sufficient to give a right of action, although such attempt be rendered abortive by the previous diversion or obstruction of the water—as, for instance, if the owner of the land were to erect a mill on the banks of the dried up stream, or drive his cattle there to water, at any time before the disturbing party had acquired an easement; but, as it is conceded, that "deterioration of the value of the premises *(c)*" is sufficient to confer a right of action, it is scarcely possible to imagine a case, in which the diversion of a running stream of water would not be attended with the result of diminishing the value of the land through which it flows.

Independently, however, of this view of the case, and assuming that no actual damage is shown to arise from the diversion, it may be suggested that an action might be maintained for it, on the ground that the undisturbed continuation of such acts, without the express consent of the owner of the land, would be evidence of a right to do them *(d)*.

"Wherever any act," says Mr. Serjeant Williams, "injures another's right, and would be evidence in future in favor of the wrong doer, an action may be

* 172 maintained for an invasion of the right without proof * of any specific injury, and this seems to be a governing principle in cases of this kind. As in the case of *Patrick* v. *Greenaway*, tried before Mr. J. *Lawrence* at Oxford Spring Assizes, 1796, which was an action of trespass for fishing in the plaintiff's several fisheries, it appeared in evidence that the defendant fished there, but did not take any fish, neither was it alleged in the declaration that the defendant caught any fish. The plaintiff obtained a verdict, which, in the following term, Easter, 1796, the defendant moved to set aside; but the Court of Common Pleas refused even a rule to show cause, upon the ground that the act of fishing was not only an infringement of the plaintiff's right, but would hereafter be evidence of the using and exercising of the right by the defendant, if such an act were overlooked" *(e)*.

(a) 1 Shower, 64. *(b)* 2 Shower, 507.

(c) Per *Holroyd*, J., in *Williams* v. *Morland*, 2 B. & Cr. 916.

(d) *Young* v. *Spencer*, 10 B. & C. 145; *Baxter* v. *Taylor*, 4 B. & Adol. 72; *Hopwood* v. *Scholfield*, 2 M. & Rob. 34.

(e) 1 Wms. Saund. 346 b, note to *Mellor* v. *Spateman*.

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If it be necessary that there should be some act of appropriation to a useful purpose, it seems clear such appropriation would be operative only to the extent to which it has already been carried, and could confer no right of action for a diversion which left sufficient water for the purpose to which the stream had been appropriated; as, quoad the surplus, the diversion would be injuria sine damno.

In the American Courts this point has been expressly decided, supporting the observations above made; it has there been held, "that no previous appropriation by the act of man is requisite to give a right of action for diverting a stream from its natural course" *(a)*.

Per Curiam, "A mill privilege, not yet occupied, is valuable for the purpose to which it may be applied. It is a property which no one can have a legal right to * impair or destroy, by diverting from it the natural * 173 flow of the stream upon which its value depends; although it may be impaired by the exercise of certain lawful rights originating in prior occupancy. If an unlawful diversion is suffered for twenty years, it ripens into a right, which cannot be controverted. If the party injured cannot be allowed in the meantime to vindicate his right by action, it would depend upon the will of others, whether he should be permitted or not to enjoy that species of property."

The Court cite the case of *Hobson* v *Todd (b)*, in which, in an action brought by a commoner who had himself surcharged against a stranger for putting his beasts on the common, it was held he might recover; and it being objected that the plaintiff had shown no damage, *Buller, J.*, said, "There is also another ground on which this action may be supported, which is, that the right has been injured; and if a commoner cannot bring such an action as this, because his cattle had grass enough to prevent them from starving, he must permit a wrong doer, like the defendant, to gain a right by the length of possession" (14).

(a) Blanchard & Another, plaintiffs in error, v. *Baker & Another*, 1832. 8 Greenleaf's Reports in the Supreme Court of Maine.

(b) 4 T. R. 71.

(14) In *Tucker* v. *Jewett*, 11 Conn. R. 311, the facts appear from the opinion of the court, which was delivered by Church, J. as follows: "For more than fifteen years before either the plaintiff or defendant became a proprietor upon this stream of water, called Beaver Brook, and before any other water-works or machinery were erected thereon, except perhaps the old saw-mill, a grist-mill had been erected upon the site of the plaintiff's present saw-mill, which, together with a dam and pond appurtenant, had been continued and occupied; and the water of said stream, as it flowed in its natural and unobstructed course, for the use of said mill, had been, during all that time, used and appropriated, by one Roswell Marsh, and those from whom he had derived title. The plaintiff claims title under Roswell Marsh. Marsh and those under whom he claimed, also, during the same time, owned the small piece of land, at the outlet of the pond, from which said stream issued, on which was a small dam for the use of said grist-mill below; and at the same time, he owned the land on both sides of said stream, which was sit-

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This doctrine of *Buller*, J., was commented on and recognized as law by *Grose*, J., in *Pinder* v. *Wadsworth* (*a*), and is consistent with the judgment of the Court of Common Pleas in a recent important case (*b*).

The correctness of the principle laid down by *Buller*, J., has been questioned, but only on the ground of its applicability to the particular case then before the Court—as an action might, at all events, have been maintained by the lord, and the acquisition of a title by the wrong doer thus prevented; and

*174 that to allow *such an action by a commoner, without special damage, would tend to a multiplicity of suits. "The law," says Mr. Serjeant Williams, citing the case of *Hobson* v. *Todd*, and *Pinder* v. *Wadsworth*, "considers

(*a*) 2 East, 161. (*b*) *Bower* v. *Hill*, 1 Bing. N. C. 555.

uated below the land of Lomar Griffin, and on which said grist-mill and dam were, as well as a saw-mill, standing some distance above the grist-mill.

If Marsh acquired no special right of water in this stream, as first occupant, it is very certain, that by his unmolested use and appropriation of the water, for the use of his grist-mill, for more than fifteen years, he acquired such a right by prescription, which he would convey to others. *Sherwood* v. *Burr*, 4 Day, 244. *Ingraham* v. *Hutchinson*, 2 Conn. Rep. 584. *King* v. *Tiffany*, 9 Conn. Rep. 162. *Buddington* v. *Bradley*, 10 Conn. Rep. 213.

This right, whether it be a special one, or only the natural right of every riparian proprietor, to use flowing water ut currere solebat, having once existed, as an appurtenant to the grist-mill, has come, along with said grist-mill, to the plaintiff, exists in him, and may be vindicated and claimed by him, for the use of his present saw-mill, standing upon the same site, unless the defendant, who is now a proprietor of the trip-hammer shop and dam above, on the stream, can establish the fact that he now has, either by grant, license or prescription, a right materially to diminish the quantity of water, or to obstruct it in its passage to the plaintiff's mill, or that, in some way, the right once existing in Roswell Marsh has become extinguished or modified. *Wright* v. *Howard*, 1 Sim. & Stu. 190. *Mason* v. *Hill & al.* 3 B. & Adol. 304. (23 Serg. & Lowb. 76.) S. C. 5 B. & Adol. 1. (27 Serg. & Lowb. 11.)

The defendant, conceding this position, does claim, that such has been the legal operation and effect of some of the deeds read in evidence at the trial, that the right once existing in Roswell Marsh never vested in the plaintiff; and that if it did, it has since become extinguished, and therefore, the defendant objected to the whole of the evidence offered by the plaintiff. It becomes necessary, therefore, to examine, with some care, the deeds in question, with reference to their operation upon the plaintiff's claims.

The first deed is from Lomar Griffin to Jewett, the defendant and John P. Oviatt, dated July 27th, 1813. This deed conveys one acre of land, the same upon which the trip-hammer shop of the defendant stands, and upon which the dam of which the plaintiff complains, was some years afterwards erected. At the date of this deed, Roswell Marsh owned the outlet of the pond, as well as the land and privileges of water now in controversy, and had, at that time, used the water as the

the right of the commoner as injured by such an act, and therefore allows him to bring an action for it, to prevent a wrong doer from gaining a right by repeated acts of encroachment" (*a*).

By the Civil Law a servitude of water flowing in its accustomed course might be obtained by the enjoyment of a stream of water, during the requisite period; and although, originally, no such right could be valid, unless binding upon the owner of the land in which the spring rose; yet this rule was afterwards relaxed (*b*). Such a servitude appears to have been valid if the water increased the value of the dominant estate, or was capable of being appropriated to a purpose of utility (*c*), or even of pleasure (*d*).

(*a*) 1 Wms. Saund. 346 b, note.

(*b*) Servitus aquæ ducendæ vel hauriendæ, nisi ex capite vel ex fonte, constitui non potest; hodie tamen ex quocunque loco constitui solet.—L. 9. ff. De serv. præd. rust.

Si aquam per possessionem Martialis eo sciente duxisti, servitutem exemplo rerum immobilium tempore quæsisti.—C. L. 2. ff. De serv. et aqua.

(*c*) Si manifeste doceri possit jus aquæ ex vetere more atque observatione per certa loca profluentis utilitatem certis fundis irrigandi causa exhibere; procurator noster ne quid contra veterem (formam) atque solemnem morem innovetur, providebit.—Ibid. L. 7.

Labeo scribit, etiamsi Prætor hoc interdicto de aquis frigidis sentiat; tamen de calidis aquis interdicta non esse deneganda: namque harum quoque aquarum usum esse necessarium; nonnunquam enim refrigeratæ usum irrigandis agris præstanthis: accedit, quod in quibusdam locis, et quum calidæ sunt, irrigandis tamen agris necessariæ sunt—ut Hierapoli: constat enim apud Hierapolitanos in Asia agrum aqua calida rigari. Et quamvis ea sit aqua, quæ ad rigandum non sit necessaria, tamen nemo ambiget his interdictis locum fore.—L. 1. § 13. ff. De aqua quot. et æst.

(*d*) Hoc jure utimur ut etiam non ad irrigandum, sed pecoris causa vel amænitatis, aqua duci possit.—L. 3. Ibid.

plaintiff now claims it, for more than fifteen years. Lomar Griffin, the grantor in this deed, owned the land on both sides of this stream, below the small dam at the outlet of the pond, and above Roswell Marsh's land, on which the plaintiff's mill stands; but he owned no special water rights, nor any rights which could conflict with the then established rights of Marsh: of course, he could convey none. Nor did he attempt to do it; he conveyed only a parcel of land on both sides of the stream. John P. Oviatt, by his deed, dated March 4th, 1815, conveyed his interest in the same parcel of land, to the defendant.

The deeds next relied upon by the defendant, as supporting his claim, are the deeds from Roswell Marsh to Benjamin Tucker, the plaintiff, Allen Jewett, the defendant, and John P. Oviatt, dated July 11th, 1814, and the several deeds of partition made by these grantees, on the 23d of September, 1814. The aforesaid deed from Marsh, conveys all the land, mills, and such privileges of water as he owned, to the aforesaid persons, as tenants in common. At that time, he owned

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* 175 * It has been already seen, with regard to running water, that every proprietor on its banks has a right to claim that the stream should run on in its accustomed course. This applies as well to the right to discharge the water as to receive it, each proprietor standing in the relation of both dominant and servient to the proprietors above and below him.

In addition to the negative easement already considered—the right to receive flowing water in its accustomed course—other rights of an affirmative nature, the object of which is to interfere with the natural course of the stream, may be acquired by user over a stream flowing through a man's land. Thus a right may be acquired to throw back upon the land of proprietors higher

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the grist-mill and water privileges now claimed by the plaintiff; also, the saw-mill and privilege standing above; and above the small piece of land at the outlet of the pond, as well as other lands lying on the stream below the defendant's trip-hammer shop. These grantees, now being joint owners of the grist-mill and privileges, had power to divert the water or obstruct it, so as to destroy the grist-mill privilege, or to render it subservient to any other use of the water. But they did not exercise such power; they permitted the water still to flow, unobstructed, for the use of the grist-mill, in the same manner as it had done for more than fifteen years before. Instead of impairing or destroying this privilege, they recognised its existence while joint owners, and, as will be seen, confirmed it, in their subsequent partition. The partition deed, executed by the plaintiff and Oviatt to the defendant, does not interfere with the grist-mill privilege, but on the contrary, recognises it, and reserves it unimpaired.

By this deed, the defendant becomes entitled in severalty to the property bought of Roswell Marsh, "excepting the grist-mill and saw-mill, with the privileges of water and mill-yards for the same, that is below the trip-hammer shop." This reserved privilege is the same which was acquired and owned, by Roswell Marsh, for his grist-mill and saw-mill, and the same now claimed by the plaintiff. The defendant and Oviatt, in their partition deed to the plaintiff, convey to him the grist-mill and pond, without any reservation of privileges. The plaintiff and defendant, at the same time, apart and convey to Oviatt, the old saw-mill and site above the grist-mill, with the privileges of mill-pond and other privileges. These several deeds, executed at the same time, and intended as a partition of the common property, must be treated and construed as one conveyance, in which there is reserved and confirmed in the plaintiff a well known and long established right, with nothing to impair it. It is the same right, which the plaintiff now seeks to protect and enforce. The defendant has not reserved, nor pretended to create, for the benefit of his trip-hammer shop, any other or greater privilege than was appurtenant to it before.

It was quite earnestly insisted, by the defendant, that the expressions in the deed from Jewett and Oviatt to Tucker, and in the deed from Tucker and Jewett to Oviatt, "with one half of the privilege of the fall of the water from Allen Jewett's trip-hammer shop to the grist-mill," so divided and aparted, or in some way affected the old grist-mill privilege, as to secure equal rights of water to each of these former tenants in common. It is not entirely certain, what precise ob-

up the stream, the water which, unless so reflected, would, by the force of gravity, pass from it; or to discharge the water upon the land lying lower down the stream, either injured in quality, or with a degree of force greater or less than the natural current.

The right claimed by the defendant in *Saunders* v. *Newman*, already cited, is an instance of the former class of affirmative easements (*a*).

In *Wright* v. *Williams* (*b*), it was held that a right to let off upon the neighboring land water which had been used for the precipitation of minerals, and was thereby rendered noxious, was an easement, and might be acquired like any other easement by user.

(*a*) Ante, p. 144; 1 B. & Ald. 258. (*b*) 1 M. & W. 77.

ject the parties had in contemplation, by the use of this language; but it is quite certain, we think, that they did not intend thereby to curtail any privileges which had been appertained to either the grist-mill or saw-mill, at least, no reasonable construction of the language used, imports any such intent. If we were to indulge in conjecture, we might very well believe from the facts in the case, that the grist-mill and saw-mill were ancient, and equally entitled, by prescriptive right, to the use of the water in the stream; and that the intent of the parties was, to preserve this equality of right unimpaired. The plaintiff having afterwards purchased the old saw-mill and its privileges of Oviatt, became entitled to the whole right.

But still the defendant claims, that if the right claimed by the plaintiff has ever existed in him, since said partition, it has become extinguished, by the operation and effect of the deed from the defendant to the plaintiff and Roswell Marsh, dated May 21, 1817. By this deed, the defendant conveyed to the plaintiff and the said Marsh, all the land he owned upon said stream, including the trip-hammer shop and the land on which it stands, and where the defendant's dam has since been erected, which causes the obstruction complained of. After the execution of this deed, the plaintiff was sole owner of the grist-mill and privileges, and tenant in common with Marsh, of the trip-hammer shop and privileges attached to it. The defendant insists, that the effect of this state of the title, was, to create such a unity of title to these mills and privileges in the plaintiff, as to merge and extinguish all former or special rights and privileges appurtenant to the grist-mill, and which have never since been restored or waived. Whatever the law might be, if the plaintiff had become sole owner of the trip-hammer shop and privileges, we should hesitate much before we yielded to the claim made here, that his sole and permanent right at the grist-mill had become extinguished, by his becoming tenant in common with another in the up-stream privilege. It is not known, that in cases where the doctrine of extinguishment, by reason of unity of title, applies, it has ever been extended as far as this. We may remark, as we have done before, that the plaintiff and Marsh, by unity of action, might have rendered the grist-mill privilege subservient to the convenience of the trip-hammer shop; for the plaintiff might have yielded his sole rights for the benefit of the tenants in common. But no such surrender was made or claimed: on the contrary, the co-

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Though every one in building is bound so to construct his house as not to overhang his neighbor's property, and construct his roof in such a manner as
*176 not to throw the rain water upon the neighboring land (*a*), * yet there appears to be authority in our law for the position, that a man may acquire a right, by user, to project his wall or eaves over the boundary line of his property, or discharge the rain running from the roof of his house upon the adjoining land.

The existence of such a right, both as to the eaves and water droppings, is recognized by the Court of Exchequer in *Thomas* v. *Thomas* (*b*).

There are ancient decisions, recognizing the same easement, in the case of

(*a*) 11 Hen. 7, f. 257. (*b*) 2 Cr. M. & Ros. 34.

tenants recognized the preferable privileges of the grist-mill, and did not attempt to deny or interrupt them, but suffered the water to flow on, in its accustomed manner, for the use of that mill.

But if the plaintiff had become sole owner of the trip-hammer shop, and all the land above his grist-mill privilege, it would not have operated to extinguish his former rights; at most, it would only suspend them. Nor do we clearly discover how it could even do this. To give effect to this claim of the defendant, it is necessary, that he should assimilate the plaintiff's rights to mere easements or servitudes; such as rights of way over another's close; or any other rights which exist on the estate of one man for the benefit of another. In such cases, to be sure, unity of title will frequently either extinguish or suspend the easement. 3 Kent's Com. 360. And such is the case of *Manning* v. *Smith*, 6 Conn. Rep. 209., upon which the defendant more especially relies; a case in which the plaintiff claimed a right of diverting the water upon the defendant's land, from its natural course, and of conducting it through the defendant's land to his own. But the present is a case of a very different character. The plaintiff here claims no rights or easements, in the defendant's land. To acquire an easement by user, such user must be adverse, and in hostility to the rights of the owner of the land upon which it is claimed to exist. But the right claimed by the plaintiff, if it did not arise from prior occupancy and appropriation of the water, was acquired simply by such user and appropriation for the term of fifteen years, although such user was not so adverse as to have been an usurpation of the rights of others. *Ingraham* v. *Hutchinson*, 2 Conn. Rep. 584. The right claimed by the plaintiff, is a natural right, arising ex jure naturæ, and not strictly an easement.

There is, also, a distinction between rights which are of necessity, and mere easements. The former, although they may perhaps be suspended, during the existence and continuance of unity of title or possession, are not extinguished by such unity. Noy, 84. *Nicholas* v. *Chamberlain*, Cro. Jac. 121. Bull. N. P. 74. Poph. 172. 3 Bulst. 339. 1 Roll. Abr. 936. *Whalley* v. *Thompson & al.* 1 Bos. & Pul. 371. in notis. 3 Taun. 24. 2 Chitt. Bla. 26. Chancellor Kent says: "Nor is a water-course extinguished, by unity of possession, and this from the necessity of the case and the nature of the subject." 3 Kent's Com. 360. And Mr. Chitty, in considering this subject, remarks, that "there is a peculiarity relating to a

a discharge of water on the neighboring land by means of a gutter or leaden pipe (*a*).

"If a man hath a sue, that is to say, a spout, above his house, by which the water used to fall from his house, and another levies a house paramount the spout, so that the water cannot fall as it was wont, but falls upon the walls of the house, by which the timber of the house perishes, this is a nuisance" (*b*).

These two classes of easements are distinctly recognized by the Civil Law, under the head of Urban Servitudes, "that a man shall receive upon his house or land the flumen or stillicidium of his neighbor" (*c*).

"The difference," says Vinnius in his Commentary on this passage, "be-

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(*a*) *Lady Browne's case*, cited in *Shury* v. *Pigott*, Palmer, 446; Comyn's Dig. Action on the case for Nuisance, A.; *Baten's case*, 9 Rep. 50, n. (b).

(*b*) Viner, Abridg. Nusance, G. 5, citing 18 Ed. 3. 22 b; Rolle Abr. Nusans, G.

(*c*) Ut stillicidium vel flumen recipiat quis in ædes suas vel in aream vel in cloacam.—I. L. 1. ff. de serv. præd.

claim of this nature, viz., that it never was destroyed, by unity of seisin of the land and water, and of the place in respect of which the use of the water was claimed; the law admitting an exception to the general rule, on account of the uncontrolable nature of water; and that the claim to water is not strictly, by grant or prescription, but *ex jure naturæ*." 1 Chitt. Gen. Pr. 215. Judge Story, in reviewing this question and the cases relating to it, in the case of *Hazard* v. *Robinson*, 3 Mason 276. expresses very nearly the same sentiments.

Upon this examination of these various deeds, we have discovered nothing, by which, in our opinion, the plaintiff is precluded from insisting upon the grist-mill privilege, as it existed in Roswell Marsh, before and at the time of his conveyance to Tucker, Jewett and Oviatt. We do not believe this privilege has been impaired, by any of the deeds read in evidence, nor extinguished, by an unity of seisin or title. Of course, we are of opinion, that the plaintiff's evidence in support of his claim, was admissible.

It was, however, suggested, that the deed from the plaintiff and Roswell Marsh to the defendant, dated September 9, 1822, by which they re-conveyed to him the same property which they had received from him, by his deed of May 21, 1817, in some way, had impaired the grist-mill privilege, or had conferred upon the defendant the rights which he has since claimed to exercise. It should here be recollected, that when this re-conveyance was made, the defendant had not erected the dam and obstruction, of which the plaintiff complains: they did not exist, at that time; nor had the defendant, at that time, claimed any thing to obstruct the water, to the injury of the plaintiff; so that the defendant acquired no new or additional rights, by virtue of this deed.

A question of much importance was suggested at the bar, which our opinion

tween the flumen and the stillicidium is this—the former is the rain falling from the roof by drops (guttatim et stillatim); the *flumen*, is when it is poured
* 177 forth in a continuous stream from the * lower part of the building. The servitude of receiving the *stillicidium* exists when my neighbor is compelled to receive upon his house the rain water running from my roof; the servitude of receiving the *flumen*, when he is compelled to receive the same flowing in a channel or conduit, and falling with force on his house."

The Civil, as well as the English law, prohibited a man from projecting the wall or roof of his house over the boundary line of his neighbor's land, even though, by spouts, or other means, the fall of water therefrom might be pre-

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upon other controling parts of the case, has rendered it unnecessary for us to decide. The plaintiff claimed, that if the rights of Roswell Marsh did not exist in him, the plaintiff, but had been destroyed, by the operation of some of the deeds; yet that from the 9th of September, 1822, when he and Marsh re-conveyed the trip-hammer, &c. to the defendant, until the obstruction complained of, a period of about twelve years, he had used and appropriated the water of this stream, for the use of his saw-mill, standing upon the grist-mill site, without molestation, in its natural channel and course; and that he had a right and claim to be protected in his appropriation and enjoyment of the water, ut currere solebat; and that neither the defendant, nor any other person, had a right, either to divert or obstruct the water to his essential injury. Upon this question, there are to be found conflicting opinions; and there are many cases which go very far, if not entirely, to support this claim of the plaintiff. 2 Bl. Com. 403. 2 Woodeson, 391. *Cox* v. *Matthews*, 1 Vent. 237. *Hatch* v. *Dwight*, 17 Mass. Rep. 289. *Striker* v. *Todd*, 10 Serg. & Rawle, 69. 3 Kent's Com. 358. *Williams* v. *Moreland*, 2 Barn. & Cres. 910. (9 Serg. & Lowb. 269.) *Mason* v. *Hill*, 3 Barn. & Adol. 304. (23 Serg. & Lowb. 76.) S. C. 5 Barn. & Adol. 1. (27 Serg. & Lowb. 11.) *Frankum* v. *Earl of Falmouth*, 6 Oarr. & Payne, 529. (25 Serg. & Lowb. 526.) *Buddington* v. *Bradley*, 10 Conn. Rep. 219. *King* v. *Tiffany*, 9 Conn. Rep. 166. *Palmer* v. *Mulligan*, 3 Caines, 307. *Platt* v. *Johnson*, 15 Johns. Rep. 213. Angell on Water-Courses, 39, 69. *Tyler* v. *Wilkinson*, 4 Mason, 401. *Martin* v. *Bigelow*, 2 Aikins' Vermont Rep. 184. 3 U. S. Law Intelligencer, 164. *Buller* v. *Reynolds*, 2 N. Hamp. Rep. 257. *Tinkam* v. *Arnold*, 3 Greenl. 120.

The defendant also claimed, that admitting the right of the plaintiff, yet as the defendant had also a right, as riparian proprietor, to use the water of the stream, he had a right, reasonably to use it, for the purpose of his trip-hammer shop, even if the plaintiff was subjected to some inconvenience and damage thereby. And exceptions are taken, by the defendant, to the charge of the judge at the trial, because this claim was not recognized by him, as the law of the case. The defendant, in support of this claim, relied much upon the case of *Platt* v. *Johnson*, 15 Johns. Rep. 213. It does not become necessary, in this investigation, to suggest a doubt of the correctness of any position assumed by the court, in that case;

vented: but a right to do so might be acquired by user; and when such projection did not, in any manner, rest upon the neighbor's soil, it was called *jus projiciendi;* where the projection was merely intended to protect the wall, either by creating shade against the heat of the sun, or keeping off the rain, it was the *jus protegendi.* "There is this difference between the right of projecting over and that of placing upon the neighbor's property—that the projection is carried out (proveheretur) in such a manner as not to rest anywhere (nusquam requiesceret), as a balcony or eaves; while the thing 'placed upon' is so put as to rest on something, 'as a beam or rafter' (*a*).

By the term water-course, is usually understood a stream of water flowing above ground; but questions of a similar nature arise with reference to the right to *water flowing in a subterraneous channel. In the case of a *178
well, it is known that the supply of water is in general furnished by percolation through the neighboring soil, so that the digging of a deeper well therein will divert the water from its course, and thus dry up the former well. If the right to water thus percolating is identical with that to water flowing above ground, it is manifest that ancient possession would be unnecessary to confer a title to water flowing to a well, in the course of nature, from a superior elevation; the mere act of sinking the well would be sufficient evidence of an intention to appropriate the water flowing beneath his soil.

(*a*) Inter projectum et immissum hoc interesse ait Labeo: quod projectum esset id, quod ita proveheretur ut nusquam requiesceret, qualia mæniana et suggrunda essent; immissum autem, quod ita fieret ut aliquo loco requiesceret, veluti tigna, trabes, quæ immitterentur.—L. 242. § 1. ff. de v. s.

as, in our opinion, none of them conflict with any principle recognized by us, in this. We have placed the claims of the plaintiff entirely upon his prescriptive rights, or such as were acquired by an uninterrupted use and appropriation of the water, for more than fifteen years. In the case of *Platt* v. *Johnson*, the plaintiff relied merely upon prior occupancy; and the counsel for the defendant notices what he supposed was a material distinction in this particular, and says: "A purchaser of land, over which a stream of water runs, acquires a right to use the water in a reasonable manner, for the ordinary purposes of mills and machinery; there being no ancient right or prescription in the case. And if, in the reasonable use of the water for such purposes, the owner of land below suffers any damage, it is *damnum absque injuria.*" And Thompson, Ch. J., in giving the opinion of the court, acquiesces in the correctness of this distinction, and justifies the defendant in a partial diversion of the water, says: "Nor is there any pretence, that the plaintiff had been so long in the previous use and enjoyment of this stream, as to afford the presumption of a grant of the same beyond the boundaries of his own land."

The objections to this view of the case are, that the ancient flow of a stream without interruption by the occupant of land above, is evidence of his assent to the continuance of such flow; but that, with regard to under-ground filtrations, as their course,—and even their very existence—may be unknown to him, no such presumption ought to be drawn; because, as has been already shown, such a presumption ought not to be furnished by any enjoyment which is had either "*vi—clam*—or *precario*." Moreover, supposing such actual knowledge to exist, it is difficult to see in what manner he could prevent the right being acquired; he could clearly maintain no action; and, in the majority of instances, he could not indicate his dissent by cutting off the veins supplying the neighboring well or fountain, without serious detriment to his own property. A further objection to an easement of this kind arises from the indefinite nature and great extent of the obligation which would be imposed by

*179 it: instances have occurred *where excavations have had the effect of draining land, although at the distance of some miles.

In *Cooper* v. *Barber* (*a*) the defendant had, for many years past, penned back a stream for the purposes of irrigation, the consequence of which was, that the water percolated through the neighboring soil; the Court appear to have been of opinion, that no right to cause such percolation was acquired by the user, and that the adjoining owner, on receiving injury from it upon erecting a house, might bring an action for it.

A more recent case (*b*) appears to be somewhat at variance with this doctrine; it may, however, be observed, that the correctness of the ruling of Lord *Ellenborough*, at *Nisi Prius*, could not be questioned, as the cause was compromised. "The plaintiff and defendant were respectively owners of adjoining closes on the banks of the river Medway. As far back as could be recollected, there had been a gush of water from a hole in the plaintiff's close, which used to run from thence, on the surface of the ground, to the river. About twenty-seven years before the action was brought, a bath was erected by the then occupier of the close near where the spring issued forth, and the water was conducted into it by a pipe. From that time till the present cause of action arose, the bath was amply supplied with water, and a considerable profit was derived from letting out the use of it to the public. In 1805 (the action being brought in 1808), the plaintiff purchased this close, and erected a

180 paper manufactory upon it, for which a copious supply of spring water is essentially requisite. About the same time, the defendant becoming owner of the adjoining close, opened a stone quarry in it. As the excavations proceeded, considerable quantities of water were found, which interrupted the

(*a*) 3 Taunt. 99.

(*b*) *Balston* v. *Bensted*, 1 Camp. 463.

workmen. A deep drain was afterwards made to carry it off into the river, and the quarry was left dry. But in the meantime, the water flowing into the plaintiff's bath had been gradually decreasing, and subsequently to the making of the drain, did not amount to more than an eighth or tenth part of its former quantity." For this diversion the action was brought. "The defence intended to be set up was, that the plaintiff had no exclusive right to the supply of water he claimed, as the principle on which twenty years' enjoyment of running water confers a right to it, appeared from the cases to be, that, after an adverse possession for so long a time, a grant was to be presumed from the owners of the land further up the stream; and such a grant could not be presumed here, as, previously to the drain being made, probably no individual knew that the plaintiff's spring was fed by water percolating through the strata in the close now occupied by the defendant." But Lord *Ellenborough* ruled, "That the only question was, whether the diminution of the supply of water to the plaintiff's bath had been caused by the drain dug by the defendant; and that there could be no doubt but that twenty years' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it." It was afterwards agreed, on the recommendation of the Court, that the water should be conveyed from the defendant's quarry to the *plaintiff's bath in the manner to be di- *181 rected by an arbitrator, and a juror was withdrawn.

The proposition laid down by Lord *Ellenborough* in the above case, appears to include under the same general rule water-courses of all descriptions, whether the stream flows in the ordinary manner above ground, or only emerges after having made its way through the adjoining land below the surface of the earth.

By the Civil law every man had a right to dig in his own land for the purpose of improving it, although he should thereby intercept the water which supplied his neighbor's fountain (*a*).

With regard to water-courses altogether artificial, there seems no reason to doubt that the long-continued submission of the servient owner to the dis-

(*a*) Marcellus scribit, cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi nec de dolo actionem: et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.—L. 1. § 12. ff. de aq. et aq. pl. arc.

Si in meo aqua irrumpat quæ ex tuo fundo venas habeat; si eas venas incideris, et ob id desierit ad me aqua pervenire, tu non videris vi fecisse, si nulla servitus mihi eo nomine debita fuerit; nec interdicto 'Quod vi aut clam' teneris.—L. 21. ff. de aq. et aq. pl. arc.

Vide etiam L. 24. § 12. ff. de damno infecto.

charge of water upon his tenement, or to the conducting of it through his land by the owner of the dominant tenement, will confer the right to continue the discharge of the water, or to receive the supply of it.

A question of much greater difficulty arises in the case of a discharge of water, when the servient owner seeks to compel the dominant to continue it, and to prevent him from altering its course, and thus attempts to invert their relative positions, and himself to become dominant.

*182 The chief objection to such a claim is, that there is no *submission (patientia), by the dominant owner to the enjoyment of the water had by the servient—he discharges the water for his own convenience, and to what the other may apply it when so discharged is immaterial to him—he has no means of preventing such an application but by discontinuing the discharge, and thus depriving himself of the benefit of his own easement.

It may be said that, according to this argument, the party discharging the water could acquire no right where the other party immediately on receiving it applied it to some useful purpose—as the latter had submitted to it only because it was advantageous to himself. The answer to this objection is, that there is a submission by the receiving party, which does not exist in the case of the discharging party. The active step, the immission of water, is the act of the latter. It is optional with the servient owner to submit to the immission or to oppose it. The motives which influence him to do one or the other are immaterial. The real inquiry in such cases must be by whose act the water was first caused to flow.

Supposing it to be unknown by which party the flow of water was caused, and that the flow is beneficial to the owners of both tenements,—to the one by the discharge, to the other by the use to which he puts the water on receiving it,—it would probably be presumed that a reciprocal easement did exist.

The recent and important case of *Arkwright* v. *Gell* (*a*), turned upon the right of the party receiving water drained from a mine, to compel the owners of the mine to continue such discharge. The Court decided that no such right existed in that case.

*183 *Independently of this general question, it would rather appear upon the facts of that case, that there was no "perpetua causa," the flow of water being of a temporary nature only; it also seems by no means clear, that the easement claimed would not have imposed the obligation not only "pati aut non facere," but also to do something positive—to continue the mining operations. If this be so, if the flow of water would not have continued in the manner desired by the plaintiff, supposing the mines to be abandoned, it is

(*a*) Exch. E. T. 1839.

clear that the obligation thus sought to be imposed was directly opposed to the legal constitution of easements (*a*).

On the other hand, if this be not the real state of the facts—if the water would continue to flow from the mines in their then state, without any further act of man, it is rather difficult to see the applicability of the illustration, used in the judgment of the Court, of water made to flow by a steam-engine. In this view of the facts, the right claimed by the plaintiff was obviously merely a negative easement, imposing on the servient owner merely an obligation "not to do" any thing to the prejudice of it *(non facere)*.

"The plaintiffs in this case," said Mr. Baron *Parke*, on delivering the judgment of the Court of Exchequer, in the case of *Arkwright* v. *Gell*, "are the occupiers of certain cotton mills at Cromford, in the county of Derby, and complain of an illegal diversion by the defendants of the water to which they were of right entitled for the supply of their mills. The defendants by their pleas deny that right, and also insist that they have not been guilty of any illegal diversion. A special case was reserved on the trial for the opinion of the *Court, who are also to draw any inference of fact, which a jury *184 might, or ought to draw.

The case appears to be this: In the beginning of the last century, certain adventurers had in part constructed, and were proceeding to continue a sough, now called the Cromford Sough, for the purpose of draining a portion of the mineral field in the wapentake of Wirksworth. How they acquired the right to make that sough is not stated; it was, however, without doubt, either by virtue of the custom of mining there prevalent, or by the express license of the owner of the soil through which it was made. The adventurers received their remuneration in the shape of a certain portion of the ore raised from the mines within the level lying above and benefitted by the sough, (technically called, within the title of the sough), in consequence of an agreement with the proprietors of the mines. The right to this easement, with its accompanying advantages, appears to have been the subject of sale and conveyance in that district; for in 1738 the then proprietors leased it for 999 years for a pecuniary consideration, with a reservation by way of rent of a part of the profits. Mr. Arkwright, under whom the plaintiffs claim, and all whose rights they may be assumed to have, became in 1836 the purchaser of the reversion expectant on the determination of that lease, and he also acquired a portion of the interest of the lessees by a conveyance from some of them. It does not appear to us that this circumstance affects the question between the parties to this suit. After the sough had been constructed, and a constant flow of water thoroughly conducted from the mines, the late Sir Richard Arkwright, the father of Mr. Arkwright, obtained, in the year 1771, a lease for eighty-four

(*a*) See ante, p. 7; and post, Incidents of Easements.

*185 years, from the lord * of the manor of Cromford, (who upon the special case is alleged to have been the owner of the land through which the Cromford Sough was made, and also the owner of a piece of land between the mouth of the sough and the brook into which the water was conveyed), of that piece of land, the brook and the "stream of water issuing and coming from Cromford Sough," with the right of erecting mills on the piece of land. In 1772, Sir Richard Arkwright erected extensive cotton mills thereon, and in April, 1789, he purchased that land and the fee-simple in the mills and the manor of Cromford, including the lands through which the Cromford Sough was made. In the mean time another company of adventurers had begun to construct another mining sough, called the Meerbrook Sough, on a much lower level in the adjoining township of Wirksworth. The defendants represent and have all the rights of that company of adventurers, and must, like the proprietors of the Cromford Sough, be assumed to have acted, either by virtue of a mining custom or by express license of the owner of the soil, confirmed by the Cromford Inclosure Act in 1802, and also to have had the authority, prior or subsequently, of the owners of mines drained by that sough, and contributing a certain portion of the ore by way of recompense. These facts are not distinctly found, but we think we must infer that such was the case, and consequently that the defendants stand in the same relation to the plaintiffs as if the owners of those mines had themselves, with the consent of the owner of the soil, constructed the sough for the purpose of freeing their mines from water; for whether they make the sough themselves, or through the agency of the adventurers, is immaterial. In 1813 the defendants, being

*186 themselves proprietors of mines * drained by it, extended the Meerbrook Sough, having made an agreement with the then proprietors of the Cromford Sough, and of other mines unwatered by it, and which appears to have been then worked down to the level of that sough, for the purpose of regulating their respective rights, and the recompense to be paid by the latter to the former set of adventurers for the benefit to be derived by them from the extension of this sough, and the unwatering by means of it of a further portion of their mineral field below the level of the former sough. The new sough was, therefore, constructed by the consent of some, if not of all those mine owners who had formerly used the Cromford Sough, and in part for their benefit; and this circumstance places the defendants in the same position in respect to the diversion of the surplus water, as if they themselves had been owners of part of the mineral field formerly drained by the Cromford Sough, and were now proceeding to unwater a further portion of the same field by means of the new sough. When the Meerbrook Sough was thus extended, the water was found to flow into it, and flood-gates were constructed at the end, the closing of which prevented the water from finding its way in that direction, but which, when opened, let off the water which would otherwise have been discharged by the Cromford Sough, and thereby pre-

vented it from flowing to the plaintiff's mill. In 1825 an arrangement was made for the mutual accommodation of Mr. Arkwright and the Meerbrook Sough proprietors, which was not to affect their rights, and which, having been determined in 1836, left them in the same situation as if it had never been made; and the gates being removed in order to carry the sough further in that direction, and the water thereby diverted from the *plaintiff's *187
mills, the defendants are in the same position as if no flood-gates had ever been made, and as if in the construction of their sough for the purpose of draining another portion of the mineral field, they had broken the natural barrier which pent the water up and made it flow through the Cromford Sough, and so caused the water to pass out at a lower level through the Meerbrook Sough, and the question is—whether the defendants by so doing are rendered liable to an action at the suit of the plaintiffs. This question, which was most elaborately and ably argued during the last term, appears to us, strictly speaking, to be one as much of fact as of law; and, when the situation of both parties is fully understood, does not appear to us to be one of much doubt or difficulty. The stream upon which the mills were constructed was not a natural water-course, to the advantages of which flowing in its natural course the possessor of the land adjoining would be entitled, according to the doctrine laid down in *Mason* v. *Hill* (*a*) and in other cases; this was an artificial water-course, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable the proprietors to get the ores which lay within the mineral field drained by it; and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only while the convenience of the mine-owner required it, and in the ordinary course it would most probably cease when the mineral laid above its level should have been extracted. That Sir Richard Arkwright contemplated (if the question of his knowledge in this state of things can be material), the discontinuance of this water-course, there *is evidence in the lease made in 1771, which contains a provision *188
for a supply from the rivers, in the event of the stream being lessened or taken away by the construction of another sough; and also, that such an event was not improbable, appears from the clause in the 2d Cromford Canal Act, 30 Geo. 3, c. 56, s. 4. What, then, is the species of right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a water-course at common law, and independently of the effect of user, under the recent statute 2 & 3 Will. 4, c. 71? He would only have a right to use it for any purpose to which it was applicable so long as it continued there. An user for twenty years, or a longer time, would afford no presumption of a grant of the right to the water in perpetuity, for such a grant

(*a*) 5 B. & Adol. 1.

would, in truth, be neither more nor less than an obligation on the mine-owner not to work his mines, by the ordinary mode of getting minerals, below the level drained by that sough, and to keep these mines flooded up to that level, in order to make the flow of water constant, for the benefit of those who had used it for some profitable purpose. How can it be supposed that the mine-owners could have meant to have burthened themselves with such a servitude, so destructive to their interests; and what is there to raise an inference of such an intention? The mine-owner could not bring an action against the person using the stream of water, so that the omission to bring an action could afford no argument in favor of the presumption of a grant; nor could he prevent the enjoyment of that stream of water by any act of his, except by at once making a sough at a lower level, and thus taking away the

*189 water entirely—a course so *expensive and inconvenient, that it would be very unreasonable, and a very improper extension of the principle which applies to the case of lights—to infer from the abstinence of such an act an intent to grant the use of the water in perpetuity, as a matter of right. A steam-engine is used by the owner of a mine to drain it, and the water pumped up flows in a channel to the estate of an adjoining land-owner, and is there used for agricultural purposes for twenty years. Is it possible from the fact of such an user to presume a grant by the owner of the steam-engine of the right to the water in perpetuity, so as to burthen himself and the assigns of his mine to keep a steam-engine for ever, for the benefit of the land-owner? Or if the water from the spout of the eaves of a row of houses was to flow into an adjoining yard, and be there used for twenty years by its occupiers for domestic purposes, could it be successfully contended, that the owners of the houses had contracted an obligation not to alter their construction so as to impair the flow of water? Clearly not: in all, the nature of the case distinctly shows that no right is acquired as against the owner of the property from which the course of water takes its origin; though, as between the first and any subsequent appropriation of the water-course itself, such a right may be acquired. And so, in the present case, Sir Richard Arkwright, by the grant from the owner of the surface for eighty-four years, acquired a right to use the stream as against him; and if there had been no grant he would, by twenty years' user, have acquired the like right as against such owner; but the user even for a much longer period, whilst the flow of water was going

*190 on from the *mines, would afford no presumption of a grant at common law as against the owners of the mines.

"It remains to be considered whether the statute 2 & 3 Will. 4, c. 71, gives to Mr. Arkwright, and those who claim under him, any such right, and we are clearly of opinion that it does not. The whole purview of the act shows that it applies only to such right as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires en-

joyment for different periods '*without interruption*,' and therefore necessarily imports such an user as could be interrupted by some one 'capable of resisting the claim;' and it also requires it to be 'of right.' But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode and usage, and then it was not 'of right;' they had no interest to prevent it, and, until it became necessary, to drain the lower part of the field. Indeed, at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it. We therefore think that the plaintiff never acquired any right to have the stream of water continued in its former channels either by presumption of grant, or by the recent statutes, as against the owners of the lower level of the mineral field, or the defendants acting by their authority, and therefore our judgment must be for the defendants."

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* Sect. 2.—*Rights to Light and Air.* * 191

The right to flowing water, it has already been shown, is at all events vested by a single act of perception to a beneficial purpose, provided the stream itself be of sufficient antiquity. The right to light and air seems to depend, however, upon very different grounds. The passage of light and air over lands unincumbered by buildings must necessarily have existed from time immemorial; but the use of the light and air so passing, by means of windows in a house or otherwise, confers no right unless it has been continued during twenty years. The natural rights of the owner of property in this respect seem to be defined by the legal maxim, "*Cujus est solum ejus est usque ad cœlum et ad inferos;*" and the passage of these elements over adjoining land, unlike that of water, affords *per se* no evidence of the enlargement of such right by an easement.

The reception of light and air in a lateral direction is an easement. The strict right of property entitles the owner to so much light and air only as falls perpendicularly on his land. He may build to the very extremity of his own land, and no action can be maintained against him for disturbing his neighbor's privacy, by opening windows which overlook the adjoining property (*a*); but it is competent to such neighbor to obstruct the windows so opened by building against them on his own land, at any time during twenty years after their construction, and thus prevent the acquisition of the easement (*b*); if,

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(*a*) *Chandler* v. *Thompson*, 3 Camp. 82.

(*b*) See per *Littledale*, J., in *Moore* v. *Rawson*, 3 B. & Cr. 340.

however, that period is once suffered to elapse, his long acquiescence becomes * 192 * evidence, as in the case of other easements, of a title, by the assent of the party whose land is subjected to it (15).

In *Penwarden* v. *Ching* (*a*), to an action of trespass for breaking and entering plaintiff's close, and breaking down boards, the defendant justified, because "the boards were obstructing an ancient window of the defendant, through which light and air at all times of right ought to pass, and that defendant entered and removed the same." The plaintiff replied, "that the light and air ought not to enter in a manner to form," &c.

(*a*) Moo. & Mal. 400. A. D. 1829.

(15) *Ancient lights.*—A person who makes a window in his house which overlooks the privacy of his neighbor, enjoys an easement in his neighbor's property, which in time may ripen into a right. But before that time has elapsed which raises a presumption of a grant, his neighbor erects a *fence* upon his own land so as to darken the windows. Held, that the owner of the house can maintain no action for being deprived of that easement, be the motive of deprivation what it may. *Mahan* v. *Brown*, 13 Wend. 261. He is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's property. The Court, by Savage, C. J:—"That an action upon the case lies for stopping the ancient lights of another is too well settled to require discussion or authority to support it. Formerly, indeed, it was holden that the lights must be ancient and beyond the memory of man. And in the case of *Bury* v. *Pope*, Cro. Eliz. 118, it was agreed by all the justices that where two own adjacent lands and one builds and makes windows looking on the lands of the other, and continues for 30 or 40 years, yet the other may lawfully erect on his own soil an house or other thing against said lights, without being liable to an action; for it was the folly of the first to build his house so near the other's land. And the maxim is quoted, *cujus est solum, ejus est summitas usque ad cælum.* Now, however, it is perfectly settled, that as the occupant may acquire a right to the house itself by 20 years uninterrupted possession under claim of title, so in the same time he shall by occupation acquire a right to an easement belonging to the house. Yelv. 216. 2 Saund. 175, a. b. c. It is true that 20 years possession does not strictly confer a right absolutely, but it raises a presumption of a grant. 2 Barn. & Cass. 686. The person who thus opens a window overlooking the privacy of his neighbor, enjoys an easement in that which does not belong to him. Yet no action lies for this encroachment upon the rights of the person whose lands are thus overlooked; the encroachment will in 20 years ripen into a right, and it is said that the only remedy is to build on the adjoining land opposite to the offensive window. 3 Campb. 80.

"The present is not a case of ancient lights. It is not contended that the action can be sustained upon that ground, but upon the principle that no one shall

Nature of casement to light.

It appeared that the window was made in 1807, "under circumstances from which, connected with the subsequent use of it, the jury might presume a grant."

It was contended for the plaintiff, that the plea could not be sustained, as the window was shown not to be an ancient window.

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so use his own property as to injure another. Thus, no man has a right to erect upon his own land, near the house of another, any manufactory which shall poison the air and render it unwholesome. So in *Morley* v. *Pragnell*, Cro. Car. 510, an action was held to lie by an innkeeper against the defendant for erecting a tallow furnace, which annoyed his house with stenches, by reason of which his guests left him, and his family became unhealthful. So in Aldred's case, 9 Co. 48, the plaintiff brought an action against Burton, the defendant, for erecting a hog-house and putting his hogs therein; and by reason of the fetid smells the plaintiff and his family could not remain in his house. The plaintiff recovered. The defendant moved in arrest of judgments that one ought not to have so delicate a nose that he cannot bear the smell of hogs, for they are necessary to the food of man; but it was resolved that the action lay. In these cases, however, it is to be observed that a positive right was invaded. Every person is entitled to the use of the elements in their natural purity, and whoever poisons them or renders them unhealthy, violates that right. The person who makes a window in his house which overlooks the privacy of his neighbor, does an act which strictly he has no right to do; although it is said no action lies for it. He is therefore encroaching, though not strictly and legally trespassing upon the rights of another. He enjoys an easement therefore in his neighbor's property, which in time may ripen into a right. But before sufficient time has elapsed to raise a presumption of a grant, he has no right, and can maintain no action for being deprived of that easement, let the motive of the deprivation be what it may; and the reason is, that in the eye of the law he is not injured. He is deprived of no right, but only prevented from acquiring a right, without consideration, in his neighbor's property. Suppose an obliging farmer permits his neighbor to pass and repass through his field, to go to the lands of that neighbor; if this is permitted for 20 years, it becomes an easement, a right of way, which the owner of the soil cannot infringe; but at the end of ten years, he chooses, from mere malice or wantonness, to shut up this passage, and refuses permission to his neighbor to pass over his lands, as he used to do for ten years past; does an action lie? Most certainly not. And yet that case is not distinguishable, in principle, from that under consideration. The defendant has not so used his own property as to injure another. No one, legally speaking, is injured or damnified, unless some right is infringed. The refusal or discontinuance of a favor gives no cause of action. The plaintiff in this case has only been refused the use of that which did not belong to her; and whether the motives of the defendant's were good or bad, she has no legal cause of complaint.

Tindal, C. J., "The question is, not whether the window is what is strictly called ancient, but whether it is such as the law in indulgence to rights has in modern times so called, and to which the defendant has a right, for this is the substance of the plea."

Some doubt appears to exist upon the authorities, whether the enjoyment of the passage of light through a window for twenty years confers a right upon the owner of the building to prevent his neighbor obstructing that particular window, or whether it imposes upon the neighbor's land the obligation of permitting the passage of a certain quantity of light, the amount of which is fixed by the original dimensions of such window, but the mode of enjoying which the owner of the house may vary at pleasure. This question be-

*193 comes * very material in considering the effect of any alteration in the mode of enjoying an easement (*a*).

By the laws of all countries, and by the English law at a very early period it appears that an action would lie for the obstructing of ancient lights (*b*). Although, however, by the civil law, a servitude of prospect could be acquired in the same manner as any other servitude, the law of England recognises, no such right (*c*), except by express grant or covenant. Of the existence of the right when so created the squares in London afford well known instances. The validity of restrictions thus imposed is fully recognised by the Lord Chancellor in the recent case of *Squires* v. *Campbell* (*d*).

In the *Attorney-General* v. *Doughty* (*e*), a motion was made for an injunction to restrain the defendant from proceeding with a certain building which would intercept the prospect from Gray's Inn Gardens; and the report states, "that the interposition of the Court was desired, not on the foundation of a nuisance, but on a long enjoyment of right to this prospect by the Society, which right had been admitted formerly by parties concerned to dispute it, and by a court of equity; namely, in 1686, when several orders or petitions were made by Lord Jeffreys to restrain the building, so as (not) to intercept this prospect: and the manner of defence thereto shows this right of the Society was not disputed; it only going upon this, that the Court was imposed on by the plans shown. That rights of this kind have been taken notice of appeared from the act of parliament made for adorning Lincoln's Inn, where the parties ac-

*194 *quiesced under such a right." Lord *Hardwicke*, however, refused to grant an injunctiou before answer, saying, "I know no general rule of

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(*a*) Vide post.

(*b*) *Aldred's Case*, 9 Rep. 58, and cases there cited.

(*c*) *Aldred's Case*, 9 Rep. 58.

(*d*) 1 Mylne & Craig, 459

(*e*) 2 Vez. Sen. 452.

common law which says that building so as to stop another's prospect is a nuisance: was that the case, there could be no great towns, and I must grant injunctions to all the new buildings in this town. It depends on a particular right, and then the party must first have an opportunity to answer it. As to the orders made by Lord Jeffreys, who was too apt to do things in an extraordinary manner, *fortiter in modo* as well as *in re*, they were made on petition, without a bill filed, and those I lay out of the case. There may be such a right as this, as in the case of the act of parliament touching Lincoln's Inn: that was upon agreement of the parties, which if it was shown here, it would be different."

The right to the use of light may be thus acquired, not only for the ordinary purpose of domestic life, but for the convenience of trade or manufacture; the extent of the right acquired by the user will be proportioned to the actual amount of enjoyment had during the requisite period; which, if doubtful, is a question of fact to be determined by a jury.

In *Martin* v. *Goble* (*a*) an action was brought for obstructing lights. It appeared, that the building in question had stood between thirty and forty years, and had formerly been used as a malt-house; but, about seven years before the commencement of this suit, it was converted into a parish workhouse; the evidence was contradictory as to the amount of light obstructed by the wall built by the defendant. *M'Donald*, C. B., *said, "It was * 195 not enough that the windows were, to a certain degree, darkened by the wall which the defendant had erected on his own ground, the house was entitled to the degree of light necessary for a malt-house, not for a dwelling-house; the converting it from the one into the other could not affect the rights of the owners of the adjoining ground. No man could, by any act of his own, suddenly impose a new restriction on his neighbor. This house had for twenty years enjoyed light sufficient for a malt-house, and up to this extent, and no further, the plaintiffs could still require that light should be admitted to it; the question, therefore, was, whether, if it still remained in the condition of a malt-house, a proper degree of light, for the purpose of making malt, was now prevented from entering it by means of the wall which the defendant had erected." The report does not state whether any new windows had been made in the house upon the change in its destination, or whether any alteration had been made in the form or size of the ancient windows, or other apertures, for admitting light.

In *Roberts* v. *Macord* (*b*) the defendant, in justification of a trespass for breaking down a wall, pleaded that the wall obstructed the passage of light

(*a*) 1 Camp. 322.

(*b*) 1 Moo. & Rob. 230.

and air to his timber yard and sawpit, to which he was lawfully entitled for drying the timber, and the more convenient use and occupation of the timber yard and sawpit. *Patteson*, J., said, "The plea was a very novel one, and one which, in his opinion, could not be supported in point of law. If such a plea could be sustained, it would follow, that a man might acquire an exclusive right to the light and air, not only as heretofore, by having been suffered to build on the edge of his property, and suffered for a certain space of time to enjoy that building without interruption, but merely by reason of having been in the habit of laying a few boards on his ground to dry; such a rule would be very inconvenient, and very unjust: still the question, in the present stage of proceedings, was, was the plea proved in point of fact? Upon that point he did not think the mere circumstance of the defendant's having had a sawpit upon the premises, and laid his timber there during twenty years, would, in a case like this be sufficient to raise the presumption of a grant. The jury must look to all the circumstances of the case, not forgetting the manner in which the defendant himself had occupied the premises. The questions for the jury were—whether the defendant had, in fact, used the sawpit and timber yard for twenty years; and whether, during that time, the light and air had been really necessary for the purpose stated in the defendant's plea: if both these facts were made out to the satisfaction of the jury, they would find for the defendant; otherwise, for the plaintiff." The jury found for the plaintiff.

No attempt was made to impeach this ruling of the learned judge by any motion for a new trial; and, indeed, the questions left by him to the jury appear to be perfectly unobjectionable as far as the defendant was concerned; although, had the two questions been determined in favor of the defendant, it would appear that the plaintiff might have contended, that a further point must have been found for the defendant; that his enjoyment was of such a

* 197 nature as indicated to the* plaintiff that such an easement was claimed against him; or, in other words, that it was not vitiated by being *clam*.

The case, however, taken altogether, is no authority whatever for the general position deduced from it by the reporters in their marginal note, that "The use of an open space of ground, in a particular way, requiring light and air, for twenty years, does not give a right to preclude the adjoining owner from building on his land, so as to obstruct the light and air." Had the jury found the two questions left to them by the learned judge in favor of the defendant, and that he had, openly as well as in fact, used the timber yard for twenty years, and, notwithstanding such finding, the Court above had decided that judgment must be entered for the plaintiff non obstante veredicto, the marginal note of the reporters would have been warranted by the case itself.

Easement of air. Right to prevent access of impure air or water not an easm't.

By the civil law, the servitude "ne luminibus officiatur" was one of the ordinary urban servitudes (*a*); a similar servitude also existed for the right of prospect (*b*), which appears to have been very extensive.

The right to the enjoyment of air is, generally * speaking, at com- * 198
mon law, governed by the same principles as those which regulate the passage of light.

The old authorities, however, mention a singular case of an easement of this kind, which might have the effect of imposing very extensive restrictions upon the owners of the neighboring land.

Wynch, J., said, "That where one erected a house so high that the wind was stopped from the windmills in Finsbury fields, it was adjudged that it should be broken down" (*c*).

"In an assize of nuisance, brought because *levavit domum ad nocumentum* of his mill, by which the wind is stopped to come at his mill, so that he cannot grind, &c., and the jury find that the defendant has erected a house *de novo*, and that only two yards of the top of the house is to the nuisance, this is found for the plaintiff, for here the declaration is not falsified (falsifie) (*d*), but only abridged, and the judgment shall be, that the two yards be dejected"(*e*.)

It may be observed here, that the right to a lateral passage of air, as well as to a flow of water, superadds a privilege to the ordinary rights of property, and is quite distinct from that right which every owner of a tenement, whether ancient or modern, possesses to prevent his neighbor transmitting to him air or water in impure condition; this latter right is one of the ordinary incidents of property requiring no easement to support it, and can be countervailed only by the acquisition of an easement for that purpose by the party causing the nuisance.

(*a*) Cum autem servitus imponitur—ne luminibus officiatur—hoc maxime adepti videmur, ne jus sit vicino invitis nobis altius ædificare atque ita minuere lumina nostrorum ædificiorum.—L. 4. ff. de serv. præd. urb.

(*b*) Est et hæc servitus—ne prospectui officiatur.—L. 3. ff. de serv. præd. urb.

Inter servitutes, ne luminibus officiatur, et ne prospectui offendatur, aliud et aliud observatur; quod in prospectu plus quis habet ne quid ei officiatur ad gratiorem prospectum et liberum: in luminibus autem (non officere) ne lumina cujusquam obscuriora fiant: quodcunque igitur faciat ad luminis impedimentum prohiberi potest si servitus debeatur.—L. 15. Ibid.

(*c*) Viner's Abridg. Nuisance, G. pl. 19.

(*d*) This is erroneously printed "satisfied" in Viner, Nuisance, N. 2. pl. 6.

(*e*) 2 Rolle's Abr. 701.

Easement of air. Custom of London. Ways non-continuous easements.

*199 * By the custom of London, a man might rebuild his house, or other edifice, upon the ancient foundation to what heigth he pleased, though thereby the ancient windows, or lights, of the adjoining house were stopped, if there were no agreement in writing to the contrary (*a*).

In all cases where the right is claimed under the statute, a justification of a disturbance by force of this custom is, it appears, taken away by the express enactment of the statute (s. 3), "any local custom or usage, notwithstanding."

Sect. 3.—*Ways.*

Rights of way are at once the most familiar and important of the class of affirmative easements which impose upon the owner of the servient tenement the obligation to submit to something being done within the limits of his own property.

Rights of this nature are in their exercise intermittent; falling within the division of non-continuous easements already alluded to. These rights are in their extent susceptible of almost infinite variety: they may be limited both as to the intervals at which they may be used—as a way to church (*b*), and the actual extent of user authorised—as a foot-way, horse-way, or carriage-way.

* 200 Thus, a way may be granted for agricultural purposes * only (*c*), or for the carriage of coals only (*d*), or for the carriage of all other articles except coals (*e*).

The civil law also recognised the validity of such modified rights (*f*).

(*a*) Com. Dig. London, N. (5); *Winstanley* v. *Lee*, 2 Swans. 339

(*b*) Viner's Abr. Nuisance, H. 15, citing 33 H. 6. 26.

(*c*) *Reynolds* v. *Edwards*, Willes, 282.

(*d*) *Ivesor* v. *Moore*, 3 Lord Ray. 291; S. C. 1 Salk. 15.

(*e*) *Marquis of Stafford* v. *Coyney*, 7 B. & Cr. 257. See, also, *Jackson* v. *Stacey Holt*, N. P. C. 455.

(*f*) Modum adjici servitutibus posse constat, veluti quo genere vehiculi agatur, (vel non agatur), veluti ut equo duntaxat, vel ut certum pondus vehatur, vel grex ille transducatur aut carbo portetur.

Intervalla dierum et horarum non ad temporis causam sed ad modum pertinent jure constitutæ servitutis —L. 4. §§ 1, 2. ff. de serv.

Usus servitutum temporibus secerni potest; forte ut quis post horam tertiam usque in horam decimam eo jure utatur, vel ut alternis diebus utatur.—Ibid. L. 5. § 1

Degrees of Ways.	Extent of right a question for the jury.

Like other easements, rights of way may be acquired by user; but as such user is not continuous, and may vary at different times, great difficulties are presented both in law and in fact, in determining the amount of right conferred by it; though the maxim, "omne majus continet in se minus," seems equally applicable here as in other cases. The real difficulty is to ascertain what constitutes the relative majus and minus in rights of this nature. A man may allow the passage of foot passengers and carriages near his house, and yet refuse permission to drive cattle along the same road.

Lord Coke, citing the authority of Fleta and Bracton (*a*), says, "There are three kinds of ways: first, a foot-way, which is called *iter*, *quod est jus eundi vel ambulandi homini*; and this was the first way. The second is a foot-way and a horse-way, which is called *actus*, *ab agendo*; and this vulgarly is called pack and prime way, because it is both a foot-way, which was the first or prime way, and a pack or * drift way also. The third is *via* or *adi-* * 201
tus, which contains the other two, and also a cart-way, &c.; for this is *jus eundi*, *vehendi*, *et vehiculum et jumentum ducendi* (*b*)."

The distinctions here taken by Lord Coke, which, in the terms used at all events, correspond with the definitions of the civil law, appear to be of no practical utility. If this division into three classes were rigorously observed, the second comprehending the rights peculiar to the first class, and the third those both of the second and first, it is obvious, that the establishment of a right to do any one of the things comprised in a superior class would at the same time establish a right to do, not only all the acts comprised in the inferior classes, but also all the other acts comprehended in that class of which it forms but a single instance. But such is clearly not the case by the law of England, in which it has been expressly decided, that a right, which, adopting Lord Coke's definition, is of the highest class, as, for instance, a right to drive carts, does not of necessity include the right to drive cattle, ranged by him in the subordinate class (*c*).

Although Lord Coke has made use of the same terms as the civil law, in distinguishing the several kinds of way, yet he appears by no means to

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(*a*) Co. Litt. 56. a.

(*b*) The text of the civil law is as follows:—Iter, est jus eundi amdulandi homini, non etiam jumentum agendi vel vehiculum; actus, est jus agendi jumentum vel vehiculum. Itaque qui iter habet, actum non habet; sed qui actum habet, et iter habet, eoque uti potest etiam sine jumento. Via, est jus eundi et agendi et ambulandi homini; nam iter et actum via in se continet.—L. 1. ff. de serv. præd. rust.

(*c*) *Dyson* v. *Ballard*, 1 Taunt. 279; *Cowling* v. *Higginson*, 4 M. & W. 250; *Hingham* v. *Rabbit*, C. P.Trin. T. 1839.

Extent of right a question for the jury. Lord Stair. Ballard v. Dyson.

have atached the same meaning to them. Thus, the *jus eundi* of the civilians,
*202 * comprised in the first class, included the right of riding on horseback as well as that of walking (*a*); the *actus* also appears to be more extensive, as comprising a right of passage for some species of carriage, (*vehiculum ducere*), though in what precise manner this right was to be exercised appears to be doubtful (*b*); as, unless some restriction is put upon this right, great difficulty must exist in ascertaining the precise distinction between *actus* and *via*.

To remove this difficulty, one commentator (*c*) has suggested, that "the actus gave a right of passage only to a small cart or other vehicle drawn or pushed by the hand," thus making the distinctions of the civil law more in accordance with those laid down by Lord Coke.

Lord Stair in his "Institutes," after remarking, that by the civil law the greater right of way comprehends the lesser, says, "Our custom sticketh not to this distinction, but measureth the way according to the end for which it was constituted, and by the use for which it was introduced, as having only a foot road, or a road for a horse, to be led or ridden upon, or only a way for leading of loads upon horseback, or a way for leading of carts, or a way for driving of cattle, and is observed accordingly" (*d*).

In *Ballard* v. *Dyson* (*e*), which was an action of replevin, the defendant avowed taking a heifer damage feasant, and issue was joined upon a plea in bar of
*203 "a right of * way to pass and repass with cattle from a public street, through and along a certain yard and way adjoining to the said place, in which &c., towards and unto certain premisses in the plaintiff's occupation as appurtenant thereon." On the trial it appeared, "that the plaintiff's building had anciently been a barn, but had not been used as such for a great many years; that the folding doors of it opened not to the plaintiff's yard, but to a highway; for many years it had been converted to the purposees of a stable; the last preceding occupier, who was a pork butcher, had used it as a slaughter-house for slaughtering his hogs; and the present occupier, who was a butcher, used it as a slaughter-house for slaughtering oxen. The yard in question, along which the right of way to these premisses was claimed, was a narrow pas-

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(*a*) Iter est enim quo quis pedes vel eques commeare potest—L. 12. De serv. præd. rust.

(*b*) Actus vero ubi et armenta trajicere et vehiculum ducere liceat.—Ibid.

(*c*) Bynkershoek.

(*d*) Book 11. tit. 7, § 10.

(*e*) 1 Taunt. 279.

sage, bounded by a row of houses on each side, the doors of which opened into it: when a cart and horse was driven through it, the foot passengers could not pass the carriage, but were compelled, on account of the narrowness, to retreat into the houses; and they would be exposed to considerable danger if they were to meet horned cattle driven through it. It was in evidence that the preceding occupier had been accustomed to drive fat hogs that way to his slaughter-house; and that the plaintiff had been accustomed to drive a cart, the only carriage which he possessed, usually drawn by a horse, but in one or two instances by an ox, along this passage to this barn, where he kept his cart; there was then no other way to it. He had lately begun to drive fat oxen that way to the premisses for the purpose of killing them there; but there was no evidence of any other user than this of the way for cattle. No deed of grant was produced. *The defendant produced no evi- *204 dence that he had ever interrupted the occupiers of the plaintiff's premises in driving cattle there, nor that they had been usually possessed of horned cattle which had not been driven that way; he admitted that there was sufficient evidence of a right of way for *all manner of carriages*. It did not appear at what period the houses adjoining the way had been built.

For the plaintiff it was contended that a right of way for all manner of carriages necessarily included a right of way for all manner of cattle; and therefore proved the prescription.

Mansfield, C. J., told the jury, that inasmuch as this was a private, and not a public way, they were not to conclude that a man might not grant a right of way to pass with horses and carts, and yet preclude the grantee from passing with all manner of cattle; and the degree of inconvenience which would attend the larger grant in this case, furnished an argument against the probability of it. He directed them, therefore, to say whether there was sufficient evidence of a right of way to drive cattle loose, or whether they would consider the grant or prescription as only co-extensive with the use that had been made of it. The jury found a verdict for the defendant.

A rule having been obtained and cause shown, the Court, after taking time to consider, discharged the rule for a new trial. The judgments delivered by the Judges were as follows:—

Mansfield, C. J., having adverted to the facts of the case, observed, that "in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the *presump- *205 tion would be for cattle as well as carriages, otherwise cattle could not be driven from one part of the kingdom to another. The authority cited from Hawkins only refers to Co. Litt., and the passage in Co. Litt. does not prove that Lord Coke was of opinion that in the case of a private way, which must originate in a grant, of which, the grant itself being lost, usage alone indicates the extent, evidence of a limited user could not be received to restrict the usual im-

port of the grant. The geneaal description given by Lord Coke does not seem to touch the question. He refers to Bracton (*a*), who only says 'there are *iter, actus,* and *via* ; but says not a word to explain the meaning of either, or the difference between them. Nor can I find in any of the books, nor even in any Nisi Prius case, any decision that throws light upon the subject. A parson has the *via* or *aditus* over a farm with carts to bring home his tithe, but he can use it for no other purpose. I have always considered it as a matter of evidence, and a proper question for a jury, to find whether a right of way for cattle is to be presumed from the usage proved of a cart-way, Consequently, although in certain cases a general way for carriages may be good evidence, from which a jury may infer a right of this kind, yet it is only evidence ; and they are to compare the reasons which they have for forming an opinion on either side. As well at the trial, as since, I have thought that there might often be good reasons why a man should grant a right of carriage-way, and yet no way for cattle. That would be the case where a person who lived next to a mews in London should let a part of his own stable with a right of carriage-way * to it which could be used with very little, if * 206 any, inconvenience to himself; yet there it would be a monstrous infrence to conclude that, if a butcher could establish a slaughter-house at the inner end of the mews, without being indictable for a nuisance, he might, therefore, drive horned cattle to it, which would be an intolerable annoyance to the grantor.

So cases may exist of a grant of land, where, from the nature of the premises, permission must be given to drive a cart to bring corn or the like, and that right might be exercised without any inconvenience to the grantor ; but it does not follow that cattle may be driven there. The inconvenience in this case is a strong argument against the probability of a larger grant. The defendant was the proprietor of all these houses. My brother *Chambre* mentioned the case of a public way, restricted to carriages only, in which some public notice was affixed to caution the public that there was no drift-way, and thought that the absence of such notice in this case was an argument against the probability of the restricted grant. This notice might be requisite in a public way, but in a private way, out of which cattle were excepted, the grantor might reasonably think it unnecessary to give his grantee notice of that, of which he must already be consusant : he might justly suppose that the grantee, knowing the nature of his right, would not attempt to use the way otherwise than according to his grant. I can find no case in which it has been decided that a carriage-way necessarily implies a drift-way, though it appears some times to have been taken for granted. I speak with doubt, because my brother *Chambre* is of a different opinion ; but I incline to hold that the verdict ought not to be disturbed."

(*a*) Lib. 4, 1. of32.2

* *Heath*, J.—"This is a prescription for a way for cattle, and a car- *207
riage-way is proved. A carriage-way will comprehend a horse-way, but not a drift-way. All prescriptions are *stricti juris*. Some prescriptions are for a way to market, others for a way to church, and in the ancient entries, both in Rastal and Clift, the pleadings are very particular in stating their claims. In Rastal, tit. *Quod permittat*, the distinction is clearly seen. Sometimes there is a carriage-way qualified. One claim is remarkable, *fugare quadraginta averia*. The usage then in this case is evidence of a very different grant from that which is claimed, namely, to drive fat oxen, animals dangerous in their nature, and which there might be very good reason to except out of a grant of a way through a closely inhabited neighborhood. The jury having heard the evidence, and formed their opinion upon it, I am not prepared to say that the verdict shall not stand."

Lawrence, J.—"I should have been as well satisfied if the verdict had been the other way; but as the jury have decided upon the evidence, I am unwilling to disturb their verdict. This is the case of a prescriptive private way, which presumes a grant: the question then is, what was the grant in this case? That is to be collected from the use; for it is to be presumed that the use has been according to the grant. A grant of a carriage-way has not always been taken to include a drift-way. In the entries are cases of prescription, not for carriages only, but for cattle also. Co. Ent. 5, 6. Quod permittat ad carriandum et recarriandum blada, fœnum, et finum, ac omnia alia necessaria sua, cum carris et carectis suis, et ad fugandum omnia et omnimoda averia sua. The person who drew that entry * certainly did not *208
conclude that a carriage-way included a drift-way for cattle. The use proved here is of a carriage-way: the grant is not shown, and the extent of it can only be known from the use. If the use had been confined to a carriage-way, I should have had no difficulty whatever in saying that it afforded no evidence of a way for horned cattle; for till they were driven there, no opposition could be made, nor the limitation of the right shown; but pigs have been driven that way, and stress is laid upon this circumstance. That then may be good proof of a right to drive pigs that way, but the user of the way for pigs is not proof of a way for oxen. The grantor might well consider what animals it was proper to admit, and what not. The place is very narrow, and full of inhabitants. There is no danger from pigs, and carriages have always some one to conduct them. Cattle may do harm, and passengers cannot always get out of their way; but if the cattle are driven forward, serious injury may be done. The nature of the place, therefore, may probably have suggested a limitation of the grant."

Chambre, J.—"I think there ought to be a new trial; for all the evidence was on one side, and the verdict went against the evidence. I never thought that a carriage-way necessarily included a drift-way; but I think it is *prima*

facie evidence, and strong presumptive evidence, of the grant of a drift-way. Undoubtedly a person may restrict his grant as he pleases, and when he has so limited it, the pleadings must be adapted to the particular grant; which accounts for the variety in the entries. But it rests with the grantor to prove

*209 the restriction of the grant; otherwise it must be intended * to be of the usual extent. This inconvenience indeed may occur from such a determination, that, if the evidence be lost, the grantor may lose the benefit of his restriction, but he may and ought to preserve the evidence of the restriction; and the inconvenience would be of small extent; for I believe the cases are very few where a carriage-way has not been accompanied with this right. There seems to be almost a necessity for including it. The grantee may send back his horses without his carriage. He may draw his carriage with oxen and the oxen, as well as the horses, must be driven back loose to pasture. There is strong presumptive evidence then of a drift-way. If the burthen of the proof lies on the tertenant, it certainly is possible that he may lose the right of restraining the way, but for one case where the evidence has been lost, and would be supplied by this decision, there will be a thousand cases where a restriction will be created that did not exist in the original grant. I fear these rights of way will be very much narrowed, if they are to be confined to such actual use of them as can be proved. The manner of using a way may vary from time to time. I think the proof of driving hogs is an important circumstance, and very strong evidence of a grant of way for cattle. According to the doctrine contended for, it would be necessary to drive every species of cattle in order to preserve the right of passing with that species. If a man had a little field where cows had not usually been pastured, it would be monstrous that he therefore should not drive his cow to it. Suppose any new species of cattle is introduced into the country, shall the grantees of private ways have no passage

*210 for them * to their lands? Is it contended, for instance, that no ancient private way in the kingdom can be used for Spanish sheep? Much of the argument has been built upon these being horned cattle. Many breeds of kine have no horns, may the grantee drive those? As to the argument that the inconvenience of such an use amounts to a nuisance, nothing of that sort appears. The grantee has constantly driven all the carriages and all the cattle that he had. This is a claim by prescription, which imports great antiquity, and it does not appear how wide the way was at the time of the original grant, and how much the houses have encroached on it long since, but those encroachments cannot deprive the grantee of his ancient right of way."

Assuming this case to have been properly decided, it would appear, that, in the English law, a right of way of any one kind does not of necessity include any other kind. Supposing the question to arise upon the record, a plea of a right of way to drive carts or carriages would be no answer to an alleged trespass in riding on horseback across a man's land; or if pleas were fram-

ed strictly in accordance with the facts in *Dyson* v. *Ballard*, a plea of a right of passage for carts would be no justification to a trespass committed by driving cattle. Assuming this to be correct, a further question of considerable difficulty arises, "whether proof of the user of any one kind of way may be evidence of a right of any other kind;" or whether, to use the words of *Chambre*, J., in *Dyson* v. *Ballard*, "it would be necessary to drive every species of cattle in order to preserve the right of passing with that species."

On the authority of the case of *Dyson* v. *Ballard*, * proof of one right *211 cannot afford more than presumptive evidence of another of equal or inferior degree, even if it go to that length, and evidence would be admissible of circumstances rebutting such presumtion, as in that case was given of facts showing the improbability of a grant for the passage of horned cattle along the road in question; and supposing that it does amount to this presumption, it must follow, that the onus probandi showing the restriction will lie upon the party seeking to rebut the presumption, though in practice it is hardly to be expected that the question will ever be raised by the mere naked proof of a right of superior degree; as it is probable, that in proving the mere extended right the whole of the facts connected with the case would be given in evidence, some of which, as in *Dyson* v. *Ballard*, may afford grounds for a verdict of the jury finding the restricted right.

Mr. *Justice Heath* and Mr. *Justice Lawrence* were, as has already been seen, of opinion, that proof of use of a cart may afford no evidence of a way for cattle. The former, indeed, lays it down, that "a carriage-way includes a horse-way, but not a drift-way;" while the latter seems to have proceeded on the general ground, that a grant not being shown, the extent of the right could only be shown from the use, from which he inferred, that proof of a use of a carriage-way and of a way for pigs afforded no evidence of a way for horned cattle.

Supposing such qualifying circumstances to appear in evidence on either side, it would be a question for the jury to say, whether the presumption of law as to the superior including the equal and inferior class of *ease- *212 ments, was rebutted by the evidence laid before them. With reference to this question, it might be important to show what had been the conduct of the parties in modern times; even modern user of the right claimed, if unobjected to, though not of itself sufficient to confer the right, would be obviously corroborative of the presumption of law.

It has, however, been seen, that in the civil law the superior class of easements comprehended the inferior (*a*); and unless the authority of Lord Coke

(*a*) Ante, 201. Julianus refert eum qui actum stipulatus postea iter stipulatur, posteriore stipulatione nihil agere; sicuti qui decem deinde quinque stipulatur.—Vinnius, Lib. 2. tit. 3. de serv. rust. 4.

as to the classification above given is to be altogether repudiated, it seems impossible not to admit a similar rule into the English law, at least to the extent of raising a presumption, that an easement of the superior class includes those of an equal or inferior degree, until the inference is rebutted by evidence; those of an equal degree, because the proof of one right is evidence of the whole class to which it belongs: those of an inferior as naturally comprised in the more extensive right.

Upon the general principle, that every easement is a restriction of the rights of property of the party over whose lands it is exercised, the real question appears to be, under the peculiar facts of each case, whether proof of a right has been given co-extensive with that amount of inconvenience sought to be imposed by the right claimed. Upon this doctrine the classification of right of way appears to depend; which assumes that the rights of each class

*213 impose an equal amount of * inconvenience on the property subject to them. It is obvious, that, in some cases, a right to drive cattle might be productive of greater inconvenience than a right to drive carts, and vice versa. It will, therefore, be for the jury to infer the extent of the supposed grant from the actual amount of injury proved under all circumstances attending it. If it appeared that the way had been used for all the purposes required by the claimant, there would be strong evidence of a general right; while, on the other hand, proof that the party having occasion for a particular way had not made use of the way in question, it would be almost conclusive evidence that he had not a right of way for that particular purpose.

This doctrine is supported by the recent case of *Cowling* v. *Higginson* (*a*), which was an action of trespass, which the defendant justified under a plea of right of way for horses, carts, wagons, and carriages. It was held, that proof of user for farming purposes did not necessarily prove a right of way for the purpose of conveying the produce of a coal mine under the defendant's land.

In the course of the argument, Lord *Abinger* observed, "The extent of the right must depend upon the circumstances. If a road led through a park, the jury might naturally infer the right to be limited; but if it went over a common, they might infer a right for all purposes. Using a road as a footpath would not prove a general right, nor proof that a party had used a road to go to church only. Some analogy should be shown between farming and mining

*214 purposes." And *Parke*, B., said, * "If it had been shown, that from time immemorial it had been used as a way for all purposes that were required, would not that be evidence of a general right of way? If they show that they have used it time out of mind for all the purposes that they wanted, it would seem to me to give them a general right. You must generalize to some

(*a*) 4 M. & W. 245.

extent. If your argument is to be taken strictly, it must be confined to the identical carriages that have previously been used upon the road, and would not warrant even the slightest alteration in the carriage or loading, or the purpose for which it was used."

Parke, B., in his judgment, said, "To make out this plea, it is necessary to show an enjoyment of the way generally *as of right*, for the period during which the plea states it to have been used; he must have used it for all purposes as of *right*; and such user, for all purposes for which it was wanted, would be evidence to go to the jury of a general right. Under a plea of prescription of a way, it was necessary to show a user of it for all purposes time out of mind, according to the usual terms in which such a plea is pleaded. If it is shown that the defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to show that they had a general right to use it for all purposes, and from which a jury might infer a general right. In this particular case, I think the user is evidence to go to the jury that the defendant had a right to a way for all purposes for twenty years. As to the *effect* of such evidence, it is unnecessary to offer any opinion. If the way is confined to a particular purpose, the jury * *215 ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all. You must generalize to some extent, and whether in the present case to the extent of establishing a right for agricultural purposes only, is a question for the jury."

The correctness of this doctrine was also recognized in the recent case of *Higham* v. *Rabbit* (*a*); in which it was held by the Court of Common Pleas, that a finding by the jury of a right of way for the purpose of carting timber, did not support a plea of a right of way for all carts, carriages, horses, and on foot, or even amount to a proof of any one of those rights taken separately, so as to admit of the verdict being entered distributively on the issue joined on the plea (16).

(*a*) C. P. Trin. Term. 1839.

(16) Where a small strip of land lay between the road and effence, and had always been left common with the road, and thereby apparently devoted to the public use, it was held, that any person would be justified in using it as a way. *Cleveland* v. *Cleveland*, 12 Wend. 172.

"Highways are regarded in our law as easements. The public by laying out a road require no more than the right of way, with the powers and privileges incident to that right; such as digging the soil and using the timber and other materials found within space of the road, in a reasonable manner, for the purpose of making and repairing the road, and its bridges. When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner

Sect. 4.—*Right to support from neighboring Soil and Houses.*

The right to support from the adjoining soil may be claimed either in respect of the land in its natural state, or land subjected to an artificial pressure by means of buildings, or otherwise.

A further right to support may, likewise, be claimed for one building from the adjoining buildings on either side.

In connexion with this subject, a question of considerable importance arises with regard to the degree of care which a party is bound to use in withdrawing support to which no right has been acquired by an easement.

*216 * § 1.—*Natural Support to Land.*

If every proprietor of land was at liberty to dig and mine *at pleasure on his own soil*, without considering what effect such excavations must produce upon the land of his neighbors, it is obvious that the withdrawal of the lateral support would, in many cases, cause the falling in of the land adjoining.

As far as the mere support to the soil is concerned, such support must have been afforded as long as the land itself has been in existence; and it would

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is not extinguished; but is so qualified, that it can only be enjoyed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber and earth, for every purpose not incompatible with the public right of way. The person in whom the fee of the road is, may maintain trespass, or ejectment or waste; 1 Burr. 143; 2 Stra. 1004; 1 Wils. 407; 6 East, 164; but when the sovereign chooses to discontinue, or abandon the right of way, the entire and exclusive enjoyment reverts to the proprietor of the soil." By Platt, J., in *Jackson* v. *Hathcway*, 15 J. R. 447.

"By the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner, although incumbered with a way. And every use to which the land may be applied, and all the profits which may be derived from it, consistently with the continuance of the easement, the owner can lawfully claim. He may maintain ejectment for the land, thus incumbered; and if the way be discontinued, he shall hold the land free from the incumbrance. By Parsons, C. J. 6 Mass. 454.

"Upon these principles, there can be no doubt but that the owner of the land can sink a drain, or any water-course below the surface of his land covered with a way, so as not to deprive the public of their easement. And it is a common practice for the use of their mills in their own land under highways, care being taken to cover the water-courses sufficiently, so that the highways remain safe and convenient for passengers. ib.

seem, in all those cases at least in which the owner of land has not, by buildings or otherwise, increased the lateral pressure upon the adjoining soil, that he has acquired by such ancient enjoyment a right to the support of it, rather as a right of property than as an easement, as being necessarily and naturally attached to the soil. The negation of this principle would be incompatible with the very security for property, as it is obvious, that if the neighboring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus deprived of support on all sides could not stand by its own coherence alone.

Although there is no direct decision in support of this doctrine, yet the leaning of the Courts appears to have been in its favor from a very early period: thus, in Rolle's Abridgement (*a*) it is laid down, "It seems that a man who has land closely adjoining my land, cannot dig his land so near mine that mine would fall into his pit; and an action brought for such an act would lie." "It may be true," said Lord *Tenterden*, in delivering *the judgment *217 of the Court of King's Bench in *Wyatt* v. *Harrison* (*b*), "that if my land adjoins that of another, and I have not, by building, increased the weight upon

(*a*) Vol. 2, 564, Trespass, Justification, T. pl. 1. *Wilde* v. *Minsterly*.

(*b*) 3 B. & Adol. 874.

"If a highway be located over water-courses, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private land, if the owner should afterwards open a water-course across the way, it will be his duty, at his own expense, to make and keep in repair a way over the water-course, for the convenience of the public; and if he should neglect to do it, he may be indicted; for the nuisance may be prostrated by filling up the water-course, if he shall not make a convenient way over it. This obligation upon the owner arises from the consideration, that when the way was located, the public were to be considered as purchasers of the easement, by the payment to the owner of all damages which he sustained in consequence of the easement. And among the causes of damage might be estimated the convenience of opening a water-course at his own expense. ib.

Laying out Highways in New York.—The former and present statutes, as to laying out roads by commissioners of highways, and the appeal to the three Judges of the county, are substantially alike. 2 R. L. 274, s. 16; ib. 282, s. 36; 1 N. S. 514, s. 57, 61; ib. 518, s. 84, 89. In the case of *Lawton* v. *Com'rs of Highways of Cambridge*, 2 Caines, 179, the opinion of the court is understood to be, that the authority of the Judges to hear the appeal was confined to the *merits* alone—the fitness or unfitness of laying out the road. And this was approved in *Com'rs, &c.* v. *Judges of Orange Co.*, 13 Wend. 432.

my soil, and my neighbor digs in his land, so as to occasion mine to fall in, he may be liable to an action."

By the Civil Law, this right of support from the neighboring soil was recognized in the restrictions it imposed upon the doing such acts as would naturally have the effect of withdrawing such support:—"If a man dig a sepulchre, or a ditch, he shall leave (between it and his neighbor's land) a space equal to its depth; if he dig a well, he shall leave the space of a fathom" (*a*).

A similar enactment has been introduced into the French Law (*b*). Whoever digs a well or ditch near a wall, whether party or otherwise, whoever wishes to build against (such wall) a chimney, forge, or oven, to erect a stable against it, or establish a magazine of salt, or any corrosive materials, must leave the interval prescribed by law and custom in this respect, or construct the works prescribed by law to prevent injury to his neighbor." In commenting upon this article of the Code, a learned French author says, "It appears to me, that the principle of this Article of the Code (674) should be extended *218 to numerous other cases, which will undoubtedly be settled by *particular enactments of the rural laws, and which, until such laws are made, should be decided in conformity with local usages; or, if they are silent, with the precepts of equity. Thus, if an individual makes a fish pond or lake on his own property, he ought to leave a sufficient extent of land to separate it from his neighbor who has already a similar reservoir." "By parity of reasoning, the owner of land, who is desirous of quarrying on his own property for stone or sand, or similar materials, must not open the earth at the extreme point which separates his land from that of his neighbor, and continue to excavate perpendicularly, because his neighbor's land, thus deprived of support, would be in danger of falling in (eboulement) (*c*)."

§ 2.—*Support to Buildings from adjacent Land.*

Where, however, any thing has been done to increase the lateral pressure, as, where buildings have been erected, it appears to be clearly settled, that no man has a right to such increased support unless the building, or other thing which makes it necessary, is of ancient erection. This was laid down in a

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(*a*) Si quis sepem ad alienum prædium fixerit infoderitque, terminum ne excedito, si maceriam, pedem relinquito; si vero domum, pedes duos; si sepulchrum aut scobem foderit, quantum profunditatis habuerint tantum spatii relinquito; si puteum, passus latitudinem.—L. 13. ff. fin. reg.

(*b*) Code Civil, Art. 674.

(*c*) Pardessus Traite des Servitudes, 302.

very early case. "If A. seised in fee of copyhold land closely adjoining the land of B., and A. erect a new house upon his copyhold land, and any part of his house is erected on the confines of his land adjoining the land of B., if B. afterwards dig his land so near to the foundation of the house of A., but not in the land of A., that by it the foundation of the messuage, and the messuage itself, fall into the pit, still no action lies by A. against B., inasmuch as it was the fault of A. himself that he built his house so near the land of B., for * he cannot by his (own) act prevent B. from making the best use of * 219 his land that he can (*a*).

It was laid down by Lord *Ellenborough* in *Stansell* v. *Jollard* (*b*), that where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or, as it were, of leaning to his neighbor's soil, so that his neighbor could not dig so near as to remove the support, but that it was otherwise of a house, &c., newly built."

In *Wyatt* v. *Harrison* (*c*), the declaration stated that the plaintiff was possessed of a certain dwelling-house—that the defendant, in re-building his dwelling-house adjoining, dug so negligently, carelessly, and improperly into the soil and foundation of his own dwelling-house, and so near the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof the plaintiff's wall gave way and was damaged. To so much of this declaration as "related to the defendant's digging into the soil and foundation of the said dwelling-house of him the defendant, so near to the soil and foundation of the said dwelling-house of the plaintiff, that by reason thereof," &c., the defendant demurred generally.

Lord *Tenterden*, in delivering the judgment of the Court, after time taken to consider, said—"The question reduces itself to this—whether, if a person builds to the utmost extremity of his own land, and the owner of the adjoining land digs the ground there so as to remove some part of the soil which formed the support * of the building so erected, an action lies for the * 220 injury thereby occasioned? Whatever the law might be, if the damage complained of were in respect of an ancient messuage possessed by the plaintiff at the extremity of his own land, which circumstances of antiquity might imply the consent of the adjoining proprietor at a former time to the erection of a building in that situation, it is enough to say in this case that the building is not alleged to be ancient, but may, as far as appears from the declaration, have been recently erected; and if so, then, according to the authorities, the

(*a*) *Wilde* v. *Minsterly*, 2 Rolle's Abr. 564, Trespass, Justification, J. pl. 1.

(*b*) MS. 1 Sel. N. P. 444, 8th ed.

(*c*) 3 B. & Adol. 871.

plaintiff is not entitled to recover. It may be true that if my land adjoins that of another, and I have not by building increased the weight of my soil, and my neighbor digs in his land so as to occasion mine to fall in, he may be liable to an action; but if I have laid an additional weight upon my land, it does not follow that he is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it. And this is consistent with 2 Rolle, Ab. (*a*). The judgment will therefore be for the defendant" (*b*).

In the case of *Dodd* v. *Holme* (*c*) the Court did not pronounce any decided opinion as to the right of support for an ancient house from the adjoining land; but *Littledale*, J., in the course of the argument, observed, "Suppose the house to have been substantially built, to have stood thirty or forty years,

*221 and to have been *kept in proper repair, do you say, that if the defendant, by excavating his adjacent ground, let down that house, though without actual negligence on his part, an action would not lie against him?"

In the case of *Slingsby* v. *Bernard and Hall* (*d*) the action was brought, not for the withdrawal of support to the plaintiff's house, which was stated in the declaration to be a modern house, but for digging so near to the foundation of the plaintiff's house that the defendants undermined his house, (undermine son mese), by reason whereof one half of the said house fell into the said pit so dug by defendant Hall." In the motion in arrest of judgment, which was made upon entirely different grounds, and refused by the Court, there is no allusion to any claim of support.

This principle was fully recognized and acted upon in the recent and very important case of *Partridge* v. *Scott* (*e*). The action was brought for an injury to the plaintiff's reversion by defendant's "undermining their own land, wrongfully, carelessly, negligently, and improperly, and without supporting or propping up the same," and removing the minerals, to the support of which mines and minerals for his premises the plaintiff was entitled; by reason whereof, and by the carelessness and improper conduct of the defendant, the foundation of the plaintiff's premises was injured, the ground gave way, and the walls and houses were damaged. The second count was similar, refer-

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(*a*) Trespass, J. pl. 1.

(*b*) In *Smith* v *Martin*, 2 Saund. 394, (cited in argument): the declaration was similar to the one in this case, containing no allegation that the house of the plaintiff was an ancient one; but no point on the law of easements was raised.

(*c*) 1 Ad. & Ellis, 493, post.

(*d*) Rolle Rep. 430.

(*e*) 3 Mee. & Welsby, 220.

ring to an injury to another messuage. The defendants pleaded, denying the plaintiff's right to support, as claimed in the declaration. The jury found for the plaintiffs, subject to a case. After *stating the pleadings, the *222 case proceeded as follows:—"The jury found that the plaintiff was possessed of a certain dwelling-house and premises, partly erected upon excavated land within four years before the injury complained of, being the house and premises to which the second count in the declaration referred, and of other houses, land, and premises, the buildings on which had been erected about thirty years before, and which are those included in the first count.

"They also found that the defendants excavated so near their own boundary (the direction of which boundary was east and west) the mines belonging to themselves, as to cause damage thereby to all the plaintiff's premises, and to cause the adjoining land of the plaintiff, not covered with buildings, to sink also. The defendants began to work their mines after the new house and buildings of the plaintiff had been finished. They sunk their shaft or pit about one hundred yards from the plaintiff's premises on the south side thereof, and worked the coal northward towards those premises.

"The jury also found, that, in order to have prevented any injury from the defendants' works to the plaintiff's premises, a rib of coal ought to have been left between those parts of the substrata over which the plaintiff's buildings and premises were situated and the works of the defendants, at least twenty yards in thickness; that the defendants worked their mines, leaving a rib of coal in these places of less than ten yards in thickness, and that they were aware that the coal had been worked out some years before on the north or plaintiff's side of their boundary, where the boundary joined the plaintiff's premises; that in so doing the defendants were *guilty of negligence *223 in not leaving a rib of sufficient thickness, if the plaintiff was entitled to support from the defendants' land and substrata. The Court are to be at liberty to draw any reasonable conclusion which the jury might have drawn.

"The question for the opinion of the Court is, whether, under the above circumstances, the plaintiff is entitled to recover; and, if he is, then whether he is entitled to damages for the old houses and land alone, or for the more recent erections also?" The case having been argued, the Court took time to consider: the judgment of the Court was delivered by *Alderson*, B.—

"The two questions in this case are of considerable importance. The facts may be shortly thus stated: The plaintiff was possessed of two houses, one an ancient one, and the other built long within twenty years, before the subject of the present action occurred. These houses were built on the plaintiff's land, and considerably within his boundary; and the modern house is stated to have been built on land which had been previously excavated for the purpose of getting coal. No such statement appears in the case as to the ancient house; and the Court cannot therefore intend that that house was built

originally on excavated land, or that the land has been excavated more than twenty years ago.

"Under these circumstances, the question is precisely similar as to both houses, and is one on which the Court do not entertain any doubt.

"Rights of this sort, if they can be established at all, must, we think, have their origin in grant. If a man builds his house at the extremity of his land,

*224 he does not thereby acquire any right of easement, for support * or otherwise, over the land of his neighbor. He has no right to load his own soil so as to make it require the support of that of his neighbor, unless he has some grant to that effect. *Wyatt* v. *Harrison* (*a*) is precisely in point as to this part of the case, and we entirely agree with the opinion there pronounced.

"In this case, if the land on which the plaintiff's house was built had not been previously excavated, the defendants might, without injury to the plaintiff, have worked their coal to the extremity of their own land, without even leaving a rib of ten yards, as they have done. And if the plaintiff had not built his house on excavated ground, the mere sinking of the ground itself would have been without injury. He has, therefore, by building on ground insufficiently supported, caused the injury to himself, without any fault on the part of the defendants; unless at the time, by some grant, he was entitled to additional support from the land of the defendants. There are no circumstances in the case from which we can infer any such grant as to the new house, because it has not existed twenty years; nor as to the old house, because, though erected more than twenty years, it does not appear that the coal under it may not have been excavated within twenty years; and no grant can at all events be inferred, nor could the right to any easement become absolute, even under Lord *Tenterden's* Act, until after the lapse of at least twenty years from the time when the house first stood on excavated ground, and was supported in part by the defendants' land.

*225 "If the law stood as it did before Lord *Tenterden's* * Act, (2 & 3 Will. 4, c. 71, s. 2), we should say that such a grant ought not to be inferred from any lapse of time short of twenty years after the defendants might have been or were fully aware of the facts. And even since that act, the lapse of time, under these peculiar circumstances, would probably make no difference. For, the proper construction of that act requires that the easement should have been enjoyed for twenty years under a *claim of right*. Here neither party was acquainted with the fact that the easement was actually used at all; for neither party knew of the excavation below the house. We should probably, therefore, have been of opinion that there was no user of the easement under a claim of right; and that Lord *Tenterden's* Act, therefore, would not

(*a*) 3 B. & Ad. 871.

Buildings must be kept in repair.

apply to a case like this. However, the facts of this special case do not raise that point.

"We think, upon the whole, that the defendants are entitled to our judgment."

It may be suggested that there are cases in which, though the house be modern, damages may be recovered for an injury done to it by digging too near the common boundary. If the owner establishes his right to support for his soil, and the jury should be of opinion that the land would have fallen in, in consequence of the digging, even had no additional weight been imposed by building, the value of the house falling with the land might, it seems, be recovered as damage resulting from the principal injury (*a*).

Assuming, however, that a right to the support of the adjacent land has been obtained by the enjoyment * of an ancient house, it appears * 226
that a condition is imposed upon the party entitled to such support, that he shall do nothing within the period requisite for conferring an easement which shall have the effect of increasing the burthen imposed upon his neighbor. Hence, if an excavation be made near an ancient house, which falls immediately afterwards, "if the building fall in consequence of its infirm condition, that would not be a damage by the act of the [defendant (*b*)] excavator:" but, even supposing the building to be so far out of repair, that "in the ordinary progress of decay, it would have fallen in a short time," it appears from the the decision in *Dodd* v. *Holme*, "that the neighbor had no right to accelerate its fall, by removing its support."

It is obvious, that if a party claiming such an easement has, during the period of the acquisition of it, done or omitted to do any thing to his own house by which its coherence and capacity to stand unsupported is diminished, or if, by excavating his own soil or other means, he has weakened the support before then afforded by his own soil—so that, to enable it to stand, an additional amount of support is required from the neighboring land—he has thereby imposed an increased burthen upon it, which there has been no ancient user to oblige the neighbor to submit to; and thence it seems to follow, that if the damage sustained would not have accrued, but for the modern alteration or neglect of the party claiming the easement, he has no right of action, though his house might have stood had there been no excavation—as such continuing to
* stand could only have been caused by receiving a degree of sup- * 227
port from the adjoining soil, which the owner of it was under no obligation to

(*a*) See *Wyatt* v. *Harrison*, 3 B. & Adol. 871.

(*b*) Per *Taunton*, J., in *Dodd* v. *Holme*, 1 Ad. & Ellis, 536

Buildings must be kept in repair. Buildings must be properly constructed.

supply. In the case of *Dodd* v. *Holme*, this point does not appear to have been distinctly considered. (17)

The same reasoning would seem to apply to the case of a house originally built in a weak and insufficient manner, in consequence of which it required a greater degree of support than would be requisite for a well-built house.

Unless there was some external indication of the weakness of the building, the neighbor would be altogether in ignorance, that a greater degree of lateral pressure was exerted than would have been the case, had the house possessed the ordinary degree of coherence of one well built.

A further objection to the acquisition of an easement of this class by prescription, is the difficulty on the part of the servient owner to offer any effectual resistance, a ground on which considerable stress was laid in the case of *Arkwright* v. *Gell (a)*.

The servient might certainly in all cases withdraw the support, but he is not obliged, in order to resist the claim, to do that which might probably be more injurious to his tenement than the easement itself would have been.

In such a state of facts, there is nothing to imply his assent to the enjoyment of the easement by the dominant owner *(b)*.

(a) Ante, p. 182.

(b) Invitum autem in servitutibus, accipere debemus, non eum qui contradicit, sed eum qui non consentit.—L. 5. ff. de serv. præd. urb.

(17) Where the owner of a lot builds upon it, he builds at his peril, for it is not possible for him, merely by building upon his own ground, to deprive any other party of such use of his, as he or they shall deem most advantageous. *Thurston* v. *Hancock*, 12 Mass. 221. The plaintiff built his house about ten years before he sued his action within two feet of the western line of his lot, knowing that those who held the adjoining lot, had a right to build equally near the line, or to dig down into the soil for any lawful purpose. He knew the shape of the ground, and that it was impossible to dig there without making excavations. The action was brought against the defendant for digging so deep on his own land as to endanger the plaintiff's dwelling—insomuch that he was obliged to take it down: Held, that he was not entitled to recover; it was *damnum obsque injuria*.

Case—Action for injury to reversion.—In *Raine* v. *Alderson*, 4 Bing. N. C. 702, it was held, that a party who has demised a house without exception of mines, may maintain an action on the case for an injury to the house by a stranger in excavating coal; although it was not clear whether the injury resulted from excavation under the house, or under an adjoining house in the plaintiff's occupation.

* § 3.—*Support to Buildings by Buildings.* * 228

A question of equal practical importance, but presenting greater difficulties, and not elucidated by any direct authority, arises where the owner of an ancient house claims a right to have it lean against and be supported by the house of his neighbor.

The obstacle to the acquisition of this easement by user, arises from the natural secrecy of the mode of its enjoyment, and the consequent difficulty of showing that it has been had with the knowledge of the owner of the servient tenement.

In order to give rise to any question of the existence of this easement, a man must have built to the extremity of his own soil; and supposing him to have built perpendicularly, as he may reasonably be expected to have done, whatever additional pressure may thereby be exerted on the soil, there would be none upon the adjoining house.

Supposing, however, that some deviation from the perpendicular should originally have existed, or have been caused subsequently by the imperfect state of the building, but to so small an extent, or in such a position, as not to be apparent to the owner of the adjoining house, the ignorance of the neighbor would exclude the presumption of that "negligence and patience," from which alone his consent to the imposition of the easement could be inferred.

If, on the other hand, the manner of imposing the pressure be of such a manifest and visible nature, as to afford the requisite indication to the adjoining owner, it would appear, that an easement of this kind may be acquired in the same manner as any other easements; as, * for instance, where * 229 a beam is inserted in the wall of the neighbor's house; although a further objection would arise from the difficulty on the part of the servient owner, in resisting the right thus sought to be acquired.

From the expression in the judgment in *Payton* v. *The Mayor of London* (*a*), "it did not appear whether the two houses had been erected at the same time, and whether the freehold in both had originally belonged to the same person;" Lord *Tenterden* seems to have inclined to the opinion, that, had such a union existed, an easement of support would have arisen upon their severance.

Such an acquisition of an easement has obviously no connexion with the title by prescription, but rather results from the doctrine of the disposition of the owner of two tenements.

It might also be urged, that such a right to support would be an easement of necessity, as, without it, the house granted or retained, could not exist.

(*a*) 9 B. & Cr. 736.

The right of support in cases of this nature was distinctly recognised in the Civil Law (*a*).

The more ancient authorities appear to be altogether silent upon the point, whether such an easement can be acquired by prescription; and in the only modern case which bears directly upon the subject, the declaration was unfortunately so ill drawn, that the Court were not called upon to decide the question of right; and, indeed, in argument, hardly any attempt appears from the

* 230 report to have been made to maintain the right to support * upon the general principles of the law of easements. The facts of this case, the points made in argument, and the reasons which influenced the Court, sufficiently appear in the judgment delivered by Lord *Tenterden*.

"This was a special action upon the case brought by the plaintiff's, as the reversioners of a house in Cheapside, in the occupation of their tenant under a lease, against the defendants as owners of the adjoining house, for injury sustained in consequence of pulling down the defendants' house. The first count of the declaration, after alleging the plaintiff's interest in a house, which in part adjoined a house of the defendants, charged that the defendants unskilfully, wrongfully, and improperly altered, pulled down, and removed their house adjoining to the plaintiffs' house, without shoring up, propping, or duly securing the plaintiffs' house, in order to prevent the same from being injured by the altering, pulling down, and removing of the defendants' house: so that in want of such shoring up, propping, or otherwise duly securing the plaintiffs' house, that house was greatly injured, weakened, and in part fell down. The second count, alleging that the houses adjoined and were connected by a party-wall, charged that the defendants so negligently, unskilfully, wrongfully, and improperly conducted themselves in and about the altering, taking away, pulling down, and removing the defendants' house, that the plaintiffs' house was by such negligent, unskilful, and improper conduct, greatly weakened, ruined, and dilapidated, and in part fell down.

"The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allegation from which a title to such sup-

* 231 *port can be inferred as a matter of law. The complaint also in both counts relates to the fact of taking down the defendant's house, and the

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(*a*) Binas quis ædes habebat una contignatione tectas: utrasque diversis legavit: dixi, quia magis placet tignum posse duorum esse, ita ut certæ partes cujusque sint contignationis, ex regione cujusque domini fore tigna; nec ullam invicem habituros actionem 'jus non esse immissum habere:' nec interest, pure utrisque, an sub conditione alteri ædes legatæ sint.—L. 36. ff. de serv. prædi. urb.

manner in which that was done. The first count is evidently framed upon a supposition that it was the duty of the defendants to use the necessary means to sustain the plaintiffs' house when they took down their own; the second count is more general, but it does not charge the want of notice of taking down the defendants, house, in order that the plaintiffs might themselves use the necessary means to sustain their own property, as the injury complained of: and, therefore, in our opinion, the action cannot be maintained upon the want of such a notice, supposing that, as a matter of law, the defendants were bound to give notice before hand; upon which point of law we are not, in this case, called upon to give any opinion.

"I have been thus particular in noticing the declaration, because it furnishes an answer to much of the learned arguments that were advanced on the behalf of the plaintiffs in support of the rule for a new trial.

"At the trial of the cause before me at Guildhall, it appeared, upon the plaintiffs' evidence, that the two houses were old and decayed, the party-wall between them weak and defective; that for some time pieces of timber called struts, had been carried across Honey Lane, on the east side whereof the defendants' house was situate, to the opposite house on the west side of that lane; that the plaintiffs' house adjoined the defendants' eastward; that these struts, by preventing the defendants' house from falling westward, had the effect also of preventing the plaintiffs' house * from falling that way; that when *232 the defendants' house was taken down, these struts were necessarily removed, and no other and longer struts substituted extending from the plaintiffs' house to the house on the opposite side of Honey Lane, nor any upright shores placed within the plaintiffs' house to sustain the floors and roof without the aid of the party-wall; that if either of these measures had been adopted, the plaintiffs' house might have stood: but that neither of them being adopted, it soon became separated from the house adjoining to it on the east, and either partly fell or was necessarily taken down, and rebuilt, being injured, dangerous, and uninhabitable. It did not appear whether the two houses had been erected at the same time, or at different times; from their construction, it seems likely that they were built at or about the same time. The freehold was then in different hands; and as the governors of the hospital are not likely to have bought or sold in modern times, it is probable that the freehold was also in different hands when the houses were built. These, however, are but conjectures; if the proof of the facts, either way, would have aided the plaintiffs' case, it was their duty to give the proof.

"It did not appear that the defendants gave any previous notice of the intention of pulling down their house, or of the time of doing so; but the defective state of both houses was known to the parties. There had been previous discussion between them, especially with regard to the party-wall, and a notice of re-building the party-wall under the act of parliament had been given; but

the defendants' house was pulled down before the expiration of the time men-
*233 tioned in that * notice. The operation of taking down the defendants' house was carried on by day, and the operation must have been seen and known by the tenant and occupier of the plaintiffs' house.

"Upon these facts appearing at the trial, I was of opinion, at the close of the plaintiffs' evidence, that it was their duty to support their own house by shores within; and upon that ground I directed a nonsuit.

"A rule to show cause for setting aside the nonsuit was granted in the ensuing term; cause was shown, and the matter very well argued on both sides during the present term. We have considered of it; and adverting to the facts proved, and to the want of evidence from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, and to the form of the declaration, we think the nonsuit was right, and the rule, therefore, must be discharged" (*a*).

Brown v. *Windsor* (*b*) was an action on the case for negligently and carelessly excavating on the defendant's own land, and thereby withdrawing the support from the plaintiff's house, which the declaration alleged it was entitled to. It appeared, that, for about twenty-six years, the plaintiff had rested his house upon a pine end wall belonging to the defendant; this had been originally done by permission of the owner of the wall; the defendant, by excavating near
*234 his pine end wall, caused it to sink, and thereby injured the * plaintiff's house, which rested against it. The jury found that this excavation was made in a careless and unskilful manner; a motion was afterwards made to set aside the verdict; but, after argument, the Court of Exchequer (*c*) held, that the action could be supported.

This case cannot be cited as a direct authority upon the point in question as the Court there clearly assumed, that the plaintiff was entitled to the support he claimed: thus, *Garrow*, B., said, "When such an easement is given, the owner of the premises can only use his rights subject to such easement; and I am of opinion, that the allegation as to the easement was established in evidence." "If a party," said *Vaughan*, B., "grant an easement, like the present, and then act so that it cannot be enjoyed, an action lies."

By the Civil Law, two servitudes were recognised, the "servitus tigni immittendi," and the "servitus onera vicini sustinendi," both belonging to this latter

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(*a*) *Peyton* v. *Mayor of London*, 9 B. & Cr. 736: see, also, *Walters and Others* v. *Pfeil*, 1 Moo. & Mal. 365; *Massey* v. *Goyder*, 4 Car. & P. 161.

(*b*) 1 Cr. & J. 20.

(*c*) *Garrow*, B., *Vaughan*, B., and *Bolland*, B.

class of support of one house from the adjoining house (*a*); the former imposed the liability of support alone, while the latter also imposed the anomalous obligation of repair on the servient tenement; but, even this, the most oppressive servitude known to the law, allowed the servient owner to pull down his house for the purpose of repair, without propping up the dominant tenement, no matter what danger he thereby exposed it to (*b*).

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*In the cases as to the right of support to land and houses * 235
from the soil and buildings adjoining, much stress has been laid upon the negligence imputed to the party charged, and some misapprehension appears to have prevailed, at least in argument, with reference to this point. This has probably arisen from the want of precision in the use of the term negligence, which *per se* is insufficient to express the distinction between negligence in law and negligence in fact.

Negligence in law is always actionable, but great uncertainty appears to exist as to the cases in which negligence in fact will afford foundation for a right of action. If a man has a right of easement to support, and his neighbor invades it, he is liable to an action—no matter how carefully he may have done the act complained of; but it is by no means equally clear where a party is not bound by any easement, that he may not be liable for the damage resulting from his negligence in fact.

The first branch of this proposition appears sufficiently obvious. It has been recognised as law in many ancient decisions—that an action lies for any act done by a man in using his own property, whereby the rights of another are injured, unless such act be altogether inevitable and beyond his control.

There is a very early case in which this point was expressly decided (*c*). A man brought an action of trespass for breaking and entering his close and treading down his grass. The defendant pleaded not guilty, and also justified the trespass, because he had a hedge * of thorns growing on a * 236
close sdjoining the close of the plaintiff, and at the time of the supposed trespass he cut the said thorns, and they *ipso invito* fell upon the land of the plaintiff, and that defendant came freshly upon the said land and took them away. To this plea the plaintiff demurred, "and it was well argued and adjourned."

(*a*) Item urbanorum prædiorum servitutes sunt hæ—ut vicinus vicini onere sustineat, ut in parietem ejus liceat vicino tignum immittere.—I. L. ff. de serv. Vide post, Incidents of easements.

(*c*) Post (*b*) 6 Ed. 4. 7, pl. 14.

Negligence in law. 6 Ewd. 4.

It was argued on behalf of the defendant, "That if a man does a lawful act, and by reason thereof damage accrues to another contrary to his intention (*encount son volunte*,) he shall not be punished;" as if I drive my beasts along the highway, and you have an acre of land adjoining thereto, and my beasts enter upon your land and eat the herbage thereof, and I come freshly and chase them out of your land, you shall not have any action against me, because the chasing them was lawful, and their entry upon your land was against my will. So, in the present case, the cutting was lawful, and the falling upon the plaintiff's land against the defendant's will; and therefore this re-taking was good and justifiable. If I cut the boughs of my tree, and they fall upon a man and kill him, I shall not be attaint as of felony; for my cutting was lawful, and the falling upon the man was against my will."

On the other side, a distinction was taken "between cases where the injury arising from an act is felony, and where it is only trespass, because felony is of malice prepense; and as it was against a man's will, it cannot be done *animo felonico;* but if in cutting my boughs they fall on a man and hurt him, he shall have an action of trespass. So if a man shooting with his bow at the butts, and his bow turn aside in his hands (*son arke swacset en sa mein*) and kill a man

* 237 *ipso invito*, it is not felony; but if his arrow hurt a man, an * action will well lie, although his shooting was a lawful act, and the hurt of the other was against his will. *Pigott*, J.—If I have a mill, and the water which runs thereto passes over your land, and you have osiers or willows growing along the water side, and you cut the willows and they fall into the stream and stop it, so that I cannot have sufficient water for my mill, I shall have an action, notwithstanding the cutting was lawful, and they fell into the stream against your will. So if a man hath a pond in his manor, and lets off the water in order to catch the fish therein, and the water surrounds my land, I shall have an action, though the doing so by him was lawful." *Young*, J., was of opinion that "no action lay, because the property in the thorns being still in the defendant, his entry to take them away was not tortious, and that the plaintiff had sustained damage *sine injuria*. *Brian*, J.—"In my opinion, when a man doth any act, he is bound to do it in such a manner as not to injure another man. If I build a house, and while the timber is being raised up a piece of timber falls upon my neighbor's house and breaks it down (*debruse sa meason*) he shall have an action against me, though the raising the timber was lawful, and the falling and injury against my will. So too if a man make an assault upon me, and I cannot avoid him, and as he is coming to beat me, I raise my stick in my own defence to strike, and another man is behind me, and in raising my stick I strike him, he shall have an action against me." *Littleton*, J., said, that "the case of the beasts put by the defendant's counsel was not law; but if a man's cattle do damage by eating the herbage, &c., he must pay for it, or they may

* 238 be distrained damage feasant, though they could* not be taken by the

lord for his rent, as the owner would be entitled to have them back again upon tender of reasonable amends. If the law be as is contended in respect to thorns, it must be so for trees also; and a man might enter with his carts to take it away if it fell into his neighbor's field, notwithstanding the neighbor had wheat or other herbs growing there. The law is the same for great and small things; and the amends shall in all cases be according to the quantity of damage done." *Choke*—"Where the principal thing was not lawful, that which dependeth upon it is not lawful. When the thorns were cut and fell on the plaintiff's land, the falling was unlawful, and therefore defendant's coming to fetch was unlawful likewise; and as to his saying that they fell *ipso invito*, that is no plea at all; but he ought to say that he could not do otherwise, or that he did all that lay in his power to keep them out, or otherwise he shall pay damages. But if the thorns or a large tree had fallen by the force of the wind, in this case he might have entered and taken them, the falling being caused not by his act, but by the wind."

So, in *Weaver* v. *Ward*, (*a*), in an action of trespass and battery, the defendant pleaded "That he was skirmishing in the London trainbands *in re militari*, and accidentally, and by misfortune, and against his will, in discharging of his piece, did hurt and wound the plaintiff." Upon demurrer, judgment was given for the plaintiff: "For though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence, playing their prizes, kill one another, that this shall be no felony, or if a lunatic kill a * man, * 239 or the like—because felony must be done *animo felonico:* but in trespass which tends only to give damages according to hurt or loss, it is not so; therefore, if a lunatic hurt a man he shall be answerable in trespass; and therefore no man shall be excused of a trespass, (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be *judged utterly without this fault;* as if a man by force take my hand and strike you, or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it appeared to the Court to have been inevitable, and that the defendant had committed no negligence to give occasion to the hurt."

Thus in 1 Rolle's Abridge. (*b*), it is said, "If my fire by misfortune burn the goods of another man, he shall have an action on the case against me.

"If the fire light suddenly in my house, I knowing nothing of it, and burn my goods and also the house of my neighbor, my neighbor shall have an action on the case against me.

"If my servant puts a candle or other fire in a place in my house, and it falls and burns all my house and the house of my neighbor, action on the case

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(*a*) Hobart, 134.

(*b*) Tit. Action sur Case, B. p. 1. citing 2 H. 4, 18.

lies against me by him; and the law is the same if my guest should do it (*a*).

"But if a stranger against my will puts a fire in my house, no action lies against me."

So, in *Turbevil* v. *Stamp* (*b*) which was an action against the defendant for so negligently and carelessly keeping the fire in his field, that it communica-

*241 ted * to the plaintiff's adjoining close of heath and burnt it. After verdict for the plaintiff, defendant moved in arrest of judgment, and it was said, "That in fact in this case the defendant's servant kindled this fire by way of husbandry, but that a wind and tempest rose and drove it into the plaintiff's field; and the Court said (*c*), "The fire in his field is his fire, as well as that in his house. He made it, and must see it does no harm, and answer the damage if it does. Every man must use his own so as not to hurt another; but if a sudden storm had arisen which he could not stop, it was matter of evidence, and he should have shown it."

So in *Comyn's Digest (d)* it is said, "An action lies for misfeasance, though the damage happen by misadventure." One of the authorities cited by Comyn is a case in Croke (*e*), of a man shooting with a gun at a bird, and thereby lighting a fire which consumed his neighbor's house.

"If a man," says *Gibbs*, C. J., in *Sutton* v. *Clarke*, "for his own benefit makes an improvement on his own land, according to his best skill and diligence, and not foreseeing that it will produce any injury to his neighbor, if he thereby unwittingly injure his neighbor, he is answerable" (*f*).

The recent case of *Vaughan* v. *Menlove* (*g*) was an action brought by the plaintiff for an injury to his reversion, occasioned by the defendant making a rick of hay on his own land near some cottages of the plaintiff, which was,

*240 "liable and likely to ignite, take fire, * and burst out in flame, of which the defendant had notice, by means whereof the said rick did ignite, take fire, and burst into flame, and by flame issuing there from the plaintiff's cottages were set on fire, and thereby, through the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick in such condition, the said cottages were burnt down. The defendant pleaded not guilty—that "the said rick or stack of hay was not likely to

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(*a*) The law is now altered as to the liability for accidental fire.

(*b*) Ld. Raym. 264. (*c*) 1 Salk. 13.

(*d*) Action upon the case for misfeasance, A. 4.

(*e*) Cro. Eliz. 10.

(*f*) 6 Taunt. 44.

(*g*) 4 Scott. 244.

ignite, take fire, and brake out into flame, nor was the same, by reason of such liability, dangerous to the plaintiff's cottages, nor had the defendant notice thereof—and other pleas, which denied that the damage occurred through the defendant's negligence.

It appeared at the trial, that the rick in question had been made by the defendant near the boundary of his own premises; that the hay when put together was in such a state as to cause persons to warn the defendant that there was danger of its taking fire; that he made some attempts to prevent this by making a chimney in the rick; that the rick burst into flames from the spontaneous ignition of the materials, and the flames communicated to and destroyed the plaintiff's cottages.

Patteson, J., left it to the jury to consider "Whether the fire had been occasioned by gross negligence on the part of the defendant;" adding, "that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances." The jury having found for the plaintiff, a rule for a new trial was obtained, on the ground that the proper question to have been left to the jury was, whether the defendant had acted *bona fide* to the best *of his judgment, the standard of "ordinary *242 prudence" being too uncertain to afford any criterion.

The argument went entirely on the question of negligence; and the decisions upon the degree of caution required in taking negotiable instruments were relied on for the defendants. The Court discharged the rule. *Tindal*, C. J., said, "I agree that this is a case of the first impression; but I feel no difficulty in the application to it of the principle upon which the determination of it must rest. This is neither a case of contract nor a case of bailment, where the degree of care which the party is called upon to exert is measured by the nature and character of the bailment. But the case falls within the general rule of law, which requires that a man shall so use his own property as not to injure or destroy that of his neighbor, and which renders him liable for all the consequences resulting from the want of due care and caution in the mode of enjoying his own. Under the particular circumstances of this case, I feel no hesitation in holding the defendant to have been as much the raiser of the fire as if he had put a lighted match to the hay-rick: for, it is well known that hay stacked in a green or damp condition will from natural causes ferment and ignite.

"In *Tubervil* v. *Stamp*, an action was held to be maintainable under circumstances very similar to those of the preceding case: 'Case on the custom of the realm, quare negligenter custodivit ignem suum in clauso suo, ita quod per flammas blada quer. in quodam clauso ipsius quer. combusta fuerunt. After verdict pro quer., it was objected, the custom extends only to fire in a house or curtilage, (like goods of guests), which are in his power. Non alloc.; for, the fire in his field is his fire, as well as that in his house; he made it, and

*243 must see that it does *no harm, and answer the damage if it does. Every man must use his own so as not to hurt another. But, if a sudden storm had arisen, which he could not stop, it was matter of evidence, and he should have showed it. And Holt, Rokesby, and Eyre, against the opinion of Turton, who went upon the difference between fire in a house, which is in a man's custody and power, and fire in a field, which is not properly so; and it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment, according to the opinion of the other three.'

"Put the case of a chemist, mixing substances which alone are perfectly innocent, but which are liable to explode on coming into contact, and thereby occasioning damage to his neighbor: who could for a moment doubt that the injured party would have a remedy by action? I am clearly of opinion that the damage in this case was properly the subject-matter of an action.

"But it is contended that the learned judge mistook the extent of the defendant's liability; and that, under the particular circumstances of this case, the defendant was not bound to adopt such measures as a man of ordinary prudence would have resorted to for the purpose of averting the threatened danger; but that it was sufficient if he acted according to the best of his own individual judgment; and therefore the learned judge ought not to have left the case to the jury as one of gross negligence, but should have left it to them to say whether or not the defendant had acted honestly and *bona fide* according to the best of his judgment. The first observation that suggests itself, in answer to that argument, is, that, seeing the infinite gradations of intellect and

*244 judgment, the doctrine contended for would *lead to an inconvenient vagueness and uncertainty in a case which perhaps more than all others requires that the rights and liabilities of the parties should be well and accurately defined.

"It is said, that there is nothing intelligible in the rule which has in many cases obtained, requiring from a party under circumstances analogous to those of the present case, the exercise of that degree of care which a prudent and cautious man would be expected to use. Such, however, has always been the rule in cases of bailment, as laid down by Lord *Kenyon* in *Coggs* v. *Barnard* (*a*), though in some cases of bailment a smaller, in others a greater degree of diligence and care are exacted. That learned judge says: 'In the second sort of bailment, viz. commodatum, or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them; so, if the bailee be guilty of the least neglect, he will be answerable; as, if a man should lend another a horse to go westward, or for a month, if

(*a*) 2 Lord Raym. 909.

the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him: but, if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse.'

"It is for the jury to say whether or not, under the circumstances, the party has conducted himself with such a degree of care and caution as might be looked for in a prudent man: and such was in substance the direction of the * learned judge. To hold the degree of care to be sufficient if co- *245 extensive with the judgment of the individual, would introduce a rule as uncertain as it is possible to conceive. In the present case, it appears to me that the defendant not only failed to observe the degree of care and caution that the law required of him, but was guilty of very gross negligence. I therefore think the rule must be discharged."

Park, J.—"I am of the same opinion. Although the facts in this case are novel, they clearly bring it within the rule of law, that a man shall so use his own property as not to do injury to his neighbor. The case of *Tubervil* v. *Stamp* is, in principle, very like the present, though in its circumstances more like the case that was tried in Berkshire, as alluded to by my brother Talfourd. The direction of the learned judge seems to me to be perfectly correct. It clearly was proper to leave it to the jury to say whether or not the defendant was guilty of gross negligence; and I think their finding was well warranted by the evidence."

Gaselee, J.—"My Lord Chief Justice and my brother *Park* having gone so fully into the matter, it is not necessary for me to say more than that I entirely concur with them. The action is clearly consistent with the principle upon which the decisions referred to turned."

Vaughan, J.—"The principle upon which we hold this action to be maintainable is by no means new. It is at least as old as *Tubervil* v. *Stamp*. It has been strenuously urged that the law cast no duty upon the defendant under the circumstances. To that, however, I cannot agree. It clearly was his duty, whilst enjoying his own premises, to take care that his neighbor was not injured by any act or neglect of his. It appears to me that the defendant's conduct was such that no * jury would be warranted in coming to *246 any other conclusion than that he had been guilty of *gross* negligence: for, when the condition of the stack, and the probable and almost inevitable consequence of permitting it to remain in its then state, were pointed out to him, he abstained from the exercise of the precautionary measures that common prudence and foresight would naturally suggest, and very coolly observed that 'he would chance it.' That which might be expected under the circumstances to have been the conduct pursued by a prudent and careful man has always been taken for the criterion in cases analogous to the present. For

example, in actions on policies of assurance, where the ship or goods, the subject-matter of the adventure, have been sold by the master for the benefit of the concerned, the question left to the jury has invariably been, whether or not the course pursued by the master has been such as a prudent and cautious man, having a due regard to the interest of all parties, ought, under the peculiar circumstances, to have adopted. In this case I think the jury would not have found for the plaintiff, unless they had been satisfied that the defendant had been guilty of gross negligence; a conclusion to which all the evidence directly pointed."

It may be remarked with reference to this case, that the question of negligence in fact was raised by every issue on the record; and as there was evidence sufficient to satisfy the minds of the jury that the conduct of the defendant was not that of a man of ordinary care and prudence, the Court were not called upon to decide the question of his liability at all events, for the consequences of his own act. In the case of *Tubervil* v. *Stamp*, the validity of which is so fully recognized, no exception is made on the ground of the

*247 defendant's * having acted bona fide; in fact, it would appear from the observations of one of the learned Judges in that case, that the fire was not the result of negligence, but was lighted for the purposes of husbandry. In the case of the chemist, supposed by *Tindal*, C. J., it may fairly be doubted, on the authority of the case above cited from Com. Dig., if he would not be equally liable, whether the injury was caused by the experiments he was making, or by his carelessness in leaving the materials in a situation liable to ignite.

The civil law appears to agree with these authorities: "If from the roof of a house, tiles thrown down by the wind should cause damage to a neighbor, the owner of the house is liable, if it happen through any defect of the house; but not if it happens through the violence of the winds or other act of God—Qua alia ratione quæ vim habet divinam:" and the reason is given for this limitation of the rule: "without this restriction the law would be unjust, for it is impossible to make a building so strong as to resist the force of a river, the sea, a tempest, or an earthquake" (*a*). The only exception mentioned in

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(*a*) Servius quoque putat, si ex ædibus promissoris vento tegulæ dejectæ damnum vicino dederint, ita eum teneri si ædificii vitio id acciderit, non si violentia ventorum vel qua alia ratione quæ vim habet divinam. Labeo et rationem adjicit: quod si hoc non admittatur iniquum erit; quod enim tam firmum ædificium est, ut fluminis, aut maris, aut tempestatis, aut ruinæ, incendii, aut terræ motus vim sustinere possit.—L. 24. § 4. ff. De damno infecto.

another place is inevitable accident (*a*). This is expressed in our law by the * maxim, "Sic utere tuo ut alienum non lædas;"—a maxim equally *248 applicable to an easement, when once legally acquired, as to any of the rights of property instanced in these decisions. It can scarcely be contended, that the careful manner in which a wall was built, could be any defence for the obstruction of an ancient window, if such be the consequence of its erection; or that an excavation, which caused the fall of an ancient house, could be justified on the ground that all possible precaution was taken to guard against such an accident.

The further question now remains to be considered, whether a man acting in the exercise or his undoubted rights of property, and doing damage to his neighbor, which under some circumstances might be justifible, is liable to an action if the damage might have been prevented by the use of reasonable care and precaution on his part.

This question also turns upon the application of the maxim, "Sic utere tuo ut alienum non lædas;" and as it is not contested, that in the interpretation of this maxim, "alienum" must be taken to mean, "the rights of the neighboring owner;" and that, therefore, no action can be maintained unless both injury and damage are sustained: the real point to be decided is—whether, the abscence of any easement restricting the neighboring owner, a party has a right to impose upon such owner a limitation as to the mode of doing a thing, which is one of the undoubted rights of property, and the performance of which he clearly has no right to prevent.

"If a man sustains damage," says *Bayley*, J., * "by the wrongful *249 act of another, he is entitled to a remedy; but, to give him that title, these two things must concur—damage to himself and a wrong committed by the other. That he has sustained damage is not of itself sufficient." *Rex* v. *Commissioners of the Pagham Level* (*a*).

(*a*) Cassius quoque scribit quod contra ea damnum datum est, cui nulla ope occurri poterit, stipulationem non tenere.—Ibid. § 8.

Si damni infecti ædium mearum nomine tibi promisero, deinde hæ ædes vi tempestatis in tua ædificia ceciderint, eaque diruerint, nihil ex ea stipulatione præstari; quia nullum damnum vitio mearum ædium tibi contingit: nisi forte ita vitiosæ meæ ædes fuerint, ut qualibet vel minima tempestate ruerint. Hæc omnia vera sunt.—Ibid. § 10.

(*a*) 8 B. & Cr. 355.

Negligence in fact.

Thus, supposing there were two modern houses, and the owner of one were desirous of pulling down his house, the consequence of which, if done in the most convenient and economical manner, would be damage to the neighboring house, by suddenly withdrawing the support which it had hitherto received, but to which it had no claim; while a more gradual withdrawal of the support might not have been attended with the same danger;—has the neighboring owner any right of action against him if he do not adopt the latter mode?

Some modern authorities would appear to answer this question broadly in the affirmative, and to lay it down as being in every case at large for the decision of the jury, whether a reasonable degree of caution has been exercised. The inconvenience that must result from the absence of some more precise and definite rule of law is obvious. A man could scarcely exercise upon his own land one of the most ordinary rights of property without exposing himself to an action for damages; the event of which would depend upon the varying opinion of a jury founded on the proverbially conflicting testimony of surveyors (*a*).

As the case put supposes that no easement has been acquired, the party
*250 must have been in the enjoyment * of that to which he had, by law, no title, and which enjoyment the neighboring owner might at any time have determined by his own act (*b*).

Where, however, a party chooses to obtain a remedy by his own act, without having recourse to law, a condition is imposed upon him, that he shall use no unnecessary violence. If, therefore, a beam be wrongfully inserted into a neighboring house, or the outer walls cohere either from the cement or the bricks dovetailing, the party proposing to remove the beam or the bricks improperly inserted in his wall, must use no unnecessary violence; and, in this respect, it must obviously be immaterial whether his object be simply to resist the usurpation, or, in addition thereto, to remove his whole building either with or without an intention to reconstruct it.

Beyond this, it appears difficult to see on what principle any restriction can be imposed upon a party in the free use of his own property, so long as he confines himself strictly within its limits. There are, however, cases which have been adduced as authorities opposed to this doctrine, such as the case in which air has been corrupted by gas and other works; but in these instances there is a clear invasion of common right; and therefore the analogy seems to fail. A man requires an easement to entitle him to the lateral passage of light and air; but he requires no easement to give him a right of action against his

(*a*) *Walters* v. *Pfeil*, 1 Moo. & M. 364; *Trower* v. *Chadwick*, 3 Bing. N. C. 334: 3 Scott, 699.

(*b*) Rolle, Abr. Remedy for Disturbance, post.

Negligence in fact. Walters v. Pfeil. Dodd v. Holme.

neighbor who immits upon his land air in a corrupted state, and thus commits a quasi trespass upon him. The real ground of action in this case is not what he does on his own, * but what he does on the complainant's land; *251 not the rendering the air impure, but the transmitting it in that state to his neighbor.

In *Waltars* v. *Pfeil* (*a*), it appeared that the plaintiffs or their tenants had neglected to take any precaution, by shoring up their houses within, or in any other way, against the effects of pulling down the defendant's house adjoining; and it appeared that this might have been so done, that the accident would not have happened to the same extent. There was, also, evidence to show that the accident was owing to the bad foundations of the plaintiff's houses; but there was conflicting evidence as to whether, by due care on the part of defendant's workmen, the mischief might have been entirely avoided.

Lord *Tenterden*, C. J., in summing up, said, "It is now settled that the owner of premises adjoining those pulled down must shore up his own in the inside, and do every thing proper to be done upon them for their preservation. That has not been done here; and it seems that if it had been, it would have given security. Still the omission does not neccessarily defeat the action; if the pulling down be irregularly and improperly done, and the injury is produced thereby, the person so acting may be liable for it, although the owner of the house destroyed may not have done all that he ought for his own protection. If, therefore, you think that the house of the defendant was pulled down in a wasteful, negligent, and improvident manner, so as to occasion greater risk to the plaintiffs than in the ordinary course of doing the work they would * have incurred, then I think the defendant liable to make *252 compensation for the consequences of his want of caution: if you think that fair and proper caution was exercised, then the defendant will be entitled to a verdict."

In *Dodd* v. *Holme* (*b*) the action was brought for digging the foundation of an intended building on a piece of land next adjoining an ancient house of the plaintiffs', so carelessly, &c., that the walls and foundations of the plaintiffs' ancient house sank and gave way: the other counts were similar—and all except the last, stated it to be an ancient house. At the trial it appeared that the house was ancient, and that the defendants excavated on their own ground, being about four feet from the plaintiffs' house. After the excavation, the plaintiffs' gable wall bulged—the defendants made an ineffectual attempt to shore it up, but it gave way in all directions, and it became necessary to rebuild it. On the part of the plaintiffs, evidence was given, that if the wall had been

(*a*) Moo. & Malk. 364.

(*b*) 1 Adol. & Ellis, 493; 3 Nev. & Man. 739.

shored properly, and in time, it would not have given way. On the part of the defendants, evidence was given, that the wall was in so rotten a state, that it could not have been effectually shored, and was pressed upon by a great weight of rubbish on the plaintiffs' premises, and that, even if undisturbed, it could not have stood six months. It appears, also, to have been contended, that if a man build to the extremity of his own land, antiquity of possession would not give him any right "to prevent a neighbor from using his own land lying adjacent." The learned judge stated the law to be as follows:—*

*253 "If I have a building on my own land, which I leave in the same state, and my neighbor digs in his land adjacent so as to pull down my wall, he is liable to an action. If, however, I had loaded my wall so that it had more on it than it could well bear, he would not be liable. And he stated the question for the jury to be, whether the fall was occasioned by the defendants' negligence or by its own infirmity, in which latter case they should find for the defendants." The jury found a verdict for the plaintiffs. In Michaelmas term following a new trial was moved for, on the "ground, that the learned judge had misdirected the jury, inasmuch as they might have been led by the summing up to suppose, that the mere act of digging near the plaintiffs' land, in consequence of which the wall fell, was negligence, for which an action lay, unless the wall was improperly loaded: whereas the real question was, whether the work had been done by the defendants in a negligent manner, or with as much care as the circumstances allowed: it was, also, contended, that it should have been left to the jury to say, whether the house was built in such a manner as a man ought to build a house at the extremity of his own land, in order to have an action against his neighbor, if any such action would lie, for injury occasioned to the house by the neighbor digging in his own soil." A rule *nisi* having been obtained, in the course of the argument, it having been denied that the antiquity of the house gave any right to support from the adjoining soil, Mr. J. *Littledale* observed, "Suppose the house to have been substantially built, to have stood thirty or forty years, and to have been kept in proper repair, do you say, that if the defendant, by excavating his adjacent

*254 ground, let down * that house, though without actual negligence on his part, an action would not lie against him?" The rule for a new trial was discharged. The judgements of the judges were as follows:—

"Lord *Denman*, C. J. The case, as presented to the Court, involves some curious points, which, however, it is not necessary to decide. The declaration charges that the plaintiffs were possessed of a house, and that the defendants so negligently and carelessly dug their foundations in the land next adjoining the land on which the said house was built, that the walls thereof sank and gave way. The question is—if those allegations were proved, and if it was properly left to the jury whether they were or were not proved. The real point in the case was, the cause of the damage sustained by the plaintiffs.

It is impossible not to see that the question, what that cause was, involves the consideration of the state in which the plaintiffs' house was at the time of the act done by the defendants. Upon that subject a great deal of evidence was given, and, no doubt, properly impressed upon the jury; and I think it was substantially left to them in the charge of the learned judge, whether or not the result complained of was caused by the negligent act of the defendants. It being so left to them, I think, upon the balance of evidence, no other result could have been expected than the verdict they gave; the damage having occurred so soon after the act complained of. A man has no right to accelerate the fall of his neighbor's house. Without, therefore, entering into the general question of law as to the right of a party building on the edge of his own soil, or the question whether twenty years' occupation is an essential part of * such right, on which I give no opinion, I think the question in this * 255 case was fairly left to the jury, and the verdict a proper one.

"*Littledale*, J. I think that the plaintiffs' house, having stood more than twenty years, might be considered as an ancient house. What difference that might make under other circumstances, it is unnecessary now to say: the plaintiffs had, at all events, acquired certain rights; and the complaint in this action is, that the defendants, by their negligence, occasioned a loss to the plaintiffs, which was a prejudice to those rights. The learned judge appears, by his report, to have put the case to the jury in language like that used by this Court in their judgment in *Wyatt* v. *Harrison* (*a*). I do not find that he left it prominently as a question, what was the state of the building; but that must have been a matter submitted to them; for, in inquiring whether the injury was owing to the neglect of the defendants, the state of the premises must have been a part of the consideration. I am of opinion that there is no ground for a new trial.

"*Taunton*, J. The question in the cause was merely one of fact, and I cannot see in what respect the jury have drawn a wrong conclusion. In every count of the declaration it is stated that the defendants did the act complained of negligently, carelessly, and unskilfully, and that by reason thereof, that is, of such negligent and improper conduct, the damage was occasioned. A very long inquiry was gone into at the trial, how far the defendants had acted negligently or * cautiously, upon which the jury have formed * 256 their conclusion; and they must be taken to have decided, according to the averments in the declaration, not only that there was negligence in the defendants, but that, by reason of such negligence, the damage accrued. It was said that the house, if undisturbed, might not have stood six months; but if that was so, still the defendants had no right to accelerate its fall: six months' enjoyment was of some value, and the defendants had no right to deprive the

(*a*) 3 B. & Ad. 871.

plaintiffs even of that short-lived existence of their dwelling-house. If the building had fallen down merely in consequence of its infirm condition, that would not have been a damage by the act of the defendants; but the jury have found otherwise, and I think the evidence supports their finding. As to the summing up, the learned judge has stated it briefly in his report, and may not recollect every observation he made; but, considering the length of time occupied by the cause, and the quantity of evidence gone into, it is impossible, even if the judge had been silent on the point, that the jury should have omitted to consider whether or not the act of the defendants was done by them negligently; and, without looking narrowly, and, as Lord Kenyon used to say, 'with eagle's eyes,' at the words used by the learned judge, I think we are justified in saying, that the minds of the jury were sufficiently directed to the question how far the damage complained of arose from the improper act of the defendants.

"*Williams*, J. I am of the same opinion; and I think it is clear from the learned judge's report, that the attention of the jury was drawn to that which

*257 was the real subject of inquiry. Much evidence was given * to show that the injury was occasioned by the faulty state of the house, and not by the negligent proceeding of the defendants; that question must have been fully before the jury, and there was nothing in the summing up to withdraw it from their notice. The bad condition of the house would only affect the amount of damages. If it was true that the premises could have stood only six months, the plaintiffs still had a cause of action against those who accelerated its fall: the state of the house might render more care necessary on the part of the defendants not to hasten its dissolution. There was evidence of an actual neglect in them; and, upon the whole, there is reason to think that the jury drew the proper inference."

The recent case of *Trower* v. *Chadwick* (*a*) appears to be in support of the first principle above laid down; but it must be conceded, that the judgment on the second count in this case is a direct authority to the effect, "That, although a man may have no right to support from the buildings of his neighbor, yet, if the latter chose to withdraw it, he must take reasonable and proper care in doing so, and, for negligence and unskilfulness in doing so, he is liable to an action."

It is, however, to be observed, that this case was decided on demurrer; and therefore the duty of the defendant being alleged, if such duty could in any case be imposed by law, it was admitted by the demurrer; and this case might be supported by a state of facts, in which the defendant, in pulling down his own house, had interfered with, or removed with unnecessary violence, mate-

(*a*) 3 Bing. N. C. 334.

rials belonging to the plaintiff's house, * and standing on the plain- *258
tiff's own ground. Unless the language of the Chief Justice is confined to some such case as that here suggested, it might have the effect of preventing the owner of a house from pulling it down even for the purpose of repair, if the necessary consequence were, that the adjoining house would fall—although such adjoining house were of recent and insecure erection, unless he took precautions, as by shoring or otherwise, to prevent injuring his neighbor —a burthen clearly not imposed upon him by law.

The facts of the case, and the points made, appear fully in the following elaborate judgment of *Tindal*, C. J.—

"This is an action on the case, the declaration in which contains two counts, in the first of which the plaintiffs allege their possession of a certain vault or cellar adjoining to certain other vaults and walls, and which in part rested upon and was of right supported in part by parts of the adjoining vaults and walls; and that the plaintiffs were of right entitled that their vault or cellar should be so supported in part; and that there are certain foundations belonging to and supporting the said vault or cellar, which the plaintiffs ought to enjoy; yet that the defendant wrongfully took down and removed the said vaults and walls so adjoining to the vault or cellar of the plaintiffs, without shoring or propping up, or taking other reasonable or proper precautions to support or secure it, so as to prevent its being weakened or destroyed, and wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the said foundations from being weakened and giving way; and the * declaration then states the injury which *259
the plaintiffs sustained, and the special damage which followed thereon. The second count states that the defendant was about to pull down the adjoining vaults and walls, and alleges it to have been the duty of the defendant, in the event of his not shoring up the walls, to give notice to the plaintiffs of his intention to pull down, and also his duty to use due care and skill, and to take due, reasonable, and proper precautions about the pulling down his vaults and walls; and then alleges a breach of such duty.

"To this declaration the defendant pleads thirteen pleas, of which, the first seven are pleaded to the first count either in part or in whole; and the eighth and subsequent pleas are pleaded in like manner to the second count of the declaration.

"The plaintiffs demur to the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and last pleas, assigning certain causes of special demurrer to each; and, the defendant having joined in demurrer, the first question arises on the validity of those pleas.

"The fourth plea, which is pleaded only to 'the not shoring or propping up the walls, or taking other reasonable or proper precautions to support or secure the vault or cellar of the plaintiffs, so as to prevent the same from being

weakened,' we hold to be bad, on two grounds:—In the first place, the traverse contained in that plea is not the traverse of any allegation to be found in the first count of the declaration. The ground of action on which the plaintiffs rely in that count, is, their right to the foundations on which their vault rested; not any duty or obligation of the defendant to prop or shore up the

*260 plaintiffs' vault, or to take * due and proper precautions in pulling down his vault. When, therefore, the defendant traverses the existence of such duty or obligation, he traverses that which is not alleged by the plaintiffs; who only mention the want of propping and shoring up, and the want of proper precaution by the defendant, as the description of the mode or means by which the injury to them was occasioned. And the second objection to this plea appears to us to be this—that it raises an issue of law, and nothing else, for the consideration of the jury, viz. whether any duty or obligation was cast upon the defendant by law or otherwise. A jury might, indeed, try whether there was any duty of that nature arising from usage or contract; for, the existence of any such duty is a mere question of fact; but they cannot try whether there is any such duty or obligation cast upon him by law, for that is a question to be determined only by the court, and not by the jury.

"On the same grounds, and for the same reasons, we hold the fifth plea to be bad in law.

"As to the sixth plea of the defendant, it appears to us to be bad also upon two grounds:—First, it is a plea which confesses without avoiding that part of the charge in the first count to which it professes to be an answer. This plea is pleaded, not as any answer to the right claimed in the declaration, but to that which is alleged in the first count as a necessary and immediate consequence from the wrongful act of the defendant; that is, it is pleaded to part of the special damage alleged to have followed from the weakening of the plaintiffs' vault or cellar. But, if the vault or cellar of the plaintiffs has been weakened in its walls or foundations by the wrongful act of the defendant, it

*261 is no avoidance * of the plaintiffs' right of action, as it appears to us, that the timber, bricks, or materials that fell upon the vault or cellar in its weakened state, were not the property of the defendant, or were not thrown there by his carelessness or negligence; but that the defendant is equally liable to answer for the injury, in whomsoever the property of those materials may be, and whether they were placed there by the act of the defendant or of any other person. The plaintiffs have alleged in their declaration, that, but for the wrongful act of the defendant, and the weakened state of the walls, 'and no other account,' was the vault unable to bear or resist the weight and pressure of the timber, &c. The defendant, therefore, is the proximate cause of this damage, and appears to us to be answerable for it. And we think this plea is further bad, because it denies an obligation in law, and, still further, an obligation which has not even been alleged in the declaration.

"The seventh plea is pleaded to the whole of the first count of the declaration. If, therefore, proposing to give an answer to the whole, it omits any material part it is bad. Now, the first count of the declaration is founded on the alleged wrongful act of the defendant, not only in pulling down the vaults and walls of the defendant, but also in digging the earth and disturbing the foundations of the vault or cellar of the plaintiffs; and to this cause of action, though confessed by the plea, there is no matter of avoidance pleaded in bar.

"The remaining pleas to which the plaintiffs have demurred apply themselves to the last count of the declaration. And of these we think the eighth plea cannot be supported, inasmuch as it traverses a matter of * law. * 262
It is pleaded as to so much of the last count as relates to the defendant not having given to the plaintiffs due and reasonable notice of his intention to pull down his walls. The allegation in this plea, that he was not bound by law or otherwise, nor was there any duty, liability, or obligation imposed on him by law or otherwise, to give any notice of his intention to the plaintiffs, appears to us to raise a direct question of law upon an issue joined on that plea.

"The eleventh plea, which pleaded to so much of the second count as alleges it to have been the duty of the defendant to have taken due and reasonable precautions about the pulling down his walls, we hold to be bad for the same reason as the last, viz. that it raises an issue of law, instead of an issue of fact, for the jury.

"The twelfth plea falls altogether within the same consideration as the sixth, and is bad for the same reason.

"The last plea, to the second count of the declaration, is bad for the same reason as the seventh plea, which is pleaded to a similar part of the first count and sets up precisely the same defence.

"But the defendant contends, that admitting the pleas to be bad, the plaintiffs have shown no sufficient ground of action, either in the first or second count of their declaration.

"The first count rests upon a precise and distinct allegation that the vault or cellar of the plaintiffs was of right supported by parts of the adjoining walls, and that the plaintiffs were of right entitled to have them so supported, and that there were certain foundations for supporting those vaults, which the blaintiffs ought * to enjoy: and the count then proceeds to allege, as * 263
part of the gravamen, that the defendant wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the foundations from being weakened. And we think, without entering into the examination of the several cases cited by the plaintiffs, this count contains a clear and substantive ground of action, viz. that of negligence and carelessness in the exercise of the defendant's rights, by means whereof the plaintiffs' rights were injured; and that, if the defendant meant to object that the plain-

tiffs' right and title was not alleged with sufficient certainty, he ought to have demurred specially to the declaration, instead of pleading over.

"With respect to the second count of the declaration, the right of action, as stated in that count, appears in one respect more doubtful. There is no allegation in this count of any right of easement *in alieno solo*, which forms the ground of the plaintiff's action in the first count. And, as to the allegation, that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore it up himself, it is objected, and we think with considerable weight, that no such obligation results, as an inference of law, from the mere circumstance of the juxta-position of the walls of the defendant and the plaintiffs. But we think ourselves not called upon, on the present occasion, to decide this question: for, the count goes on to allege that it was also the duty of the defendant to use due care and skill, and take due, reasonable, and proper precautions, in pulling down his wall

*264 adjoining to the plaintiffs' * vault; so that, for want of *such* care, skill, and precaution, the plaintiffs' vault might not be injured; and we think that duty is clearly imposed by law; and that a breach which alleges that the defendant conducted himself so carelessly, negligently, and unskilfully, in pulling down his walls, as by reason thereof to injure the plaintiffs' wall, is well assigned; and that, inasmuch as this latter allegation of duty is severable from the former, it states a good ground of action.

"Upon the whole, therefore, we think the plaintiffs are entitled to judgment on the demurrers filed to the several pleas of the defendant."

The language of Lord *Tenterden* in *Walters* v. *Pfeil* evidently applied to the case of a usurpation having taken place, as, otherwise, there could be no necessity for showing: the same observation applies to *Trower* v. *Chadwick;* while, from the variety of points which combined to form the judgement of the Court in *Dodd* v. *Holme*, it can hardly be advanced as a decision upon this precise point.

Upon the amount of caution required in cases where no easement exists, depends the question, whether it is the duty of a party, intending to make alterations which may affect his neighbor's premises, to give notice of his intention (*a*).

If the above observations are well founded, it would seem that no such duty is imposed, although,in the present unsettled state of the law upon this point, it would be highly imprudent to neglect such a precaution.

*265 * The general rule of law upon this subject is thus laid down by Bracton:—

"Nocumentum enim poterit esse justum et poterit esse injuriosum; injuri-

(*a*) See *Massey* v. *Goyder*, 4 Car. & P. 161.

osum ubi quis fecerit aliquid in suo injuste—contra legem vel contra constitutionem prohibitus a jure; si autem prohibere a jure non possit ne faciat, licet nocumentum faciat et damnosum, tamen non erit injuriosum, licitum est enim unicuique facere in suo quod damnum injuriosum non eveniet vicino (*a*)."

"An action does not lie for an act not prohibited by law; as, if a lessee at will, by his negligence, burn his house, an action on the case does not lie, (at the suit of the landlord), for the law does not punish him for permissive waste" (*b*); if, however, the fire be transmitted beyond the bounds of his property, and communicate to the adjoining house, he would have been liable at common law (*c*).

Subject to the restriction already mentioned, that an encroachment must not be removed with unnecessary violence, there seems nothing to take this class of cases out of the rule before adverted to—"That a party confining himself within the limits of his own property may deal with it as he will." If he dig a pit, he is not bound to put a fence round it, to keep trespassers from falling into it (*d*).

In the recent case of *Harris* v. *Ryding* (*e*) there had been a grant of the minerals under the land, and the defendant removed them in such a negligent manner * that the surface of the earth fell in. In this case it is ob- * 266 vious, and it appears to have been so admitted, that there existed the natural easement of support for the upper soil from the soil beneath; and therefore the entire removal of the inferior strata, however done, would be actionable if productive of damage, by withdrawing that degree of support to which the owner of the surface was entitled. It was a clear violation of the duty of the servient owner to do no act whereby the enjoyment of the easement could be interfered with.

The seeming exception to this rule, arising from the prohibition to use dangerous instruments or animals for the protection of premises, without notice, depends upon the principle, that a man shall not do that indirectly which he cannot do directly; and as such means of offence would be calculated to do more injury than he would be justified in using to defend his possession against trespassers, he shall not be allowed to do so unless he gives such no-

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(*a*) Lib. 4, f. 421.

(*b*) *Countess of Shrewsbury's case*, 5 Rep. 13 b.

(*c*) *Tubervill* v. *Stamp*, &c., ante, p. 242.

(*d*) 1 Rolle, Abr. 88, pl. 4.

(*e*) Exch. E. T. 1839.

tice as makes the party fully aware of the danger he is rushing upon, and the damage sustained by him clearly the consequence of his own act (*a*).

The cases in which parties acting in a public capacity, and under the limited authority conferred by their office, have been held liable for the injurious consequences of their want of care, do not afford any authority upon this subject—whether they are liable for not taking due and proper precautions in

*267 doing the *acts they are authorized to do; or liable only if they have not acted to the best of their skill and judgment: the principles already adverted to do not appear to apply to them.

In the case of *Jones* v. *Bird* (*b*), an action was brought against the Commissioners of Sewers, for negligently making sewers near the plaintiff's houses, whereby the foundations thereof were weakened, and the walls fell down. It appeared, that the sewer, which it was necessary to repair, ran immediately adjoining the plaintiff's houses with a stack of chimneys belonging to one of the houses resting upon the arch of it. Being necessary to rebuild this arch, the defendants, to support the chimneys, placed under them a transum and two upright posts: the chimneys fell, and in consequence of their fall, the houses fell also. Contradictory evidence was given as to whether proper care was taken in supplying the place of the arch. It further appeared, that there was no specific notice given to the owner of the house to which the chimneys belonged, of the danger in which they would be placed. But a general notice was given to the inhabitants of the houses, that the sewer was repairing; the jury having found a verdict for the plaintiff, under the direction of the Chief Justice, a rule was obtained for a new trial, which was afterwards discharged, the Court holding, "That the Commissioners of Sewers and agents when repairing sewers in the neighborhood of houses, were bound to take all proper precaution for their security; and that one question for the jury to consider was, whether shoring up was a proper precaution, and whether it

*268 had been omitted. I also told them," continued *Abbott*, C. J., "that, even, if they were of opinion that the stack of chimneys could not, by any shoring up whatsoever, have been prevented from falling, still it was the duty of the defendants, if they thought so, to give specific notice of the danger to the owner; and that, if they did not do so, they were responsible." "As to the merits of the case," said *Bayley*, J., "it is contended, that the defendants

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(*a*) Post, Ch. 7.

(*b*) 5 B. & Ald. 837.

are protected, if they acted bona fide, and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skilful manner, and the question was most properly left to the jury to say, whether the defendants had done all that any skilful person could reasonably be required to do in such a case."

In the case of *The King* v. *Commissioners of Sewers for the Levels of Pagham* (*a*), it was held, that where commissioners of sewers acting *bona fide* for the benefit of the levels for which they were appointed, directed certain defences against the inroads of the sea, which caused it to flow with greater violence against and injure the adjoining land not within the levels, they could not be compelled to make compensation to the owner of it, or to erect new works for his protection. "I am of opinion," said Lord *Tenterden*, "that the only safe rule to lay down is this, that each land-owner for himself, or the commissioners acting for several land-owners, may erect such defences for the land under their care, as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy."

"It seems to me," said *Bayley*, J., "that every land-holder exposed to the inroads of the sea has a right to protect himself, and is justified in making and erecting * such works as are necessary for that purpose; and the *269 commissioners may erect such defences as are necessary for the land intrusted to their superintendence. If, indeed, they made unnecessary or improper works, not with a view to the protection of the level, but with a malevolent intention to injure the owner of other lands, they would be amenable to punishment by criminal information, or indictment, for an abuse of the powers vested in them. But if they act bona fide, doing no more than they honestly think necessary for the protection of the level, their acts are justifiable, and those who sustain damage therefrom must protect themselves. If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title those two things must concur—damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient. Here the party may have sustained damage, but the commissioners have done no wrong. The right which each land-owner has, is to protect himself, not to be protected by his neighbors. To that right no injury has been done, nor can any wrongful act be charged against the commissioners."

The Civil Law recognized the same distinction between acts of self-defence and ordinary acts in the use of property (*a*).

(*a*) 8 B. & Cr. 355.

(*b*) Idem Labeo ait, si vicinus flumen (aut) torrentem averterit, ne aqua ad eum perveniat, et hoc modo sit effectum ut vicino noceatur, agi cum eo aquæ pluviæ

Negligence in exercise of a limited right. The Grocers' Company v. Donne.

* 270 In this case it was a fact held, that the commissioners had, with respect to making defences against the sea, the same right as the owner of the land; and that as every owner has, as incident to the property, the right of doing whatever may be requisite for its protection from the incursions of the sea, they were not liable for the injury resulting from the erection of such defensive works.

In the recent case of *The Grocers' Company* v. *Donne* (*a*), the same principles were recognized.

Tindal, C. J., in delivering the judgment of the Court of C. P., said,—"But the the question is, whether the facts found upon this award bring the case within the terms of the declaration. The cause having been referred, and the arbitrator having stated the facts for the opinion of the Court, we must see whether or not the facts so found raise the duty set up by the plaintiffs in their declaration. The declaration states that the commissioners wrongfully and injuriously did make, cut, and dig a certain shaft, sewer, gutter, and ditch, near unto an ancient messuage and premises in possession of the plaintiffs, and did unskilfully, wrongfully, and improperly make, cut, and dig the said shaft, sewer, gutter, and ditch, so being near unto the said ancient messuage and premises of the plaintiffs as aforesaid, and did also make, cut, and dig the said shaft, gutter, sewer, and ditch, without shoring up, propping, or duly securing the said messuage and premises, or the earth and subsoil supporting the walls of the said ancient messuage and premises of the plaintiffs as aforesaid, in order to prevent the same from being injured by the said making,

* 271 cutting, and digging of the said shaft, sewer, * gutter, and ditch as aforesaid. As to the want of notice, the arbitrator has raised no question. We must then look at the award, and see whether or not the commissioners have conducted themselves in an unskilful, wrongful, and improper manner in the construction of the sewer in question. The allegation of unskilfulness is negatived by the award, for it expressly finds that the work was done in a skilful and proper manner. But the question is, whether the commissioners are to be mulcted in damages by reason of their having proceeded by a process called tunnelling, in preference to open cutting. If the award had found, that, in the judgment of experienced men, no injury would have resulted to

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arcendæ non posse, aquam enim arcere, hoc est, curare ne influat: quæ sententia verior est, si modo non hoc animo fecit ut tibi noceat, sed ne sibi noceat.—L. 2. § 9. ff. De aq. et aq. pl. arc.

Aggeres juxta flumina in privato facti, in arbitrium aquæ pluviæ arcendæ veniunt, etiamsi trans flumen noceant; ita si memoria eorum extet, et si fieri non depuerunt.—L. 23. § 2. ff. Ibid.

(*a*) 3 Scott, 356; and cases there cited.

the plaintiffs, had the commissioners proceeded by open cutting, the plaintiffs would have been entitled to a verdict. But the arbitrator finds that there was risk in either way, though less in degree from open work than from the other mode: and if the commissioners were bound to pursue that mode which gave the greatest possible chance of escape from injury, the verdict ought to be entered for the plaintiffs. But how are we to say that the commissioners are to be liable in damages, not because they did not preform the work in a skilful, proper, and workmanlike manner, but because they did not adopt that course which afforded the utmost possible chance of averting danger? The Court is not to balance possibilities. We are called upon to pronounce a judgment against the commissioners, because, had another mode of operation been resorted to, by some remote possibility the damage of which the plaintiffs complain *might* not have accrued. It seems to me that the plaintiffs can only entitle themselves to a verdict by showing that the injury * *272 would not have happened if the sewer had been constructed by open cutting: and consequently the verdict must be entered for the defendant."

Where, however, from the situation of the premises, the acts of the party, though done entirely on his own property, may be productive of injury to the public, he is bound to exercise such a degree of care and caution as shall prevent persons exercising, on their part also, reasonable care to avoid the danger. If, however, he has used such due caution, he will not be liable for injury arising from the interference of a wrong doer.

Thus, in *Daniels* v. *Potter and Others* (*a*), an action was brought for negligently permitting the flap of the defendants' cellar to remain unfastened whereby it fell upon and broke the plaintiff's legs. It appeared in evidence that the flap was placed in a slanting position, on a projecting ledge, about a foot above the pavement. It was not fastened in any way, but merely leaned against the window of the defendants' warehouse and the house adjoining. One of the plaintiff's witnesses said, that the passing of a stage-coach or heavy waggon might have the effect of shaking it down. The defendants' witnesses stated, that the flap was pulled over by some boys who were playing about, and who, though warned by defendants' men, would not go away; and that the flap had been placed in the same way for many years, and that no accident had happened.

Tindal, C. J., said, "The defendants were bound, in placing the flap, to use such precaution as would preserve it under all ordinary circumstances from falling down; but if it was so secured, and a third person * over *273 whom they had no control, came and removed it, then I think the defendants will not be liable. The plaintiff says, that the flap fell in consequence of the

(*a*) 4 C. & P. 262.

negligence of the defendants; the defendants' case is, that it was placed securely, and that a wrong-doer pulled it over on the plaintiff, and your verdict will be for the plaintiff or the defendants, according as you believe the one or the other of these stories. There is no doubt as to the law of the case. The question for your consideration will be, whether upon this occasion the defendants and their servants did use due and ordinary care in placing up this flap so as to prevent any accident from happening. It might certainly have been secured by a string, or by a hook, or by some person holding it, if that were necessary to the security of it. A tradesmen under such circumstances is not bound to adopt the strictest means, but he is bound to use such care as any reasonable man looking at it would say is sufficient; and if he does use such care in the placing of the flap, and a wrong-doer comes and displaces it from the position in which it has been placed, it being that in which a careful man would place it, he will not be answerable in an action, but the party must look for compensation to such wrong-doer who so displaced it."

The jury found for the plaintiff.

So, too, in *Proctor* v. *Harris* (*a*), where the action was brought against a publican for leaving open a trap-door on the foot-pavement, in the evening, after the lamps were lighted. It appeared that the defendant had, immedi-

*274 ately before the accident occurred, been * lowering a butt of beer into his cellar through this very apperture.

Tindal, C. J., in summing up, said, "The question is, whether a proper degree of caution was used by the defendant. He was not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public have a right to walk along these footpaths with ordinary security. It may be said, on the one hand, that these kinds of things must be, and that trade cannot be carried on without them; but, on the other hand, it must be understood, that as they are for the private advantage of the individual, he is bound to take proper care, when he is using his cellar, to prevent injury. With respect to the plaintiff, you will have to consider whether there was so little care and caution on his part, that he was himself guilty of negligence in running into the danger. If there had been sufficient light, most likely it would have prevented him from falling in. A more infirm person might have sustained a greater injury than it appears the plaintiff has received. The question is, whether you think this flap was in the nature of a nuisance, used in the manner it was, and whether, looking to all the circumstances, the plaintiff fell in, owing to the negligence and carelessness of the defendant, in not sufficiently protecting the place at

(*a*) 4 Car. & P. 337.

this hour, being after dark. If you think so, you will find for the plaintiff. But, if you think that the plaintiff did not himself use due caution in the matter, then you will give your verdict for the defendant."

Sect. 5.—*Legalization of Nuisances.*

* The term nuisance is applied, in the English law, indiscriminately, *275 both to disturbances of an easement already acquired, and infringements upon the natural rights of property, for which an action can be sustained. Strictly speaking, however, the term nuisance should be confined to the latter class of injuries only—those acts which, though originally tortous, as infringing the common law rights of property, may nevertheless, in process of time confer a prescriptive title by enjoyment. This distinction may be further illustrated by considering, that when the matter of complaint is the disturbance of an easement, the acts done, if allowed to be continued for a certain period, would be evidence to show that no easement existed; whereas, in the case of a nuisance, properly so called, the effect of a similar continuance will be evidence of a right.

Many acts done upon a man's own property, which are in their nature injurious to the adjoining land, and consequently actionable as nuisances, may be legalized by prescription. Thus, the right not to receive impure air is an incident of property and for any interference with this right an action may be maintained; but by an easement acquired by his neighbor, a man may, it appears, be compelled to receive the air from him in a corrupted state, as by the admixture of smoke or noisome smells, or to submit to noises caused by the carrying on of certain trades. Thus, too, with regard to flowing water, though the right to receive the stream in its accustomed course is an easement, yet the right not to have impure water discharged upon a man's land is one * *276 of the ordinary rights of property; the infringement of which can only be justified by an easement previously acquired by the party so discharging it.

Thus, it is said in Viner's Abridg. (*a*,) that an ancient brew-house, though erected in Fleet Street or Cheapside, is not a nuisance. So, it seems, that an ancient user may be a justification for the exercise of a noisy (*b*) or offensive trade (*c*), or for discharging water in an impure state upon the adjoining land (*d*).

(*a*) Nuisance, G.

(*b*) *Elliotson* v. *Feetham*, 2 Bing. N C. 134; S. C. 2 Scott, 174

(*c*) *Bliss* v. *Hall*, 6 Scott, 500.

(*d*) *Wright* v. *Williams*, 1 M. & W. 77

Bliss v. Hall. Doctrine of coming to nuisance exploded. Leeds v. Shakerly.

In *Bliss* v. *Hall*, *Tindal*, C. J., says, "The plaintiff came to his house clothed with all the rights appurtenant to it; one of which, at the common law, is a right to wholesome untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time that the law will presume a grant from his neighbors in favor of the party who causes it."

"Twenty years' user," said *Park*, J., "would legalize the nuisance."

Some ancient authorities appear to have recognized a species of right to corrupt the air or disturb a natural easement given by an enjoyment, however short, provided that at the commencement of it no person was in a situation to be injured by such corruption or disturbance; the party afterwards complaining, even though the nuisance was modern, was said to have come to the nuisance, and was held to have no right of action for any injury sustained.

"If my neighbor," says Blackstone, "makes a tan-yard, so as to annoy and *277 render less salubrious the air * of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and may continue" (*a*).

It is difficult to see on what principle this doctrine could have been supported, and indeed many of the old authorities are at variance with it, and the recent decisions of the Court of C. P. upon this point appear to have restored the law to an accordance with the general principles of easements.

In *Leeds* v. *Shakerly* (*b*), the declaration stated, that the plaintiff was seised in fee of a mill, and that he and all those, &c., from time whereof, &c., had had a water-course running by three mills, A, B, and C, to his said mill. That the defendants cut the banks of the water-course in A, whereby he lost the profits of his mill. After verdict for the plaintiff it was moved in arrest of judgment, "That it was not alleged that the plaintiff was seised of the mill at the time of the cutting." For the plaintiff it was argued, that the words, "seisitus existit, ipse qui et omnes illi," &c., have used the water-course, were a sufficient averment of seisin at the time; and that this very objection had been made and overruled in *Dame Brown's case* (*c*). But all the court (absente *Popham*), held, that the declaration was insufficient for this cause. *Gawdy* said, that, in *Brown's case*, the opinion of Lord *Dyer* was, that the count was insufficient, and error is there brought of the said judgment."

In Dyer's Report of the case of *Moore* v. *Dame Brown*, above referred to, it *278 is said, "But the writ and count * were faulty in that the plaintiff

(*a*) 2 Com. 402.

(*b*) Cro. Eliz. 351.

(*c*) Dyer, 420.

was not supposed to be owner of the said side and messuage of Blackfriars at the time of the diversion, but only at the time of the action commenced; whereas the plaintiff *is* seised, and does not say *was* seised, &c., therefore the plaintiff was not damnified by the diversion; wherefore the plaintiff could not have judgment given. But by Bendlowe's Reports (216), it appears that judgment at length was given. And the roll being searched, it appears judgment was given, and the plaintiff acknowledged satisfaction of the damages, and the defendant afterwards brought a writ of error."

In *Tenant* v. *Goldwin* (*a*), where it was held, that the plaintiff was entitled to recover damages against the defendant, who had allowed his wall to be out of repair, so that the filth from his forica ran into the plaintiff's cellar, there is the following dictum of Lord *Holt*; "If a man erects a house and a house of office, and the house of office adjoins to a vacant piece of ground which keeps in the filth of the house of office, if the owner of the vacant piece of ground will dig a cellar there, he must make a wall to the house of office."

In the report in Salkeld, who was counsel in the case, the above dictum is given with the very important additional term that "the house of office was ancient," and even then it is enunciated as a doubtful position. "The case might possibly be such that the defendant might not be bound to repair, as if the plaintiff made a new cellar under the plaintiff's old privy, or in a vacant piece of ground which lay next the old privy; in such case the plaintiff must defend himself."

* In *Lawrence* v. *Obee* (*b*), where an action was brought for a *279 nuisance, and it appeared that the nuisance was not felt by the plaintiff until he opened a window through which the offensive smell entered, Lord *Ellenborough* is reported to have said, "That the plaintiff having brought the nuisance upon himself by opening the window, had no right of action." It is fully consistent with the facts stated in the report, the nuisance might have been an ancient one, and therefore legalized by time. It was not pressed upon the Court, that the right to open a window and the right not to have corrupted air immitted upon a man's property, are both common law rights requiring no easement to support them. The wall in which the window was opened was an ancient one, but no point appears to have been raised on that ground.

These cases, however, appear to be opposed to principle, and to the general current of authority, both ancient and modern.

Ric. de D. (*c*) brings a writ of "Quod permittat" against R. and S., and the

(*a*) 2 Lord Raymond, 1089; S. C. 1 Salkeld, 360.

(*b*) 3 Camp. 514.

(*c*) Assiz. Book 4, pl. 3, p. 6.

Doctrine of coming to nuisance exploded. Lib. Ass. Westbourne v. Mordaunt.

nuisance was assigned, that, whereas he hath a house in S., with apple, pear, and other trees, bearing fruit, the defendants levied a lime-kiln so near to the house of the said Ric., that, when the kiln was burning, the smoke thereof burnt and scorched the trees, which became dry and unfruitful.

The defendant pleads, that the plaintiff hath no estate in the tenement to which, &c., except as lessee for life under the Abbot de Berg.

* 280 The defendant further pleaded, that the lime-kiln *was so built and used by the defendant's father before the plaintiff had any interest in the frank tenement; without this, that he had levied any nuisance since, &c.

Upon argument, the Court held the plea bad—"If the defendant's father were now alive, the plaintiff would have an assize against him."

Herle, J., said, "It might be he (the father) had the kiln there, but did not use it, and the tort began with the user; or that the tort was begun, and then discontinued, and renewed again, after he was possessed of the frank tenement; and then he shall have his assize. Thus, if my father had a right of way, which was stopped by a hedge or by a ditch levied across it, and the tort was submitted to without debate all the lifetime of my father, and after his death I find the way open, and enter and use it, and am afterwards disturbed by the feoffee of him who levied the hedge, I shall have an assize of nuisance.

"So here, although he have the kiln before, &c., and the tort begun, if afterwards such tort be discontinued, and then in his (plaintiff's) time it begin (again) to burn, he shall have an action for such tort."

In Fitzherbert (*a*), it is said, "If a man levy a nuisance unto the freehold of another, and he to whom the nuisance is done make a feoffment fee of the land, and he who did the nuisance make a feoffment of the land in which the nuisance is, yet there is a writ in the Register for the feoffee of him to whom the nuisance was levied against the feoffee of the other to reform that nuisance.

* 281 * In *Westbourne* v. *Mordaunt* (*b*), which was an action upon the case, the declaration stated that the plaintiff was possessed of a meadow adjoining a certain brook, from the 20th April, et adhuc inde, &c., and that defendant, on the said 20th April, put in divers loads of stones into the said brook, and by it obstupavit aquam illam; that it, from the said 20th April to the day of the writ purchased, overflowed his meadow, so that he could not have any benefit from it.

After verdict, it was moved in arrest of judgment, "because the nuisance is supposed to be done before the plaintiff's title did commence, so no cause of action."

(*a*) N. B. 124. H.

(*b*) Cro. Eliz. 191

Doctrine of coming to nuisance exploded. Beswick v. Cunden.

Gawdy, J., said, "The declaration is good, for an action of the case declareth the whole matter so, that it is not material when the nuisance was erected, for he that is hurt by it shall have an action."

Fenner, J., agreed, it may be the nuisance was not by the stopping till the running of the water, and the action being brought, as the truth is, is well brought; and Wray being absent, they commanded judgment to be entered, if nothing said to the contrary.

In *Beswick* v. *Cunden* (*a*) the plaintiff declared that the defendant "levied a dam in such a river such a day, whereby it surrounded the land of J. S., who afterwards enfeoffed the plaintiff thereof, and that defendant adhuc malitiose custodivit the said dam, whereby the plaintiff's land is surrounded." To this declaration the defendant demurred in law.

In support of the demurrer it was contended, that the plaintiff could not maintain the action, as he had * nothing in the land at the time when *282 nuisance was erected, and 4 Assize, 3, was cited, and no new injury was done it was admitted that an action would lie if any new act had been done, as the turning of the water cock in Dyer, 319, which made a new nuisance each time.

On the other side it was said, that the action was not brought for levying the dam, but continuing the same from such a day to such a day, which was after the plaintiff's purchase, &c. *Rolf's case*, decided in Easter Term, 25 Eliz. (*b*), was cited, that "where one erected a house so near to another's, that the rain descended from the new house, &c., and the heir brought an action upon the case for the nuisance made by building the house in his father's time, he should recover by judgment."

Gawdy and *Popham*, Justices, thought the action was well brought for the continuance; and *Popham* took this distinction between the cases in which no interest remains in the thing obstructed to the party against whom the nuisance is done, and where he still retains some profit or interest therein. In the former case the remedy is provisional only; in the latter it passes to the heir or purchaser. "If I have potwater running from my river to my home, and T. stops it in his land before it comes to my land, and T. die, or make a feoffment over, my heir or feoffee have not any remedy for this tort made before their time; but where any profit remains which comes to the heir or feoffee after the nuisance done there, for so much of the profit as is come unto them, and is taken from them by the * continuance of the nuisance, *283 they shall have their action. Then here, by the levying the dam, the inheritance of him to whom it was levied is not taken away; but, although his

(*a*) Ibid. 402.

(*b*) Not reported in Croke; cited 5 Rep. 102.

land be surrounded, some profit remained unto him, which he hath conveyed to the feoffee, which being taken from him by the continuance of the nuisance, it is a reason that the feoffee should have his action; and, therefore, if one levies a bank in a river, whereby part of my land is surrounded, and afterwards I make a feoffment of my land to J. S., and afterwards another part is surrounded by reason of that bank, he shall have an assize of nuisance (quod fuit concessum); so here, for that the land of the feoffee grew *a malo ad pejus de die in diem*, by reason of the inundation made by this dam, it is reason the feoffee should have his action. The same law is for a nonfeasance, viz. for not repairing of a bank, where &c."

Clench and *Fenner*, Justices, *contra*, were of opinion, that the feoffment extinguished the tort, "and nothing had been done since the feoffment which the feoffee could punish." Upon its being moved again, the justices all agreed that the action was well brought, and it was accordingly adjudged for the plaintiff.

Another action on the case, between the same parties, for the continuance of a certain bank (quandam molem), appears to have been decided in favor of the defendant on demurrer to the declaration:—"All the justices resolved for the defendant. 1st. That this action upon the case lies not, because, if it were a nuisance, the plaintiff might have his remedy by an assize or quod permittat; and a man shall never have an action on the case where he may

*284 have * any other remedy, by any writ found in the Register, for this is only given where there wants such a remedy. 2d. There is not here any offence committed by the defendant, for he allegeth that he kept and maintained a bank, which is, that he kept it as he found it, and that is not any offence done by him, for he did not do any thing; and, if it were a *nuisance before his time, it is not any offence in him to keep it;* but the plaintiff is to have his remedy to abate it by a quod permittat; and, therefore, this case differs from 4 Ass. pl. 3, for there the using was a new nuisance, but is not so here" (*a*).

In the report of the same case in Moore (*b*), it is stated, "that the bank was levied before the defendant was enfeoffed;" and it was adjudged "by the Court, that the action lay for the continuance against the feoffee, and that in

(*a*) Cro. Eliz. 520.

There appears to be some mistake in the report here, as the defendant not only kept, but also levied the dam, though not in the plaintiff's time: the Court appear to have confounded the right of a plaintiff to sue with the liability of a defendant to be sued for the continuance of a nuisance erected before his estate commenced.

(*b*) 353, nom. *Beswick* v. *Comeden*.

Doctrine of coming to nuisance exploded. Rolf v. Rolf. Penruddock's case.

such case it would lie against an heir; and a case was cited of *Rolf* v. *Rolf* in this Court, where a house was built so near to another house, that the (new) one annoyed the other with continual dropping, and the feoffment was made of the new house; and it was adjudged that an action on the case would lie against the feoffee for the continuance."

According to this latter report, these cases are only an authority for the position—that the feoffee of a party who erected a nuisance is liable for its continuance—a * position which, except in some particular cases, ap- *285 pears hardly to have been questioned.

The report of the case of *Rolf* v. *Rolf*, as given by Lord Coke (*a*), is altogether different, and fully confirms the passage from Fitz. N. B., above cited. John Rolf was seised of a house in fee, and Richard Rolf was seised of a piece of land adjacent to the said house, and on this he built a new house so nearly adjoining the house of John, that the rain fell thereon from the roof of his new house. John Rolf died, and his house descended to his son, as did the new house and land to the son of Richard, who refused, upon request made to him, to remove the projecting eaves, and John, the son, accordingly brought an action against him, and upon demurrer it was held, that the action lay—because the defendant, on request, did not reform the nuisance which his father made, but suffered it to continue to the prejudice and damage of the son and heir of him to whom the wrong was done.

In Moore, 449, nom. *Beswick* v. *Comeden*, three exceptions are taken: 1st, That assize lay and not case. 2d, That "custodire and manutenere" are not sufficient words of tort. And 3d, That a quod permittat lay by the statute, and not an action on the case. And it was adjudged, that the plaintiff should take nothing by his writ.

In another report, nom. *Beswick* v. *Omuden* (*b*), it is said, "adjudged that the feoffee shall have an action on the case for a nuisance erected before his time, and continued during his time, but only for the continuance."

*In *Penruddock's case* (*c*), one *Clark* brought a *quod permittat* against *286 Penruddock and wife, "and the case was such—*John Cock* built a house, on his own freehold, so near the curtilage of *Thomas Chuckley* that it hung over three feet of the said curtilage; and afterwards *Chuckley*, to whom the nuisance was done, conveyed his house to the plaintiff, and *John Cock* conveyed his house to the defendants; and the first question was—whether the writ lies in this case for a feoffee or not;" and it was objected, "that when a wrong and inju-

(*a*) 5 Rep. 101.

(*b*) Moore, 599.

(*c*) 5 Rep. 101.

ry is done by levying of a nuisance for which an action lies, that if he who has the freehold to which the nuisance is done conveys it over, now this wrong is remediless. As if the landlord encroaches on the rent of his tenant, the tenant cannot avoid this wrong in an avowry; but in an assize, or a cessavit, or a *ne injustæ vexes* he may. But if the tenant to whom the wrong is done enfeoffs another, his feoffee shall never avoid this wrong, for he shall take the land in the same plight as it was given him." And so in the case of common.

"But it was answered and resolved, that the dropping of the water in the time of the feoffee was a new wrong, so that the permission of the wrong by the feoffor, or his feoffee, to continue to the prejudice of another, should be furnished by the feoffee of the house, &c., and if it be not reformed after request, a *quod permittat* lies against the feoffee." This judgment was affirmed on a writ of error, and "so this case was adjudged by all the judges of England."

In *Some* v. *Barwish* (*a*), it is said, "It was also held that for a nuisance erect-

* 287 ed in the time of the devisor, * and continued afterwards, (as this case was), the devisee shall join in the action; for the continuance thereof is as the new erecting of such a nuisance."

In *Roswell* v. *Prior*, as reported in 12 Mod. 635, after giving the decision that an action lay for continuing a nuisance either against the lessor, or his lessee, at the plaintiff's option, there is the following dictum:—"But if this action here were brought *by* an *alienee* of the land to which the nuisance was against the erector, and the erection had been before any estate in the alienee, the question would have been greater; because the erector never did any wrong to the alienee." The reports of this case in Salkeld and Lord Raymond (*b*), contain no such dictum, which, at the utmost, amounts to a doubt only, and is directly at variance with the decisions in *Rolf* v. *Rolf* and in *Penruddock's* case.

The following authority has been frequently cited on this point:—In Com. Dig. (*c*), it is said, "So it does not lie for a reasonable use of my right, though it be to the annoyance of another. As if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbor." No authority is cited. This appears, however, to refer rather to the amount of annoyance requisite to give a right of action at all for a nuisance, than to the right to cause one.

(*a*) Cro. Jac. 231.

(*b*) Vol. 2, 460; vol. 1, 392, 713.

(*c*) Nuisance, (G). pl. 18.

Doctrine of coming to nuisance exploded. Brewery case. Elliottson v. Feetham.

In Viner's Abr. (*a*) it is said, "If a man build a kiln to burn chalk, to the nuisance of my house and trees next adjoining, and after discontinues the use of it, and then dies, and his heir renews the use of it again, this is a new nuisance by the heir, and a *quod permittat* lies against him for it. But otherwise it would be, if the *kiln never was discontinued in the life of the *288 father, but had been always used, and the heir continued to use in the same manner; for there no *quod permittat* lies against him.—4 Ass. 3.

The case itself (*b*), of which this purports to be an abstract, does not contain the last of these two positions; in addition to which it is expressly relied on in *Penruddock's case* as an authority for a *quod permittat* lying in a case where, if the above question were correct, it clearly could not have been maintained. The position in Viner would no doubt be true, if sufficient time had elapsed to confer a prescriptive title on the father, and no addition had been made by the son; but of this no mention is made in the Year Book.

"Where there hath been an ancient brew-house time out of mind, although in Cheapside or Fleet-street, &c., this is not any nuisance, because it shall be supposed to have been erected when there were no buildings near. Contra—If a brew-house should be now erected in any of the streets or trading places, this shall be a nuisance, and an action on the case lies for whomsoever shall receive any damage thereby; and accordingly in an action brought by one *Robins*, a laceman, in Bedford-street, against a brewer, for a nuisance from the brew-house to the goods in his shop, (it being a brew-house of *ten years' standing*), the jury gave for two years' damages, £60." The obvious inference from which is, that the laceman's shop had only been opened during the two years for which the damages were given (*c*).

In the recent case of *Elliottson* v. *Feetham and Another* (*d*), the declaration complained of a nuisance to *the plaintiff's dwelling-house, from *289 certain workshops and a manufactory for the working of iron, belonging to the defendants. The defendants pleaded, "That they were possessed of their said workshops and manufactory in the declaration mentioned, long, to wit, for the space of ten years, before the plaintiff became possessed of his said term of and in the said messuage or dwelling-house, with the appurtenances, in the declaration mentioned; and that the defendants always from the time at which they so became possessed of their said workshops and manufactory, down to and until the plaintiff so became possessed of his messuage or

(*a*) Nuisance (L).

(*b*) Vide ante, 279.

(*c*) Viner Abr. Nusans (Mc).

(*d*) 2 Bing. N. C. 134; S. C. 2 Scott, 174.

Doctrine of coming to nuisance exploded. Elliottson v. Feetham. Bliss v. Hall.

dwelling-house with the appurtenances, as aforesaid, used, exercised, and carried on the said trade and business of ironmongers, and worked iron, and made and manufactured ironmongery goods in their said workshops and manufactory, without any let, suit, interruption, molestation, or complaint, by or on the part of the owners or occupiers of the said messuage or dwelling-house now of the plaintiff; and that the defendants, from the time the plaintiff so became possessed of his said messuage or dwelling-house, hitherto, had continued to use, exercise, and carry on the said trade and business of ironmongers, and to work iron, and make and manufacture ironmongery goods in their said workshops and manufactory, in the same manner as they had always, from the time of their becoming possessed of their said workshops and manufactory, down to and until the time when the plaintiff so became possessed of his said messuage or dwelling-house, been used and accustomed to do, and without making or causing to be made in their said workshops and manufactory larger fires, or louder, heavier, more jarring, va-

*290 rying, or agitating, hammering, * or battering sounds or noises than the defendants had during all the previous time been accustomed to do, or than were necessary and requisite to enable them to carry on their said trade and business in and upon their said workshops and premises, in the same manner as they had always theretofore been used and accustomed to do."

Upon demurrer to the replication, the plea, which it was attempted to support on the authority of the case of *Leeds* v. *Shakerly* (*a*), was held bad, "the Court intimating, that the defendants should at least have alleged a holding of twenty years' duration." Judgment was given for the plaintiff.

In *Bliss* v. *Hall* (*b*), an action on the case was brought for a nuisance, occasioned by the defendant carrying on the business of a candle-maker. The defendant pleaded that he was possessed of the messuage in which &c. for three years before the plaintiff became possessed of the house to which &c., and had during all that time carried on his business "in the same manner and degree, and to the same extent, and at the same hours, as at the time when" the nuisance complained of took place. Upon demurrer to this plea, the Court gave judgment for the plaintiff.

Tindal, C. J., said, "The plaintiff in his declaration complains that the defendant wrongfully carried on in messuages contiguous to the messuage of the plaintiff the trade or business of a candle-maker, &c., by means whereof divers noisome, noxious, and offensive vapors, fumes, smells, and stenches, issued from the defendant's messuages, and diffused themselves through and

(*a*) Ante p. 277.

(*b*) 5 Scott, 500.

about the plaintiff's messuage, thereby corrupting the * air, and mak- *291
ing the plaintiff's dwelling offensive and unwholesome, &c.

"The defendant, in answer, says, that he was possessed of his messuages for the space of three years next before the plaintiff became possessed of his messuge, and that he had, during all that time, carried on the trade of a candle-maker there, to the same extent and in the same manner as at the time complained of. That plea appears to me to afford no answer whatever in point of law to the charge in the declaration, which unquestionably is a nuisance. It may be that the defendant was the first occupier; but the plaintiff came to his house clothed with all the rights appurtenant to it, one of which at common law is, a right to wholesome and untainted air, unless the business which creates the nuisance has been carried on there for so great a length of time, that the law will presume a grant from his neighbors in favor of the party who causes it. *Elliottson* v. *Feetham* decided the point."

Park, J., cited *Penruddock's case* (*a*), and observed, "*Elliottson* v. *Feetham* is identical with the present case. As the Lord Chief Justice there observed, 'when a man takes a house he takes it with all the rights incident to it;' so here, even in the case supposed by the defendant's counsel, the plaintiff would have had a right to that of the deprivation of which he complains. Twenty years' user would legalize the nuisance, but here the defendant only alleges a user of three years."

Vaughan, J., concurred. "An offensive trade," said the learned Judge, "may be a nuisance or not, according to the place in which it is carried on. Here the manufactory complained of is not shown to have been * re- *292
mote from human habitations. There is nothing upon the face of the plea to show that the nuisance is hallowed by prescription." And Mr. Justice *Bosanquet* added, "It clearly is not enough in such a case as this for the defendant to show a short possession and exercise of the offensive trade anterior to the commencement of the plaintiff's possession. Nothing less than a twenty years' user will afford a defence."

The right of sending on the neighboring land air impregnated with smoke to such an extent as to be a nuisance, was recognized as a servitude by the civil law in the same manner as a right of throwing water used in manufactories, or otherwise, upon the adjacent land (*b*), though no such servitude ex-

(*a*) 5 Rep. 101; supra, p. 286.

(*b*) Enimvero non putare se ex taberna casearia fumum in superiora ædificia jure immitti posse, nisi ei rei servitutem talem admittat. Idemque ait, et ex superiore in inferiora non aquam non quid aliud immitti licet. In suo enim hactenus facere licet, quatenus nihil in alienum immittat; fumi autem sicut aquæ esse immissionem, posse igitur superiorem cum inferiore agere 'jus illi non esse id ita facere.'—L. 8. § 5. ff. si serv. vind.

isted where the right was claimed to such an extent only as was necessary for the ordinary purposes of domestic life (*a*) (18).

It is by no means easy to define in general terms what precise amount of infringement of the general rights of property is requisite to confer a right of
*293 action. There "must, at all events, be some sensible * diminution of these rights affecting the value or convenience of the property;" and though certain trades have been declared to be nuisances when carried on in particular situations, yet it appears to be in every instance a question of fact whether such a degree of annoyance exists as can be said to amount to a nuisance.

The fact that a private nuisance may also be indictable as a nuisance to the public, does not prevent any individual from bringing an action against the party causing it, provided he can prove that he has himself sustained some special injury thereby (*b*).

The oldest reported case of a nuisance caused by carrying on an offensive trade is in 4 Ass. 3. already mentioned, for erecting a lime kiln.

A tan-house is necessary, for all men wear shoes, and nevertheless it may be pulled down, if it be erected to the nuisance of another: in like manner of a glass-house, and they ought to be erected in places convenient for them (*c*).

Ergo per contrarium agi poterit 'jus esse fumum immittere:' sed et interdictum 'uti possidetis' poterit locum habere, si quis prohibeatur qualiter velit suo uti.—Ibid. § 5.

Nam et in balneis inquit vaporibus quum Quintilla cuniculum pergentem in Ursi Julii instruxisset, placuit, potuisse tales servitutes imponi.—Ibid. § 7.

(*a*) Pomponius dubitatur an quis possit ita agere, 'licere fumum non gravem, puta ex foco, in suo facere,' aut 'non licere.' Et ait magis non agi posse, sicut agi non potest 'jus esse in suo ignem facere, aut sedere, aut lavare.'—Ibid. § 6.

(*b*) *Chichester* v. *Lethbridge*, Willes, 73; *Crowder* v. *Tinkler*, 19 Ves. 621.

(*c*) Per *Hide*, C. J., in *Jones* v. *Powell*, Palmer, 539.

(18) *Prescriptive* right to maintain a public nuisance, inadmissible. *Mills* v. *Hall*, 9 Wend. 315. Although the defendant has been permitted to overflow the plaintiff's land with his mill pond for 20 years, yet if such overflow spread disease and death through the neighborhood, it may be abated, and he must respond in damages for the special injury which any individual may have sustained from it. ib.—8 Cowen, 152; 4 Wend. 9.

"The erecting a common or private brewhouse is not of itself a nuisance, nor the burning of sea-coal in it; but if it is erected so near the house of another that his goods are thereby spoilt, and his house made uninhabitable by the smoke, an action lies (*a*).

In 1 Roll. Abr. (*b*) instances of nuisances are given by a man keeping stinking tallow and greaves, the stench whereof drove away the guests from the plaintiff's house; and by erecting a smelting-house adjoining plaintiff's field, whereby the grass was withered and his horses and cows killed.

* In 2 Roll. Abr. (*c*) the instances given of trades which are nui- *294
sances at law, are:—A glover making a lime-pit so as to corrupt a water-course; a man levying a pig-sty so near a house that by reason of the smell the owner cannot live therein; the erecting a lime-kiln; and "a dyer erecting a dye-house so near to my house that I cannot dwell therein, pur le fetor del fume et auter sordides."

In *Aldred's case* (*d*), the declaration stated, that, by reason of the stench from the defendant's pig-sties, "the plaintiff and his servants could not remain in his house for fear of infection."

In *Rex* v. *Pierce* (*e*), an information was brought against the defendant, by the Recorder of London, for erecting and continuing a soap boilery in Wood-street. It was held by *Jefferies*, C. J., "That, though such a trade is honest, and may be lawfully used, yet if by its stench it be an annoyance to the neighbors, it is a nuisance." A case is also mentioned of a "calenderman in London, in Bread-street, who was convicted before Lord Hale on such an information; for that the noise of his trade disturbed the neighbors and shook the adjacent houses:" and another case of a brewhouse, on Ludgate-hill, *Rex* v. *Jordan*, where defendant was compelled "to prostrate the same and convert it to other purposes; for that such trades ought not to be in the principal parts of the city, but in the outskirts."

A case is cited in *Jones* v. *Powell* (*f*), of an action brought against a dyer, "Quia fumos, fœditates, et alia sordida juxta parietes querentis posuit, per quod parietes putridæ devenerunt, et ob metum infectionis * per hor- *295
ridum vaporem, &c., ibidem morari non audebat."

(*a*) Agreed per Cur. Ibid.

(*b*) 88. Action on the Case, pl. 6, 7.

(*c*) Nusans. 141, pl. 13, 14, 15, 18.

(*d*) 9 Reports.

(*e*) 35 Car. 2; Shower, 327, Case 329.

(*f*) Hutton, 136.

Instances of Nuisances.

In *Jones* v. *Powell*, a brewhouse in which sea-coal was burnt, was held to be a nuisance.

In *Baines* v. *Barker* (*a*), Lord *Hardwicke* refused to grant an injunction to stay the building of a small-pox hospital, in Cold Bath Fields, very near the houses of several of the plaintiff's tenants; though it appeared that in the lease of the house in question, granted by the plaintiff to the defendant, there was a covenant against turning it into a brewhouse, because it would be a nuisance. The Lord Chancellor said, "I am of opinion it is a charity likely to prove of great advantage to mankind. Such an hospital must not be far from a town, because those that are attacked with that disorder, in a natural way, may not be carried far. There was lately an indictment, at the summer assizes, 1750, in Sussex, against one Fremen, for such an hospital. The defendant was acquitted.

"So, an action doth not lie for a reasonable use of my right, though it be to the annoyance of another; as if a butcher, brewer, &c., use his trade in a convenient place, though it be to the annoyance of his neighbor (*b*)." (19).

"It would be a needless task to enumerate all the instances of nuisance for which an action may be maintained. It may be sufficient to observe, that the erection of any thing offensive, so near the house of another as to render

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(*a*) Ambler, 158.

(*b*) Com. Dig. Action on the case for a nuisance, (C.): no authority cited.

(19) *A right to use merely, cannot confer a right unreasonably and unnecessarily to prejudice the rights of others.*—9 Conn. 305. It is said, by one whose word has been pronounced to be law, that an action on the case does not lie for the *reasonable use* of my right, though it be to the annoyance of another; (Com. Dig. tit. Action upon case for a Nuisance, C.) clearly implying, that such an action will lie for an *unreasonable* use of one's right. Thus, if one carry an unreasonable weight, with an unusual number of horses, on a highway, it is a nuisance. Com. Dig. tit. Chimin. A. 3. So if the house of two tenants in common or joint-tenants be ruinous, a writ *de reparatione facienda* lies against him, that will not repair. Fitz. N. B. 127. Co. Litt. 200. So if the house of A. be near the house of B., and A. suffer his house to be so ruinous that it is like to fall upon B.'s house, B. may have a writ *de domo reparando;* or, on special damage, an action on the case. Co. Litt. 56. a. and n. 375. by Harg. So an action lies against him, who corrupts the air, by noxious trades. Hutt. 136. 9 Co. 59. Cro. Car. 510. 2 Ld. Raym. 1292.

The maxim *sic utere tuo ut alienum non lædas* applies to a wagoner who uses the public highway; the butcher and tallow-chandler who exercise their trades. See also the case of *Rlanchard* v. *Baker*, 8 Greenl. 253.

it useless and unfit for habitation, e. g. the erection of a swine-sty, lime-kiln, privy, smith's forge, tobacco-mill, tallow-furnace, near a common inn, or the like, is actionable (*a*)." (20).

(*a*) Sel. N. P. 9th Ed. 1137; *Elliottson* v. *Feetham*, 2 Bing. N. C. 134; *Bliss* v. *Hall*, 5 Scott, 500.

(20) *Nuisance.*—In an indictment for keeping or erecting a house, which is a nuisance, two things only are necessary to be stated:—1. That from the nature of the establishment, it may be an annoyance. 2. That, from its situation, it has actually become so. *State* v. *Purse*, 4 M'Cord, 472.

2. A house, which, from the purpose for which it is used, or the situation in which it is placed, may not be a nuisance, may become so by negligence in keeping it; and when that is the ground of prosecution, it must be so laid in the indictment. ib.

3. The erection of any building, which from its disagreeable odor or noxious affluvia, is offensive, or unwholesome, may be a nuisance; but whether it actually is or is not so, must depend on circumstances. ib.

1. (*Nuisance in Turnpike road.*) A turnpike road is a public highway; and an indictment will lie, as for a public nuisance, against any person placing obstructions thereon. *Commonwealth* v. *Wilkinson*, 16 Pick., 175.

2. (Obligations of towns as to roads.) Towns are not obliged to keep the whole of a highway from one boundary to the other, free from obstructions and fit for the use of travellers. *Howard* v. *North Bridgwater*, 16 Pick., 189.

3. Thus, where the travelled part of a highway was raised with a gutter on each side, and beyond the gutter on one side and at the distance of nearly eight feet from the travelled path, were large loose stones which occasioned an injury to a traveller's horse, it was held, that the town was not answerable for the injury. ib.

CHAPTER VII.

PARTY WALLS AND FENCES.

Party walls presumed to be in common. Presumption rebutted.

* 296 * Although, strictly speaking, the rights and liabilities of the owners of property adjoining to a party-wall relate principally to the doctrine of tenancy in common, yet, some of the rights exercised over it partake of the character of easements.

The common user of a wall adjoining lands belonging to different owners is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands in equal moieties, as tenants in common (*a*).

Where the precise extent of land originally belonging to each owner can be ascertained, the presumption of a tenancy in common does not arise, but each party is the owner of so much of the wall as stands upon his own land (*b*). (21).

(*a*) *Cubitt* v. *Porter*, 8 B. & Cr. 257, and note, p. 259.

(*b*) *Matts* v. *Hawkins*, 5 Taunt. 20.

(21) The *property in the wall follows the property in the land.*—It does not follow that either party may pull the wall down though there be but one wall. Thus in *Wiltshire* v. *Sidford*, 1 M. & Ry. 404, where it appeared that the plaintiff was the owner of a house at W., and that the defendant having purchased an adjoining house, pulled it down and rebuilt it; and in doing it built upon and against the wall which the plaintiff claimed as his. The Judge told the jury, that if they were satisfied that there was but one wall, neither could maintain trespass, and the jury returned a verdict for the defendant. *Littledale*, J. "Two things were left to the jury, namely whether there was more than one wall, and if not, whether that was not a party wall. The plaintiff says, the Judge has misdirected the jury, in not drawing their attention to the property in the soil, and *Matts* and *Hawkins* has been referred to. To that case I certainly subscribe; the property

Presumption rebutted.

In the latter case, there seems no authority for saying that the rights of the respective owners of the portions of the wall differ from those of the proprietors of any other two walls which abut on each other: unless prevented by some easement having been acquired, either party would be at liberty to pare away or even entirely to remove his portion, notwithstanding the * *297 other half might be unable to stand without the support of it (*a*). At the utmost, the fact of the close union of the walls could only impose a duty of greater caution than might otherwise be required in removing the materials. "If," said *Bayley*, J., "the wall stood partly on one man's land and partly on another's, either party would have a right to pare away the wall on his side, so as to weaken the wall on the other, and to produce a destruction of that which ought to be the common property of the two (*b*).

In general, however, party-walls will be found "to be built on the common property of the two, and to be the common property of both;" and, in the absence of any further proof than that which is afforded by evidence of a common user, such will be presumed to be the case (22).

(*a*) 8 B. & Cr. 264. (*b*) *Cubitt* v. *Porter*, 8 B. & Cr. 257.

in the wall follows the property in the land. It does not follow that either party might pull the wall down, for each has a right to use the property of the other. The jury, by finding that it was a party wall, have negatived an entire property in the plaintiff. If they were tenants in common of the soil, the conclusion is right."

By st. in Pennsylvania, "the first builder, shall be reimbursed one moiety of the charge of such party wall, or so much thereof as the next builder shall have occasion to make use of, before such builder shall any ways break into the said wall." And it has been held, that this right is a personal right against the second builder, and on payment by the owner of the adjoining lot, the claim is extinguished; so that a purchaser from the first builder cannot recover when a second building shall be erected. It is not a lien on the land, and no action can be supported against the assignee of the second builder. The first builder is confined to his personal remedy. 5 S. & R. 1; 1 Dall. 341.

A. a builder proposes to B. the occupier of an adjoining house, to build a party wall, and states the expenses. B. answers, very well; I expect to pay what is right and fair; and the wall is built. Held, that A. was entitled to recover his share of the expense without reference to the building act. *Stuart* v. *Smith*, 2 Marsh. 435; 7 Taunt. 158, S. C.

(22) *Fences.*—Parsons, C. J. (in *Rust* v. *Low*, 6 Mass. 90.) "At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force or prescription; but he was, at his peril, to keep his cattle on his own close, and to prevent them from escaping. And if they escaped they might be taken on

Building act. Obligation to keep in cattle. Spurious easement, to repair.

In the Metropolis, party-walls are regulated by the provisions of the Building Act, stat. 14 Geo. 3, c. 78.

The only general obligation with respect to fences imposed by the common law is, that every proprietor of land should prevent, by fences or other means, his cattle from trespassing on the land of his neighbors.

There may, however, be a spurious kind of easement obliging an owner of land to keep his fences in a state of repair, not only sufficiently to restrain his

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whatever land they were found damage feasant; or the owner was liable to an action of trespass by the party injured. And where there was no prescription, but the tenant had made an agreement to fence, yet he could not be compelled to fence, and the party injured by the breach of the agreement had no remedy but by an action on the agreement; (Cro. Eliz. 709, *Nowel* v. *Smith*.) In the case of a prescription to fence, he could be obliged to fence by the writ of curia claudenda, sued by the tenant of the adjoining close, who might also recover damages by that writ; (Fitz. N. B. 297.)

When our ancestors first settled in this country, they found it uncultivated; and when closes were made by the settlement and cultivation of the lands, there could be no prescription to fence; and therefore the common law authorizing the writ of curia claudenda, being inapplicable to the state of the colony was never introduced. Provision respecting fences was early made by the legislature of the colony of Massachusetts Bay, which expired with the repeal of the first charter. Afterwards the obligations to fence were regulated and enforced by laws passed by the legislature of the province of Massachusetts Bay. These laws continued in force until their reversion by the legislature of the commonwealth; and the statutes passed by this legislature are the foundation of all the obligations imposed on the citizens by law to make and to repair fences.

"By the statute of 1785, c. 52, legal, sufficient fences between adjoining occupied closes may be made and kept in repair, through the whole year, at the will of either tenant, but at the equal expense of the two tenants, each tenant being liable to the charge of making half the fence. What shall be deemed a sufficient fence is defined by the statute; and if the tenants do not agree on the division of the fence, or if either neglects sufficiently to make or maintain his part, a remedy is expressly provided. Each town is to choose annually two or more fence-viewers, to be sworn to the faithful discharge of the duties of the office. And any two of these officers are authorized, at the request of either tenant, to divide the fence on the line on which the fence is to be made, and to assign to each tenant his part, which he and the succeeding tenants are to make and maintain; and also, at the request of either tenant, to decide whether the fence of the other is sufficient or not. And if either tenant after such division and assignment duly made in writing, and recorded in the town clerk's office, shall neglect to make or main-

Spurious easement to repair.

own cattle within bounds, but also those of his neighbors (*a*); and rendering him liable for any injury which his neighbor's cattle may sustain in consequence of the non-repair * of the fences, which, unless an easement *298 had been acquired, he clearly would not be. This liability is, however, confined to the cattle of his neighbor, or such as are rightfully on the adjoining land, and does not extend to all cattle whatsoever, though they may have entered through the land of the party towards whom this obligation to keep the fences in repair legally exists. "If the cattle of one man escape into the land of another, it is not any excuse that the fences were out of repair, if the cattle were trespassers on the close from whence they come." Per *Heath*, J., in *Donaston* v. *Payne* (*b*).

In an annonymous case reported in Ventris (*c*), the plaintiffs declared that

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(*a*) Per *Bayley*, J., *Boyle* v. *Tamlyn*, 6 C. & Cr. 337-9.

(*b*) 2 H. Bl. 527; vide etiam per *Wilmot*, C. J., 3 Wilson, 126.

(*c*) 256.

tain his share so assigned, the other tenant may do it; and may recover at law against the negligent tenant double the expense, as ascertained by the fence-viewers; with twelve per cent interest, if on notice and request it be not paid. This statute does not make void any written agreement respecting the making and repairing of fences.

"The legal obligations of the tenants of adjoining lands to make and maintain partition fences, where no written agreement has been made, rest on this statute. But in this position are not included adjoining lands, which are not both occupied by their respective owners, nor lands inclosed in a general field or common pasture, nor a close adjoining to a highway. These cases may be governed by different rules.

"An assignment pursuant to the statute imposes the same duty as would result from a prescription; and instead of a curia claudenda, one tenant may make and repair the fence belonging to the other on his neglect, and recover of him double the expense with double interest. And instead of averring in pleading, that the tenant has used by prescription to make or repair, in the technical form, it is sufficient to allege that he is obliged by law to make and repair; and give the assignment in evidence.

"When there has been no assignment, but only a written agreement executed by the tenants of the adjoining closes, it may be a question whether such agreement shall have the force of an assignment; and if not, whether the tenant, whose cattle have escaped, can plead such agreement in bar of an action of trespass, or must have his remedy by an action on the agreement. It is true that a curia claudenda does not lie, but against a tenant, who is obliged by prescription to repair. And by analogy an agreement between the tenants, making a division of the fence, each

Liability for Driving or enticing animals. Rooth v. Wilson.

the defendants were bound to maintain a certain fence, and that, by reason of their neglect to do so, a mare of the plaintiff's escaped through the fence, and was drowned in a ditch. After verdict for the plaintiff on motion in arrest of judgment, the Court held, that the plaintiff was entitled to recover.

In *Rooth* v. *Wilson (a)*, where a person to whom a horse had been sent, turned it into a pasture, and by the defect of the fence, which the neighboring owner was bound to repair, it fell down into the neighboring close and was killed; the liability of the defendant for the consequences of his neglect in not repairing, was not disputed, the only point made, being that the bailee could not maintain the action (*b*).

(*a*) B. & Ald. 59.

(*b*) See also *Powell* v. *Salisbury*, 2 You. & Jer. 391.

one mutually undertaking to repair his part, would not authorize one tenant, who had made or repaired the fence of the other, on his refusal, to recover of him double the expense.

"But there appears to be no good reason, after an actual division by such agreement, if the cattle of one tenant escape into the close of the other tenant, through the defect of the fence, which the other had agreed to make and repair, why the owner of the cattle might not aver, that the party complaining had bound himself by his agreement to make and maintain the fence, and that the cattle escaped through his default. For if he had agreed to make and repair the fence, he ought by law to fulfil his agreement.

"Prescription to fence is allowed at common law, as resulting from an original grant or agreement, the evidence of which is lost by lapse of time; and it is reasonable that the agreement produced should be as effectual as a presumption, that it once existed, but is lost, arising from ancient usage. The country has now been settled long enough, to allow of the time necessary to prove a prescription; and ancient assignment by fence-viewers, made under the late provincial laws, and also ancient agreements made by the parties, may have once existed, and be now lost by the lapse of time. It seems then that the owner of the cattle may aver, that the party complaining ought by law to make and maintain the fence, in which case he must produce the assignment by fence-viewers, or show that he is bound by agreement to make and repair the fence, which agreement he ought in pleading to set out; or that he is bound by prescription, when he should regularly plead the prescription, and may prove it by ancient usage. [See the very sensible and rational opinion of Popham, C. J. against that of the other judges in the case of *Newell* v. *Smith* before cited.]

"Every person then may distrain cattle doing damage on his close, or maintain trespass against the owner of the cattle, unless the owner can protect himself by the provisions of the statute, or by a written agreement, to which the parties to the suit are parties or privies or by prescription.

Liability for driving or enticing animals. Townshend v. Wathen.

Analogous to this liabilty arising from neglect to do * what the par- * 299
ty was bound to do, is that incurred by a party doing some positive act, as driving or enticing into his property the animals of his neighbors, so that they sustain injury thereby.

Thus in *Townshend* v. *Wathen* (*a*), where the defendant set traps baited with strong-smelling flesh so near the edge of his property, as thereby to entice the plaintiff's dogs in the neighboring close, which were caught in the traps and wounded, it was held, that the defendant was liable. Lord *Ellenborough* said, "Every man must be taken to contemplate the probable consequences of the act he does. And, therefore, when the defendant caused traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act. That which might be taken as general evidence of malice against all

(*a*) 9 East, 277.

"As no agreement or prescription is pleaded or alleged in this case, it is necessary to consider the extent of these provisions; whether they oblige a tenant, liable to make the partition fence, or a certain part of it, to fence against the cattle of strangers, or only against such cattle as are rightfully on the adjoining land. And we are perfectly satisfied, that he is obliged to fence only as in the case of prescription at common law. The manifest object of the statute was to establish the rights and obligations of tenants of adjoining occupied closes, respecting the making and maintaining partition fences; and the rights of persons not having any interest in either of the adjoining closes, remain unaffected by the statute, and are to be defined and protected by the common law. With this view, it is provided, that after the assignment, neither of the tenants of contiguous closes are obliged to maintain the partition fence through the year, if they otherwise agree. And it cannot be admitted that strangers to this agreement can lawfully claim any benefit from it.

"But in opposition to this reasoning it is said that by the third section of the statute of 1788, c. 65, no person injured in his land by the cattle of another, is authorized to maintain trespass quare clausum fregit, or to distrain the cattle damage feasant, unless his own land is sufficiently fenced. And from this section it is argued, that if the close of the party injured is not sufficiently fenced, he can distrain damage feasant neither the cattle of the tenant of the adjoining close, whence they escaped, nor the cattle of a stranger.

But we do not consider that this section is liable to this construction; but that all the provisions of it, so far as they extend are merely in affirmance of the common law. By this section a man injured in his close, which is sufficiently fenced, by sheep, swine, horses or neat cattle, may have his action against the owner; or may distrain them damage feasant. But it cannot be supposed, when goats,

dogs coming accidentally within the sphere of the attraction which he had placed there, must surely be evidence of it against those in particular which were placed nearest to the source of attraction and within the constant influence of it. What difference is there in reason between drawing the animal into the trap by means of his instinct which he cannot resist, and putting him there by manual force?"

Where, however, no such obligation to repair exists, it seems, though there are authorities throwing doubt on the point, that the owner of the land is not liable for injury sustained by cattle which are trespassing upon his property.

*300 "If A. seised of a waste adjoining a highway, dig a * pit in the waste within thirty-six feet of the said way, and the mare of B. escape into the said waste, and fall into the said pit, and there die, still B. shall not have any

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asses, or mules trespass upon his land, which is sufficiently fenced, that all remedy is taken away. It is evident that this section is merely affirmative of remedies existing, at common law, from a consideration of the fifth section. By this it is enacted, that in trespass or replevin the party injured, shall recover his damages, if the beasts escaped into his close through a part of his fence that was sufficient, although a part of his fence was insufficient.

"At common law, when a man was obliged by prescription to fence his close, he was not obliged to fence against any cattle, but those which were rightfully in the adjoining close; 10 E. 4, 7, 8; 22 E. 4; Fitz. Abr. curia claudenda, 2; Jenk. 4, Cent. ca. 5. But the owner of cattle may avail himself of the insufficiency of the fence of the close injured, if he has an interest in the adjoining close, to authorise him to put his cattle there, as a right of way, and highway, a license, a lease, or a right of common; Fitz. N. B. 298, note.

"Against this position the plaintiff has cited Fitz. Abr. 298, note 6, where it is said, that, if A. be bound to fence against B., and B. against C., and beasts escape out of the land of C. into the land of B. and thence into the land of A., A. shall not maintain trespass against C. But if A. be bound to fence against B. and the beasts of B. escape into the lands of A. and thence into the lands of D. a stranger, D. may maintain trespass against B. who shall be left to his curia claudenda against A. By calling D. a stranger I suppose is meant, that neither A. nor D. is bound to fence against each other. For this distinction is cited 10 E. 4, 7 and 36; H. 6. Fitz. Abr. Cur. Claud. Bar. 168.

"As this distinction is not supported, but opposed by other cases, we have looked into the authorities cited. The 10 E. 4, 7, clearly proves that D. may maintain his action. It is thus laid down by Coke, J., "If I have a close between the close of A. on one side, and the close of B. on the other side, which I ought to fence; and through defect of fence A's cattle escape into my close, I can have no action, for it is through my own default. But if they pass through my close into the close of B. he may have an action against A. who shall be put to his writ de curia claudenda against me." The case of 36 H. 6, is not reported in the year books, but

action against A., for that the making of the pit in the waste and not in the highway, was not any tort to B., but that it was by the default of B. himself that his mare escaped into the waste (*a*)."

So, in *Sarch* v. *Blackburn* (*b*), an action was brought "for knowingly keeping a ferocious dog accustomed to bite mankind, and which bit the plaintiff." The plaintiff was a watchman of the parish, and was bitten as he was going in the middle of the day to the defendant's house by a back way, which the defendant contended was a private way for himself and family only.

(*a*) *Blythe* v. *Topham*, 1 Rolle's Abr. Action on Case (p). Nuisauces; S. C. Cro. Jac. 158; see also *Brock* v. *Copeland*, 1 Esp. 203.

(*b*) Moo. & Mal. 505; 4 C. & P. 297, S. C.

there is a short statement of it in Fitz. Abr. Bar. 168. And I believe this distinction arose from a mistake of the case. It is thus, "Note, that it was adjudged by the court, if my beasts go into the close of onother [de autre] which is adjoining to my close, for the defect of the close of the other, [del l' autre] that I shall not be punished, because I dont retake them, and put them again into my close, until reparation be made of the other close, because they would go again," &c. Now by mistaking the third close for a close of a third person, who, because of the defect of his own fence, could maintain no action against the owner of cattle, the distinction arose, but it is not well founded. That I have given the true translation appears from Jenks 4. Cent. ca. 5. The rule as there laid down is, if A. has green acre, adjoining to his own close white acre, which adjoins to B's close black acre, which A. ought to fence against. If B's cattle go from his black acre to A's white acre, and thence to A's green acre, this is no trespass, because A. did not fence his white acre against B's black acre. This seems to be the same case of 36 H. 6, stated in Fitz. Bar. 168.

"We therefore consider it settled at common law, that the tenant of any close is not obliged to fence, but against cattle which are rightfull yon the adjoining land. And accordingly in the entries, where defect of inclosure is pleaded, the party pleading it claims some right or interest in the adjoining close, whence the escape was made, or justifies under those who have such right or interest; Rust. Ent. 620, b. 622; 6 Inst. Cler. 677, 680, and the entries there cited.

Let us now examine the bar in the case before us. It is therein averred, that the plaintiff and Trask are jointly and equally bound by law to make and maintain the partition fence between their closes.

"But we know of no such obligation imposed by law. The respective occupiers of two closes adjoining are bound, each one to make and maintain half the partition fence; but unless the fence, or the line on which it is to be made; has been divided by a written agreement between the parties, or assigned pursuant to the statute, or by perscription, neither party is obliged to make or maintain any part of the partition fence.

The plaintiff was alone at the time, and there was no evidence of the reason of his being in the place where he was bitten. There was a notice, "Beware of the dog," but the plaintiff could not read.

Tindal, C. J., left it to the jury to say on which side there was negligence. "If the plaintiff was negligent, if he was where he ought not to have been, or if he neglected means of notice, he cannot recover: if the defendant placed the dog where he might injure persons, not themselves in fault, he is responsible.

"The plaintiff certainly is not entitled to recover in this action, if he was injured by his own fault. There is no evidence to show why the plaintiff was on the spot in question, whether with a lawful or unlawful object. The law, however, would rather presume a lawful object: and there is no improb-

*301 ability in his * having one, for he was on one of the ways to the house itself at mid-day, although certainly it was not the most public and usu-

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"Indeed if there existed a joint obligation to make the fence, no legal effect would flow from it; for then each party would be bound equally to make every part; and if the fence was defective, each party would be chargable with the deficiency; and upon the escape of cattle from either close to the other, through a defect in any part of the fence, the owner of the cattle could not allege the escape to be from the deficiency of the other's fence.

However, it appears to us very immaterial whether there was, or was not a sufficient fence between the plaintiff's close and the locus in quo; for the cattle did not escape that way. They escaped from the plaintiff's close into Low's close. And it is not averred that Low's partition fence was insufficient, but that the plaintiff and Low were jointly bound to maintain it, and that it was out of repair. The fence was therefore as much the plaintiff's as Low's and the plaintiff is as much in default, on account of the deficiency as Low. It does not appear that this fence had ever been divided, and therefore each party at his peril was bound to keep his cattle on his own land.

"But we conceive it immaterial, whether the cattle escaped into Low's close through his default or not. The cattle then escaped into Rigg's, close, through want of any fence. And it does not appear that Low and Riggs were obliged to make a partition fence. If the cattle were rightfully on Low's close, he was bound at his peril to prevent their escape into Riggs' close; and when they did escape, a trespass was committed. Trask had not fenced her close against Riggs, and the cattle were by wrong on Riggs' close; the owner of the cattle having no interest in that close, or any right to put his cattle there. And Trask was not obliged to fence against any cattle that had escaped from Low's close to Riggs' close. When the cattle escaped into her close from Riggs', it was a trespass, and her bailiff might lawfully distrain them damage feasant.

"The bar is therefore bad, and no sufficient answer to the conusance of the defendants.

al way. If he was lawfully there, I do not think the mere fact of the defendant's having put up the notice relied on would deprive him of his remedy. The mere putting up the notice is not sufficient for this, unless the party injured is at least in such a condition as to be able to become cognisant of its contents. The plaintiff could not read; the notice, therefore, furnished no information to him; and there were no circumstances in the way in which the dog was kept to apprize him of the danger. If, therefore, he had a right to be where he was, I see no fault or negligence in him to deprive him of his remedy. Still the defendant will not be liable unless he is in fault; unless he knows the character of the dog, which he certainly did in this instance, and unless he keeps it improperly with that knowledge. The mere putting up the notice does not, I think, in this case excuse him. But it is said, that he has a right to keep a fierce dog to protect his property. He certainly has so; but not, in my opinion, to place it on the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. If the dog was placed in such a situation that he could injure the plaintiff, ig-

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"If in fact the cattle had escaped from the plaintiff's close into Low's, through the defect of Low's fence, yet the plaintiff must fail in his replevin against the defendants, and may have his remedy against Low by an action of the case. Vid. Cro. Jac. 665. *Holbach* v. *Warner;* 1 Salk. 335, *Star* v. *Booksbey.*

By the the Court. Plea in bar adjudged bad.

The case of *Wells* v. *Howell*, 19 J. R. 385; *Haladay* v. *Marsh*, 3 Wend. 142, recognize these principles as good law in New York.

An agreement in reference to partition fences is binding, if made between the parties to the suit, or those under whom they claim. But if the parties differ as to the agreement, the fence-viewers may decide upon it. *Barger* v. *Kortright*, 4 J. R. 414.

That a party has maintained a fence as his own, this raises a presumption that t belonged to him to maintain. *Colden* v. *Eldred*, 15 ib. 220.

Tenants in common—Rights of, as against co-tenants. One tenant in common, has a right to clean a well held in common; and if unreasonably obstructed by his co-tenant, the latter will be responsible in action. *Newton* v. *Newton*, 7 Pick. 201.

Tenants in common of a *basin* adjoining a *public canal*, and they agree upon a division of the lots; Held, that the respective occupants of the basin in front of his lot, must so use it as not to injure the others. *Beach* v. *Child*, 13 Wend. 343.

Fence-Occupant liable in trespass. In *Tewsbury* v. *Bucklin*, 7 n. H. R. 518 where defendant had license to put his oxen into his neighbor's pasture, and the oxen escaped into the plaintiff's close, the partition fence not being divided, Held, that the owner of the oxen, and not the owner of the pasture, was liable in trespass for the damage.

norant of the notice, and going for a lawful purpose to the house by a way which he was entitled to use, I think the defendant would not be protected from this action."

The cases, some of which appear at first sight to be in opposition to this doctrine (*a*), are instances in which a party has resorted to the use of some *302 dangerous * engine or ferocious animal for the preservation of his property, and has thus done indirectly what the law would not allow him to do by his own hand, unless it were absolutely necessary to preserve his property from immediate injury (*b*); and even here, if the party injured had express notice, and nevertheless persisted in committing the trespass, he can obtain on redress, but must take the consequences of his own act (*c*).

In the case of a warren or ancient park it would appear to be lawful to erect spikes, &c., as the keeper may kill dogs if they have recently been killing or chasing deer, although not then actually so employed (*d*).

There appears to be no authority in the English law, that, in the abscence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted on his neighbor's soil.

The principle objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it.

Supposing no easement to exist, there seems nothing to take this out of the ordinary rule that a man may abate any encroachment upon his property, and *303 therefore that he may cut the roots of a tree so encroaching, * in the same manner that he may the overhanging branches (*e*).

The decided cases bearing upon this subject have turned rather upon the question of property in trees growing upon the limits of two adjoining heritages, than upon the question of easements.

(*a*) *Dean* v. *Clayton*, 7 Taunt. 489; *Bird* v. *Holbrook*, 4 Bing. 628.

(*b*) *Vere* v. *Lord Cawdor*, 11 East, 568; *Janson* v. *Brown*, 1 Camp. 41; *Corner* v. *Champneys*, 2 Marshall, 584.

(*c*) *Ilott* v. *Wilks*, 3 B & Ald. 304

(*d*) *Protheroe* v. *Matthews*, 5 Car. & P. 583; *Wadhurst* v. *Dam*, Cro. Jac. 44; *Barrington* v. *Turner*, 3 Lev. 28; 2 Roll. Abr. 567, L. 2.

(*e*) Palmer, 536.

Master v. *Pollie* (*a*), was an action "of trespass, *quare clausum feregit, et asportavit* the plaintiff's boards." The defendant justified, "That there was a great tree which grew between the close of the plaintiff and that of the defendant, and that part of the roots of the tree extended into the close of the defendant, and were nourished by his soil; that the plaintiff cut down the tree, and carried it into his own close and sawed it into boards, and the defendant entered and took and carried away some of the boards, *prout ei bene licuit.* The plaintiff demurred to this plea, and it was contended that the plea was bad, for although some of the roots of the tree are in the defendant's soil, yet the body (*le corps del maine parte*) of the tree being in the plaintiff's soil, therefore all the residue of the tree belongeth to him likewise. And of this opinion is Bracton; but if the plaintiff had planted a tree in the soil of the defendant, it shall be otherwise, *quod curia concessit;* but *Mountague*, C. J., said, "That the plaintiff cannot limit the roots of the tree, how far they shall go. *Vide* 2, *Ed.* 4, 23" (*b*).

In an anonymous case reported in the same volume, it is said (*c*), "If a tree grow in a hedge which divides the land of A. and B., and by its roots takes nourishment * in the land of A. and also of B., they are tenants in * 304 common of the tree; and so it was adjudged."

In *Waterman* v. *Soper* (*d*) "It was ruled by *Holt*, C. J., at Lent Assizes, at Winchester, upon a trial at Nisi Prius, 1597-8: 1st, That if A. plant a tree upon he extreemest limits of his land, and the tree growing extends its roots into the land of B. next adjoining, A. and B. are tenants in common of this tree; but if all the roots grow into the land of A., though the boughs overshadow the land of B., yet the branches follow the root, and the property of the whole is in A. 2nd, Two tenants in common of a tree, and one cuts the whole tree —though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole flight of pigeons."

in *Holder* v. *Coates* (*b*), an action of trespass was brought for cutting a tree of the plaintiff. The body of the tree stood in the defendant's land, but some of the lateral roots grew into the land of both parties. The evidence as to the position of the principal root was conflicting.

Littledale, J., referred to the case first above cited, from Rolle's R., and expressed his preference for the law as there laid down over the ruling of Lord

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(*a*) 2 Rolle, Rep. 141.
(*b*) This reference is incorrect.
(*c*) 255.
(*d*) 1 Lord Raymond, 737.
(*e*) Moo. & Mal. 112.

Ownership of boundary trees.

Holt in *Waterman* v. *Soper*. The learned judge, in summing up, told the jury, that he did not see on what grounds they could find for either party, as to the proportion of nourishment derived by the tree from the soil of the plaintiff and defendant respectively; "but that the safest criterion for them would be to

* 305 consider whether, from the * evidence given as to the situation of the trunk of the tree above the soil and of the roots within it, they could ascertain where the tree was first sown or planted." Upon the jury saying that they could not tell in whose ground the tree first grew, a verdict for the defendant was taken by consent.

By the Civil Law, the neighbor into whose land the roots of a tree penetrated was not permitted to cut them off, although he might institute a suit to contest the right. With regard to the property of a tree, the roots of which extended into two heritages, it would appear that if it derived its nourishment equally from both, it became common property. If it drew its nourishment substantially from one heritage only, on whichever side it was originally planted, the property passed to the owner of the land supplying the nourishment (*a*)

Potheir, in his commentary on the passage of the Digest, that "the tree remains the property of him in whose soil it had its origin," says, "This is so, notwithstanding it is said in the Institutes, that the tree shall be considered his into whose soil the roots are protruded; for this is to be understood of such a protrusion of the roots as to draw all the nourishment for the tree

* 306 from the neighboring soil; but if my tree * pushes the extremities of its roots only into my neighbor's soil, though it may by that means draw some nourishment therefrom, nevertheless the tree remains mine, because the tree has got its origin and the greater part of the roots in my soil."

The Civil Law appears to agree with the rule as laid down in the anonymous case in Rolle, and in *Waterman* v. *Soper*, and, consequently, to be at variance with the opinion of Mr. J. *Littledale*.

(*a*) Si arbor in vicini fundum radices porrexit, recidere eas vicino non licebit; agere autem licebit, non esse ejus, sicuti tignum, aut protectum, immissum habere: si radicibus vicini arbor aletur, tamen ejus est in cujus fundo origo ejus fuerit.—L. 6. § 2. ff. arb. furt. cæs.

Si vicini arborem ita terra presserim ut in meum fundum radices egerit, meam effici arborem. Rationem enim non permittere ut alterius arbor intelligatur quam cujus fundo radices egisset. Et ideo prope confinium arbor posita, si etiam in vicinum fundum radices egerit, communis est.—L. 7, § 13, ff. de adq. rer. dom.

I. § 31. ff. de rer. div. is identical in expression with the latter authority.

Ownership of boundary trees.

The French Code contains many minute provisions upon this subject (*a*). (23)

(*a*) Arts. 671-2-3, Code Civil, Pardessus traite des Servitudes, 297.

(23) The law of *Masters* v. *Pollie* is upheld in the late case of *Lyman* v. *Hale*, 11 Conn. 177. Bissell. J. observes :—"The same doctrine is also laid down, in *Millen* v. *Fandrye*, Pop. R. 161. 163. *Norris* v. *Baker*, 3 Bulstr. 178. See also 20 Vin. Abr. 417. I Chit. Gen. Pr. 652. We think, therefore, both on the ground of principle and authority, that plaintiff and defendant are not joint owners of the tree ; and that the charge to jury, in the count below, was, on this point, erroneous." Again :—"The bill of exceptions finds, that the defendant gathered the pears growing on the branches which overhung his land, and converted them to his own use, claiming a title thereto. And the charge to the Jury proceeds on the ground that he has a right so to do. Now if these branches were a nuisance to the defendant's land, he had clearly a right to treat them as such, and as such, to remove them. But he as clearly had no right to convert either the branches or the fruit to his own use. *Beardslee* v. *French*, 7 Conn. R. 125 ; *Welsh* v. *Nash*, 8 East 394 ; *Dyson* v *Collich*, 5 B. & Ald. 600 ; 2 Phil. ev. 138.

PART II.

OF THE INCIDENTS OF EASEMENTS.

The Incidents of Easements may be considered with reference to—

1st. The obligation to do the works necessary for the enjoyment of the easement, as to make repairs.

2nd. The secondary easements ancillary to, and depending upon, the primary easements.

3rd. The extent and mode of enjoyment.

CHAPTER I.

OBLIGATION TO REPAIR.

As a general rule, easements impose no personal obligation upon the owner of the servient tenement to do any thing—the obligation to repair falls upon the owner of the dominant tenement.

"Ad aquæ ductum," says Bracton, "pertinet purgatio, sicut ad viam pertinet refectio" (*a*).

"Where I grant a way over my land, I shall not be bound to repair it," said *Twisden*, J., in *Pomfret* v. *Ricroft* (*b*).

"By the common law of England, he that hath the * use of a thing * 308 ought to repair it," said Lord *Mansfield*, in *Taylor* v. *Whitehead* (*c*).

"The grantor of a way is not bound to repair it if it be foundrous (*d*)."

(*a*) Lib. 4, fol. 222.

(*b*) 1 Saund. 322 a; see also *Gerard* v. *Cooke*, 2 Bos. & Pull. N. R. 109.

(*c*) 2 Douglas, 745.

(*d*) Com. Dig. Chimin, (D. 6).

This is in accordance with the principles of the Civil Law, which imposed the burthen of repair in cases of easement upon the owner of the dominant, and not upon the owner of the servient tenement (*a*).

By the French Code Civil (*b*), the expenses incurred in constructing any works necessary for the use or preservation of any easement, must be borne by the party entitled to it.

What is above said is to be understood with reference only to the non-liability to repair on the part of the owner of the servient tenement.

It would appear on the principles hereafter considered, that where the enjoyment of the easement is had by means of an artificial work, (*opus manufactum*), the owner of the dominant tenement is liable for any damage arising from its want of repair. Thus, if a man carries water by means of conduit-pipes through his neighbor's land, he must keep those pipes in repair.

Where the easement is natural, and the injury to the servient tenement arises from natural causes only, no such liability accrues.

The case of *Hoare* v. *Dickenson* (*c*), where an action was brought for the bad state of repair of some water-pipes, is not opposed to the principles above laid
*309 down, * although from the point upon which the Court gave judgment, it cannot be treated as an authority in support of it; nor indeed upon the facts as stated in the report could the point of liability to repair be raised; for the declaration did not state to whom the pipes belonged, nor that they ran through the plaintiff's land, but alleged merely that the defendant caused the water to run near the plaintiff's foundations, whereby they were rotted, so that, as the Court said, the defendant was plainly a wrong-doer, and upon this ground they gave judgment.

A question appears to have been raised in some old cases, whether there was not by the law of England an exception to the rule already laid down—that the owner of the dominant tenement was bound to make the necessary reparations.

In Fitz. Nat. Brev. (*d*), there is a writ commanding the mayor and sheriff of a town to summon one before them for not repairing his cellar, to the dam-

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(*a*) In omnibus servitutibus refectio ad eum pertinet qui sibi servitutem adserit, non ad eum cujus res servit.—L. 6, § 2. L. 8, ff si serv. vind.

(*b*) Art. 698.

(*c*) 2 Lord Raymond, 1568.

(*d*) 127 F.

Spurious easement to compel servient owner to repair. Edwards v. Hallinder.

age of him who has a cellar beneath it, which by *the custom of the said town* he was bound to repair. The other writ *de reparatione facienda* (*a*), is the case of a house becoming ruinous, and dangerous to the neighboring houses.

There is a case in Keilway (*b*), as follows;—"It seems to *Fineux* and *Brudenell* in the K. B., that where I have a chamber below (*meason pavaile*), and another has a chamber above mine (*haute meason*), as they have here in London, in this case I may compel him who has the chamber above to cover his chamber for the salvation of the timber of my chamber below; and in the same manner he may compel me to sustain my * chamber below, by the *310 reparation of the principal timber, for the salvation of his chamber above.—*Nota et studie.* For some at the bar think that I may suffer my chamber to fall down (*deschuer*); but all were agreed that I could not abate my chamber to the destruction of the upper chamber, and the manner for me to compel another to sustain his chamber, *ut supra*, if the law be such, is by action on the case," &c.

So it is said by *Rainsford*, J., in *Pomfret* v. *Ricroft* (*c*), "If a man devise by deed a middle room in a house, and afterwards will not repair the roof, whereby the lessee cannot enjoy the middle room, an action of covenant lies for him against his lessor."

The case in Keilway was doubted by Lord *Holt*, in *Tenant* v. *Goldwin* (*d*), where he said, "he thought the writ in Fitzherbert must be founded upon the particular custom of places." Serjeant Williams, in his note to *Pomfret* v. *Ricroft*, (*e*) observes, "It is difficult to say upon what other ground but custom such an action can be supported."

In *Edwards* v. *Hallinder*. (*f*), an action was brought by the tenant of a cellar against the tenant of the room above, both holding under the same landlord, for overloading his floor, whereby it fell through and destroyed the plaintiff's wine in the cellar beneath.

The defendant pleaded, "That, before the charging of the floor, *ut supra*, the said floor had sustained greater weight, and, further, that the landlord let the said shop to him, to lay there the weight of thirty tons, and he had laid there but the weight of twelve tons; and also that the walls of the said cellar were so weak that * the floor of the said shop fell by reason thereof. *311 Upon which there was a demurrer in law, and judgment was given for the plaintiff, which was affirmed on a writ of error in the Exchequer Chamber,

(*a*) 127 C. (*b*) 98 b.

(*c*) 1 Saund. 322.

(*d*) 1 Salk. 360; S. C. 2 Lord Raymond, 1089.

(*e*) 1 Saund. 322. a.

(*f*) 2 Leon. 93 S. C.; 6 Mod. 314; Popham, 46.

Spurious easement to compel servient owner to repair. Result of authorities.

as it would appear, upon the ground that there being no traverse of the fact charged in the declaration—the overloading—the plea was impertinent. Nothing whatever was decided as to the liability to repair.

Gent, B., was of opinion, "That the defendant had not fully answered the declaration, for he was charged with the laying too much weight on the floor there, so as *vi ponderis* it fell down; to which the defendant has said that the walls were ruinous *in occultis partibus*, and doth not answer to the surcharging (*scil.*), *absque hoc*, that he did surcharge."

Clarke, B., agreed with *Gent*, B., as it appears, in opposition to *Manwood*, C. B., who thought no traverse was necessary.

The report in Popham gives the argument in the Exchequer Chamber; from which it appears that the judgment was affirmed on the same ground that it was given below.

In an anonymous case (*a*), it is said, "If a man has an upper room, an action lies against him by one who has an under room, to compel him to repair his roof. And so where a man has a ground room, they over him may have an action to compel him to keep up and maintain his foundation." *Sed quære.* For if a man build a new house under the roof of an old one which is ready to tumble, whether he shall have a writ *de reparatione facienda*, because *debet et consuevit* are necessary words in the declaration."

*312 * *Holt*, C. J., said, "That every man of common right ought so to support his own house as that it may not be an annoyance to another man's."

The report of the case in Keilway in reality amounts to no more than a statement that such a point had been agitated. The dictum of *Rainsforth*, J., in *Pomfret* v. *Ricroft*, was probably founded, according to Serjeant Williams, upon this report; there seems also some doubt whether it did not proceed on the ground of a covenant implied in the demise. The writ in Fitzherbert is obviously founded on a local custom only; and the case in Leonard went off entirely on a point of pleading: there appears, therefore, to be no authority whatever to oppose to the opinion of Lord Holt, that such an obligation could only exist when specially imposed. (24).

(*a*) 11 Mod. 8.

(24) In *Loring* v. *Bacon*, 4 Mass. 575, the question arose whether the owner of the lower part of the house was obliged to contribute to the repairs of the upper part. Parsons, C. J. in delivering the judgment of the court says:—"The plaintiff declares in case upon several promises. The first count is indebitatus assumpsit in the sum of eighty dollars, according to the account annexed to the writ, the items of which are for timber, boards, shingles, nails and labor, and victualling the workmen. The second count is a quantum meriut for the same items, tech

Spurious easement to compel servient owner to repair. Paries oneri ferendo.

The Civil Law, it is true, recognizes the existence of such an easement as this, (oneris ferendi), as distinguished from the ordinary easement of support, (tigni immittendi); but it appears, that the additional obligation of repair could only be imposed by an express stipulation to that effect in the instrument creating the easement (*a*), or at all events there must have been a prescriptive right to the repair, as well as to the support. Indeed, it has been doubted whether such an easement could exist at all, unless the precise technical expression "paries oneri ferendo" was inserted in the original grant (*b*).

The servitude of the Civil Law, called "*paries oneri ferendo*," imposed upon the owner of the servient tenement * the obligation not only of sup- *313

(*a*) Modus autem refectionis in hac actione ad eum modum pertinet, qui in servitute imposita continetur; forte ut reficiat lapide quadrato, vel lapide structilli, vel quovis alio opere quod in servitute dictum est.—L. 6. § 5. ff. si serv. vind.

(*b*) Stair's Inst. 328; Erskine Inst. 431.

nically supposed to be different but similar. The third count is a general indebitatus assumpsit for eighty dollars, laid out and expended.

The facts being agreed by the parties, the question of law comes before the court on a case stated. From this case, it appears, that the defendant is seised in fee simple of a room on the lower floor of a dwelling house, and of the cellar under it; and that the plaintiff is seised in fee of a chamber over it, and of the remainder of the house; that the roof of the house was so out of repair, that unless repaired, no part of the house could be comfortably occupied; that the defendant, though seasonably requested by the plaintiff, refused to join with him in repairing it; and the plaintiff then made the necessary repairs, and has brought this action to recover damages for her refusal to join in the repairs. It is also agreed that the parties had from time to time repaired the respective parts of the house at their several expense. And the question submitted to the court is, whether the plaintiff can recover in this action.

This is an action of the first impression. No express promise is admitted; but if there is a legal obligation on the defendant to contribute to these repairs, the law will imply a promise.

We have no statute, nor any usage upon this subject, and must apply to the common law to guide us.

Although in the case, the parties consider themselves as severally seised of different parts of one dwelling-house, yet in legal contemplation, each of the parties has a distinct dwelling-house adjoining together, the one being situated over the other. The lower room and the cellar are the dwelling-house of the defendant; the chamber, roof, and other parts of the edifice, are the plaintiff's dwelling-house. And in this action it appears that having repaired his own house, he calls upon her to contribute to the expense, because his house is so situated that she derives

porting the dominant edifice, but also of keeping his own buildings in such a state of repair, as should enable them to sustain the pressure. The validity of this servitude, though admitted to be of an anomalous character, appears to have been fully established, notwithstanding some difference of opinion upon this subject (*a*); but still it was said that the obligation was not upon the person, but upon the tenement, and that by relinquishing the tenement, the owner's liability to repair was determined (*b*).

This obligation to repair was, however, strictly construed, and did not carry
*314 with it as an incident any * obligation to furnish support to the dominant tenement during any necessary reparation of the servient tenement. In

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(*a*) Eum debere columnam restituere quæ onus vicinarum ædium ferebat, cujus essent ædes quæ servirent, non eum qui imponere vellet, nam cum in lege ædium ita scriptum est—*paries oneri ferendo, uti nunc est, ita sit*—satis aperte significari in perpetuum parietem esse debere; non enim hoc his verbis dici, 'ut in perpetuum idem paries æternus esset,' quod ne fieri quidem posset, sed 'uti ejusdem modi paries in perpetuum esset qui onus sustineret;' quemadmodum, si quis alicui cavisset, ut servitutem præberet qui onus suum sustineret, si ea res, quæ servit et tuum onus ferret, perisset, alia in locum ejus dari debeat.—L. 33. ff. de serv. præd. urb.

In servitute oneris ferendi hoc amplius est, quod vicinus columnam aut parietem qui oneri ferendo est reficere tenetur, et idoneum onere sustinendo præstare, qua parte servitus hæc degenerat et spuria esse agnoscitur—quippe cum contra naturam servitutum hoc sit ut quis cogatur aliquid facere in suo.—Vinnius, Inst. Lib. 2, tit. 3, de serv. urb. § 3.

Etiam de servitute quæ oneris ferendi causa imposita erit actio nobis competit, ut et onera ferat et ædificia reficiat ad eum modum qui servitute imposita comprehensus est; et Gallus putat non posse ita servitutem imponi, 'ut quis facere aliquid cogeretur' sed 'ne me facere prohiberet:' nam in omnibus servitutibus refectio ad eum pertinet qui sibi servitutem adserit; non ad eum cujus res servit: sed evaluit Servii sententia, in proposita specie, ut possit quis defendere, jus sibi esse, cogere adversarium reficere parietem ad onera sua sustinenda.—L. 6. § 2. ff. si serv. vind.

(*b*) Labeo autem hanc servitutem nom hominem debere, sed rem; denique licere domino rem derelinquere, scribit.—Ibidem.

Hæc autem actio in rem magis est quam in personam, et adversus dominum, sicuti cæterarum servitutum intentio.—Ibid. § 3.

a benefit from his repairs, and would have suffered a damage, if he had not repaired.

Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff.

Houses for the habitation, and mills for the support of man, are of high consid-

Spurious easement to compel servient owner to repair.

this respect, the owner of the dominant tenement was bound to take care of himself, by shoring or other means, or, if he neglected so to do, he might "take down (*a*) his house and rebuild it when the wall was restored" (*b*).

The analogous servitude "*tigni immittendi*," clearly imposed no obligation on the owner of the servient tenement to keep his walls in repair; the right conferred was "to insert a beam into the neighbor's wall, so that it might remain there, and the neighbor's wall might sustain the weight," but nothing beyond this (*c*).

By the French Civil Code, when the different stories of a house belong to

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(*a*) "Ironicum consilium," says Pothier.

(*b*) Sicut autem refectio parietis ad vicinum pertinet: ita fultura ædificiorum vicini cui servitus debetur, quamdiu paries reficietur, ad inferiorem vicinum non debet pertinere; nam si non vult superior fulcire—deponat, et restituat quum paries fuerit restitutus; et hic quoque sicut in cæteris servitutibus actio contraria dabitur, hoc est, *jus tibi non esse me cogere*.—L. 8. ff. si serv. vind.

(*c*) In imponenda servitute tigni immittendi hoc agitur, ut ex nostro pariete liceat tignum trabem immittere in parietem vicini, ita ut ibi requiescat, et vicini paries sustineat onus immissi—nihil amplius.—Vinnius, Inst. Lib. 2, tit. de serv. urb. 3.

Competit mihi actio adversus eum qui cessit mihi talem servitutem, ut in parietem ejus tigna immittere mihi liceat, supraque ea tigna, verbi gratia, porticum ambulatoriam facere, superque eum parietem columnas, structiles imponere, quæ tectum porticus ambulatoriæ sustineant—L. 8. § 1. ff. si serv. vind.

Distant autem hæ actiones (*i. e.* oneris ferendi et tigni immittendi) inter se: quod superior quidem locum habet etiam ad compellendum vicinum reficere parietem (meum); hæc vero locum habet ad hoc solum ut tigna suscipiat, quod non est contra genera servitutum.—Ibid. § 2.

eration at common law; and when holden in common or joint tenancy, remedies are provided against those tenants, who refuse to join in necessary reparation, by the writ de reparatione faciendâ; Co. Lit. 200, b.—Fitz. N. B. 295. In Co. Lit. 56, b. it is said, that if a man has a house so near to the house of his neighbor, and he suffers it to be so ruinous that it is like to fall on his neighbor's house, he may have a writ de domo reparandâ, and compel him to repair his house. In Keilway, 98, b. pl. 4, there is a case reported, in the time of Henry the Eighth, in which Fineux and Brudenell, justices of the king's bench, were of opinion, that if a man have a house underneath, and another have a house over it, as in the case in London, the owner of the first house may compel the other to cover the house, to preserve the timbers of the house underneath; and so may the owner of the house above compel the other to repair the timbers of his house below;

Spurious easement to compel servient owner to repair. Code Civil.

different proprietors, their respective rights and liabilities are fixed with great
*315 minuteness—supposing the instruments creating their respective * titles to contain no provisions for repair. The main walls (gros murs) and roof are kept in repair at the expense of all the proprietors, (each contributing according to the value of the portion which belongs to him): the proprietor of each story is bound to keep in repair his own floor; the proprietor of the first story is bound to keep in repair the staircase leading up to it; the proprietor of the second is bound to keep in repair that part of the staircase which leads from the first story to him; and so with regard to the other proprietors (*a*).

(*a*) Art. 664, Pardessus Traite des Servitudes, 288.

and this by action of the case. But some of the bar were of opinion, that the owner of the house underneath might suffer it to fall; yet all agreed that he could not pull it down to destroy the house above. And in Fitz. N. B. 296, there is a writ of this kind. But in the case of *Tenant* v. *Goldwin*, 6 Mod. 314, Lord Holt was of opinion, that this writ was by virtue of a particular custom, and not of the common law; and he doubted the case in Keilway.

But there is unquestionably a writ at common law, de domo reparanda, the form of which we have in Fitz. N. B. 295, in which A. is commanded to repair a certain house of his in N. which is in danger of falling, to the nuisance of the freehold of B. in the same town, and which A. ought, and hath been used to repair, &c. This writ, Fitzherbert says, lies, when a man, who has a house adjoining to the house of his neighbor, suffer his house to lie in decay, to the annoyance of his neighbor's house. And if the plaintiff recover, he shall have his damages; and it shall be awarded that the defendant repair, and that he be restrained until he do it. But it is otherwise in an action of the case; for there the plaintiff can recover damages only. And there appears no reasonable cause of distinction in the cases, whether a house adjoin to another on one side, or above, or underneath it.

But if the case in Keilway is law, the plaintiff cannot recover, for by that case the defendant could have compelled the plaintiff to repair his house, or compensate her in damages for the injury she had sustained from his neglect to repair it. And he has the like remedy against her.

If the case in Keilway is not law, then upon analogy to the writ at common law, the plaintiff cannot compel the defendant to contribute to his expenses in repairing his own house. But if his house be considered as adjoining to hers, she might have sued an action of the case against him, if he had suffered his house to remain in decay to the annoyance of her house.

In every view of this case, there is no legal ground on which the plaintiff's action can be supported. We do not now decide on the authority due to the case in Keilway; but if an action on the case should come before us founded on that report, it will deserve a further and full consideration. The plaintiff must be called.

Spurious easement to compel servient owner to repair. Lord Stair.

The Scotch Law, which to a great extent is based upon the Civil Law, is in accordance with the doctrine, "that to impose such an obligation to repair on the owner of the servient tenement, there must be either an express stipulation to that effect, or actual proof that there is a prescriptive right to the repair as well as to the support."

"The precise positive servitude of city tenements," says Lord Stair, "is the servitude of support, whereby the servient tenement is liable to bear any burden for the use of the dominant, and that, either by laying on the weight upon its walls or other parts thereof, or by putting in joists, or other means of support, in the walls of the same, which the Romans called *servitutem tigni*

In *Cheesborough* v. *Green*, 10 Conn. 318, which was an action on the case brought by the owner of the lower part of a store against the owner of the upper part and roof of the building to recover damages for suffering the roof to be out of repair, the Court held, that the action could not be sustained; in a Court of Chancery only can the plaintiff have adequate remedy. Daggett, Ch. J. The declaration, in substance, is, that the plaintiff owns the first and second stories of a brick store, and the defendant owns the third story and roof. The defendant has suffered the roof to decay and become leaky and ruinous, so that the lower part of the building is injured, and for this neglect of the defendant this action is brought. The Superior Court, on a trial, found the facts alleged true, but adjudged the declaration insufficient. It is now to be decided, by this court, whether this action can be sustained. There is no statute, nor any custom, nor any adjudged case in Connecticut, on the subject. The plaintiff relies upon the principles of the common law to uphold this action. He founds himself, principally, on a case Keilway 98. b. pl. 4. where the doctrine was laid down, by two Judges of the Court of King's Bench. In *Tenant* v. *Goldwin*, 6 Mod. 314. S. C. 1 Salk. 360. Lord Holt disapproved of the case in Keilway, and said, that is was not supported by the custom of particular places, and not by the common law. There was a writ de reparatione facienda against those of several joint tenants, or tenants in common, who refused to join in necessary repairs. So if the house of A. be near that of B., and the former become so ruinous that it endangers the latter, B. may have a writ de domo reparanda, and compel A. to repair his house. I am not aware, that any such writ has been known in the practice of our courts. Perhaps an action on the case would lie against any one, who should negligently suffer his building to decay, and fall on and injure the property of another, on the maxim Sic utere tuo ut alienum non lædas. That, however, is not this case.

Nor can we say, in the absence of statute regulation, or express decision, that this doctrine is so reasonable that an action can be sustained. In large cities, houses generally consist of four or five stories. The owner of the fifth story, upon the principle assumed by the plaintiff, is compellable to furnish a sufficient roof to protect the whole building against water. Also, the owner of each story is obliged to secure the side and ends, as the case may be, against the entrance of

Spurious easement to compel servient owner to repair Lord Stair.

immittendi; or otherwise, this servitude may be, by bearing the pressure, or putt, of any building, for the use of the dominant tenement, as of a vault, or pend, or the like; such is the servitude of superstructure whereby any building may be built upon the servient tenement. Like unto which is now frequent in Edinburgh, when one tenement is built above another, at diverse times, or diverse stories, *or contignations of the same tenement are * 316
bought by diverse proprietors, and thereby the upper becomes a distinct tenement, and hath a servitude upon the lower tenements, whereby they must support it. The question useth to be moved here, whether the owner of the servient tenement be obliged to uphold or repair his tenement, that it may be sufficient to support the burden of the dominant tenement?

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water to the annoyance of all those who own or occupy below. The owner of the lower story is compellable, also, to keep the foundation suitably repaired, to sustain each of the other stories, with their additional (as the case may be) superincumbent weight.

These considerations, and others easily suggested, would lead to the conclusion, that a remedy, in such case, can be furnished, only by a Court of Chancery. The principles adopted, by Chancellor Kent, in *Campbell* v. *Mesier & al.* 4 Johns. Ch. Rep. 334. countenance this idea. The case of *Loung* v. *Bacon*, 4 Mass. Rep. 575. was pressed by the counsel for the plaintiff. There, it was decided, that the owner of the upper story could not recover in assumpsit against the owner of the floor and cellar, for necessary repairs to the roof. Chief Justice Parsons speaks of the case in Keilway, without deciding on its authority. He does not decide the plaintiff to be without remedy: he says truly, he has no legal ground for recovery. It will be borne in mind, that there was then [1806] no court of chancery in Massachusetts.

The case of *Carver* v. *Miller*, 4 Mass. 559, decides that where tenant in dower agreed that Carver should repair and take the profits until he was paid, Held, that he could not call upon the reversioners in case of the death of the widow. At common law, if there be two joint tenants or tenants in common of a wood, or of arable land, the one has no remedy against the other to make enclosures or repairs for the safeguard of the wood or crop. But a house or a mill, is of higher legal consideration; and one joint tenant or tenant in common may have a writ de reparatione facienda against the other; for each one is holden to repair and sustain his house or mill; 11 Rep. 82, B.—Co. Litt. B. 3. c. 4 s. 323.

Whether this maxim of the common law, as applied to mills, is in force here, may be doubtful, especially since the provincial statute of 7 Ann, c. 1. was passed, which was revised by the statute before mentioned. In the early settlement of this country, mills were erected over streams of water then sufficient, but which by the clearing of the country, have so far failed, that the mills could now be wrought but a small part of the year; and the profits would not be a sufficient inducement to keep them in repair. To this discouragement may be added the

Spurious easement to compel servient owner to repair. Lord Stair.

"There are opinions of the learned, and probable reason upon both facts, for the affirmation maketh the common rule, that, when any thing is granted, all things are understood to be granted therewith that are necessary thereto; so he who constituteth upon his tenement a servitude of support, must make it effectual; and for that negative servitudes are odious, and not to be extended beyond what is expressly granted or accustomed, to which we incline; and, therefore, it would be adverted how the servitude is constituted, that, if it appear the constituent had granted this servitude so as to uphold it, not upon the account of his own tenement, but of the dominant, he must so continue; and it is not only a personal obligation, but a part of the servitude passing with the servient tenement, even to singular successors: but if it appear not so constituted, it will import no more than a tolerance to lay on or impute the burden of the dominant tenement upon the servient, which, therefore, the owner of the servient neither can hinder or prejudge; but he is not obliged to do any positive deed by reparation of his own tenement to that purpose; but the owner of the dominant tenement hath right to repair it for his own use, by reason of his servitude, and the owner of the servient tenement cannot * hinder him; yea, in what he thereby advantages the servient *317 tenement, he hath upon the owner thereby the natural obligation of recompense in quantum lucratus.

"If it be objected, that, within burgh, the owners of the inferior and supporting tenements are obliged to repair for the behoof of the superior tene-

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erection of new mills in the neighborhood, in more convenient situations. And as to saw-mills, the consumption of all the timber in their vicinity has rendered many of them useless. As there have been many mills heretofore erected, which could not now be wrought with adequate profit, it would be unreasonable to enable any individual part-owner to compel his partners in all cases to keep their mill in repair. And the statute has accordingly provided, that if a part-owner will repair against the consent of his partners, he shall look to the profits only for his reimbursement.

But it is not necessary now to determine whether this common law remedy can or cannot be applied at this time by our courts; for the action of contribution lay by a tenant in common or joint tenant against his co-tenants only, and not against a reversioner. For the consideration on which the writ is founded, is the perception of the people by all the parties to the action; and he in remainder or reversion is not entitled to the profit; F. N. B. 295.

Held, that under the st. of 1795, C. 74 s. 6, the remedy against a part owner of a mill, who refuses to repair, is by reimbursement out of the profits; no action lies against his heirs or assignees. But when all the proprietors contract to repair, then a remedy must be had on the contract, if it be broken, and not on the act.

Spurious easement to compel servient owner to repair. Lord Stair.

ments, the owners whereof may legally enforce reparation; yet it inferreth not this to be the nature of a servitude, but a positive statute or custom of the burgh for the public good thereof, which is concerned in upholding tenements. But mainly the reason of it is, because when diverse owners have parts of the same tenement, it cannot be said to be a perfect division, because the roof remaineth roof to both, and the ground supporteth both; and therefore, by the nature of communion, there are mutual obligations upon both, viz. that the owner of the lower tenement must uphold his tenement as a foundation to the upper, and the owner of the upper tenement must uphold his tenement as a roof and cover to the lower, both which, though they have the resemblance of servitudes, and pass with the thing to singular successors, yet they are rather personal obligations, such as pass in communion even to the singular successors of either party" (*a*).

A somewhat similar question arises in the case of a public highway or bridge, where a particular person is held liable to repair *ratione tenuræ* (*b*), or by prescription, contrary to the common law, by which the obligation is imposed upon the parish or county (*c*).

(*a*) Stair's Institutes, Book 2, tit. 7, § 6.

(*b*) 2 Inst. 700; Com. Dig. Chimin, A. 4.

(*c*) *Regina* v. *Inhabitants of the County of Wilts*, Salkeld, 359.

In *Converse* v. *Ferre & al.* 11 Mass. 325, where three part owners of a dam and stream agreed that each should do his proportion of the work and furnish also his proportion of the materials for repairing the dam, and if one failed in these respects, he should pay the deficiency in money:—two fulfilled; and one expended beyond his proportion; the question was whether the plaintiff could recover such excess of expenditures against the other two, one of whom had fulfilled. The two defendants were tenants in common of a saw and grist-mill; but they held the same by separate titles, each one moiety: and the plaintiff owned a blacksmith shop and trip hammer. All these moved by the same stream. Held, that plaintiff could not recover against the defendants jointly, because his only remedy was on the contract; and by *that* there was no joint promise to this effect;—there being no remedy at common law.

In *Carver* v. *Miller*, *supra*, the tenant in dower died before the plaintiff had received his pay out of the profits of the mill according to the agreement, and he was held to be without remedy. But the Court observe, that if such deficient proprietor, being tenant in fee, shall after the repairs made aliene or die, before the charges are reimbursed, it may deserve consideration, whether within the equity, although not within the words of the act, his assignees or heirs may not be holden to account.

Liability of servient owner to repair by prescription or tenure.

* "Et sicut poterit quis facere nocumentum injuriosum in faciendo, ita poterit in non faciendo, in proprio vel in alieno, ut si ex constitutione obstruere et claudere, purgare et réficere, et non fecerit cum ad hoc tenc- *318
atur" (*a*).

If a man, who is bound by tenure to repair a certain causeway by prescription, does not repair it, per quod my land is surrounded, I may have an action on the case against him (*b*).

As, however, the obligation thus imposed on the servient tenement is contrary to the usual incidents of easements, it will, of course, require greater strictness of proof.

Although, as it should appear by the Civil Law, with the single exception of the servitus oneris ferendi, no easement could exist which imposed on the owner of the servient tenement an obligation to repair, and any stipulation to that effect was personal, binding on the contracting parties only, and not imposing any charge upon the inheritance, so as to pass with it into the hands of a new owner; yet there is little doubt that, by the law of England, such an objection may be imposed either by express grant or prescription.

Any stipulation by deed, affecting the quality or mode of enjoyment of land—as, for instance, a covenant to repair a house upon it (*c*), runs with the land; and this doctrine implies to implied as well as express covenants (*d*); and as a prescriptive right to an easement * is equivalent to an ex- *319
press stipulation by deed, which the law allow to be made in favor of the successive owners of the neighboring tenement, it seems that the same consequences must follow from it.

If a man make a bridge for the common good of all the subjects, he is not bound to repair it, for no particular man is bound to reparation of bridges by the Common Law, but ratione tenuræ, or præscriptionis. As to the second, the remedy was, if it were a private bridge, as to a mill, which A. was bound to maintain, over which B. had a passage, &c., if the bridge were in decay, B. might have his writ de ponte reparando (*e*).

"By the Common Law," says Lord *Mansfield*, "he that hath the use of a thing ought to repair it;" but "the grantor may bind himself" (*f*).

(*a*) Bracton, Lib. 4, f. 232; Com. Dig. Tit. Chimin, D. 6.

(*b*) 29 Ed. 3. 32 b; and see 1 Wms. Saunders, 322.

(*c*) 2 Inst. 701.

(*d*) *Spencer's case*, 5 Rep. 16; *Mayor of Congleton* v. *Pattison*, 10 East, 135.

(*e*) *Easterby* v. *Sampson*, 9 B. & Cr. 505; 4 Man. & Ry. 422; S. C. in Error, 1 Cr. & J. 105; 4 Moo. & P. 601.

(*f*) *Taylor* v. *Whitehead*, 2 Doug. 745.

"However," says Mr. Serjeant Williams in the note to *Pomfret* v. *Ricroft*, "the grantor of a right of way may be bound either by express stipulation or prescription to repair it" (*a*): and he cites the case of *Rider* v. *Smith* (*b*), in which an action was brought against the owner of a close for not keeping in repair a footway running across it, and the Court held, that a declaration, alleging that, "by reason of his possession," the defendant ought to repair, was good on demurrer, and that the special matter of the obligation might be given in evidence; thus recognising, at all events, the possibility of such an obligation being established.

As the obligation to repair is by law imposed upon the owner of the domi-
*320 nant tenement, a corresponding * right is also conferred upon him—to do all those acts which may be necessary to secure the full enjoyment of the easement, even though he should thereby be compelled to commit a trespass. This right to do all such acts as are essential to the enjoyment of the easement granted, was recognized in a very early case (*c*).

Choke, J.—"If a man grant me (a right) to dig in his land and to make a trench from a certain fountain or spring to my place, so that I may lay down a pipe to convey the water to my place, if afterwards the pipe is stopped or broken so that the water run out of it, I cannot dig in his land to amend the pipe—for this was not granted to me—but if he grant that I may dig, &c., to amend the pipe, tociens quociens, &c., then I shall dig. And, in like manner, if I prescribe to have such a conduit, I must also prescribe to scour and amend it, tociens quociens, &c., or otherwise I cannot dig in his land to amend, &c. But this was denied in both cases, for it was said by the Court, that it is incident to such a grant to scour and amend."

Thus, in the case of *Pomfret* v. *Ricroft* (*d*), already cited, it was held, that where a party had an easement to use a pump in his neighbor's land, "although neither the soil nor the pump itself was granted to him, yet by the grant of the use of the pump the law had given him the liberty, (to enter upon the land and repair the pump), for when the use of a thing is granted, every thing is granted by which the grantee may have and enjoy such use. As if a man gives me a license to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes,
*321 * though the soil belongs to another and not to me" (*e*). In this

(*a*) 1 Saund. 322.

(*b*) 3 T. R. 766.

(*c*) 9 Ed. 4, 35.

(*d*) 1 Saund. 322.

(*e*) This is cited as clear law by Lord Coke in *Liford's case*, 11 Rep. 52 a.

case the action, (which was in covenant), was brought by the grantee of the easement, for a breach of the implied covenant to repair on the part of the grantor. The Court of K. B. gave judgment for the plaintiff, which was aforesaid reversed in the Exchequer Chamber upon the grounds above given.

As, then, at Common Law, the obligation to repair falls on the owner of the dominant tenement—and it must be his own fault if the way be impassable—he can have no right to leave the ordinary track on account of its want of repair, for which the owner of the land is not answerable (*a*); though it may be otherwise, in the case of public highways.

There is no authority expressly deciding this point where the obligation is imposed by prescription, or otherwise, on the servient tenement.

It is thus stated in Comyn's Digest—

"If a man be bound by prescription to the repair of a way, he need not keep it in better repair than it always was.

"But if it be impassable, a passenger may break the fence, and go extra viam as much as is necessary to avoid the bad way." Upon reference, however, to the original authority (*b*), it clearly appears that the grantor of the way was bound to keep it in repair.

The misapprehension of the authority cited in Comyn's Digest (*c*) appears to have originated in the * mistake of Blackstone, who lays it down, *322 that in public, as well as in private ways, a man who had the right of way might, if it were out of repair, go over the adjoining land" (*d*).

The cases cited by Blackstone, in support of this position, appear to be those of public ways only.

This distinction is also recognized by the Civil Law: if the public highway was impassable, a traveller might pass along the land adjoining; but no such right appears to have existed in respect of private ways (*e*). (25).

(*a*) *Taylor* v. *Whitehead*, 2 Douglas, 745; *Bullard* v. *Harrison*, 4 M. & Sel. 387, overruling, 2 Blackstone's Com. 36.

(*b*) Cited in *Hen's case*, Sir W. Jones, 296.

(*c*) See *Bullard* v. *Harrison*, 4 M. & Sel. 390.

(*d*) 2 Comm. 36.

(*e*) Cum via publica vel fluminis impetu vel ruina amissa est, vicinus proximus viam præstare debet.—L. 14. § 1. ff. quemad. serv. amit.

Si locus per quem via, aut iter, aut actus debebatur, impetu fluminis occupatus esset, et intra tempus quod ad amittendam servitutem sufficit, alluvione facta, restitutus est, servitus quoque in pristinum statum restituitur. Quod si id tempus præterierit, ut servitus amittatur, renovare eam cogendus est.—Ibid.

Per agrum quidem alienum qui servitutem non debet, ire vel agere vicino minime licet, uti autem via publica nemo recte prohibetur.—C. L. 11. ff. de serv. et aqua.

(25) In *Read* v. *Smith et al.* Berton R. (New Brunswick,) the action was tres-

Right to deviate, if way foundrous.

pass *quare*, &c. brought by the owner of a meadow, for casting timber logs upon his close, and with oxen, &c. tearing up and subverting his soil. The plea of justification alleged, that Smith was the owner of certain timber in the river, which was floating to market, when there arose a flood, and the timber against his will, and to his great damage, was driven by the wind and current upon the plaintiff's meadow, and there left by the receding waters, without the power of the owner of the timber to prevent it; and in order to remove the same from the plaintiff's land, he, with the requisite teams, and with the least possible damage, entered and removed the timber, as it was necessary for him in order to get it to market to fulfil his engagements. Upon demurrer, the court held the plea bad, because it did not exonerate the defendant from all fault, by showing that he had used his best endeavors to prevent the timber from coming on to the plaintiff's land.

Upon the same principle an entry into the land of another is justified in order to identify and retake things stolen. *Higgins* v. *Andrews*, 2 Rol. R. 55. So, if the wind blows my tree upon the land of another, I may enter upon the land and take it. By Choke, 6 Ed. 4. 7; 2 H. Bl. 254; Hammond's N. P. 168. s. 3.

If a highway be located over water-courses, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private land, if the owner should afterwards open a water-course across the way, it will be his duty, at his own expense, to make and keep in repair a way over the water-course, for the convenience of the public; and if he should neglect to do it, he may be indicted for the nuisance; and upon a conviction, the nuisance may be prostrated by filling up the water-course, if he shall not make a convenient way over it. By Parsons, C. J. 6 Mass. 451.

CHAPTER II.

SECONDARY EASEMENTS.

Secondary easements implied by law. Bracton.

* It has been already seen, that certain easements are implied by * 323
law as incident to a grant, since without them the thing granted could not be fully enjoyed (*a*); in the same manner the express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one.

Bracton speaks of easements in general as appurtenances of "tenements," and of these secondary easements as appurtenances of the former (*a*):—"Omnia jura prænotata et omnes servitutes sunt de pertinentiis tenementorum, et pertinent a tenemento ad tenementa; et habent hujusmodi pertinentiæ suas pertinentias, sicut ad jus pascendi et ad pasturam pertinet via et liber ingressus et egressus; et eodem modo ad jus fodiendi, falcandi, et secandi, hauriendi, potandi, piscandi, venandi, et hujusmodi, liber accessus et recessus, scilicet via, iter, et actus, ratione diversorum usuum ut supra. Item ad jus aquæ ducendæ pertinet purgatio; item ad iter, secundum quod est de pertinentiis pertinentiarum, vel de pertinentiis per se, ut si via per se concedatur sine alia servitute pertinet refectio, sicut ad aquæ ductum pertinet purgatio" (*b*).

* This, like the general case of implied easements, is comprehend- * 324
ed under the maxim, "Lex est cuicunque aliquis quid concedit concedere videtur et id sine quo res esse non potuit" (*c*).

Thus, too, in the civil law, the right to a servitude drew with it a right to such secondary servitudes as were essential for its enjoyment (*d*).

(*a*) See ante, "Easements of Necessity."

(*b*) Bracton, Lib. 4, f. 232.

(*c*) *Liford's case*, 11 Rep. 54. a.

(*d*) Qui habet haustum iter quoque habere videtur ad hauriendum, et (ut ait Neratius, lib. 3 *membranarum*), sive ei jus hauriendi, et adeundi cessum sit, utrumque habebit: sive tantum hauriendi, inesse et aditum; sive tantum adeundi ad fontem, inesse et haustum. Hæc de haustu et fonte privato.—L. 3. § 3. ff. de serv. prœd. rust.

Extent of dominant owner's right. Senhouse v. Christian. Gerard v. Cook.

In doing the works which are necessary for the enjoyment of the easement, the owner of the dominant tenement may do every thing that is required for the full and free exercise of his right.

Thus, it has been held, that the grant of a right of way, with liberty to make and lay causeways, and to use and enjoy the same, with wains, carts, wagons, and other carriages, and to carry coals, authorized the grantee to lay a framed wagon-way (*a*). "The question is," said *Ashurst*, J., in his judgment in that case, "whether, under this general grant for the purpose of carrying coals among other things, he has a right to make *any such way* as is necessary for the carrying of that commodity. There are no great collieries in the northern part of the kingdom, where they have not those framed wagon-ways. And the case itself expressly states, that the defendant cannot so commodiously enjoy this way in any other manner. Therefore, under the original
* 325 grant, he has a right to make a framed wagon-way along the slip of * land in question, which is necessary for the purpose of carrying his coals, it being in the contemplation of the parties at the time of making the grant" (*b*).

Thus, too, in *Gerard* v. *Cook* (*c*), where the grant was made of a piece of land, as a foot or causeway, with "all other liberties, powers, and authorities incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage," it was held, that the grantee had a right to put a piece of flag-stone upon a part of the land in front of a door opened by him from his house, it being proved that it was usual to put down such flag-stones before doorways, and that the doorway in question could not have been so conveniently used without it (*d*).

By the civil law, the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest enjoyment of his servitude, so long as he did not impose any additional burthen upon the servient

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(*a*) *Senhouse* v. *Christian*, 1 T. R. 560.

(*b*) In an early case, 6 Ed. 4, it was held, that a man was not justified to enter for the purpose of repairing unless the way was altogether impassable; it was not sufficient that it could not be used so conveniently as before; and on the inconvenience to the party entitled to the way being urged, and that he would be without remedy, *Suit*, J., said, "If he went that way before in his shoes, let him now pluck on his boots."—Cited 2 Doug. 747, 4th ed. This, however, is clearly not law.

(*c*) 2 Bos. & Pul. N. R. 109.

(*d*) *Duncomb* v. *Randall*, Hetley, 34; *Brown* v. *Best*, 1 Wilson, 174; *Weld* v. *Hornby*, 7 East, 195.

heritage (*a*); and this right extended to the justification of any trespass committed by him and his workmen on any part of the servient heritage, (loca * quæ non servient), in the executing of such works as were necessary *326 for the enjoyment of the servitude (*b*); and the owner of the servient tenement was prevented from doing on the land, not only any thing immediately injurious to the easement, but any thing which, by obstructing the incidental right of repair, would indirectly be productive of the same consequence: in addition to which, in the case of a water-course, the servient tenement was expressly subjected to the obligation of leaving a passage for the nearest access of the owner of the dominant tenement and his workmen, and also a sufficient space on each side of the stream for depositing the necessary materials (*c*).

So, too, if the easement were a right of way, which could not be enjoyed without the construction of works, (opere facto), the grant carried with it a right to dig and lay materials upon the soil (*d*); or if the position of the servient land were higher than the house to which the right was granted, and no level passage existed across the land to cut steps or slopes in the soil for the more convenient use of the easement, provided * no greater in- *327

(*a*) Quintus Mucius scribit, cum iter aquæ vel quotidianæ vel æstivæ, vel quæ intervalla longiora habeat, per alienum fundum erit, (licere) fistulam suam vel fictilem, vel cujuslibet generis in rivo ponere, quæ aquam latius exprimeret; *et quod vellet*, in rivo facere licere, *dum* ne domino prædii aquagium deterius faceret.—L. 15. ff. de serv. præd. rust.

(*b*) Sed et depressurum vel adlevaturum rivum, per quem aquam jure duci potestatem habes, nisi si id facere cautum sit.—L. 11. com. præd.

(*c*) Refectionis gratia accedendi ad ea loca quæ non serviant facultas tributa est his quibus servitus debetur, qua tamen accedere eis sit necesse, nisi in cessione, servitutis nominatim præfinitum sit qua accederetur, et ideo nec secundum rivum nec supra eum si forte sub terra aqua ducatur, locum religiosum bominus soli facere potest, ne servitus intereat; et id verum est.—Ibid.

Si prope tuum fundum jus est mihi aquam rivo ducere, tacita hæc jura sequuntur—ut reficere mihi rivum liceat, ut adire qua proxime possem ad reficiendum eum ego fabrique mei, item ut spatim relinquat mihi dominus fundi quo dextra et sinistra ad rivum adeam, et quo terram, limum, lapidem, arenam, calcem jacere possim.—Ibidem, § 1.

(*d*) Si iter legatum sit qua nisi opere facto iri non possit, licere fodiendo, substruendo, iter facere, Proculus ait.—L. 10. ff. de. serv.

Extent of dominant owner's right. Bracton. Civil law.

jury were committed than was necessary for the enjoyment of the right of way (*a*).

But in doing these works for the enjoyment of an easement, the owner of the dominant tenement must not do any thing to alter the accustomed mode of enjoyment in such a manner as to impose a greater burthen upon the servient tenement.

"I agree with the proposition," said *Rooke*, J., in the case of *Gerard* v. *Cooke*, "that the grantee may use the way in the manner which is most convenient to himself, if he does not thereby produce inconvenience to the grantor;" a position with which *Chambre*, J., agreed, observing, "if any injury had been sustained by the grantor it might make a difference."

"Reficere autem est," says Bracton, "id quod corruptum est in pristinum statum reformare, ei vero permittitur reficere et purgare rivum qui jus habet servitutis, et qui aquæ ducendæ causa id fecit. In pristinum statum dico, quia si quis rivum deprimit vel attollit, dilatat, vel extendit, operit apertum vel qua per excessum delinquit (*b*)."

"Sed non potest quis sub specie refectionis deterius aliquid facere, nec altius nec latius nec humilius nec longius aliquid facere (*c*)."

So also by the Civil Law, a party entitled to a right of way could not compel the owner of the land to allow him to repair it with stones, (silice), unless there was an express stipulation to that effect. "Sed de refectione viæ et *328 interdicto* uti possumus, quod de itinere actuque reficiendo competit; non tamen si silice quis sternere velit, nisi nominatim id convenit" (*d*).

In like manner, a party having the right of receiving water through a pipe could not substitute for it a stone conduit. "Recte placuit non alias per lapidem aquam duci posse, nisi hoc in servitute constituenda comprehensum sit; non enim consuetudinis est, ut qui aquam habeat, per lapidem statum ducat: illa autem quæ fere in consuetudine esse solent ut per fistulas aqua ducatur, etiam si nihil sit comprehensum in servitute constituenda fieri possunt, ita tamen ut nullum damnum domino fundi ex his detur (*e*);" But he had a right

(*a*) Si domo mea altior area tua esset, tuque mihi per aream tuam in domum meam ire agere cessisti, nec ex plano aditus ad domum meam per aream tuam esset, vel gradus vel clivos propius januam meam jure facere possum, dum ne quid ultra quam quod necesse est itineris causa demoliar.—L. 20. § 1. ff. de serv. præs uub.

(*b*) Lib. 4, ff. 233.

(*c*) Lib. 4, ff. 233, b.

(*d*) L. 17. § 5, ff. si serv. vind.

(*e*) L. 17. § 1. ff. De aqua et ad. pl. arc.

No unnecessary damage to be done to servient tenement.

even without any express stipulation to repair it in the ordinary way, provided he thereby did no harm to the owner of the land.

In entering upon the neighboring soil for the purpose of doing these necessary works, the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labors might have caused to the servient tenement (*a*). This, however, must not be confounded with damage to the servient tenement naturally arising from the easement itself, as where a stream of water overflowed its banks in consequence or the rising of a new spring in it (*b*).

As, * however, these ancillary servitudes were only conferred for * 329
the full enjoyment of the primary servitude, they ceased upon its extinction (*c*).

As a general rule, the right of repair extended no farther than to restore the servitude to its original condition (ad pristinam formam) (*d*); though such restored servitude need not be to specifically the same state; thus a bridge might be built, if the way were otherwise impassable (*e*).

It might be provided by express stipulation, that the owner of the dominant tenement should not have any right to repair, or only to a certain extent (*f*) (26).

(*a*) Si fistulæ per quas aquam ducas, ædibus meis applicate, damnum mihi dent in factum actio mihi competit; sed et damni infecti stipulari a te potero.—L. 18. ff. de serv. præd. urb.

(*b*) Servitus naturaliter non manufacto lædere potest fundum servientum; quemadmodum si imbri crescat aqua in rivo, aut ex agris in eum confluat, aut aquæ fons secundum rivum, vel in eo ipso inventus postea fuerit.—L. 20. § 1. ff. de serv. præd. rust.

(*c*) Labeo ait, si is qui haustum habet per tempus quo servitus amittitur, ierit ad fontem nec aquam hauserit, iter quoque eum amisisse.—L. 17. ff. quemad. serv. amit.

(*d*) Reficere sic accipimus ad pristinam formam iter et actum reducere; hoc est, ne quis dila-tet, aut producat, aut deprimat, aut exaggeret—et aliud est enim reficere, longe aliud facere.—L. 3. § 14. ff. de itinere.

(*e*) Apud Labeonem quæritur—si pontem quis novum velit facere viæ muniendæ causa, an ei permitatur? et ait permittendum, quasi pars sit refectionis hujusmodi munitio. Et ego puto veram Labeonis sententiam si modo sine hoc commeari non possit.—Ibid. § 16.

(*f*) Fieri autem potest, ut qui jus eundi habeat et ageni, reficiendi jus non habeat; quia in servitute constituenda cautum sit, ne ei reficiendi jus sit ; aut sic, ut si velit reficere, usque ad certum modum reficiendi jus sit.—Ibid. § 14.

(26) *Repairs.*—In *Doage* v. *Badger*, 12 Mass. 65, it appears that the well and

No unnecessary damage to be done to servient tenement.

pump were out of repair in 1801, when defendant purchased the land in which they are situated, and so continued until the time of bringing the action; and it was held that the defendant was not liable for repairs made upon such well and pump until after a request and refusal to repair. The Court by Jackson. J. say—"Considering the plaintiff's title proved by prescription, we may suppose that some former owner of the defendant's estate granted to the plaintiff, or those whose estate he has, the right to use the well and pump, on the condition mentioned in the declaration; (each paying their proportion of the repairs when thereunto requested,) or perhaps that the two estates or messuages were formerly held in common, with the well and pnmp appurtenant to both, and upon a division, the use of the well to be used in common, as appurtenant to each messuage.

"If it was a grant, we must suppose a covenant originally annexed to it, and running with the land of both grantor and grantee, in order to bind the grantor and his assigns to make the repairs. The case, in this view, is not supported by the evidence.

"The other supposition, viz. that the well as such, is held in common, as appurtenant to the respective messuages better comports with the evidence; and that there is no prescription or agreement alleged, binding either party exclusively to make the repairs, without a previous request to the defendant to join in making the necessary repairs. *Case* is a substitute for the old writ *de reparatione facienda*, which lies where one tenant in common of a house or mill, &c. "is wiliing to repair, and the other will not." If one tenant could sue, without any previous refusal by his co-tenant to contribute, so might the other. From the form of the writ in the register (Fits N. B. p. 153,) the plaintiff before the bringing the action had repaired the house, and was to recover the defendants proportion of the expense of those repairs. The writ concludes "*in ipsius dispendium non modicum et gravamen.*" It is clear that, until he have made the repairs, he cannot recover in any form of action, any thing more than for his loss, as of rent, &c. while it remains in decay.

CHAPTER III.

EXTENT AND MODE OF ENJOYMENT.

Dominant owner not to extend his enjoyment.

* As every easement is a restriction upon the right of property of the * 330 owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction. Supposing no express grant to exist, the right must be limited by the amount of enjoyment proved to have been had.

Thus, it is laid down in Rolle's Abridgment—if A. be seized in fee, and grant to B. a right of way to a certain close, B. cannot use that way to go to other closes without first going to the other close specified in the grant (*a*). But it was said that if a defendant justifies under a right of way from D. to Blackacre, if the plaintiff replied, that at the time of the trespass the defendant went with his carriage from D. to Blackacre, and thence to a mill, the replication would not support the action, for when he was in Blackacre he might go where he pleased (*b*). But, it sems, that if a man have a way for carriages, from D. to Blackacre, over my close, and afterwards he purchase land adjoining to Blackacre, he cannot use the aforesaid way with carriages * to the land adjoining, though he goes first to Blackacre, and from * 331 thence to the land adjoining, for this might be greatly prejudicial to my close; but it seems, that if I wish to help myself I ought to show this special matter, *and that he uses it for the land adjoining* (*c*).

In the latter case of *Ward* v. *Lawton* (*d*), the defendant justified under a right of way, for carts and carriages, to a close called C. The plaintiff replied, that the defendant drove the carts to C., and also further to D. The plaintiff upon

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(*a*) Chemin private, A. (Comment poet estre use), pl. 1. *Hodder* v *Holman.*

(*b*) Ibidem, pl. 2, *Saunders* v. *Moses;* vide *Stolt* v. *Stolt*, 16 East, 343.

(*c*) Chemin private, pl. 3, S. C.

(*d*) 1 Lord Raymond, 75, S. C. 1 Latch 111.

demurrer to the rejoinder had judgment; and it was resolved, "that the defendant had not pursued his prescription, for the prescription is to go to C.; then when he goes to C., and further to D., he has not authority to do it." And *Powell*, J., jun., said, "That the difference is, where he goes further, to a mill or a bridge, there it may be good; for by the same reason, if the defendant purchases 1,000 closes, he may go to them all, which would be very prejudicial to the plaintiff." And for authorities they relied upon 1 Rolle, Abr. 391, pl. 3; 1 Mod. 190, 3 Kebl, 348 (*a*).

So, in *Senhouse* v. *Christian*, where a right of way was granted, with liberty to make causeways, &c., it was held that no right was conferred upon the party to make a transverse way, which would have imposed an additional burthen upon the servient tenement. (*b*)

If a man increases the size of an ancient window, it is clear that he has no title to the additional quantity of light thus received by him: how far such

* 331 alteration * operates to defeat the right altogether will be hereafter considered (*c*)

So, too, by the Civil Law, a party entitled to a flow of water for irrigation or other purposes, was not allowed to impart the use of it to his neighbors (*d*); nor, as it appears, even if he himself purchased the adjoining lands, would he be entitled to take a larger quantity of water than before for the use of his estate (*e*); for in determining the amount of a servitude, regard is to be had to the accustomed mode of enjoyment rather than the necessity of the dominant tenement. A party having acquired the easement tigni immittendi, could not increase the number of beams which his neighbor was bound to support, and might be compeled to remove any additional one inserted by him (*f*).

The pulling down a house for the purpose of repair, does not, by the law of England, even when construed most strictly, cause the loss of any ease-

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(*a*) See *Cowling* v. *Higginson*, 4 M. & W. 216; and ante, "Ways."

(*b*) 1 T. R. 560.

(*c*) Post, Part III. Ch. 2, s. 3.

(*d*) Ex meo aquæ ductu Labeo scribit, cuilibet posse me vicino commodare; Proculus contra, ut ne in meam partem fundi aliam, quam ad quam servitus acquisita sit, uti ea possit. Proculi sententia verior est.—L. 24. ff. de serv. præd. rust.

(*e*) Non modus prædiorum sed servitus aquæ ducendæ terminum facit.—C. 12. ff. de serv. et aqua.

(*f*) Si cum proprius sit paries passus sim (te) immittere tigna quæ antea habueris, si nova velis immittere prohiberi a me potes; imo etiam agere tecum potero, ut ea quæ nova immiseris tollas.—L. 14. ff. si serv. vind.

ment attached to it, if it be accompanied by an intention, acted upon within a reasonable time, of rebuilding it (*a*).

By the civil law, the mere destruction either of the dominant or servient tenement extinguished a servitude, though it was held to revive if the house was * rebuilt on the same site and of the same dimensions as before (*b*). *333

A mere alteration in the mode of enjoyment, as the change of a mill from a fulling to a grist mill, or the like (*c*), whereby no injury is caused to the servient heritage, or a trifling alteration in the course of a water-course (*d*), does not destroy the easement.

By the civil law, the owner of the dominant tenement might make any alteration in the mode of enjoying his servitude, provided he thereby imposed no additional burthen on the servient heritage; he might make the condition of his neighbor better, but not worse (*e*).

This, however, must be taken with some qualification when applied to the case of natural easements. The owner of land in which a spring took its rise, or upon which rain fell, was allowed, for the necessary purposes of cultivation, a reasonable degree of liberty in changing the course of the water running to his neighbor's land, though he might thereby make the servitude more burthensome.

"It seldom happens," says Pardessus (*f*), "that running water, which takes its rise on an estate, or even the rain water which falls upon it, is absorbed there and escapes without any apparent issue. Some mode of discharge is then necessary; and it is in the obligation * to suffer this discharge, *334 that by the code (*g*) consists the subjection of the inferior heritage towards those whose lands are more elevated, to receive the waters which flow from them naturally. Even if this discharge should be prejudicial to the plantations

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(*a*) *Luttrell's case*, 4 Rep. 86; see also *Moore* v. *Rawson*, post, Extinguishment of Easements.

(*b*) Si sublatum sit ædificium ex quo stillicidium cadit, ut eadem specie et qualit te reponatur, utilitas exigit ut idem intelligatur. Nam alioquin si quid strictius interpretetur, aliud est quod sequenti loco ponitur; et ideo, sublato ædificio, usufructus interit, quamvis area pers est ædificii.—L. 20. § 2. ff. De serv. præd urp.

(*c*) *Lutrell's case*, 4 Rep. 86.

(*d*) *Hall* v. *Swift*, 6 Scott, 167. S. C. 4 Bing. N. C. 381.

(*e*) L. 20. § 5. ff. de srev. præd. urb. post.

(*f*) Traite des servitudes, § 82, (7th ed. 113).

(*g*) Code Civil, Art. 640.

of the inferior heritage, or should prevent its cultivations by bringing down upon it stones and sand, no action could be maintained for the damage so done. No one is responsible for the effects of nature (*a*). The case even cannot be excepted, where for more than thirty years (*b*), whether from causes purely natural, such as, the scarcity of water, whether from the sole act of the proprietor, as, for example, if he had kept the water, or, in any other manner which offered a large surface for evaporation, the spring should have had no issue upon the inferior heritage. As such rights as are imposed by the general law, and the nature of things, are not lost by mere non-user, whatever time may have elapsed."

"The same article adds, that 'this obligation applies only to the waters which flow naturally without any act of man;' those which come either from springs or from rain falling directly on the heritage, or even by the effect of the natural disposition of the places, are the only ones to which this expression of the law can be applied. He who, for whatsoever use it may be, shall employ in his house, or on his heritage, water which he drew from a well, reservoir, &c., cannot discharge it (faire couler) upon the inferior heritage

*335 without the permission of the proprietor. A man who devotes * his heritage to a species of cultivation requiring frequent irrigation, ought to make at the extremities of his land ditches to receive the surplus water which without this precaution, might percolate to his neighbor's land. The latter might with reason contend that such a process is not natural, and would not have taken place but for the act of man (*c*). Comformably to this principle, the Code (*d*) does not permit the discharge of water from a roof or the neighboring land, even though it might happen, that, were the site of the building unoccupied (vague), the rain fell there would by a natural servitude flow into the neighboring land."

"It would appear, however, to be a false application of these principles, to consider as the act of man the fall of water from a fountain newly opened, even though the opening has been caused by the labor of the proprietor of the land. If any contest arose as to the obligation to receive the water, the question for the tribunals to decide would be—upon which heritage the water would most naturally fall."

(*a*) Quod si natura aqua noceret ea actione non continentus.—L. 1. § 1. ff. de aq. et aq. pl. arc.

(*b*) That is to say, the period of prescription by the French law.

(*c*) Idemque ait, et ex superiore in inferiora non aquam, non quid aliud immitti licet; in suo enim alii hactenus facere licet quatenus nihil in alienum immittat.—L. 8. § 5. ff. si serv. vind.

(*d*) Art. 681.

Alteration of dominant tenement. American decisions.

"It is not, however, to be understood that because the flow of water must not be caused by the act of man, that, therefore, the proprioter who transmits water to the inferior heritage is not permitted to do any thing on his own land, that he is condemned to abandon it to a perpetual sterility, or never vary the course of cultivation, simply because such acts would produce some change in the manner of discharging the water. The law could not have had this intention, it *prohibits only the immission intothe in- *336
ferior hetitageof the waters which would never have fallen there by the disposition of the places alone. It neither would nor could refuse to the superior proprietor the right to aid and direct the natural flow" (*a*).

In American Courts questions have frequently arisen upon the conflicting claims of different owners of land adjacent to a stream, where no exclusive right has been acquired by any party.

"The proprietor of a water-course," says Mr. Justice *Story*, "has a right to avail himself of its momentum, as a power which may be turned to beneficial purposes, and he may make such a reasonable use of the water itself for domestic purposes, for watering cattle, or even irrigation, provided it is not unreasonably detained or essentially diminished; for although, by the case of *Weston* v. *Alden* (*b*), the right of irrigation might seem to be general and unlimited, yet subsequent cases have restrained it consistently with the enjoyment of the common bounty of nature by other * proprietors, through whose *337
land a stream had been accustomed to flow, and the qualification of the right by these decisions is in accordance with the Common Law. (*c*).

(*a*) Hæc autem actio locum habet in damno nondum facto, opere tamen jam facto; hocest, de eo opere ex quo damnum timetur; totiensque locum habet quotiens manu facto opere agro aqua nocitura est; id est, cum quis manu fecerit quo alter flueret quam natura soleret: si forte immittendo eam aut majorem fecerit aut citatiorem aut vehementiorem; aut si comprimendo redundare effecit; quod si natura aqua noceret ea actione non continentur.—L. 1. § 1. ff. de aq. et aq. pl. arc.

De eo opere quod agri colendi causa aratro factum sit Quintus Mutius ait, non competere hanc actionem. Trebatius autem, non quod agri sed quod frumenti duntaxat quærendi causa aratro factum sit, solum excepit.—L. 1. § 3. Ibid.

Sed et fossas agrorum siccandorum causa factas Mutius ait fundi colendi causa fieri; non tamen (oportere) corrivandæ aquæ causa fieri; sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.—L. 1. § 4. J bid. Vide etiam §§ 5, 6, 7, 8, 9, 10, 11. Ibid.

(*b*) 7 Mass. 136.

(*c*) *Tyler* v. *Wilkinson*, 4 Mason, N. S. R. 397.

Alteration of dominant tenement. American decisions.

The general principle governing this point is thus stated by Chancellor Kent in his learned Commentaries (*a*):—

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple use for it while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it."

"This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application."

"The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the * 338 subsequent * use of the same water. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water."

"All that the law requires of the party, by and over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors below on the stream. He must not shut the gates of his dam, and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbor. Pothier lays down the rule very strictly, 'that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would

(*a*) 3 Kent, Comm. 439.

naturally do, and injure the proprietor below.' But this must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become entirely *useless, either for manufacturing or agricultural purposes. The *339 just and equitable principle is given in the Roman law:—"Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat." (27).

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(27) *Water-Course, reasonable use of.—A right to use merely, cannot confer a right unreasonably and unnecessarily to prejudice the rights of others.* Although the right is a prescriptive right; nothing can be prescribed for but what may pass by grant. 1 Vent. 387. But a grant to the use of one, not for the use of his mill, but to prevent the use of the water for his neighbor's mill cannot be presumed. 9 Conn. R. 305, where the Court by Williams, J. say:—"It is said, by one whose word has been pronounced to be law, that an action on the case does not lie for the *reasonable* use of my right, though it be to the annoyance of another; (Com. Dig. tit. Action upon the case for a Nuisance C.) clearly implying, that such an action will lie for an *unreasonable* use of one's right." "The elements being for general and public use," says Thompson, C. J. in 15 J. R. 213, 218, "and the benefit of them appropriated to individuals, by occupancy only, this occupancy must be regulated and guarded with a view to the individual rights of all, who have an interest in their enjoyment."

The parties must use their rights whether ancient or modern so as not needlessly and maliciously to injure others. Thus in *Twiss* v. *Baldwin*, *supra*, it appeared that defendants, having an ancient mill, claimed the right to retain the water in their pond at their pleasure, and were not bound to let it off to accommodate the plaintiffs below; but the Court held, that defendants were bound to use the water so as not needlessly to injure the occupants of the water below. And because the defendants had not raised their dam, it did not follow that no action will lie for an injury done by water. To make *that* the only test of damage, would be to adopt a principle wholly inadequate to do justice. It is not the height of the dam, but the height of the water, which does the injury, (*Stiles* v. *Hooker*, 7 Cowen, 266.)

"The plaintiffs state their right; and the injury done by the defendant's act, by unreasonably depriving them of the use of the water, that is, by penning and shutting it back, without any beneficial purpose to themselves. The gist of the action is the unreasonable or wrongful conduct in diverting and obstructing the water, to the injury of the plaintiffs. Whether this act was done wantonly or maliciously, or without any possible benefit to themselves, it was evidence of an unreasonable use of the water, and an unreasonable, or wrongful exercise of their privilege; and the injured had a right to satifaction." *Twiss* v. *Baldwin*, *supra*, (p. 307.)

"In the case before the court, the damages are not claimed for negligence or

Easements severed on severance of dominant tenement.

If a severance of the dominant tenement takes place, all its easements, which are attached to the tenement, and not to the person of the owner, will attach to the severed portions (*a*); if a house be divided into two distinct tenements, each of these will retain the original right to have the windows unobstructed.

It is obvious, however, that, by such severance, no right is acquired to impose an additional burthen on the servient tenement. However numerous the occupants of the severed tenement may be, they must still confine themselves within the limits of the right existing at the time of severance.

The Civil Law distinctly recognized the doctrine, that the dominant tenement continued to enjoy its servitudes, notwithstanding a severance (*b*).

As it is the duty of the owner of the dominant tenement not to do any act

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(*a*) *Tyrringham's case*, 4 Reports, 36 b; *Wyat Wild's case*, 8 Reports, 78 b; *Harris* v. *Drew*, 2 B. & Adol. 164.

(*b*) Si stipulator decesserit pluribus hæredibus relictis, singuli solidam viam petunt.—L. 17. ff. de serv.

Si prædium tuum mihi serviat, sive ego partis prædii tui dominus esse cœpero, sive tu mei per partes servitus retinetur, licet ab initio per partes acquiri non poterit.—L. 8. § 1. ff. de serv.

unskilfulness, but for an unreasonable exercise of an act lawful in itself."—"And while I admit, that no man is answerable in damages for a reasonable exercise of a right; where it is accompanied by a cautious regard for the rights of others, where there is no just ground for the charge of negligence or unskilfulness, and where the act is not done maliciously; I am warranted, by the opinion of the same Judge who delivered the opinion in the case above cited, (*Panton* v. *Holland*, 17 J. R. 92, 98,) in saying, that for an unreasonable exercise of his right, unaccompanied by a cautious regard for the rights of others, a party is answerable. If then, the defendants did the acts charged wantonly, maliciously, and without any useful purpose to themselves, it was an unreasonable exercise of their rights." ib.

Diverting.—Every man, through whose land water passes, may use it for watering his cattle, or irrigating his land, but he must use it in this latter way, so as to do the least possible injury to his neighbor who has the same right. *Weston* v. *Alden*, 8 Mass. 136; *Anthony* v. *Lapham*, 5 Pick. 175; *Ingraham* v. *Hutchinson*, 2 Conn. R. 584.

No person has a right to divert water on his own land, so as to turn it from the land of his neighbor, lower down the stream. *Coalter* v. *Hunter*, 4 Rand. R. 58. An owner on the stream above must so construct his dam, and so use the water, as not to injure his neighbor below, in the enjoyment of the same water according to its natural course. *Sackrider* v. *Beers*, 10 J. R. 241.

which imposes an additional burthen upon the owner of the servient tenement, so the latter must do no act which interferes with the exercise of the right already acquired, or those secondary easements which are requisite for * its full and free enjoyment (*a*). If his wall be liable to an easement * 340 of support to a neighboring house, he must not (except for the purpose of necessary repair) pull down, or otherwise weaken the wall, so as to make it incapable of rendering the requisite degree of support (*b*);—he must not plough up a foot-path across his field (*c*), or drive stakes to obstruct a water-course flowing to a mill (*d*), even though the stream be incapable of use at the place where the obstruction is made from the want of cleansing (*e*).

It is even said by *Jones*, J., in *James* v. *Hayward* (*f*), that he must not erect a gate across a foot-way running over his land.

There is a deficiency of authority upon the question—whether the owner of the servient tenement is considered as the author of an obstruction to the easement arising entirely from the growth of the roots or branches of trees standing on his soil, and therefore liable for the consequences.

In the recent case of *Hall* v. *Swift* (*g*) an action was brought for disturbing the plaintiff in the enjoyment of a water-course. "The only positive obstruction by the act of the defendant that appeared was, that, upon two or three occasions, he had directed his servants to place a turf at the embouchure of a stream, for the purpose of irrigating his field, the ultimate stoppage* *341 being occasioned by the intrusion of the roots of a tree growing upon the defendant's land, whose fibres grew into and filled up the channel." The jury found that the defendant had "obstructed the plaintiff in the enjoyment of the water;" and the Court after consulting the learned Judge who tried the cause, and who reported, "that the facts had been fully and fairly left to the jury, and that he was satisfied with their finding," refused to disturb the verdict.

(*a*) Bracton, Lib. 4, ff. 233, post.

Si totus ager itineri aut actui servit, dominus in eo agro nihil facere potest quo servitus impediatur, quæ ita diffusa est, ut omnes glebæ serviant.—L. 13. § 1. ff. De serv. præd. rust.

(*b*) *Brown* v. *Windsor*, 2 Cr. & J. 30.

(*c*) 2 Rolle, Abr. Nusans, G. pl. 1.

(*d*) Ibid. pl. 8, 9.

(*e*) *Bower* v. *Hill*, 1 Bing. N. C. 555.

(*f*) Sir W. Jones, R. 221.

(*g*) 6 Scott, 167.

Duty of servient owner. By the civil law he was liable. Rights of servient owner.

By the Civil Law, the servient owner was not allowed to plant trees, or do any other act, so as to obstruct the passage of light to a window enjoying the servitude "in luminibus officiatur" (*a*); and the further progress of a work already commenced might be stopped on the same grounds (*b*). To render a man liable to an action for the discharge of rain-water upon his neighbor's land, such water must have been diverted from its natural course by some act of man (*opus manufactum*); and this consequence was held to ensue when the diversion was caused by planting a bed of willows (*c*).

The real question appears to be, whether, in contemplation of law, the damage is the result of the act of man in planting the trees, however long the

*342 time may be before they become injurious; or whether it arises * solely from the act of nature. In the latter case it is clear no right of action would accrue: "*Actus Dei nemini facit injuriam:*" in the former case he would, of course, be liable; and it would appear, that, in this case, he is liable—for every consequence is considered to result from an act of man, which proceeds from an act of volition on his part, and the ordinary natural causes: the growth of a tree, when planted, is no more the effect of natural causes, than that fire should communicate from one field to another by an ordinary wind; or that a stone, when flung, should strike an object at which it is aimed.

The servient owner has likewise his rights: the dominant owner's encroachments can be justified only to the extent of his easement; as to all beyond that, his acts constitute a private nuisance for which an action may be maintained. With regard, therefore, to all artificial easements, he is bound to keep his works in such a state, that they shall cause no inconvenience to the neighbor beyond that warranted by the easement; and if he neglects this, he brings himself within the ordinary case of a violation of the rule, "Sic utere tuo ut alienum non lædas," and is of course liable to an action.

The servient owner has in this, as in other cases of nuisance, the privilege

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(*a*) Si arborem ponat ut lumini officiat, æque dicendum erit contra impositam servitutem eum facere—nam et arbor efficit quo minus cœli videri possit.—L. 17. ff. de serv. præd. urb.

(*b*) Quodcumque igitur faciat ad luminis impedimentum prohiberi potest si servitus debeatur: opusque ei novum nunciari potest, si modo sic faciat ut lumini noceat.—L. 15. Ibid.

(*c*) Sed apud Servii auctores relatum est, si quis salicta posuerit, et ob hoc aquæ restagnaret, 'aquæ pluviæ arcendæ' agi posse, si ea aqua vicino noceret.—L. 1 § 6. ff. de aq. et aq. pluv. arc.

Rights of servient owner. Civil Law.

of taking the remedy into his own hands. The reformation of a nuisance, as appears from Bracton, is not confined to the case of prostration, but the party aggrieved by a nuisance arising from the want of repair of a neighboring edifice, may himself do the necessary acts, "vel relevari vel reparari si querens ad hoc sufficiat" (*a*). (See 17 Pick. 201; 13 Wend. 343.)

*By the Civil Law it was expressly provided that the servient *343 owner might compel the dominant to keep in repair his artificial works (*b*). In the case of natural servitudes, no action lay for any change produced by causes entirely independent of the act of man, and each party was in general compelled to submit to the inconvenience or entitled to the benefit of all changes effected by the hand of nature in the condition of his tenement. If, however, a reparation could be effected which in no respect deteriorated the condition of the dominant, while it rendered less onerous that of the servient owner, it seems that the latter might himself perform the necessary repairs: thus, if by accretions of mud or other natural causes, the flow of the stream became irregular, and consequently injurious to the servient owner, he might enter on the adjoining land and cleanse the stream, provided he thereby did no injury to his neighbor (*c*).

(*a*) Lib. 4. ff. 230.

(*b*) Aggerem qui in fundo vicini erat vis aquæ dejecit, per quod effectum est ut aqua pluvia mihi noceret. Varus ait, si naturalis agger fuit, non posse me vicinum cogere 'aquæ pluviæ arcendæ' actione, ut eum reponat vel reponi sinat. Idemque putat, et si manufactus sit neque memoria ejus exstaret—quod si exstet, putat 'aquæ pluviæ arcendæ' actione eum teneri. Labeo autem, si manufactus sit agger etiamsi memoria non exstat, agi posse ut reponatur. Nam hac actione neminem cogi posse ut vicino prosit, sed ne noceat, aut interpellet facientem quod jure facere possit. Quamquam tamen deficat 'aquæ pluviæ arcendæ' actio, attamen opinor utilem actionem vel interdictum mihi competere adversus vicinum, si velim aggerem restituere in agro ejus qui factus, mihi quidem prodesse potest, ipsi vero non nociturus est. Hæc æquitas suggerit etsi jure deficiamur.—L. 2. § 5. ff. de aq. et aq. pl. arc.

Trebatius existimat, si de eo opere agatur quod manufactum sit, omnimodo restituendum id esse ab eo cum quo agitur. Si vero vi fluminis agger disjectus sit, aut glarea injecta, aut fossa limo repleta, tunc patientiam duntaxat præstandam.—L. 11. § 6. Ibid.

(*c*) Apud Namusam relatum est—si aqua fluens iter suum stercore obstruxerit, et ex restagnatione superiori agro noceat, posse cum inferiore agi 'ut sinat purgari;' hanc enim actionem non tantum de operibus esse utilem manufactis, verum etiam in omnibus quæ non secundum voluntatem sint. Labeo contra Namusam probat; ait enim naturam agri ipsam a se mutari posse, et ideo quum per se natura agri fuerit mutata, æquo animo unumquemque ferre debere, sive melior sive

Vague grant of easement, how assigned. Expressed opinions at variance.

*344 * Where a right of way is granted generally, or arises by implication of law, questions have arisen as to the part of the land over which the way shall be taken—which party is entitled to assign the way—and under what restrictions such right must be exercised. The opinions expressed on these points appear to be somewhat at variance with each other.

It is laid down in Rolle, Abr. (*a*), "that the grantor shall assign the way (of necessity) where he can best spare it;" while, in a case in Siderfin (*b*), *Glyn*, C. J., says, "that the defendant (the grantee) may take a convenient way without permission of the grantor; and if he taketh what is inconvenient, or too much, the law shall adjudge it."

Mansfield, C. J., in *Morris* v. *Edgington* (*c*), appears to have been of opinion, that a party entitled to a way of necessity, might take that which was most convenient for the enjoyment of the premises demised to him.

If, however, the right of way has once been assigned, its course cannot be altered by either party without the consent of the other.

"If A. has a way through the land of B., and B. ploughs up the soil where *345 the way was used, and leaves * another part of the same close for a way, A. may use the ancient track, and need not go where the way is assigned *de novo*" (*d*).

By the Civil Law a distinction appears to have existed between those cases in which the servitude, in general terms, was imposed by will, and where it was created by any act *inter vivos*. In the former case, the option of allotting the position and direction of the servitude was with the heir, provided he did nothing to injure the rights of the party to whom the servitude was devised (*e*); in the latter case, unless the instrument contained some express stipulations in this respect, the grantee was at liberty to select such portion of the servient heritage as was most suitable to him, although, in this case also, certain re-

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deterior ejus conditio facta sit. Idcireo si terræ motu aut tempestatis magnitudine soli causa mutata sit, neminem cogi posse ut sinat in pristinam loci conditionem redigi. Sed nos etiam in hunc casum æquitatem admisimus.—L. 2. § 6. Ibid.

(*a*) Tit. Graunt. pl. 17.

(*b*) *Parker* v. *Welestead*, 2 Sid. 112.

(*c*) 3 Taunt. 24.

(*d*) Com. Dig. Chemin. D. (5); Noy, 128.

(*e*) Si via, iter, actus, aquæductus legetur simpliciter per fundum, facultas est hæredi per quam partem fundi velit constituere servitutem; si modo nulla captio legatario in servitute sit.—L. 26. ff. de serv. præd. rust.

Vague grant of easement, how assigned.

strictions were imposed, as that he should not use his servitude to the damage of the grantor's house, gardens, or vineyards (*a*).

* If, however, the party so entitled once made his choice, he was no * 346 longer at liberty to select a new direction for the exercise of his servitude (*b*).

(*a*) Si locus, non adjecta latitudine, nominatus est per eum qualibet iri poterit. Sin autem prætermissus est (locus) æque latitudine non adjecta, per totum fundum, una poterit eligi via, duntaxat ejus latitudinis quæ lege comprehensa est; pro quo ipso, si dubitabitur, arbitri officium invocandum est.—L. 13. § 3. ff. Ibid.

Si cui simplicius via per fundum cujuspiam cedatur vel relinquatur in infinito, videlicet per quamlibet ejus partem, ire agere licebit; civiliter modo: nam quædam in sermone tacite excipiuntur; non enim per villam ipsam nec per medias vineas ire agere sinendus est, quum id æque commode per alteram partem facere possit, minore servientis fundi detrimento.—L. 9. ff. de serv.

Sed quæ loca ejus fundi tunc quum ea fieret cessio ædificiis, arboribus, vineis vacua fuerint, ea sola eo nomine servient.—L. 22. ff. de serv. præd. rust.

Si mihi concesseris iter aquæ per fundum tuum, non destinata parte per quam ducerem—totus fundus tuus serviet.—L. 21. ff. Ibid.

(*b*) Verum constitit ut qua primum viam direxisset ea demum ire agere deberet, nec amplius mutandæ ejus potestatem haberet; sicuti Sabino quoque videbatur, qui argumento rivi utebatur—quem primo qualibet ducere licuisset, posteaquam ductus esset transferre non liceret, quod et in via servandum esse verum est.—L. 9. ff. de serv.

At si iter actusve sine ulla determinatione legatus est, modo determinabitur, et qua primum iter determinatum est ea servitus consistit, cæteræ partes agri liberæ sunt. Igitur arbiter dandus est qui utroque casu viam determinare debet.—L. 13. § 1. ff. de serv. præd. rust.

PART III.

OF THE EXTINGUISHMENT OF EASEMENTS.

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*THE modes by which easements may be lost correspond with *347
those already laid down for their acquisition:—1. Corresponding to the express grant is the express renunciation; 2. To the disposition by the owner of two tenements, the merger by the union of them; 3. To the easement of necessity, the permission to do some act which of necessity destroys it; 4. And to the acquisition by prescription, abandonment by non user.

CHAPTER I.

BY EXPRESS RELEASE.

IT would appear, that, in the case of easements, as of other incorporeal rights, an express release, to be effectual, must be under seal (*a*): this rule, however, must not be taken to exclude a written instrument not under seal, or even a parol declaration, as evidence to show the character of any act done, or any cessation of enjoyment.

(*a*) Co. Litt. 264. b.; Com. Dig. Release (A. 1), (B. 1).

Acts of Parliament.

*348 * Acts of Parliament, by which easements are destroyed, as, for instance, the General Inclosure Act, 41 Geo. 3, c. 109, s. 8, have the operation of express releases (*a*).

(*a*) *Logan* v. *Burton*, 5 B. & Cr. 513: *Harber* v. *Rand*, 9 Price, 58: *White* v. *Reeves*, 2 B. Moore, 23: *Thackrah* v. *Seymour*, 1 Cr. & Mee. 18.

CHAPTER II.

BY IMPLIED RELEASE.

SECT. 1.—*Extinguishment by Merger.*

Extinguishment and suspension.

*As an easement is a charge imposed upon the servient, for the advantage of the dominant tenement, when these are united in the same owner the easement is extinguished—the special kind of property which the right to the easement conferred, so long as the tenements belonged to different owners, is now merged in the general rights of property. *349

But in order that the easement should be entirely extinguished, it is essential that the owner of the two tenements should have an estate in fee-simple in both of them, of an equally perdurable nature. "Where the tenant," says *Littleton*, "hath as great and as high an estate in the tenements as the lord hath in the seigniory, in such case, if the lord grant such services to the tenant in fee, this shall enure by way of extinguishment. *Causa patet*" (*a*). Upon which Lord *Coke* observes (*b*), "Here Littleton intendeth not only as great and high an estate, but as perdurable also, as hath been said, for a disseisor or tenant in fee upon condition hath as high and great an estate, but not so perdurable an estate as shall make an extinguishment." In a previous section, speaking of seigniories, rents, profits a prendre, &c., he says, "They are said to be extinguished when they are gone ever, *et tunc moriuntur*, and can never * be revived, that is, when one man hath as high and as perdurable an *350 estate in the one as in the other" (*c*).

(*a*) S. 561.

(*b*) Co. Lit. 313. b.

(*c*) Co. Litt. 313. a.

Easements extinguished by unity do not revive on severance. Shewry v. Pigott.

Unless this be the case, the easement, of whatever species it be, is suspended only so long as the unity of possession continues, and revives again upon the separation of the tenement. "Suspense cometh from suspendeo, and, in legal understanding, when a seigniory, profits a prendre, &c., by reason of the unity of possession of the seigniory, rent, &c., and of the land out of which they issue, are not *in esse* for a time, *et tunc dormiunt*, but may be revived or awaked (*a*).

So strictly has this doctrine been construed, which requires the estates in the two tenements to be of an equally high and perdurable character, that no extinguishment was held to have taken place where the king was seised of one tenement "of a pure fee-simple indeterminable," *jure coronæ*, and of the other of an estate in fee-simple, determinable on the birth of a Duke of Cornwall. *Rex* v. *Inhabitants of Hermitage*. (*b*).

This principle appears to be equally applicable to all easements. When two tenements become completely united, and, as it were fused into one, the owner may modify the previous relative position of the different parts at his pleasure; if he exercises this right so that the part which previously served the other no longer does so—as, for instance, by changing the direction of a spout which emptied the rain water of the one on the adjoining tenement, it has never been doubted that by so doing he destroyed the easement for ever (*c*).

* 351 * But it has been contended, that if he neglect to do so, and again sever the tenements, all easements having the qualities of being both continuing and apparent, as well as all those which existed by necessity, were revived upon the severance. In the 11th Henry 7 (*d*), it was decided, "that a customary right in the City of London to have a gutter running in another man's land was not extinguished by unity of possession." It was argued that if the purchaser of both tenements had destroyed the gutter, the right would not have revived; to which *Danvers*, J., replied, "If the matter were so, it might have been pleaded specially: it would be a good issue."

In *Shewry* v. *Pigott* (*e*), in an action on the case for stopping a water-

(*a*) Co. Litt. 313. a.

(*b*) Carthew, 241. See also *Canham* v. *Fiske*, 2 Cr. & J. 126; *Thomas* v. *Thomas*, 2 Cr. M. & R. 34.

(*c*) 11 Henry 7, f. 25. *Lady Brown's case*, cited in *Shewry* v. *Pigott*; Palmer, 446.

(*d*) Fol. 25.

(*e*) 3 Bulstrode, 339; S. C. Palmer, 446.

Easements extinguished by unity do not revive on severance.

course, which had been used to have its current into the plaintiff's yard, and fill a pond with water, it was held that a unity of possession of the land of the house and place to which, and of the land through which, &c., was no bar. "There is a difference," said *Whitelocke*, J., "between a way or common and a water-course. These begin by private right, by prescription, by assent as a way or common, being a particular benefit to take part of the profits of the land—this is extinct by unity, because the greater benefit shall drown the less. A water-course doth begin *ex jure naturæ*, having taken this course naturally, and cannot be averted."

In the report of this case in Latch, it is said, "Rent shall be extinguished by unity, and also a way, because it does not exist *durant* the unity; but it is othererwise of a thing which exists, notwithstanding the unity." A case of warren is cited from 35 Henry, f. 55, 56.

*In *Buckley* v. *Coles (a)*, the Court of Common Pleas intimated a de- *352 cided opinion, that unity of seisin was sufficient to work an extinguishment, wtihout actual unity of occupation. In *Drake* v. *Wrigglesworth* (*b*), the Court doubt whether seisin implied possession; but it should seem from a more recent case, that from seisin the law will presume possession (*c*).

It will, however, be found that the classes of easements with respect to which this revivor is supposed to take place, exactly correspond with those already considered, as being acquired by the implied grant resulting either from the disposition of the owner of the two tenements, or from the easement being of necessity.

It is practically immaterial whether the foundation of the right be a new grant, or a revival of the old right; but the former appears to be the most correct view of the title to them, and it is certainly more in harmony with the general principles of the law of easements (*d*).

In the Civil Law, on the union of two inheritances in the same owner, all servitudes were extinguished by confusion; and on any future serverance it was necessary to reimpose them expressly (*e*). (28)

(*a*) 5 Taunt. 311.

(*b*) Willes, 658.

(*c*) *Stott* v. *Stott*, 16 East, 343.

(*d*) 2 Bing, 76; S. C. 9 Moore, 166; *Holmes* v. *Goring*, ante, p. 84.

(*e*) Servitutes prædorium confunduntur, si idem utriusque prædii dominus esse cœperit.—L. 1. ff. Quem. serv. amit.

Si quis ædes, quæ suis ædibus servirent cum emisset traditas sibi accepit, confusa sublatapue servitus est, et si rursus vendere vult nominatim imponenda servitus est, allioquin liberæ veniunt.—L. 30, ff. De serv. urb. præd.

Tortio amititur (servitus) confusioue enm prædia confusa sunt, sive cum idem, utrius prædii dominus esse cœperit.—Vinnius Comm. ad Inst. Lib. 5, tit. 3, Quibus modis serv. amittuntur, § 6.

(28) It is laid down in Buller's N. P. (p. 74,) "that a right of water-course does

License to obstruct.	Cessation of enjoyment.

*353 * SECT. 2.—*Extinguishment of Necessity.*

It has already been seen, on the clearest authority both of our own law and the Civil Law, that if the owner of the dominant tenement authorizes an act to be done on the servient tenement, the necessary consequence of which is to prevent his future enjoyment of the easement, it is thereby extinguished (*a*).

And provided the authority is exercised, it is immaterial whether it was given by writing or by parol (*b*).

(*a*) ante, p. 20.

Si stillicidii immittendi jus habeam in aream tuam, et permisero jus tibi in ea area ædificandi, stillicidii immittendi jus amitto; et similiter, si per tuum fundum via mihi debeatur, et permisero tibi in eo loco per quem via mihi debetur aliquid facere, amitto jus viæ.—L. 8. ff. quem. serv. amit.

Amittitur servitus remissione, tum apertatum tacita—puta, si permissero domino fundi servientis, in loco serviente, facere id quo servitus impediatur.—Vinnius Comment. ad Inst. L. 2, tit. Quibus modis servitutes amittuntur, § 6.

(*b*) *Liggins* v. *Inge*, ante, p, 34.

not seem to be extinguished by unity of possession in any case." For this he cites the case of Surrey vs. Piggott, in Latch 153, and Popham 166. The case in substance was this: A was possessed of a rectory, of which a curtillege was parcel. From time immemorial a watering-place for cattle, &c. existed in said curtillege, and a stream had flowed from Milford stream through a piece of land called the hop-yard to fill the pond at the watering-place. A afterwards purchased the hop-yard, and thus became possessed of the rectory and hop-yard at the same time. He then sold the hop-yard to B, under whose title the defendants entered and obstructed the water-course by erecting a stone dam across it within the limits of the hop-yard. The court were unanimously of opinion, that the right to the water-course was not extinguished by the unity of possession; and that the plaintiff was entitled to recover for the obstruction. The case is most fully reported in Popham. Whitelock J. said, "that a way or common shall be extinguished, because they are a part of the profits of the land; and the same law is of fishings also; but in our case the water-course doth not begin by consent of parties, nor by percription, but *ex jure naturæ*, and therefore shall not be extinguished by unity of possession." He took the distinction, that where a thing hath its being by perscription, unity will extinguish it; but where the thing hath its being *ex jure naturæ*, it shall not be extinguished. Jones J. was of the same opinion for the same reason. Doddridge J. went into a larger examination of the subject, and held, that the unity of possession did not extinguish the right to the water-course, for two reasons; (1), for the necessity of the thing; (2). for the nature of the thing, being

SECT. 3.—*Extinguishment by Cessation of Enjoyment.*

As the acquisition of an easement is an addition to the ordinary rights of property of the dominant, and a corresponding diminution of those rights of the servient tenement, so the loss of the easement, when once acquired, by restoring both tenements to their natural state, is an addition to the rights of the servient, and a corresponding diminution of those of the dominant.

Hence, though the law regards with less favor the acquisition and preservation of these accessorial rights, than of those which are naturally incident to property; and, * therefore, does not require the same amount of proof *354 of the extinction as of the original establishment of the right: yet as an easement, when once created, is perpetual in its nature, being attached to the inheritance, and passing with it, it should seem that some acquiescence on the part of the owner of the inheritance must be necessary to give validity to any act of abandonment. The doctrine of the extinction of easements by merger, already considered, supports this view, proceeding, as it does, on the ground that the loss of an easement is a permanent injury to the inheritance, and can therefore only take place when the same party is the owner of the fee-simple of the servient and dominant tenements.

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a water-course, which is a thing running. He put the case, "A man owned a mill, and afterwards purchases the land upon which the stream goes, which runs to the mill, and afterwards aliens the mill, the water-course remains." Crew C. J. concurred in the opinion. The same case is reported in Noy 84, Palmer 444, William Jones 145, and 3 Bulst. 339, but without any essential difference. Upon this case it does not appear to me, that there is any difficulty in admitting its entire correctness. It proceeds upon this plain principle, that a privilege, which was annexed to, and in actual use with the rectory during the unity of possession, and was not parcel of the other land or a profit a prendre out of that land, was to be considered as still existing as an appurtenance or privilege annexed to the rectory, notwithstanding the unity of possession. The running water over the hop-yard, was not parcel of the hop-yard, or an easement growing out of it. But if, during the unity of possession, the privilege had been disannexed by the owner, as if the owner had during that period stopped the water-course and thus destroyed the privilege, the case would have been otherwise. A subsequent grant of the rectory would then have conveyed only the privilege actually in existence and use at the time of the conveyance. This doctrine was admitted by the court in Surrey vs. Pigot, to be correct, and was adjudged in a case in 11 Hen. 7, 25, b, which was on that occasion cited and approved. The case 11 Hen. 7, 25, was as follows: A was the owner of a tenement, to which there was an ancient gutter

The Prescription Act is silent as to the mode by which easements may be lost. Its enactments as to interruption and disabilities apply in terms only to the acquisition.

It is the policy of the law, favoring the freedom of property, that no restriction should be imposed upon one tenement, without a corresponding benefit arising from it to another, and hence it is that it is essential to the validity of an easement that it should conduce to the more beneficial enjoyment of the dominant tenement.

If, therefore, any alteration be made in the disposition of the dominant tenement, of such a nature as to make it incapable any longer of the perception of the particular easement, the *status* of the dominant tenement, to which the easement was attached, and which is an inherent condition of its existence, is determined.

Such alteration must, of course, be of a permanent character, evincing an * 355 intention of ceasing to take the * particular benefit, or otherwise an

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running through an adjoining tenement, and afterwards he bought the adjoining tenement; and then sold the first tenement to the plaintiff. It was held, that the ancient gutter was not extinguished by the unity of possession; but that it would have been otherwise, if A during the unity of possession had destroyed the gutter, or cut it off. The reason is, that it was a necessary and subsisting easement. "If, therefore, in the case at bar, the dam of the lower mill had never been lowered, the right to use a dam of that height, notwithstanding the unity of possession, would have passed to the subsequent grantee of the lower mill, as a subsisting privilege or appurtenance upon the doctrine asserted, and correctly asserted, by Doddridge J. But the dam during the unity of possession and long before had been lowered two feet, and so far as it was an adverse right, had been extinguished in point of use before the unity of possession, and not being severed during that unity, it was extinguished for ever. It did not pass by the grant to Congdon, for nothing passes by a grant of a mill and the privileges and appurtenances thereof, but privileges and appurtenances existing at the time of the grant." By Story J. in *Hazard* v *Robinson*, *infra*.

The case of *Hazard* v *Robinson*, 3 Mason, 272 decides, that where one owns an upper mill and another a lower mill on the same stream; and the latter lowers his dam and lets it remain so more than 20 years, and then conveys to the owner of the upper mill, who then sells the lower mill to a third person. Held, that the third person had no right to raise the water higher; the unity of possession did not affect the right acquired by the 20 years occupation. The court say—That by the unity of possession, any adverse right of obstruction of the water of the upper mill, in *posse*, and not in *esse*, was extinguished; and the grant of the lower mill only conveyed such privileges and appurtenances as to the dam and water, as were at that time used and appropriated to it.

easement might be lost by the mere pulling down of the tenement for the purposes of necessary repair (*a*). Thus, if a man have a projecting roof, by means of which he enjoyed the easement of throwing his eaves-droppings on his neighbor's land, any alteration of the form of such projection, from which it could be inferred that he meant to direct the rain water into a different channel, would destroy his right to the easement. Thus, too, the stopping up an ancient window (*b*).

By the Civil Law the pulling down a house with the intention of re-building did not cause the loss of a servitude, provided the new edifice was erected upon the site and of the dimensions of the old, and did not increase the burthen imposed upon the servient tenement (*c*).

In *Moore* v. *Rawson* (*d*), it appeared that the plaintiff, having some ancient windows, pulled down the wall in which they were situated, and rebuilt it as the wall of a stable, without any window. About fourteen years after this, the defendant erected a building in front of this blank wall, and after such building had remained there about three years, the plaintiff re-opened a window in the same place that one of the ancient windows had formerly stood and brought this action for the obstruction to his newly-opened window by the defendant's building. A rule having been obtained to enter a nonsuit, pursuant to liberty reserved at the trial, the Court of K. B. made the rule absolute.

* *Abbott*, C. J., in delivering his judgment, said, "I am of opinion *356 that the plaintiff is not entitled to maintain this action. It appears that many years ago the former owner of these premises had the enjoyment of light and air by means of certain windows in a wall in his house. Upon the site of this wall he built a blank wall without any windows. Things continued in this state for seventeen years. The defendant, in the interim, erected a building opposite the plaintiff's blank wall, and then the plaintiff opened a window in that which had continued for so long a period a blank wall without windows; and he now complains that that window is darkened by the buildings which the defendant so erected. It seems to me, that, if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain

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(*a*) *Luttrell's case*, 4 Rep. 86.

(*b*) *Laurence* v. *Obee*, 3 Camp. 514.

(*c*) (Si servitus stillicidii non avertendi debebatur): si antea ex tegula cassitaverit stillicidium, postea ex tabulato, vel ex alia materia, cassitare non potest.—L. 20. § 4. ff. de serv. præd. urb.

(*d*) 3 B. & Cr. 332; Dowl. & R. 234.

for a considerable period of time, it lies upon him at least to show, that, at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time. I think that the burthen of showing that lies on the party who has discontinued the use of the light. By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying those purposes into effect. For these reasons I am of opinion, that the rule for a nonsuit must be made absolute."

* 357 *Bayley*, J., said, "The right to light, air, or water, is * acquired by enjoyment, and will, as it seems to me, continue so long as the party either continues that enjoyment, or shows an intention to continue it. In this case the former owner of the plaintiff's premises had acquired a right to the enjoyment of the light; but he chose to relinquish that enjoyment, and to erect a blank wall instead of one in which there were formerly windows. At that time he ceased to enjoy the light in the mode in which he had used to do, and his right ceased with it. Suppose that, instead of doing that, he had pulled down the house and buildings, and converted the land into a garden, and continued so to use it for a period of seventeen years, and another person had been induced by such conduct to buy the adjoining ground for the purposes of building. It would be most unjust to allow the person who had so converted his land into garden ground, to prevent the other from building upon the adjoining land which he had, under such circumstances, been induced to purchase for that purpose. I think that, according to the doctrine of modern times, we must consider the enjoyment as giving the right; and that it is a wholesome and wise qualification of that rule to say, that the ceasing to enjoy destroys the right, unless at the time when the party discontinues the enjoyment he does some act to show that he means to resume it within a reasonable time."

Holroyd, J., added, "I am of the same opinion. It appears that the former owner of the plaintiff's premises at one time was entitled to the house with the windows, so that the light coming to those windows over the adjoining land could not be obstructed by the owner of that land. I think, however, that the right acquired by the enjoyment of the light continued no longer

* 358 * than the existence of the thing itself in respect of which the party had the right of enjoyment; I mean the house with the windows: when the house and the windows were destroyed by his own act, the right which he had in respect of them was also extinguished. If indeed, at the time when he pulled the house down, he had intimated his intention of re-building it, the right would not then have been destroyed with the house. If he had done some act to show that he intended to build another in its place, then the new

house, when built, would in effect have been a continuation of the old house, and the rights attached to the old house would have continued. If a man has a right of common attached to his mill, or a right of turbary attached to his house, if he pulls down the mill or the house, the right of common or of turbary will *prima facie* cease. If he show an intention to build another mill or another house, his right continues. But if he pulls down the house or the mill without showing any intention to make a similar use of the land, and, after a long period of time has elapsed, builds a house or mill corresponding to that which he pulls down, that is not the renovation of the old house or mill but the creation of a new thing, and the rights which he had in respect of the old house or mill do not, in my opinion, attach to the new one. In this case, I think, the building of a blank wall is a stronger circumstance to show that he had no intention to continue the enjoyment of his light than if he had merely pulled down the house. In that case he might have intended to substitute something in its place. Here he does, in fact, substitute quite a different thing—a wall without windows. There is not only nothing to show that he meant to renovate the * house so as to make it a continuance of *359
the old house, but he actually builds a new house different from the old one, thereby showing that he did not mean to renovate the old house. It seems to me, therefore, that the right is not renewed as it would have been, if when he had pulled down the old house, he had shown an intention to re-build it within a reasonable time, although he did not do so *eo instanti*."

Littledale, J.—"According to the present rule of law a man may acquire a right of way, or a right of common, (except, indeed, common appendant), upon the land of another, by enjoyment. After twenty years' adverse enjoyment the law presumes a grant made before the user commenced, by some person who had power to grant. But if the party who has acquired the right by grant ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right. I think, that if a party does any act to show that he abandons his right to the benefit of that light and air which he once had, he may lose his right in a much less period than twenty years. If a man pulls down a house and does not make any use of the land for two or three years, or converts it into tillage, I think he may be taken to have abandoned all intention of rebuilding the house; and, consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does any thing to show that he did not mean to convert the land to a different purpose, then his right would not cease. In this case, I think the owner of the plaintiff's premises abandoned his right to the ancient lights, by erecting the blank wall instead of that in * which the ancient windows were; for he then indi- *360
cated an intention never to resume that enjoyment of the light which he once had. Under those circumstances, I think that the temporary disuse was a complete abandonment of the right."

"Suppose a person," said *Tindal*, C. J., in delivering the judgment of the Court in *Liggins* v. *Inge* (*a*), "who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return, could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished; or that he should be compellable to pull down his mill, if the former mill-owner should afterwards change his determination, and wish to rebuild his own. In such a case it would, undoubtedly, be a subject of inquiry by a jury, whether he had completely abandoned the use of the stream, or left it for a temporary purpose only."

It appears from these cases, that the law has fixed no precise time during which this cessation of enjoyment must continue;—the material inquiry in every case of this kind must be, whether there was the intention to renounce the right. Every such alteration of the dominant tenement raises the legal presumption of an intention to give up the right; and it lies upon the party who has discontinued the enjoyment to show that such cessation was of a temporary nature only. And, from the language of the judges, it does not appear to be necessary that the servient owner should have done any act after the change had taken place in the dominant tenement to assert the freedom of his tenement from the easement; but it is sufficient if the consequence of

*361 *the change be an entire cessation of enjoyment, accompanied by an intention to relinquish the right, though, in point of fact, in the case above cited the owner of the servient tenement had, during the cessation of enjoyment, done an act which he could not lawfully have done had the easement existed, and the owner of the dominant tenement had taken no steps to remove the obstruction; yet no stress was placed upon these circumstances.

In *Lawrence* v. *Obee*, Lord *Ellenborough* held, that where an ancient window had been filled up with brick and mortar for twenty years the case stood as if it had never existed (*b*).

By the Civil Law an urban servitude could not be lost by mere abandonment on the part of the owner of the dominant, unless, during the cessation of enjoyment, some act was done by the owner of the servient tenement evincing an intention of defeating the servitude—as if a man having a window should have stopped it up during a certain time, a previously-acquired easement of the passage of light would not have been lost, unless the owner of the servient tenement had done something during the interval to obstruct the passage of light: so, too, in the case of an easement tigni immittendi, mere removal of the beam was sufficient to defeat the right, unless the owner

(*a*) 7 Bing, 693.

(*b*) 3 Camp. 514.

of the servient tenement stopped up the hole in which the beam was placed (*a*); and, on the same ground, by no lapse of *time would the *362 right be lost during which, owing to the delay in re-building the servient tenement, the easement could not be exercised (*b*).

Although, however, there appears to be no authority in our law for requiring any such act as the condition of the extinction of an easement; yet such an act, unopposed by the owner of the dominant tenement, as in the case of *Moore* v. *Rawson*, would be almost conclusive evidence that there was no intention to preserve the easement. (29)

(*a*) Hæc autem jure similiter, ut rusticorum quo que prædiorum, certo tempore non utendo pereunt; nisi quod hæc dissimilitudo est, quod non omnimodo pereunt non utendo; sed ita si vicinus simul libertatem usucapiat, veluti si ædes tuæ ædibus meis serviant 'ne altius tollantur,' 'ne luminibus mearum ædium officiatur; et ego per statutum tempus fenestras meas præfixas habuero vel obstruxero; ita demum jus meum amitto, si tu per hoc tempus ædes tuas altius sublatas habueris; alioquin si nihil novi feceris, retineo servitutem. Item si 'tigni immissi' ædes tuæ servituten debent, et ego exemero tignum, ita demum amitto jus meum, si tu forma unde exemptum est tignum obturaveris et per constitutum tempus ita habueris; alioquin si nihil novi feceris, integrum jus meum permanet.—L. 6. ff. De serv. præd. urb.

(*b*) Si cum jus haderes immittendi vicinus statuto tempore ædificatum non habuerit, ideoque nec tu immittere poteris, non ideo magis servitutem amittes; quia non potest videri usucepisse vicinus tuus libertatem ædium suarum qui jus tuum noninterpellavit.—L. 18. § 2. ff. quem. serv. amit.

(29) *Easement by abandonment.* A person may lose a right to ancient lights by abandonment of them, within a less period than 20 years; as where he relinquishes the enjoyment of them, as by building a blank wall to his house, or any other act which is absolute and decisive. *Manning* v. *Smith*, 6 Conn. 289. See also *Pritchard* v. *Atkinson*, 4 N. H. R. 1.

A right of way acquired by uninterrupted possession and use for 20 years, may in like manner be lost by disuser; in other words, the discontinuance of the use for a long period affords a presumption of the extinguishment of the right. 3 Masons, 272.

The case of *White* v. *Crawford*, 10 Mass. 189 decides that a right of way proved by a grant or prescirption is not lost by *non-user* for 20 years. Sewrll. J. says—"even a right of way, depending upon evidence from presciptive use, is not lost by *non-user* or by tortious interruption or neglect; Com. Dig. Prescription, E. 2."

In *Curtis* v. *Jackson*, 13 Mass. 507. which was case for obstructing and diverting water from the plaintiffs mill. The defendant erected an obstruction or weir in the stream above the plaintiff's mill; and he attempted to justify it by parol proof of a grant of the right to divert the water, which evidence being rejected he then claimed that a grant was to be presumed from the evidence of a claim and user for

Alteration by encroachment.

A question of much greater difficulty arises in those cases in which there has been no actual cessation of enjoyment, but the mode of enjoyment has been more or less altered; and where, instead of an intention to relinquish the right, an attempt has been made to usurp a greater right than the party was entitled to.

Assuming, then, that the encroachment confers no new right, two questions arise:—1st, whether a valid easement still subsists to the extent previously enjoyed; and, 2ndly, if this be determined in the negative, whether the party is still at liberty to restore his tenement to its former condition, and recur to his former mode of enjoyment.

*363 The 1st question may be considered with reference to * two distinct classes of easements:—those which depend upon repeated acts of man, and require no permenant alteration in the dominant tenement, as rights of way, or to draw water; and those which require for their enjoyment a permanent adaptation of the state of the dominant tenement.

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more than 20 years. But the court observed that, if such claim and user for 20 years previous to 1790 be sufficient to support the presumption of a grant, it may be doubted, whether the non-claim and non-user since that time be not sufficient to rebut such a presumption. But at any rate, the exclusive use of the water, cannot justify a permanent obstruction in the stream, which may be injurious to the plaintiffs beyond the extent of the ancient usage and claim.

1. (*Extinguishment of way.*) The enroachment, by one party, upon a way held in common, by building part of the wall of a house upon a portion of it and enclosing another portion within fence, work an extinguishment by operation of law; especially where the other party sells his interest after such acts done, and the purchaser on his part acquiesces in and confirms what has been done. *Corning* v. *Gould.* 16 Wendell, 531.

2. (*Relinquishment of easement.*) Where a party relinquishes the enjoyment of an easement or servitude, it lays with him to show an intention to resume the use of it within a reasonable time; and where there are no circumstances intimating the suspension to be temporary only, a bona fide purchaser will be protected in the enjoyment of the property as it appeared at the time of his purchase. Ib.

Every privilege in derogation of the rights of the owner of land is viewed with jealously by the law, and is confined to the limits and objects prescribed by the grant. *Taylor* v. *Hampton*, 4 M' Cord, 96.

Thus, when a person claims the right of keeping up a pond of water, which overflows the land of another; the pond must be kept within its prescribed limits, that is, the height to which it was kept at the time of the purchase, and the use must be limited to the specific object to which it was then applied. Ib.

By the extinguishment of a servitude, is meant its annihilation, and not its suspension only. Ib.

Alteration by encroachment. Cherrington v. Abney. Cotteril v. Griffiths.

In the former case, the previously existing right will not be affected by acts of usurpation, the extent of which may, in such cases, easily be ascertained: thus, if a party having a right of footway were to use it, not only as such, but also as a horse or carriage way, though he might thereby become liable to an action for such trespass, he might nevertheless sustain an action for any disturbance of his foot way. The right thus sought to be usurped would, in the mode of its enjoyment, be altogether distinct from the previous easement.

With respect to those easements which require for their enjoyment a permanent adaptation of the state of the dominant tenement, it is extremely difficult to reconcile the decisions, or to extract any clear or intelligible principle from them; but it appears to be admitted, that, if the alteration in the mode of enjoyment is such as clearly not to render the easement more onerous on the owner of the servient tenement, the right remains unimpaired.

In *Cherrington* v. *Abney* (*a*), bill was filed for an injunction to prevent stoppage of lights; there being six lights in an old house, it was insisted, that, "in the new, they should have but the same number of lights, and of the same dimensions, and in the same places, or else may stop up and blind them *."

"So, must not make more stories, more lights, nor in other places. * 364

"It is certain they cannot alter the same to the prejudice of the owner of the soil—as if before so high as they could not look out of them into the yard shall not make them lower, and the like; for privacy is valuable.

"One trial had another granted."

In *Cotteril* v. *Griffiths* (*b*), it appeared that the plaintiff's windows had never been completely opened until a short time before the action was brought, but there had been blinds sloping upwards without giving any view over the defendant's premises. Lord *Kenyon* ruled, that, the defendant having by

(*a*) 2 Vernon, 646, cor. King, L. C.

(*b*) 4 Esp. 69.

A right to overflow the land of another is an incorporal hereditament, and if extinguished for a moment, cannot be revived. Ib.

Servitudes may be extinguished, either by the act of God, operation of law, or the act of the party. If the act which prevents the servitude is the act of the party, it will effect an extinguishment of the right. But if it is prevented by the act of God, or by the operation of law, this will only cause a suspension of it; for the act of a party will be construed most strongly against himself, but he shall not be injured by an act of God, or the law. Ib.

A servitude is extinguished by an obstruction of a permanent nature by the party himself to whom the service is due, or by his consent, or by the voluntary acquisition or acceptance of any other right or privilege incompatible with the exercise of it. Ib.

his act made the plaintiff's windows darker than they were when the blinds were up, the action was sustainable.

In *Martin* v. *Goble (a)*, where a building having been used for upwards of twenty years as a malthouse was converted into a dwelling-house, *M'Donald*, C. B., held, that "the house was entiled to the degree of light necessary for a malthouse, and not for a dwelling-house: the converting it from one to the other could not affect the rights of the owners of the adjoining ground: no man could, by any act of his, suddenly impose a new restriction upon his neighbor."

In *Chandler* v. *Thompson* (*b*), it appeared "that there had been for many years a small window in the place in question. About three years before the action was brought, the plaintiff considerably enlarged it, both in height and width, and put in a sash frame instead of a leaded casement. The defendant, who was the owner of the adjoining ground, then covered several inches of *365 the space occupied by the old window, but still admitted* more light to pass through the new window than the plaintiff had enjoyed before the alteration." *Le Blanc*, J., ruled, "that the whole space occupied by the old window was privileged, and that it was actionable to prevent the light and air passing through as it had formerly done. That part of the new window which constituted the enlargement might be lawfully obstructed; but the plaintiff was entitled to the free admission of light and air through the remainder of the window, without reference to what he might derive from other sources."

In *Garritt* v. *Sharp* (*c*), it appeared that, for upwards of twenty years, the buildng in question had been a barn, on the side of which, abutting on the plaintiff's premises, were several apertures, about one or two inches wide, through which light and air passed to the barn, the only other opening being the barn door: the plaintiff's case was, that these openings were made for the purpose of admitting light and air; the defendant contended, that they had been caused by decay and wear, by the boards shrinking. In 1833, the plaintiff turned the barn into a malthouse, stopped some of the crevices, and converted others, by cutting, into windows, to which he put lattices. The defendant then erected a wall which prevented the access, not only of any additional light which might have been obtained by the alteration, but also, as the plaintiff alleged, of that quantity which came into the building in its original state. The defendant (as was stated on the motion for a new trial) offered evidence to show, that the alteration in the mode of admitting light to the plaintiff's

(*a*) 1 Camp. 322.

(*b*) 3 Camp. 80.

(*c*) 3 Adol. & Ellis, 325.

building was injurious to the defendant's adjoining * property; *366 such evidence, however, was not received. *Tindal*, C. J., left it to the jury to say, whether the apertures were originally placed there on purpose to admit light, and whether the defendant had obstructed any portion of the light (*a*) admitted; and, in case of their finding in the affirmative on these questions, he directed them, if the light now fell short of the quantity before enjoyed by the plaintiff for the use of his barn, to give damages for such diminution. The jury found for the plaintiff. A new trial was moved for—first, on the ground of misdirection; on which it was contended, that "the proof given respecting the apertures in the barn did not entitle the plaintiff to any enjoyment of windows which admitted light more extensively, and in an entirely different manner; and that no license for such an enjoyment could be presumed from the license, if proved, to have crevices in the wall of the barn:" the rejection of evidence above mentioned was also relied on as a ground for a new trial. The court granted a new trial, principally, as it should seem, on the ground, that, although "although the point was made, yet the jury were not required by the judge to consider whether the plaintiff had essentially varied the manner in which the light was enjoyed." In the concluding part of the judgment is the following passage:—"It is enough to say, that a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether; and, in this case, some part, even of the plaintiff's proofs, made it proper that the opinion of the jury should be taken upon that subject."

* In *Bridges* v. *Blanchard* (*b*), the alteration of the windows, upon *367 which the question arose, was assumed by the Court in their judgment to consist of "a carrying out of the walls (in which the windows were), five feet, in the same direction;" and it should seem an alteration of their shape into bay-windows,—the original wall having been destroyed.

Patteson, J., in delivering the judgment of the Court, said, "As to the windows at the east, the case finds that they do not occupy the places of the old windows; the wall, in which those windows were, no longer exists: and, assuming that no greater change of position has been made than is necessarily consequent upon a carrying out of the side walls five feet, and converting the termination into a bow, such a change is, in our opinion, sufficient to prevent their being clothed with the same rights as the former windows. In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired, (a question of admitted nicety), still the act of

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(*a*) The word "originally" seems to have been omitted here; there was no question that *some* light had been obstructed.

(*b*) 4 Ad. & Ellis, 176; 5 Nev. & Man. 567.

the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and, as the act of the one is inferred from the enjoyment of the other owner, it must, in reason, be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given. It appears to

* 368 us that convenience and justice both require * this limitation; if it were once admitted that a new window, varying in size, elevation, or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And, in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation, or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window, to which he might have the greatest objection, and to which he would never have assented, if it had come in question in the first instance. The case of *Chandler* v. *Thompson* (*a*) is not at all inconsistent with this reasoning. There, an ancient window had been enlarged; the original aperture remained: and the case only decided that *that aperture* remained privileged as before the enlargement. We do not forget that the windows in the present case, whatever their privilege may be, do not claim it as *ancient* windows in the ordinary way from an acquiescence of twenty years; but this circumstance furnishes no ground for any distinction as to the point now under consideration."

The Court also decided that the plaintiff had acquired no easement even for the original windows.

Similar questions have arisen in the cases of other easements. In *Lutrell's case* (*b*), an action was brought for the diversion of water. The declaration stated, that, the plaintiff, on the 4th of March, in the 40th year of Elizabeth,

* 369 was seised in fee of two old and * ruinous fulling-mills, and that from time whereof, &c., magna pars aquæ cujusdam rivuli ran from a place called Hod Weir to the said mills; and that for all the said time there had been a bank to keep the water within the current; and that afterwards the plaintiff, on the 8th October, 41 Eliz, pulled down the said fulling-mills, and in June, 42 Eliz., in place of the said fulling-mills erected two mills to grind corn, and the said water ran to the said mills until the 10th September next following; and the same day the defendants foderunt et fregerunt the bank and diverted the water from his mills, &c.

(*a*) 3 Campb. 80.

(*b*) 4 Rep. 87. a.

"The defendants pleaded not guilty, and it was found against them, on which the plaintiff had judgment; upon which the defendant brought a writ of error in the Exchequer Chamber, on which two errors were assigned. The principal of these was, that by the breaking and abating of the old fulling-mills, and by the building of new mills of another nature, the plaintiff had destroyed the prescription and could not prescribe to have any water-course to grist-mills: 'As if a man grants me a water-course to my fulling-mills, I can't, as it was said, convert them to corn-mills, nec e contra.'

"One of the cases cited in argument was from 10 Hen. 7. 13 a, b, and 16 Hen. 7. 9 a, b, "where the abbot of Newark granted by fine to find three chaplains in such a chapel of the convent, afterwards the said chapel fell, and there *tenetur*—(during the time there is no chapel), the divine service shall cease, for it ought to be done in a decent and reverend manner, and not at large *sub dio*; but the tenetur, if the chapel is rebuilt in the same place where the old stood, then he ought to do the divine service again:" but (it was collected) if it is built in another place, * then the grantee is not bound to do divine service there. *370

"The next case cited strongly supports the principle, that an alteration, whereby a greater burthen would be imposed, destroys the right altogether. "If there be lord and tenant, and the tenant holds to cover and repair the lord's hall, as in the 10 Edw. 3 (*a*), in this case, if the hall falls, yet if the lord builds the hall in the same place where it was before, and of such bigness as it was before, the tenant is bound to cover it; but if it is of greater length or breadth, so as prejudice may come to the tenant, or if it is built in another place, or if that which was the hall is converted to a cow-house, a kitchen, or the like, he is not bound to cover it; for the lord, by his act, cannot alter the nature of the tenure, nor of the service which the tenant ought to do.

"It was contended in argument, that the alteration from fulling-mills to corn-mills might be injurious to the grantor, because he might have corn-mills himself, the proximity of others to which might injure him; and the principle was denied, that a man may preserve an easement by rebuilding on the same spot, and in the same manner, unless the previous destruction had been caused by some act of God, as by tempest or lightning; but it was resolved, "that the prescription did extend to these new grist-mills, for it appears by the Register, and also by Fitz. Nat. Brev., that if a man is to demand a grist-mill, or any other mill, the writ shall be general, de uno molendino, without any addition of grist or fulling. 21 Ass. 23, agrees of a plaint in assize; so that the mill is the substance and thing to be demanded, and the addition of *grist or fulling are but to show the quality or nature of the mill; *371 and therefore, if the plaintiff had prescribed to have the said water-course to his mill generally, (as he well might), then the case would be without question

(*a*) 23.

he might alter the mill into what nature of a mill he pleased, provided always that no prejudice should thereby arise, either by diverting or stopping of the water as it was before; and it should be intended that the grant to have the water-course was before the building of the mills, for nobody would build a mill before he was sure to have water, and then the grant of a water-course being generally to his mill, he may alter the quality of the mill at his pleasure as is aforesaid (30).

"So, if a man has estovers, either by part or prescription, to his house, although he alter the rooms and chambers of this house, as to make a parlor where it was the hall, or the hall where the parlor was, and the like alteration of the qualities, and not of the house itself, and without making new chimneys by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions would be destroyed; and although he builds a new chimney, or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estoves on the part newly added,—the same law of conduits and water-pipes and the like.

"So, if a man has an old window to his hall, and afterwards he converts the hall into a parlor, or any other use, yet it is not lawful for his neighbor to stop it, for he shall prescribe to have the light in such part of his house; and although in this case the plaintiff has made a question, forasmuch as he has not

*372 *prescribed generally, but particularly to his fulling-mills, yet forasmuch as in general the mill was the substance, and the addition demonstrates only the quality, and the alteration was not of the substance, but only the quality or name of the mill, and that without any prejudice in the water-course to the owner thereof, for these reasons it was resolved that the prescription remained." A further case is mentioned of a grant to a corporation, who were afterwards incorporated by another name: it was held, that they retained all their franchises and privileges, because no person would be prejudiced thereby.

So, in *Saunders* v. *Newman* (*a*), where the claim in the declaration was for a mill generally, it was held, that the right to the discharge of the water was not lost by an alteration in the dimensions of the mill-wheel. "The owner (of a mill)," said Mr. J. *Abbott*, in that case, "is not bound to use the water in the same precise manner, or to apply it to the same mill; if he were, that

(30) The antiquity of the mill itself affords no protection to an alteration by which a new machine is put in. *Simpson* v. *Seavy*, 8 Greenl. 138. But the use of an ancient mill may be changed, provided it does not injure his neighbor. *Blanchard* v. *Baker* 8 Greenl. 253.

(*a*) 1 Bar. & Ald. 258, ante, p. 144.

would stop all improvements in machinery: if, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different."

In *Thomas* v. *Thomas* (*a*), the action was brought for a disturbance of the easement of eaves droppings; and it appeared that the height of the wall, and the projection of the thatch from which the water fell, had been increased within five or six years before the action was brought. The defendants had built up a wall on their own premises, so as to prevent the water falling from the thatch at all. The jury found for the plaintiff, and the Court refused to disturb the verdict; but * the point appears to have been very slight- *373
ly urged, and consequently but little considered by the Court.

So, in the case of *Hall* v. *Swift* (*b*), where the plantiff had a right to water flowing from the defendant's land, across a lane, to his own land, and it appeared, that, "formerly, the stream meandered a little down the lane before it flowed into the plaintiff's land, and that, in the year 1835, the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises;"—and this, it was contended, negatived the right claimed in the declaration. *Tindal*, C. J., in his judgment, said—"If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment,—the making straight a crooked bank or foot-path would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself." (31).

It is directly admitted, in many cases, and in none is it denied—that the right of the owner of the dominant tenement to make alterations in the mode of his enjoyment is, in all cases, subject to the condition, that no additional restirction or burthen be thereby imposed on the servient heritage—and although, where the amount of excess can be ascertained and separated, as in the case of *Estovers* (*b*), such excess alone is bad, and the original right will nevertheless remain; yet, in those cases where the original and excessive

(*a*) 2 Cr. M. & Ros. 34; 1 Gale, 61. S. C.

(*b*) 6 Scott, 167.

(*c*) *Luttrell's case*, ante. p. 371.

(*d*) *Way.* The case of *Sprague* v. *Waite*, 17 Pick. 309, decides that the erection of a public pound on the highway is only an encroachment on the easement, pua not a destruction of it. *Sprague* v. *Waite*, 17 Pick. 309.

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uses are so blended together that it would be impossible, or even difficult, to

*374 *separate them, and to impede the one without, at the same time, affecting the enjoyment of the other, the right to enjoy the easement at all appears to be lost, so long as the dominant tenement remains in its altered form. It is admitted by the Court of King's Bench, in the case of *Garrill* v. *Sharpe* (*a*), that "the mode of enjoying an easement might be so changed as to defeat the right altogether;" and it would seem, on principle, that this consequence should ensue, at all events to the above extent, wherever a material injury is caused to the owner of the servient tenement by the alteration, and the original and usurped enjoyments are so mixed together as to be incapable of being separately opposed.

If such increased enjoyment would clearly narrow the servient owner's original right of building or otherwise acting on his own property, his tenure is damnified; for, though, in strictness of law, he may still build, provided he do not injure the original easement, he can now do so only under the condition of being subject to the opinion of a jury, on a question so nice as that, whether the building in question, clearly injurious as it would be to the usurped right, be or be not so to the original right.

The difficulty of this question would be increased in proportion to the magnitude of the alteration, and the lapse of time since it was made; consequently in point of fact, in every case of negative easement where no action is maintainable for the simple enjoyment, the servient owner would be compelled to submit to almost any usurpation, as in very few instances could he safely exercise his right of obstruction.

*375 *It may further be observed, that, as all easements are restrictions upon the natural rights of property, in every case of conflict between the interest of the owners of the dominant and servient tenements, the liberty of the latter is more favorably regarded by the law than the attempts of the former to limit it; and, therefore, even supposing the dominant owner to retain his right of action for what would have been a disturbance of the original easement, it would be incumbant on him to show in order to maintain his action, that the obstruction to the usurped was clearly an interference with such original right; and also, if this were made out, it should seem, he should further show that the usurped portion was capable of being obstructed without disturbing the original easement.

The judgment of the Court of King's Bench, in *Bridges* v. *Blanchard*, is in accordance with these possitions; but it seems difficult to reconcile these principles with some of the earlier Nisi Prius decisions. In *Cotteril* v. *Griffiths* (*b*), where the right was to have light through windows impeded by blinds sloping

(*a*) 3 Adol. & Ellis, 325; 4 Nev. & M. 834.

(*b*), Ante, p. 364.

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upwards, admitting light only, but giving no view, it would be almost impossible for the owner of the adjoining land to restrict the passage of air to the original amount when the blinds had been removed. To the case of *Chandler* v. *Thompson*, (*a*), the same observations apply: in this latter case, if the house were not built to the extreme edge of the dominant tenement, it must be physically impossible to obstruct the light passing through the increased portion without at the same time darkening the original aperture.

* In the case of a water-course, this difficulty of fact can rarely occur, * 37
but there, as in the other instances mentioned in *Luttrell's case*, the fact of any prejudice thereby arising to the servient heritage would be equally fatal to the validity of the easement in its altered form.

The Civil Law appears to recognize the above positions. Where a man had a right of way, and used in a mode not warranted by the grant, although he committed a trespass on his neighbor, the right of way was not lost (*b*), But a roof could not be lowered so as to make the servitus stillicidii more burthensome (*c*).

Upon the second question, "Whether a party is still at liberty to restore his tenement to its former condition and recur to his former enjoyment," there is no express authority in the English law. It should seem, however, that he would have no such right, as * he would have clearly evinced an inten- * 377

(*a*) 3 Camp. 80.

(*b*) Si is cui via vel actus debebatur, ut vehiculi certo genere uteretur, alio genere fuerit usus, videamus ne amiserit servitutem; et alia sit ejus conditio qui amplius oneris quam licuit vexerit, magisque hic plus quam aliud egisse videatur—sicuti si latiore itinere usus esset, aut si plura jumenta egorit quam licuit, aut aquæ admiscuerit aliam. Ideoque in omnibus istis quæstionibus servitus quidem non amittuntur, non autem cenceditur plus quam pactum est in servitute.—L. 11. ff. quem. serv. amit.

(*c*) Si antea ex tegula cassitaverit stillicidium, postea ex tabulato vel ex alia materia cassitare non potest.—L. 20. § 4. ff. de serv. præd urb.

Stillicidium quoquo modo adquisitum sit altius tolli potest, levior enim fit eo facto servitus—cum quod ex alto cadet lenius et interdum direptum, nec perveniet ad locum servientem—inferius demitti non potest quia fit gravior servitus, id est, pro stillicidio flumen. Eadem causa retro duci potest stillicidium; quia in nostro magis incipiet cadere; produci non protest, ne in alio loco cadat stillicidium quamin quo positaservitus est; lenius facere poterimus, acrius non. Et omnino siendum est—meliorem vicini conditionem fieri posse, deterioiem non posse, nisi aliquid mominatim servitut impomenda immutatum fuerit.—L. 20. § 5. Ibid.

tion to relinquish his former mode of enjoyment (*a*); and in addition to the actual encroachment, the uncertainty caused by the attempted extention of the right would of itself impose a heavier burthen upon the owner of the servient tenement, if such return to the original right were permitted.

The easements hitherto spoken of are of the continuous class, that is to say, where the enjoyment either is or may be continuous without any farther act of man (*b*). It now remains to consider how intermittent easements, as rights of way or rights to draw water, may be lost.

There seems to be no doubt that easements of this nature may be lost by mere non-users, provided such cessation to enjoy be accompanied by the intention to relinquish the right; from the very nature, however, of the enjoyment, and from the circumstance that the cessation to enjoy may take place, without any alteration in the dominant tenement, it must always be difficult to lay down any precise rule to determine when a cessation of user shall be taken to have the characteristics requisite to make it amount to an abandonment of the right.

In considering this part of the subject two questions appear to arise:—

1st. Supposing there to have been simply a cessation of user, has the law presented any fixed period to raise the presumption of a release or abandonment of the easement.

*378 2ndly. If any such period be fixed, can a shorter * period suffice, if there be clear evidence of intention to relinquish the right?

Lord Coke appears to have been of opinion that when a tittle by prescription was once acquired, it could only be lost by non-user during a period equal to that required for its acquisition. "It is to be known that the title being once gained by prescription or custom cannot be lost by interruption of the possession for ten or twenty years (*c*)."

At this time the analogy to the statute of James I. had not been introduced into the law.

In *Doe* v. *Hilder* (*d*), Lord *Tenterden*, in delivering the judgment of the Court, said—"One of the general grounds of a presumption is the existence of a state of things which may most reasonably be accounted for, by supposing the matter presumed. Thus the long enjoyment of a right of way by

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(*a*) *Moore* v. *Rawson*, 3 B. & Cr. 332; 5 D. & R. 234: *Garritt* v. *Sharp*, 4 Nev. & M. 834; 3 Ad. & Ell. 325.

(*b*) Ante, p. 16.

(*c*) Co. Litt. 114. b.

(*d*) 2 B. & & Ald. 791.

A. to his house or close over the land of B., which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of such land ; and if such right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may most reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right,—in the latter, a release of it, is presumed."

Mr. J. *Littledale*, in the case of *Moore* v. *Rawson* (*a*), though he did not cite the above authority, expressed an opinion in accordance with it, that easements of this character could only be lost by a cessation of *enjoyment dur- *379 ing twenty years ; the learned Judge distinguished between these easements and a right to light and air, principally on the ground—that the former, as far as their acquisition by prescription was concerned, could only be acquired by enjoyment accompanied with the consent of the owner of the land, while the enjoyment of the latter required no such consent, and could only be interfered with by some obstruction.

"According to the present rule of law, a man may acquire a right of way or a right of common (except, indeed, common appendant) upon the land of another by enjoyment: after twenty years' adverse enjoyment, the law presumes a grant made before the user commenced by some person who had power to grant; but if the party who has acquired the right by grant, ceases for a long period of time to make use of the privilege granted to him, it may then be presumed he has released the right. It is said, however, that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period ; and that, as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user to raise a presumption of release ; and this reasoning, perhaps, may apply to a right of common or of way." (32)

In *Holmes* v. *Buckley* (*b*), where there had been a grant of a water-course through two peices of land, with a covenant by the grantor to cleanse the same, the Court decreed the party claiming the land under the grantor to cleanse the stream, although * the grantee had cleansed it at his own * 380 expense during forty years.

The precise period requisite to extinguish a right of way by mere non-user does not appear to have been determined by any express decision of the English Courts ; but it is said to have been decided in an American case, "that a right of way is not lost by non-user for less than twenty years (*c*)."

(*a*) 3 B. & Cr. 339.

(*b*) 1 Eq. Cas. Abr. 27. (*c*) *Emerson* v. *Wiley*, 10 Pickering, R., 210.

(33) *Extinguishment of way.* 21 years occupation of land, adverse to a right of way, bars the right. *Yeakle* v. *Nace*, 2 Whar. R. 123.

Must be an intention to relinquish right. Non-user with disclaimer.

The following cases elucidate the doctrine that a mere intermittance of the user, or a slight alteration in the mode of enjoyment, when unaccompanied by any intention to renounce the acquisition of a right, does not amount to an abandonment.

In *Pagne* v. *Shedden* (*a*), issue was taken upon a plea of right of way; and it appeared, that, by agreement of the parties, the line and direction of the way used had been varied, and at certain periods wholly suspended. *Patteson*, J., was of opinion, that the occasional substitution of another track might be considered as substantially the exercise of the old right and "evidence of the continued enjoyment of it," and that the suspension by agreement was not inconsistent with the right.

In *Hall* v. *Swift* (*b*) where it appeared that about forty years since a stream of water from natural causes ceased to flow in its accustomed course, and did not return to it until nineteen years before the action was brought, the Court held, that the right to the flow of water was not lost. "It is further objected,"

*381 said *Tindal*, C. J., "that the right claimed has been lost by desuetude, the water having many years since discontinued to flow in its accustomed channel, and having only recommenced flowing nineteen years ago. That interruption, however, may have been occasioned by the excessive dryness of seasons, or from some other cause over which the plaintiff had no control. But it would be too much to hold that the right is, therefore, gone; otherwise, I am at a loss to see why the intervention of a single dry season might not deprive a party of a right of this description, however long the course of enjoyment might be."

So, by the Civil Law, where a right of this kind was lost by the fountain drying up, it was held to revive as soon as the fountain burst forth again (*c*)

Where, however, there has not been a mere cessation to enjoy, but it has been accompanied by indications of an intention to abandon the right, as by a disclaimer, there is authority for saying, that a shorter period will be sufficient

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(*a*) 1 Moo. & Rob. 382. The defendant failed in establishing any right of way.

(*b*) 6 Scott, 167.

(*c*) Hi qui ex fundo Sutrino aquam ducere soliti sunt, adierunt me, proposuerunt-que—aquam qua per aliquot annos usi sunt, ex fonte qui est in agro Sutrino, ducere non potuisse, quod fons exaruisset; et postea ex eo fonte aquam fluere cœpisse, petieruntque (a) me—ut quod jus non negligentia aut culpa sua amiserunt, sed quia ducere non poterant, his restitueretur. Quorum mihi postulatio cum non iniqua visa sit succurrendum his putavi. Itaque quod jus habueruut tunc cum primum ea aqua pervenire ad eos non potuit, id eis restituere placet.—L. 35. ff. de. serv. præd. rust.

Non-user with disclaimer. Norbury v. Meade. Harmer v. Rogers.

to extinguish the right. Such direct evidence of intention appears to have been treated in the same manner as the similar indications afforded by a change in the status of the dominant tenement. Such non-user, accompanied by confessions that the party had no right at all events be * strong *382 evidence, and in effect almost conclusive, that he never had any such right.

In *Norbury* v. *Meade and Others* (*a*), the Lord Chancellor said, "In the case of a right of way over the lands of other persons, being an easement belonging to lands, if the owner chooses to say I have no right of way over those lands, that is disclaiming that right of way; and though the previous title might be shown, a subsequent release of the right might be presumed."

In *Halmer* v. *Rogers* (*b*), where a public right of way was claimed in Scotland, Lord Eldon said, "It was contended in argument, that, according to the law of scotland, it was necessary to prove forty years' uninterrupted enjoyment down to the period of trial. But it is quite impossible to maintain a position of that kind; for it would lead to this consequence, that if you were to establish an uninterrupted enjoyment, even for the period of sixty or seventy years, an occupier could at any time defeat that right by successive obstructions, although these obstructions might be resisted by persons exercising the right of way, unless they thought proper to go into a court of justice. I apprehend that cannot be the case. It cannot be the case certainly by the law of England. If the right be once established by clear and distinct evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in."

It is evident this language cannot be taken literally, that no amount of non-user would be sufficient to defeat a right of way once fully established. The obvious meaning of Lord Eldon was, that where acts of inter- * *383 ruption are proved as evidence that the right has ceased, the material inquiry must be, whether such acts of interruption were known and acquiesced in.

A most important question upon this point arises under the Prescription Act, "Whether in all cases where an easement is claimed by prescription, the user must possess all the qualities requisite to confer a title down to the very commencement of the suit; and therefore, although the right may have clearly existed at an earlier period, it is destroyed by a subsequent user not possessing those essential qualities." It has been already seen that, by the statute, the period of user to acquire an easement must be that immediately preceeding the

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(*a*) 3 Bligh, 241.

(*b*) 3 Bligh, N. S. 447.

commencement of an action; and if the statute be held to be obligatory in all cases upon parties to proceed under it, and to exclude the common law evidence of prescription, many ancient rights will be lost by modes which at the common law would have been insufficient to produce that result, and which the legislature, in framing the statute, did not appear to contemplate.

As, for example, where within the period requisite to confer an easement there has been a unity of possession of the dominant and servient tenements by the statute, no right would be acquired; and supposing the right of way to be ancient, the incidental operation of the statute would be to destroy it, because the party claiming would be unable to make out his title, whereas at common law no such consequence would have ensued (*a*).

* 384 * So, of any other failure of the requisite qualities of the user.

Another anomaly might also arise as to the mode of losing an easement, which would be different in the case of an easement claimed by express grant and by prescription. Thus, a right of way by express grant would not be determined by unity of possession, as it would be if claimed by prescription.

This inconvenience may be obviated by considering this as an affirmative statute, which does not take away the common law (*b*); and that a party may, therefore, allege and prove a prescriptive title in the same manner as if the statute had not passed—and there is authority for this view of the case. In the recent case of *Onley* v. *Gardner* (*c*). where the defendant failed in proving a sufficient title under the statute in consequence of a unity of possession, the Court, after argument, in which it was held, that such unity defeated the title under the statute, allowed the defendant to amend his plea by pleading a right of way by prescription generally; and in *Richards* v. *Fry* (*d*), where it was suggested in argument, that "If a party had a right three years ago, which he released, and then an action was brought against him for a trespass committed before the release, if he pleads according to the letter of the statute, *i. e.* a user for thirty years before the commencement of the suit, he would be defeated, although the act in question was perfectly justifiable at the time."

Patteson, J., observed, "He might not be able to avail himself of the statute, but he would have a defence at common law."

* 385 * So the Prescription Act enacts, that an, "interruption, which shall be acquiesced in for a year, after the party claiming such right shall have had notice of the interruption, and of the authority under which the same is made, shall prevent a right being acquired."

(*a*) See *Lawson* v. *Langley*, 4 Ad. & Ellis. 890.

(*b*) Bacon, Abr. Stat. G.

(*c*) 4 Mee. & W. 469.

(*d*) 3 Nev. & P. 496.

Incidental effect of Prescription act.

The statute contains no similar provision, applying in terms to the extinction of an easement already acquired, whether by express grant or by prescription only; but it would be a great anomaly if any less interruption could extinguish a right than that required to break the continuity of enjoyment in acquiring one. There is, however, no case in which the construction of this act has come in question, which decides—that, supposing the right to have been once established, any such interruption would be sufficient to defeat it; but it seems, that, by a probably unintentional consequence of the enactment, wherever an easement is claimed by prescription only, however long the period during which it may have been enjoyed, and although, from its position, it may have been coeval with the very land to which it is attatached, a single instance of the interruption, as defined by the statute, will be sufficient to defeat it; at all events, unless the right has been established by some previous action.

The statute, as has been already mentioned, enacts, that the respective periods, the evidence of enjoyment during which shall confer an easement, "shall be taken to be those next before some suit or action, wherein the claim or matter to which such period may relate shall have been brought into question." If this provision is to be taken strictly, if the plaintiff has acquiesced in a year's interruption during the period * requisite to confer the * 386 easement immediately preceding the bringing an action, his right is gone.

Thus, for instance, if the right to have a stream run on in its accustomed course be an easement, it is vested in the owners of the adjacent land by the simple fact of its having so run on from time immemorial (*a*); and even if a manifest act of appropriation is requisite to confer a right of action for an interference with the stream, yet it is clearly established, that a single act, however recent, is sufficient; and upon that being done, the party has a right to have the stream flow in its accustomed course, unless an easement to divert it has been acquired by some neighboring owner, which can only be obtained in the same manner as any other easements.

Suppose then, that, before any mill has been established on a stream, or any overt act of appropriation has been exercised, one of the parties on the banks of the stream erects a mill, by which he materially interferes with the ordinary course of the stream, and he is allowed to continue such mill without interference during a year, though all the other parties interested in the stream have been fully aware of his proceedings; if, after that time, such parties on the stream, being desirous of availing themselves of the benefit of its natural course, should bring an action, founding their right upon the continued course of the stream during the requsite period next before the commencement of

(*a*) Ante, p. 170.

the suit, it appears they must be defeated, for, during that period, there has been an "interruption for a year acquiesced in by them."

387 And this further incidental consequence, at variance * with the general principles of the law of easements, would arise—that the party so interrupting and appropriating an excessive quantity of the stream for a year without opposition, *though he could not, strictly speaking, acquire the right, would, in fact, obtain the power to continue such excessive user;* for there would be no longer any person in a situation to contest the legality of his enjoyment, as all those whose interest in the stream would otherwise have entitled them to complain of the diversion, would be precluded by having acquiesced in the interruption; nor could they acquire, by any subsequent enjoyment, a right to more water than the interruption had left. This objection would apply equally whether they brought an action for the obstruction, or by their own act abated it: if they brought the action, they must prove the uninterrupted enjoyment as the foundation of their right to maintain it; if defendants in an action of trespass for the actual abatement, they must justify themselves by the same proof.

Whether an overt act of appropriation, if such act be necessary in order to maintain an act for a diversion of the stream, be done before or after the interruption, is immaterial for this purpose, as the right which is affected by the interruption is altogether independent of such act of appropriation.

It can scarcely be contended, that, by the term "acquiescence" in the statute, any affirmative act of assent is required, provided the party has had the requisite notice of the interruption.

One anomalous consequence, if the above construction of the law be correct, would be, that the party interrupting would be fully supplied with the means of defence against any action brought against him for the interruption;

388 yet, as the diversion would invest him *with no new right, he might be deprived of the benefit resulting from it without having any legal means of redress.

In various classes of easements, the owner of the servient has the full period required for their acquisition given him by law to consider what steps he shall take to preserve his own rights; but, in this case, a single year alone is allowed him. It is true that in the case of windows, for instance, the rights which the owner of the servient tenement seeks to protect are the common law rights of property, whereas the right to a water-course is an easement; but the right to water flowing in an ancient channel must frequently be of as high antiquity, and is often of quite as much value, as any other right of property; and it differs, as has been already remarked, from most other easements, in being so necessarily attached to the inheritance as to approximate in its qualities to the ordinary rights of property.

It may not be unimportant to remark, that, if, at the time of the decision of

Mason v. *Hill*, the statute had been in force, and the conclusions above given are correctly deduced from it, that case must have been decided in favor of the defendant, who had interrupted the course of the stream for a period considerably exceeding a year, and, for anything that appears to the contrary, without opposition of any kind on the part of the plaintiff, who was fully aware of the interruption.

By the Civil Law, the same period was fixed for the loss of a prædial servitude by non-user, as for its original acquisition by enjoyment—ten years where both parties were present, twenty when either was absent—and, until this full period had elapsed, the servitude, though, owing to some alteration in the dominant tenement, it had ceased to exist for a series of years, might at any *time revive by the two tenements being restored to their orig- *389
inal relative position: thus, a right of way, interrupted by alienation of a portion of the dominant tenement, revived upon its re-purchase (*a*); so, too, the servitude "*altius non tollendi*" revived if the intervening buildings were pulled down.

To lose an urban servitude, as already seen, some act of the owner of the servient tenement was also required. Where the servitude was only to be used at fixed intervals, exceeding a day, the periods of prescription for the loss by non-user were prolonged to twenty and forty years. Any user within that time, however, in right of the dominant tenement, whether by the owner, occupier, or their friends, servants, or guests, was sufficient to preserve the servitude (*b*).

(*a*) Si quis ex fundo, cui viam vicinus deberet, vendidisset locum proximum servienti fundo non imposita servitute, et intra legitimum tempus quo servitutes pereunt, rursus eum locum acquisivisset, habiturus est servitutem quam vicinus debuisset.—L. 13. ff. quem serv. amit.

(*b*) Sicut usumfructum qui non utendo per biennium in soli rebus, per annale autem (tempus) in mobilibus vel se moventibus, diminuebatur, non passi sumus hujusmodi sustinere compendiosum interitum: sed ei decennii vel viginti annorum damus spatium: ita in cæteris servitutibus obtinendum esse censuimus, ut omnes servitutes non utendo amittantur, non biennio (quia tantummodo soli rebus annexæ sunt) sed decennio contra præsentes vel viginti spatio annorum contra absentes: ut sit in omnibus hujusmodi rebus causa similis explosis differentiis.—C. L. 13. ff. de serv. et aq.

Si sic constituta sit aqua " ut vel æstate ducatur tantum vel uno mense " quæritur quemadmodum non utendo amittatur: quia non est continuum tempus: quo, cum uti non potest, non sit usus. Itaque et si alternis annis vel mensibus quis aquam habeat duplicato constituto tempore amittitur: idem et de itinere custoditur. Si vero " alternis diebus aut die toto aut tantum nocte " statuto legibus tem-

*390 *The period of twenty years was fixed as the limit, by a constitution of Justinian, for the loss, by non-user, of a right of way which was only to be exercised for one day, at intervals of five years, (uno tantummodo die per quinquennium), great doubts having previously existed upon this point amongst jurists (*a*).

The period for losing by non-user, as well as that for acquiring servitude by enjoyment, might be made up from the time of the occupation or ownership of successive persons—both the acquisition and loss having respect to the tenement, and not to the person (*b*).

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pore amittitur, quia una servitus est. Nam et si alternis horis vel una hora quotidie servitutem habeat, Servius scribit perdere eum, non utendo, servitutem: quia id quod habet cotidianum sit.—L. 7. ff. quem serv. amit.

Postremo finitur (servitus) etiam non utendo—si videlicet nemo servitute usus sit, neque is cui debetur, neque possessor prædii dominantis amicusve aut hospes; cæterum ita si nemo usus sit servitute per constitutum continuum tempus, quod tempus est decem vel viginti annorum. Enimvero si servitutis usus continuum aut quotidianum tempus non habeat, forte quia alternis annis aut mensibus constituta est, duplicato constituto tempore non utendo amittitur, id est adversus præsentes viginti annis, adversus absentes quadraginta. Idemque et in longioribus intervallis pro ratione et facultate utendi, statuendum. Quicumque vero aut nostro ut prædii nomine usus sit, possessor, mercenarious, hospes, amicus, colonus, fructuarius, retinebimus servitutem.—Vinnius Comm. ad Inst. Lib. 2. tit. 3. quibus modis serv. amittantur, § 6.

(*a*) C. L. 14. de serv. et aq.

(*b*) Tempus quo non est usus præcedens fundi dominus cui servitus debetur imputatur ei qui (in) ejus loco successit.—L. 18. § 1. ff. quem serv. amit.

PART IV.

OF THE DISTURBANCE OF EASEMENTS.

CHAPTER I.

WHAT AMOUNTS TO A DISTURBANCE.

*THERE is a clear distinction as to the foundation of the right of *391 action for a private (*a*) nuisance, properly so called, and an action for the disturbance of an easement. No proof of any right, in addition to the ordinary right of property, is required in the case of the former: to maintain an action for a disturbance of an easement to receive air by a window, proof of the accessorial right must be given, as where an action is brought for corrupting the air, or establishing an offensive trade; yet the incidents of the two classes of rights, as far as concerns the remedies for any infringement of them, are similar. "A man has no need to prescribe to do a thing which he may do of common right, as if he has distrained for rent, rent services, &c.; or if I would prescribe that when a man builds a house so that from his house the water runs upon my land, I have been used to abate that which causes the water to run upon my land, this prescription is void, *for by the common law *392 I can do that as well" (*b*). In many cases an action may be founded on both these rights; thus, in an action for corrupting a water-course, the plaintiff complains of an infringement of his easement to receive the water in its accustomed course and usual purity, and also of an injury to his common law

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(*a*) Ante, p. 275.

(*b*) Per *Choke*, J., 8 Ed. 4. 5, pl. 14; *Tenant* v. *Goldwin*, 1 Salkeld, 366.

rights of property, in having water in a corrupted state discharged upon his land.

Aldred's case (*a*) furnishes a somewhat similar instance. In that case, the plaintiff complained of the stoppage of his windows, and that the defendant had erected a wooden building, and kept hogs therein, by means of which his easement of light was obstructed, and his enjoyment of his messuage diminished by the smell of the hogs. Both injuries are called nuisances, and the same principles as to the remedies for them applied indiscriminately to both.

It is not every interference with the full enjoyment of an easement that amounts in law to a disturbance; there must be some sensible abridgment of the enjoyment of the tenement to which it is attached, although it is not necessary that there should be a total obstruction of the easement. "Item," says Bracton, "si quis aliquid fecerit quominus ad fontem, &c, ire possit, vel haurire, vel de fontana aquæ, non tantam aquam ducere vel haurire, tales cadere possunt in assisam" (*b*).

Thus it is said, in *Aldred's case*, "If A. makes a water-course, running in a ditch from the river to his house, for his necessary use, if a glover sets up a *393 *lime-pit for calf-skins and sheep-skins, so near the said water-course that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it as it is adjudged, 13 Henry 2. 26."

For affixing a small pipe, and thereby taking water from a larger one (*c*), or for diverting part of the water only (*d*).

A case is mentioned by Mr. Starkie (*e*), of an action brought for disturbance of a water-course, where it appeared that the water, after being used for irrigation, was returned to the natural channel; and *Wood*, B., nonsuited the plaintiff. As, however, it was shown that a portion of the water was lost by irrigation and absorption, the Court of King's Bench is reported to have set aside the nonsuit.

To maintain an action for obstructing light, it is sufficient to show that the easement cannot be enjoyed in so full and amp'e a manner as before—or that

(*a*) 9 Rep. 57.

(*b*) Bracton, Lib. 4, ff. 233.

(*c*) *Anon.* Ibid. 248 b, pl. 80; see also *R.* v. *Tindal*, 6 Ad. & Ellis. 143.

(*d*) 2 Evid. 9, 11. note.

(*e*) *Moore* v. *Dame Brown*, Dyer, 319 b, pl. 17.

the premises are to a sensible degree less fit for the purposes of business or occupation (*a*).

Parker v. *Smith and Others* (*b*),—*Tindal*, C. J., in summing up, said, "The question in this case is, whether the plaintiff has the same enjoyment now, which he used to have before, of light and air, in the occupation of his house; —whether the alteration, by carrying forward the wall to the height of ten feet, has or has not occasioned the injury which he complains of. It is not every possible, every *speculative exclusion of light which is the *394 ground of an action; but that which the law recognizes, is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business. It appears that the defendants' premises had been injured by fire, and they re-erected them in a different manner. They have a right to re-erect in any way they please, with this single limitation, that the alteration which they make must not diminish the enjoyment, by the plaintiff, of light and air. It is contended by the defendants, that, on the whole, the light and air are increased. If, as matters now stand, upon the evidence you have heard, you think that this is a true proposition, then the plaintiff will have no ground of action. But if, on the contrary, you think that, in effect, these alterations (though they may separately be improvements) upon the whole diminish the quantity of light and air, then you will find for the plaintiff, with nominal damages; and your verdict will have no other effect, than that of a notice to the defendants, that they must pull down the building of which the plaintiff complains."

The injury complained of must be of a substantial nature, in the ordinary apprehension of mankind, and not arising from the caprice or peculiar physical constitution of the party aggrieved.

"If the boughs of your tree grow over my land, I may cut them off; but I cannot justify cutting them before they grow over my land, for fear they should grow over" (*c*).

"Whether the defendant may pull down the nuisance* before the *395 house is made, and so come to be a nuisance,—I do much doubt of this—here, it is only said, the plaintiff *conatus fuit* to edifie this house, and rear up the timber; the defendant hath no hurt by this, for he may afterwards leave off again—the defendant is not to pull this down for the intent only. If one comes upon his own land, and intends to come upon my land, upon this im-

(*a*) *Cotteril* v. *Griffiths*, 4 Esp. N. P. C. 69.

(*b*) 5 Car. & P. 438; *Back* v. *Stacy*, 2 Car. & P. 465.

(*c*) Per *Coke*, J., *Norris* v. *Baker*, 1 Rolle, Rep. 394.

agination I am not to lay hands upon him: I never saw in any book a justification for a conation, because he did not do it" (*a*).

In *James* v. *Hayward* (*b*,) *Jones*, J., said, "If a private man hath a way over the land of J. S. by prescriptive grant, J. S. cannot make a gate across the way."

"If a chandler erects a melting house, it is a common nuisance; but if a man is so tender-nosed that he cannot endure sea coal, he ought to leave his house" (*c*).

"If a man set up a school so near my study, who am of the profession of the law, that the noise interrupts my studies, no action lies" (*d*).

So, the ploughing up of land, over which a man had a right of way, is a nuisance to his right of way; for it is not so easy to him as it was before (*e*). Or, the driving of stakes into a water-course, or otherwise diverting it, whereby I can no longer have sufficient water for my mill (*f*); or, even if the stream be choked up for want of cleansing (*g*); or by the roots of trees growing into it (*h*).

*396 *Although generally, some injury must have been sustained before redress can be had, yet, if the necessary consequence of what has already been done, will be an injury to an easement, it is not a condition precedent to the exercise of the remedy, that actual damage shall have accrued. Thus, if a party intending to build a house, which will obstruct my ancient lights, erect fences of timber, for the purpose of building, I have no right to pull them down; "cur nemo tenetur divinare. But, if a house be built, the eaves of which project over my land, I need not wait till any water actually fall from them, but may pull them down at once" (*i*). So, too, it was admitted, in

(*a*) Per *Coke*, J., in S. C., 3 Bulstrode, 197; see *Penruddock's case*, 5 Rep. 101. Lex not favet delicatorum votis. *Aldred's case*, 9 Coke, 527.

(*b*) Sir W. Jones, 222.

(*c*) Per *Doddridge*, J., in *Jones* v. *Powell*, Palmer, 536.

(*d*) Com. Dig. Action on the Case for a Nuisance (C).

(*e*) 2 Roll. Abr. Nusans. G. pl. 1.

(*f*) Ibid. pl. 8, 9.

(*g*) *Bower* v. *Hill*, 1 Bing. N. C. 546.

(*h*) *Hall* v. *Swift*, 6 Scott, 167.

(*i*) 2 Roll. Abr. 145. Nusans. U.

Jones v. *Powell* (*a*), "that an action did not lie for the fear of a nuisance merely; but it is otherwise where there is apparent cause for the fear, and, therefore, *metus et periculum:* for if a man waits until infection comes, it is too late to bring the action."

Mere threats, unaccompanied by any act, do not amount to a disturbance (*b*).

A similar rule existed in the civil law. If the work was completed, the natural consequence of which would be damage to the party complaining, he need not wait until such damage actually occurred (*c*).

An action lies as well for a disturbance of the secondary easements, without which the primary one cannot be *enjoyed, as for a disturbance of the *397 primary easement itself.

"Item," says Bracton, "si quis ire ad fontem prohibetur, habet actionem quare quis obstruxit, quia cui conceditur haustus ei conceditur iter ad fontem et accessus *(d)*" (33).

(*a*) Palmer, 536.

(*b*) *Earl of Shrewsbury's case*, 9 Rep. 51 a.

(*c*) Hæc autem actio, (aquæ pluviæ arcendæ), locum habet in damno nondum facto, opere tamen jam facto; hoc est, de eo opere ex quo damnum timetur, totiensque locum habet quotiens manu facto opere agro aqua nocitura est. Id est, quum quis manu fecerit ut aliter flueret quam natura soleret —L. 1. ff. de aq. et aq. pl. arc.

(*d*) Lib. 4, ff. 233.

(33.) In the case of *The People* v. *Canal Appraisers*, 13 Wend. 355, the subject in respect to the rights of a private owner of property of any description, when its beneficial enjoyment is essentially impaired in the prosecution of public works, seems to have been much considered. Sutherland, J. in delivering the judgment of the supreme Court, observes:—"The facts, then, upon which the relator's title to the middle sprout depends are these: The middle sprout is a branch of the Mohawk river, in which, above the falls, the tide never ebbs or flows, and which never has been used, and is incapable of being used for any species of navigation. The relator owns the north half of Green Island, which is bounded on the north by the middle sprout. Van Schaick Island lies upon the opposite side of this stream, and is bounded by it on the south. The relator neither claims nor shows any title to this island; it is held under a patent older than the patent of the manor of Rensselaerwyck.—Upon the acknowledged principles of the common law, the proprietors of these islands own respectively to the center of the stream; for nothing is better settled than that grants of land, bounded upon rivers or streams where the tide does not ebb or flow, carry the exclusive right of the grantees to the middle of the stream, unless the language of the grant is such as clearly and unequivocally to show the intent of the parties that it should not ex-

tend beyond the water's edge. Where the stream is navigable for either boats or rafts, the public have a right to use it for those purposes, and the rights of the adjoining proprietors are subject to the public easement. They can use the water, or the land under the water, in any manner which does not impair its use as a public highway; but they cannot erect dams, or place other obstructions in the stream, which will interfere with its free and convenient use for public purposes. Nor can the state divert the water of the stream, or interfere with it in any other manner which will render it less useful to the proprietors of the adjacent shores. This doctrine is perfectly settled in England, and has been repeatedly acknowledged and applied in this court and in the courts of several of our sister states. The English and American authorities are all referred to in the learned and elaborate note to the reporter, in Ex parte Jennings, 6 Cowen, 548, et seq, and in 3 Kent's Comm. 427, 428, 429, 430, 2d ed. Hale's de Jure Maris. ch 4, 5. Dougl. 425. *Palmer* v. *Mulligan*, 3 Caines' R. 318. *Shaw* v. *Crawford*, 10 Johns. R. 236. *The People* v. *Platt*, 17 ib. 195. *Hooker* v. *Cummings*, 20 ib. 90. Ex parte Jennings, 6 Cowen, 518. This principle has been recognized and adopted not only in this state, but also in Maine, New Hampshire, Massachusetts, Connecticut, New Jersey, Maryland, Ohio, and Virginia. 3 Greenl. R. 269, 474. 2 N. Hamp. R. 369. 7 Mass. R. 496. 14 ib. 149. 4 Pick. R. 268. 2 Conn. R. 481. 6 ib. 471. 1 Halst. 1. 1 Rand. 417. 3 ib. 33. 3 Ohio R. 495. 5 Harr. and John. R. 195. It is not my intention to enter into a discussion of the question whether this principle of the common law is suited to the nature and extent of our inland streams. That is no longer an open question in this court, in relation to streams of the character and description of the middle sprout. The principle has been applied in the various cases above referred to, and its wisdom and applicability to our condition are there satisfactorily maintained."

The case of *Ex parte* Jennings, *supra*, decides, that the state cannot by the erection of an artificial state dam overflow and destroy a valuable water fall in a tributary stream, without paying for it.

CHAPTER II.

REMEDIES FOR DISTURBANCE.

Remedy by act of party.

* The remedies for any disturbance of an easement are of two kinds: * 398 —1. By act of the party aggrieved; and, 2. By act of law.

SECT. 1.—*Remedies by Act of the Party.*

"Note, reader," says Lord Coke, "there are two ways to redress a nuisance, one by action, and in that he shall recover damages, and have judgment—that the nuisance shall be removed, cast down or abated, as the case requires; or the party aggrieved may enter and abate the nuisance himself (*a*)."

Bracton says, that the remedy by act of the party must be taken without delay.

"Ea vero quæ sic levata sunt ad nocumentum injuriosum, vel prostrata vel demolita, statim et recenter flagrante maleficio, sicut de aliis disseisinis, demoliri possunt, et prosterni, vel relevari et reparari, si querens ad hoc sufficiat; si autem non, recurrendum est ad eum qui jura tuetur, qui per tale breve remedium habebit (*b*)."

It was resolved by all the Justices, "that a man aggrieved by a nuisance may enter upon the land of * another and abate the nuisance, by the * 399 Common Law, without prescription, and trespass will not lie against him either for the entry or abatement (*c*)."

(*a*) *Batten's case*, 9 Rep. 54 b.

(*b*) Lib. 4. ff. 233; and vide ff. 233 b.

(*c*) Broke's Apridg. Nuisance, f. 151, b, pl. 33.

Remedy by act of party. Wigford v. Gill. Rex. v. Rosewell.

"If a man make a ditch in his own land, by means of which the water which runs to my mill is diminished, I may myself fill up the ditch (*a*).

"If a man erects upon his own soil any thing which is a nuisance to my mill, house, or land, I may remain (estoier) on my own soil, and throw it down. And so I may enter on his soil, and throw down the nuisance, and justify this in action of trespass (*b*)."

"If a nuisance be made to my frechold, I may enter on his land (who made it) and deject the nuisance."

"If a man stops my way to my common, and incloses the common, I may justify the dejection of the inclosure of the common or way."

"If a nuisance be made to my land in which I have an estate for years, I may still deject the nuisance (*c*)."

In an old case (*d*), it was decided, "That if water runs through the land of M., and he stops the water in his own close, so that it surrounds my land, I may enter on his close to remove the obstruction, and he shall not maintain an action."

J. S. erected a mill-dam, part upon his own land and part upon the land adjoining; the owner of the land adjoining pulled down the portion of the dam standing upon his land, by which all the dam fell down, and the water ran out. All the Court held it was justifiable. "So, if one erects a wall partly upon his own lands and partly upon the land of his neighbor, and the neighbor

*400 pulls * down the part of the wall upon his land, and thereupon all the wall falls down, this is lawful (*e*)."

So in *Rex* v. *Rosewell* (*b*) it is laid down, "If H. builds a house so near mine that it stops my lights, or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down;" "and for this reason only, 'it is said,' a small fine was set upon the defendant in an indictment for a riot in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights."

(*a*) 9 Ed. 4. 35 b.

(*b*) 2 Rolle, Abr. Nusans. (S).

(*c*) Ibid. W.

(*d*) 8 Ed. 4, 5.

(*e*) *Wigford* v. *Gill*, Cro. Eliz. 296.

(*f*) Salkeld, 459.

Remedy by act of party. Raikes v. Townshend.

In *Raikes* v. *Townshend* (*a*), where the disturbance complained of was the obstruction of a rivulet, by means whereof the defendant's cattle could not obtain water so plentifully as before, and the defendant entered upon the soil of the plaintiff and abated the mill-dam; after judgment for the defendant, a motion was made to enter judgment for the plaintiff *non obstante veredicto* which was overruled. The passages above cited from Rolle's Abr. were relied on as an authority for confining the right to abate to the cases of nuisance to a mill, house, or land. Lord *Ellenborough* C. J., said, "These cases are only put as instances."

No previous demand is requisite except where the servient tenement, on which the nuisance is erected, has passed into other hands since the erection; in this case it seems, that, without such demand, the abatement would not be lawful, for the new occupant was not liable to a *quod permittat* before request made (*b*); *but the demand may be made either on the lessor or les- *401
see, for the continuance is a nuisance by the lessee, against whom an action well lies (*c*).

The abatement may be made by the party in possession of the dominant tenement, although the nuisance existed previous to his entering on the possession of it (*d*).

In abating a private nuisance, a party is bound to use reasonable care that no more damage be done than is necessary for effecting his purpose (*e*).

But, in abating a public nuisance, it seems doubtful whether the same degree of caution is required (*f*). Thus, in *Lodie* v. *Arnold* (*g*), it is said, "When H. has a right to abate a public nuisance, he is not bound to do it orderly and with as little hurt in abating it as can be." "In the case of *James* v. *Hayward* (*h*), the defendant might have opened the gate without cutting it down,

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(*a*) 2 Smith, 9.

(*b*) *Penruddock's case*, 5 Rep. 101.

(*c*) *Brent* v. *Haddon*, 2 Cro. Jac. 555.

(*d*) Ibid.

(*e*) Com. Dig. Action on the Case for a Nuisance.

(*f*) In Comyn's Digest, it is stated, "That a man may justify pulling down a house with violence, whereby the materials are lost." The only authority cited for this position is the case of *Lodie* v. *Arnold*, which is an authority for it at all events only in the case of an abatement of a public nuisance.

(*g*) Salkeld, 458.

(*h*) Cro. Car. 184; Roll. Abr. Nusans. T.; Sir W. Jones, R. 221, S. C.

yet the cutting was lawful; and the Court denied *Hill's case* (*a*), that matter of aggravation need to be answered."

In the case of *Lodie* v. *Arnold*, it appears from the report, that the materials of the house pulled down rolled into the sea, but not that the defendant threw them there.

*402 *In *James* v. *Hayward*, it is laid down, that "a (public) nuisance must be abated, in such a convenient manner as it can be: if a house be levied to the nuisance (of another), the whole house shall be abated; if a part, that part only shall be abated; but, as to the house, when the nuisance is abated, it is not lawful to destroy the materials, but they shall, after the abatement, remain to the owners of them, and to him who did the nuisance" (*b*).

It does not appear in this case that the gate was fastened, but rather the contrary (34).

SECT. 2.—*Remedies by Act of Law.*

The remedy by act of law for the disturbance of an easement is either by action at law or by suit in equity.

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§ 1. *Remedy by Action at Law* (35).

(a) *Parties to Actions.*

Parties entitled to Sue.]—As an easement is a benefit attached to the dom-

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(*a*) Cro. Car. 384.

(*b*) Ante, p. 401.

(34) *Obstructions in Highway.*—A turnpike company or their agents may lawfully remove any obstructions upon their road; for such roads are under the management of the companies to which they belong. *Estes* v. *Kelsey*, 8 Wend. 555. And although the company *may* maintain an action for an injury to their road, yet they are not obliged to resort to an action; but may peaceably take down and remove an obstruction, such as a fence, without being responsible in damages. ib.

The question of public nuisance is not inquirable of in a collateral way. Thus, in *Stiles* v. *Hooker*, 7 Cowen 266, which was case for flowing back water so as to injure plaintiff's mill; it was held to be no defence, that plaintiff's mill was a nuisance. See also 3 Caines, 315.

(35) *Nuisance.*—A person injured by an obstruction to the highway may main-

Remedy by action at law.	Who may sue.

inant tenement, the party in possession may sue for any interference with its enjoyment, even though such interference be of a temporary nature only.

If such interference be of a permanent nature, and injurious to the inheritance, the reversioner may also have an action for the same disturbance (*a*).

* It appears to be by no means clearly defined what is such a * 403 permanent damage, as will entitle the reversioner to sue; it should seem, however, that he may maintain an action for any disturbance which in its present form is injurious to the possession, and which, without any further

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(*a*) Com. Dig. Action on the Case, Nuisance B. *Jackson* v. *Pesked*, 1 M. & S. 234; *Alston* v. *Scales*, 9 Bing. 3; *Baxter* v. *Taylor*, 4 B. & Adol. 72. See also *Hopwood* v. *Schofield*, 2 Moo. & Rob. 34.

tain an action. *Pierce* v. *Dart*, 7 Cowen, 609. But there must be some special damage to the party before he can sue. The Court say:—"The damage to the plaintiff was but a trifle. It consisted in the delay, and the time spent in abating the nuisance. Gibbs would not place it higher than 6 cents at each abatement, or 25 cents in the whole.

"It is conceded that special damage would maintain the action; but denied that this is the kind of damage intended by the rule. The question is certainly not without its difficulties. The English cases have fluctuated; and until a recent decision of the king's bench, no rule defining the nature or limit of the individual injury which is to warrant the action, can be found. In *Hart* v. *Basset*, (T. Jones, 156,) it was held enough that the plaintiff was obliged, by the obstruction, to convey his tithes by a more circuitous route. *Iveson* v. *Moor*, (Carth. 451,) gave an action where the plaintiff was prevented from carrying his coal in carts and carriages, and *Chichester* v. *Letheridge*, (Willes, 71,) holds, that obstructing the highway by bars, &c. and withholding the plaintiff from abating the nuisance, so that he could pass, was sufficient.

"*Hubert* v. *Groves*, (1 Esp. Rep. 148,) and which was considered by the king's bench on motion for a new trial, held, that being put to the necessity of going a circuitous route, was not such special damage as would warrant the action. And there is a dictum in *Paine* v. *Partrick*, (Carth. 194,) that delay of a journey by which one is damnified, and some important affair neglected, is insufficient. Nor are the American cases exactly uniform. In *Hughes* v. *Heiser*, (1 Bin. 463,) where the cases already mentioned are considered, the plaintiff recovered on the ground that he was prevented from passing down the Big Schuylkill with his rafts. But in *Barr* v. *Stevens*, (1 Bibb's Kentucky Rep. 293,) Trimble, J. in delivering the opinion of the court, says it is not enough that one is turned out of his way; and he seems to require that some corporal damage should arise from the injury.

"The late cases of *Rose* v. *Miles*, (4 M. & S. 101,) overrules the dictum in *Paine* v. *Partrick*, and the case of *Hubert* v. *Groves*. It adopts the other English cases, with the principle of *Hughes* v. *Heiser;* and, for the first time, seems to

interference by the act of man, would, in the ordinary course of things, continue to be so on the determination of the particular estate (*a*): but it has been held, that, where the disturbance, as a trespass on the land, is not of a continuous nature, even though done expressly in the assertion of a right, the reversioner could not sue (*b*).

(*a*) *Bower* v. *Hill*, 1 Bing. N. C. 555.

(*b*) *Baxter* v. *Taylor*, 4 B. & Adol. 72.

furnish an express general rule for the class of cases which we are considering. The plaintiff's passage down a public navigable river was obstructed; and he was put to expense in going a circuitous route. An action on the case for this injury was sustained by the whole court; and we think the principle to be extracted from the case is, that any, the least injury to an individual, as an expense of time or money, or labor, &c. entitles him to an action. It is a special damage as contradistinguished from the injury to the public in general, which is theoretical, or resting in presumption of law only. Lord Ellenborough said the injury did not rest merely in contemplation. The plaintiff was impeded in the act of navigating, and incurred expense. If a man's time or money is valuable, it seemed to him, that this was a particular damage.

"Such seems to be the distinction deducible from a majority of the cases.

"In the case at bar, the plaintiff was certainly put to some expense. There was a delay, and labor in abating the nuisance, so that he might proceed on the road. True, the injury was trivial; and it is not difficult to see that the damages are excessive. But we cannot interfere on that ground where the action below is for a tort.

"But it is contended that the remedy by action was barred by the abatement; that the plaintiff having taken the means of redress into his own hands, is concluded, as in case of distraining an article damage feasant. We don't understand this to be the effect of removing a nuisance. True, it is treated in the books as a remedy by the act of the party. But it does not operate to redress the injury like a distress. It is preventive merely; and resembles more an entry into land, or recaption of personal property. Neither will bar an action for the original invasion of the plaintiff's right. Suppose in this case the plaintiff's horse or carriage had been injured; would it be pretended that his afterwards throwing down the fence, should operate as an indemnity? The case at bar depends on the same principle."

In *Pierce* v. *Dart*, *supra*, it was held, that the private action was not barred in consequence of the abatement of the nuisance by the plaintiff.

The abatement of the nuisance by the plaintiff, does not extinguish the plaintiff's right of action for the damages resulting from the nuisance anterior to the removal. *Gleason* v. *Cary*, 4 Conn. R. 418; *Kendrick* v. *Bartland*, 2 Mod. R. 253.

The correctness of the decision in that particular case appears to depend upon the question, whether the user during the continuance of the particular estate would be evidence against the reversioner,—which the Court assumed it would not. But even admitting that enjoyment, shown to have commenced since the beginning of the particular estate, would confer no title as against the reversioner, even if he was aware of it—a point of considerable doubt (*a*) —it seems hardly possible to say, that enjoyment during a long particular estate would not interpose difficulties to the reversioner in resisting the claim upon its determination. "The ground upon which a reversioner is allowed to bring his action for obstructions apparently permanent to lights and other easements which belong to the premises is, that, if acquiesced in, they would become evidence of a renunciation and abandonment" (*b*) (36).

*If the disturbance be continued, a fresh action may be maintained *404 from time to time by the persons filling the situation of tenant in possession or reversioner (*c*).

Parties liable to be Sued.]—The party creating the disturbance is liable to an action, whether he be the owner of the servient tenement or not (*d*).

For the continuance of a disturbance, each successive owner of the servient tenement is liable, though it may have been erected before his estate commenced.

Where, however, the party was not the original creator of the disturbance, a request must be made to remove it, before any action is brought; but it is

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(*a*) Vide supra, Part 1., Chap. 5, Sect. 2, p. 108.

(*b*) Per Cur. in *Bower* v. *Hill*. See also 1 Wms. Saund. 346 b, n.; *Hopwood* v. *Schofield*, 2 Moo. & Rob. 34.

(*c*) *Penruddock's case*, 5 Rep. 101; *Shadwell* v. *Hutchinson*, 2 B. & Adol. 97.

(*d*) Com. Dig. Action on the Case for a Nuisance.

(36) The person in possession of the farm or lot through which the highway passes is, in contemplation of law, in possession of the highway, subject to the public easement; for being in possession of the lot, he is *prima facie* in possession of every part of it. This principle is recognized in *Cortelyou* v. *Van Brunt*, 2 J. R. 363. The right of passage is but a servitude or easement, and trespass will lie for any exclusive appropriation of the soil. *Gidney* v. *Earl*, 12 Wend. 98.

Owner of soil—trespass.—A person placing obstructions in a public highway, is not liable to the owner of the soil in an action of trespass. *Mayhew* v. *Norton*, 17 Pick. 357.

Remedy by action at law.	Party liable to be sued.	Trespass or case.

sufficient if such request is made to the party in possession, though he be only lessee (*a*).

If the owner of land on which a nuisance is created lets the land, an action for the continuance will lie, at the option of the party injured, either against the landlord or the tenant (*b*).

But no such action lies against the landlord for any such act of his tenant done during the continuance of the tenancy (*c*).

(b) *Forms of Action.*

*405 * The ancient Common Law remedies by assize of nuisance, and the writ of *quod permittat prosternere* had long fallen into disuse, before they were abolished by the recent statute for the Limitation of Actions and Suits (*d*).

The modern remedy at law for the disturbance of an easement, is generally by an action on the case. Occasionally, the disturbance may be the consequence of a direct act of trespass, and there then appears to be some room to doubt whether trespass is not the only form of action maintainable. There are, however, authorities from which it seems that in all cases of consequential injury resulting from a direct act, the party aggrieved has the option of suing either in trespass or in case.

Where the injury results from an act which is partly a trespass, and partly productive of consequential injury only, it is expressly decided that case is maintainable, and it seems that trespass also might be supported.

In *Wells* v. *Ody* (*e*), an action on the case was brought for the stoppage of ancient windows, by the erection of a wall. It appeared in evidence that the houses of the plaintiff and defendant were contiguous, and that the defendant had erected a party-wall, which stood partly on his own and partly on the plaintiff's land. A further elevation by the defendant of the party-wall, to form the side of a workshop, had the effect of darkening the plaintiff's an-

*406 cient windows. One question *left by the learned judge, (*Parke*, B.),

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(*a*) *Penruddock's case*, 5 Rep. 101; *Brent* v. *Haddon*, Cro. Jac. 555.

(*b*) *Christian Smith's case*, Sir W. Jones, 272: *Rosewell* v. *Prior*, 2 Salkeld, 460; S. C. 1 Ld. Ray. 713: *R.* v. *Pedley*, 1 Adol. & Ellis, 822; S. C. 3 Nev. & Man. 627.

(*c*) *Cheetham* v. *Hampson*, 4 T. R. 320.

(*d*) 3 & 4 W. 4, c. 27, s. 36.

(*e*) 1 M. & W. 452.

to the jury, was, "Whether, supposing the wall to consist only of that part which stood on the plaintiff's land, it would have the same effect as the wall which was actually erected." The jury found that it would. It was then objected on the part of the defendant, that the action should have been in trespass, the part of the wall which was nearest the plaintiff's windows, and therefore the proximate cause of the injury, being erected on the plaintiff's own land, and, consequently, a direct injury to the plaintiff's property.

The verdict was taken for the plaintiff, with liberty to the defendant to move for a nonsuit. A rule having been obtained, it was urged in argument, "That though trespass might lie, a plaintiff was, in every case, at liberty to waive it and bring case for the consequential injury. *Brandscomb* v. *Bridges* (*a*), and *Smith* v. *Godwin* (*b*), were cited. The Court did not decide the case upon this broad ground, but confined their judgment to the decision, "That where an injury had been done of a consequential nature, to the comfort and convenience of another, effected partly by an act of trespass, and partly by an act that was not a trespass; but from either of which the injury must and would have resulted, case might be maintained;" and the Court also said, that in such a case trespass would lie. "Suppose," said Lord *Abinger*, "a person's premises are injured by the changing of a water-course, by the erection of a weir partly on the land of the defendant, the erection of that which is on the plaintiff's land would * be the subject of an action of trespass; and *407 doing the same thing on the defendant's land would be the subject of an action on the case. If both acts are done at the same time, and form part of one *res gesta*, and the consequential damage is in respect of both together, it appears to me the plaintiff may bring his action of trespass, or his action on the case. There are not wanting sufficient analogies to show, that, where an injury is done to a right of way—in fact, where there is a common injury—there may be a common remedy, and there a party may adopt either." "It appears to me," said Mr. B. *Parke*, "that this action is maintainable. This is a wall built partly on the property of the plaintiff, and partly on that of the defendant. The wall is an entire wall, and not separate. Then it appears to me this is a case in which the plaintiff has the option as to the form of action he may choose to adopt, and the more natural and proper remedy is by an action on the case."

It is obvious, that, if the principle contended for in argument in the case of *Wells* v. *Ody*—that a plaintiff may, in all cases, waive the trespass, and sue for the consequential injury—had been recognized as undoubted law, the case

(*a*) 1 B. & Cr. 145.

(*b*) 4 B. & Adol. 419.

might have been at once disposed of, without entering into the refinements upon which the judgment of the Court was founded.

Trover affords a familiar instance of waiving the tort, and suing for the consequential injury.

Modern decisions appear to lean in favor of the election, either to sue for the trespass, or waive that, and sue for the consequential damage only; and there

*408 are ancient authorities bearing on the same subject, * to the like effect:—"If I have a house, by prescription, on my soil, another cannot erect his house, on his own soil, so near to my land as to cause the rain to flow from it and fall upon my land (*a*)." "So, if a man erect a house which overhangs my house, this is a nuisance to my house; for, of necessity, the rain must fall from it on my land, and this taketh away my air, and preventeth me building up my house as I lawfully might" (*b*).

In *Whiting* v. *Beeway (c)*, it was held, that an action on the case was maintainable against the defendant for having with force and arms erected a certain weir or bank, by means whereof the water of a certain stream overflowed the plaintiff's meadow: it is there said, that the bank was laid as erected vi et armis, and not the overflowing—which was the injury there complained of.

In Fitz. N. B. (*d*), a similar injury was held to be the subject of an action of trespass.

The *Earl of Shrewsbury's case* (*e*), is an important authority on this subject. That was an action on the case, in which the Earl of Shrewsbury declared, setting out his title as Seneschal of Mansfield, and complained, that the defendant, with force and arms, prevented him from exercising his said office, and receiving the profits thereto by law belonging: to the writ and declared it was objected, that they were vi et armis; and the book, 42 Ed. 3. 33 c, and

*409 17 Ed. 4. 2, were cited, and F. N. B. 86 H, that an action on * the case shall be vi et armis; and as to that, it was resolved by the Court, that the writ and declaration were good enough.

"And a difference was taken betwixt non-feasance and mis-feasance; for non-feasance or negligence shall never be said vi et armis, for that would be oppositum in objecto; neither for negligence or non-feasance shall the writ

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(*a*) 1 Rolle's Abr. Action on the Case, 107, citing 22 H. 6. 15, referred to by *Parke*, B., in *Wells* v. *Ody*.

(*b*) 2 Rolle's Abr. Nusans. 141.

(*c*) 2 Rolle's Rep. 248.

(*d*) Trespass, 87 H.

(*e*) 9 Rep. 42.

say, contra pacem. 12 H. 4. 3 a, 45 E. 3. 17 b, 43 E. 3. 33 a. But some writs shall be contra pacem, which shall not be vi et armis, as 9 H. 6. 1 a. Recaption shall be contra pacem, and against the law and the statute, but shall not be vi et armis. So, in all actions for a thing done against any statute, the writ shall be contra pacem, vide 17 E. 3. 1 a, although it is for non-feasance. But when there are two causes of an action on the case, the one causa causans, and the other causa causata, causa causans may be alleged to be vi et armis, for that is not the immediate cause or point of the action, but causa causata, as in 12 H. 4. 3 a: the putting of dung into the river is causa causans, and, therefore, it may be vi et armis, but causa causata, the point of the action on the case, is the drowning of the plaintiff's land. So, in 8 R. 2, Hosteler 7, Register 105 a, the breaking of the inn may be alleged vi et armis; for defectus custodiæ is the point of action on the case against the hostler, M. 29 E. 3. 18 b. The Abbot of Evesham brought an action on the case against certain persons, and declared that he had a fair in S., with all that belonged to a fair and that the defendant with force and arms disturbed the people coming to the fair, (which was causa causans), by which the plaintiff lost his toll, (which was causa causata), the * point of the action, and the action main- *410
tainable. Vide 16 E. 4. 7 a, b; F. N. B. 89 M; 19 R. 2. tit. Action sur le Case, 52. So, in the case at bar, the defendants might, vi et armis, hinder or interrupt the plaintiff in exercising the office, and that is causa causans; by which he loses his fees, &c., and that is causa causata, the point of the action, 7 H. 4. 44 b. If an action on the case has sufficient matter, although it has matter impertinent also, yet it shall be maintainable."

In *Pitts* v. *Gaince and Another* (*a*), the declaration stated, that the plaintiff was master of a ship, which was laden and ready to sail, and that defendant entered and seized the ship, and detained the ship. It was objected that the action should have been in trespass; and 4 Ed. 3. 24; Palmer, 47; 13 H. 7. 26, were cited as authorities. *Holt*, C. J., said, "The master only declares as a particular officer, and could only recover for his particular loss; yet he might have brought trespass, as a bailiff of goods may, and then, as a bailiff, he could only have declared upon his possession, so that he was possessed, which is enough to maintain trespass." Judgment pro querente.

So, in *Mikes* v. *Caby* (*b*), it was held, that an action on the case would lie by the master of a ship against the officers of a corporation for wrongfully distraining his cargo, whereby he lost his voyage, Lord *Holt* expressly stating, "that he might have trespass or case, at his election."

Where the injury has been caused partly by mis-feasance, and partly by non-

(*a*) Salk. 10.

(*b*) 12 Mod. 382.

feasance, it seems to have been clearly settled, that an action on the case may
*411 be * maintained (*a*); there are, however, cases in which it has been held, that case would lie, though the injury complained of was the immediate result of the wrongful act of the defendant (*b*) (37).

From these authorities it appears to be clear, that there are many instances of actions on the case in which the cause of the damage may be alleged to have been done vi et armis.

(*a*) *Scott* v. *Shepherd*, 2 W. Blackstone, 897: *Ogle* v. *Barnes and Others*, 8 T. R. 188: *Branscomb* v. *Bridges*, 1 B. & Cr. 145: *Moreton* v. *Harden*, 4 B. & Cr. 223.

(*b*) *Williams* v. *Holland*, 10 Bing. 112, and cases there cited: *Smith* v. *Goodwin*, 4 B. & Ald. 419: *Wells* v. *Ody*, per *Parke*, B. supra, p. 407.

In *Dumbree* v. *Dee*, 2 Rolle, Rep. 139, the Court held the declaration bad, because it contained two distinct causes of action—one, "the breaking open and carrying away the piers," the subject of an action of trespass; the other, "the locking up the plaintiff's own pew, *per quod* he could not sit there to hear divine service," the subject of an action on the case.

(37) In *Wall* v. *Osborn*, 12 Wend. 39, which was trespass for entering upon the plaintiff's land and carrying away a mill. It appeared that the mill for the most part stood upon the land of the plaintiff, but projected a few inches upon the defendant, the owner of the adjoining lot. Defendant sold the mill to a third person and promised to aid in taking it away. The defendant removed the mill, but it did not appear that defendant assisted. Chief Justice Jones, before whom the trial was had, instructed the jury, that the sale of the mill and the promise of aid did not make the defendant guilty of a trespass. Upon error sued out, however, the supreme court reversed the judgment, saying:—"If the law were otherwise, great injury might ensue, without remedy to the aggrieved party." In *Guille* v. *Swan*, 19 J. R. 382, Ch. J., Spencer says: "To render one man liable in trespass for the act of others, it must appear either that they acted in concert, or that the act of the individual sought to be charged, ordinarily and naturally produced the acts of the others. In *Scott* v. *Shepherd*, 2 Black. R. 892, Ch. J., De Grey laid it down as a correct principle, that one who does an unlawful act is considered the doer of all that follows. In the language of Lord Ellenborough, *Scam* v. *Bray*, 3 East, 595, he is the *causa causans*—the prime mover of the damage to the plaintiff. By the act of selling the plaintiff's property, the defendant assumed a control over it, and by appointing a time for the removal of the mill in the case of *Wall* v. *Osborn*, *supra*, he virtually directed the purchaser to take it away. In the case of *Morgan* v. *Varick*, 8 Wend. 594, the defendant sold the plaintiff's steam engine, and requested the purchaser to take it away; and he was held liable in trespass. The principle has been frequently recognized, that any unlawful interference with or assertion of control over the property of another, is sufficient to subject the party to an action of trespass or trover, 8 ib. 613; 7 Cowen, 735; See also 10 Mass. 125.

(c)—*Pleadings in Actions for Disturbance.*

The Declaration—The Allegation of Title.]—Whenever a plaintiff claims more than he is entitled to of common right, he must allege in his declaration that—he ought to have that which he demands (*a*).

Thus, in a recent case (*b*), the declaration stated that the plaintiff was possessed of certain rooms in a dwelling-house, and in respect thereof was entitled to an easement to take water from a cistern, and that defendant wrongfully, &c., "locked and fastened, and caused and procured to be locked and fastened up, a certain door and doorway, situate and being in the said dwelling-house, and leading to the said cistern, *and kept and continued *412 the same so locked and fastened up for a long space of time, to wit, &c., and thereby, for and during all that time, continually hindered and prevented the plaintiff and his family from having access to the said cistern, and absolutely prevented plaintiff and his said family from taking any water from the said cistern, and wholly excluded them from the use, benefit, and enjoyment of the same; and plaintiff and his family, by means of the premises, could not, during any part of the time aforesaid, obtain water from the said cistern, nor have the use and benefit of the same, as they of right &c.

After verdict for the plaintiff upon an issue traversing the right to the cistern, the Court arrested the judgment, upon the ground, that the issues having passed over the question of right to the doorway, no facts could be intended, and that the judgment must be taken as to this point, as if it were by default or on general demurrer; and though if the declaration had alleged generally a right to use the cistern, and had complained that that right was interrupted, it might have been good; yet, as it had stated the particular mode of obstruction, by fastening the door, the plaintiff was bound to allege a right to pass through the door;" and the fastening was assimilated to a common obstruction to a way, where the right to use the way should appear. "The plaintiff," said Lord *Denman*, "is prevented from going where he is not shown to have a right to go, in order to get to a place where he has a right to go."

In some early authorities a distinction is taken as to the mode of alleging title in actions against strangers and the terretenant of the servient tenement: in the former case it was admitted that a general allegation, * "that *413 he had and ought to have the right claimed," was sufficient; while in the lat-

(*a*) *Wyatt* v. *Harrison*, 3 B. & Ad. 871.

(*b*) *Tebbutt* v. *Selby*, 6 Ad. & Ellis, 786.

ter case it was said, that a title by grant or prescription must be shown, it being an attempt "to put a charge upon" the defendant (*a*).

It appears, however, to be now clearly settled, that in all cases, whether the action be brought against the servient owner or a stranger, a general allegation of right is sufficient (*b*).

It has been usual in practice, in declaring for a disturbance of continuous easements, as rights to light and support, to allege antiquity of enjoyment; although such an allegation may possibly, in some cases, be operative where the general claim of right is omitted (*c*); yet, if the latter be inserted, there is no more reason for requiring a specific description of title in these instances than in the case of a way (*d*) or water-course (*e*); and it has accordingly been decided, that, in an action for stopping light, a declaration, alleging that the plaintiff was possessed of a house in which he ought to have such and such lights, was good on demurrer *(f)*.

Where the plaintiff claims under a disposition of the owner of two tenements, (as in the case of *Compton* v. *Richards (g)*,) such allegation of antiquity

*414 must be *omitted; or, if inserted, must be treated as immaterial.

In actions by the reversioner, he must show that he sues in that capacity, and allege that the disturbance is to the injury of his reversionary estate (*h*).

As the right to an easement exists in respect of the dominant tenement, the declaration usually states the possession of the tenement by the plaintiff, and that by reason thereof he was entitled to the right for the disturbance of which the action is brought.

A right of way may be alleged to be appurtenant to the dominant tenement *(i)*.

(a) St. John v. *Moody*, 3 Keble, 529, S. C. 531; *Blockley* v. *Slater*, 1 Lutw. 119; *Winford* v. *Wollaston*, 3 Levinz, 266.

(b) Tennant v. *Goldwin*, 1 Salk. 360; S. C. 2 Ld. Raym. 1089; *Rider* v. *Smith*, 3 T. R. 766; 2 Wms. Saund, 113 a, note; Com. Dig. Pleader (C. 39); see, also, *Trower* v. *Chadwick*, 3 Scott, 699.

(c) Com. Dig. Prescription, H. *Wyatt* v *Harrison*, 3 B. & Ad. 871.

(d) Blockley v. *Slater*, 1 Lut. 119.

(e) Sandys v. *Trefusis*, Cro. Car. 577.

(f) Villiers v. *Ball and Others*, Shower, 7.

(g) 1 Price, 27. Ante, p. 65.

(h) Jackson v. *Peasked*, 1 M. & Sel. 234.

(i) Bright v. *Walker*, 1 Cr. M. & Ros. 211

"However, although the plaintiff is at liberty to declare upon his possession generally, yet if he undertakes to set out a title, and does it insufficiently, the declaration is bad" *(a)*. If, however, the title, as stated on the face of the declaration, is good, it has been said that the plaintiff is not bound to prove the same title as he has set out in his declaration *(b)*, "for the disturbance is the gist of the action, and the title is only inducement, and cannot be traversed." He must prove the same right, but he need not prove the same title (*c*).

In *Frankum* v. *Lord Falmouth* (*d*), the plaintiff alleged that he was possessed of a certain mill, "and by reason thereof had, and of right ought to have, a *certain water-course, which had been used and accustomed to flow, *415 and still of right ought to flow to it." The defendant traversed the plaintiff's right to the water modo et forma.

It appeared, at the trial, that the stream was an ancient stream, but that the mill had not been built more than fourteen years. *Alderson*, B., held that this evidence did not support the right claimed, and refused to amend the record, on the ground that such amendment would cause a material alteration in the issues; he, however, directed the jury to find the facts specially; and the special finding was indorsed on the record, under the 3 & 4 Will. 4, c. 42, s. 4. The Court of King's Bench, on motion, agreed with the learned Judge, and refused a rule to enter judgement for the plaintiff. The Court said, "the variance was material, and the defendant might have prepared his defence to meet the claim made in respect of the mill, and not of the land."

The real ground of this decision appears to have been, that not only was the title different, but the right proved was altogether a different one from that stated in the declaration. The right proved was to the flow of the stream in its accustomed course, in other words, to the natural easement. The right alleged was in respect of an appropriation, which, to confer a title, must have been ancient, and might have been in derogation of the natural easement, and, at all events, was totally irrespective of it.

By the recent statute, in all actions upon the case, and other pleadings wherein the party claiming may "now by law allege his right generally, without averring the existence of such right from time immemorial, * such gen- *416 eral allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided shall be admissible in evidence, to sustain or rebut such allegation" (s. 5).

(*a*) 1 Wms. Saund. 164 a; *Dorne* v. *Cashfield*, 1 Salk. 363; *Crowther* v. *Oldfield*, 2 Ld. Raym. 1230.

(*b*) 1 Wms. Saunders, 146 a.

(*c*) Buller, N. P. 76; *Ferrer* v. *Johnson*, Cro. Eliz. 336.

(*d*) 2 Adol. & Ellis, 452; S. C. 4 Nev. & Man. 330.

Remedy by action at law.	Description of right.

The plaintiff must describe in his declaration the nature of the right, in the enjoyment of which he has been disturbed—thus, in an action for the disturbance of a way ; he must state the *terminus a quo* and *ad quem*, and the kind of way he claims, as a foot-way (*a*), &c. ; but a precise local description, as by alleging the land to be in any particular place, is not requisite,—it is sufficient to state it as being within the county (*b*), nor is it necessary to mention the intervening closes (*c*) (38).

(*a*) Vide Com. Dig. Action upon the Case for a Disturbance, B. (1) ; Chemin, D. (2).

(*b*) *Mersey and Irwell Navigation* v. *Douglas*, 2 East, 502.

(*c*) *Simpson* v. *Lcwthwaite*, 3 B. & Adol. 266.

(38) *Declaration, form of.*—In *Twiss* v. *Baldwin*, 9 Conn. 291, it was contended that where plaintiffs set out a right to use the water according to its *natural* course, and *without interruption*, this was descriptive of their right and must be proved. But the Court overruled the objection—saying :—Here the plaintiffs declare on a right to the use of the water without interruption ; yet they also state, that the defendants have a dam *above*, which, of course, must form some interruption. Of this, however, they do not complain, but that they have unreasonably penned and stopped the water. The unreasonable detention, then, is the burden of the complaint ; and if the allegation respecting the natural course of the stream, or the right to enjoy it without hinderance or interruption, were stricken out, it would not effect the plaintiffs right to recover. Williams, J. in delivering the judgment of the court observes :—" Is there such a variance between the proof exhibited and the allegations, that the plaintiffs cannot recover ? It is said, that the plaintiffs have set forth a perscriptive right ; and must, therefore, prove it. " The claim in the declaration is, that on the 28th of June, 1830, and ever since the plaintiffs had a clock manufactory on a stream called the Harbour, and that they had right to use and employ the water of said stream, and that the same should flow, without interruption, over and through their land and in their race-way to there manufactory, in a convenient and customary manner, according to the natural and usual flow of said stream, and without the hinderance of the defendants or any other person.

" This, it is said, is a presumptive right, which must be precisely proved. The claim is to the enjoyment of the water in a convenient and customary manner ; but whether that is to be proved, by occupancy, or grant or prescription, does not and need not, appear. That the right is set out as perscriptive rights formerly were, (Luttrell's case, 4 Co. 84.) or as they now are in a plea, (Am. Prec. Dec.200.) will not be claimed. But, it is said, that the words *currere solebat et consuevit*, are considered as equivalant to setting out a title by prescription. *Surry* v. *Piggot*,

Remedy by action at law.	Allegation of breach of duty.

Of the Statement of the Breach.]—In an action on the case for a disturbance, it is sufficient to allege a disturbance generally, without showing the particular manner of the disturbance (*a*).

"I incline to think," said Lord *Ellenborough*, (*b*), "that the gravamen need not be described with any local certainty. A plaintiff in such an action may indeed make it necessary to prove the gravamen in a particular place, by giving it a specific local description, as by alleging the nuisance as standing and being in a certain place, particularly described; but * in general such *417 particularity is not necessary." "It is sufficient to describe the substance of the injury, in order to give the other party notice of what he is to defend."

(*a*) Com. Dig. Action on the Case for a Disturbance, B. (1); *Anon.* 3 Leon. 13; *Doucne* v. *Dee*, Cro. Jac. 604.

(*b*) *Mersey and Irwell Navigation* v. *Douglas*, 2 East, 497.

Poph. 171. *Hebblethwaite* v. *Palmer*, 3 Mod. 25. *Tenant* v. *Godwin*, 2 Ld. Raym. 1094. It is true, that in support of a verdict, where these words were found in a declaration, the court would presume that a prescriptive right was proved under them; but it does not follow, that they would have been so considered, had the objection been made under a demurrer. Indeed, Lord Holt, whose opinion has been relied upon, in *Roscwell* v. *Prior*, 1 Ld. Raym. 392. S. C. 2 Salk. 459. held, in a prescription for ancient lights, that the words *consuevit et debuit* would not be sufficient upon a demurrer. As it is now settled, that bare possession is sufficient to support an action of this kind, (Anon. Cro. Car. 499.) there is no necessity to set out a prescriptive right; much less is it necessary to presume, that it was intended by these words to set out such a right, for the purpose of defeating the plaintiff, by supposing a variance to exist between the allegations and the proofs.

"This declaration is much like the form now used in England, founded on possession, where it is intended to avoid the preciseness, required in setting out a prescriptive right. *Williams* v. *Morcland*, 2 Barn. & Cres. 910. (9 Serg. & Lowb. 269.) *Sheers* v. *Wood*, 7 J. B. Moore, 345. (17 Serg. & Lowb. 76.) *Liggings* v. *Inge* & al. 7 Bing. 682. (20 Serg. & Lowb. 287.) I think, therefore, the plaintiffs were not bound to prove a prescriptive right.

In *Rickets* v. *Sxey*, 2 B. & Ald. 360, the plaintiff declared, that he was possessed of a certain messuage, and divers, viz. 150 acres of land, with the appurtenances, in the parish of A. B, and by reason thereof, he ought to have, and still of right ought to have, common of pasture in and upon said messuage and land in and upon a certain waste, called the Wheat Common, &c. At the trial, it appeared, that the right was claimed in respect of Ashford Hall and the land usually held with it; on which issue the plaintiff failed. It also appeared, that he was possessed of land within the parish in respect of which he was entitled to a right of common, on which there was no messuage; and it was held, that if the plaintiff prove part only, he was entitled to recover. Best, J. said: "That in cases of contract and pre-

Remedy by action at law.	Allegation of breach of duty.

"It would have been sufficient," said Mr. J. *Le Blanc*, "to have stated that they diverted the water above the navigation of the plaintiffs, by means of which the injury complained of happened."

In the recent case of *Tebbutt* v. *Selby*, *Patteson*, J., appears to have doubted whether such a general allegation of obstruction would be sufficient *(a)*.

In all actions for the disturbance of an easement, the venue is local *(b)*, but, as in other cases of local actions, it may be changed after issue joined, though not before *(c)*, by order of the court or a judge *(d)*.

(a) 6 Adol. & Ellis, 793.

(b) Com. Dig. Action, D. 3.

(c) *Bell* v. *Harrison*, 2 Cr. M. & Ros. 733.

(d) 3 & 4 W. 4, c. 42, s. 22.

scription, the allegation must be proved as laid; but that rule is not applicable to cases of tort, where the right is merely inducement to the action. In this case, the plaintiff is entitled to judgement, if he has a right of common, and that right has been disturbed, by the defendants. Now, he has stated a right in his declaration, and has proved the same right in part, by his evidence; and I think that is sufficient to entitle him to damages pro tanto." (p. 367.) Holroyd, J. said: "It is quite enough, in cases of tort, if you prove the same ground of action laid in the declaration, although not to the extent there stated; and in such cases, the court will give judgment as if the declaration had been originally confined to the action proved. In cases of contract and prescription, it is different; for in the former, if all that is stated in the declaration be not proved, it is proof of a different contract and a different ground of action. In the latter case, where a prescription is alleged in bar, it is one entire thing, and must be proved as laid. In the present case, the declaration does not allege any prescription, but states, that the plaintiff was possessed of land and a messuage, and that he ought in respect of them to have a right of common. Now, the proof given is not of a different allegation, but of the same allegation in part; and that is sufficient." (p. 366) The above case was applied by the court to the case of *Twiss* v. *Baldwin*, 9 Cown. 305, where the plaintiffs in case for a disturbance in the enjoyment of water, did not prove all they had alleged; they did not prove their right to the extent stated; but they established a right, and that they had been disturbed in the enjoyment of it. The court said:—"The proof, then, is not of a different allegation, but of the same allegation in part. That proof of part of the essential allegations in an action founded on tort, is sufficient the action, is certainly true, 1 Chit. Plead. 373. Ca. temp. Hardw. 121. And he need not ever prove the same title. Bul. N. P. 76." The plaintiff in an action of tort, need only prove enough of the facts alleged, to show that he has a good cause of action.

Of the Plea.]—Previous to the recent modification of the rules of pleading, the plea of the general issue, in an action on the case, in addition to traversing the whole declaration, was sufficiently comprehensive to let in almost every possible defence.

By the new rules, the plea of not guilty in actions on the case "shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the indictment; and no other defence than such denial shall be admissible; all other pleas, or denial, shall take issue on some particular matter of fact alleged in the declaration."

"*Ex. gr.* In an action on the case for a nuisance to *the occupation *418 of a house, by carrying on an offensive trade, the plea of not guilty will operate only as a denial that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

"In an action on the case for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way."

In *Frankum* v. *Lord Falmouth* (*a*), the declaration set out that the plaintiff was possessed of a water grist mill, and by reason thereof ought to have had and enjoyed the water of a certain stream flowing to the said mill. The breach alleged that the defendant "wrongfully and injuriously diverted the stream," &c. The fact of the diversion having been proved, it was held, that the plea of not guilty to the allegation of "wrongfully and injuriously diverting" did not put the title in issue, and that the plaintiff was therefore entitled to a verdict.

So in *Dukes* v. *Gosling* (*b*), in an action for disturbing a right of way, it was held that the plea of not guilty put in issue the fact of obstruction only, and admitted the inducement, as stated in the declaration.

If the defendant relies upon a loss of the easement—for the disturbance of which the action is brought—by the plaintiff's non-user, such non-user must be pleaded according to its legal effect (*c*). In this case it should seem he ought to traverse the plaintiff's right.

(*a*) 2 Ad. & Ellis, 452; S. C. 4 Nev. & Man. 330.

(*b*) In 1 Bing. N. C. 588; S. C. 1 Scott, 750. See *Trower* v. *Chadwick*, 3 Scott, 699; S. C. 3 Bing. N. C. 334.

(*c*) *Manning* v. *Wasdale*, 5 Adol & Ellis, 758.

(d) *Of the Pleadings where Tort is justified under an Easement.*

*419 *The pleadings hitherto considered have been those used in actions on the case brought for the disturbance of an easement. The pleadings in actions in which the defendant justifies the act complained of by virtue of an easement, present greater difficulties.

The defendant suffers from the operation of the inveterate rule of pleading, which requires greater certainty and precision in the plea than in the declaration *(a)*.

In a declaration for a disturbance to an easement, it has been already seen that a general allegation of title is sufficient (*b*). In a plea justifying by virtue of such a right, the title to the right must be set out formally. So long as the distinction existed between the mode of stating title in actions, against a wrong-doer and against the terre-tenant, this rule was consistent; but it is somewhat difficult to say why, in an action against a terre-tenant seeking to impose a burthen upon him, a greater degree of laxity should have been permitted to the claimant, when alleging his right, than when defending himself under it. In either case, the title under which he claims is equally within his own knowledge.

These actions are for the most part actions of trespass; though, in some instances, as that of legalized acts of nuisance, the proper form of action is an action on the case.

It is clearly established, that in a plea justifying the act complained of under an easement, the particular title upon which the defendant relies, whether by

*420 grant *or prescription, or by user under the statute, must be set out.

If the defendant justifies at common law, whether by grant expressed or implied, as by prescription or otherwise, he must show that the easement has been annexed to the fee in the dominant tenement; and if he cannot allege himself to be the owner of the fee, he must deduce the title to his own particular estate (*c*).

In justifying under a prescriptive right of way, it is necessary to set out the termini accurately (*d*), but it is not essential that all the intervening closes over

(*a*) *Grimstone* v. *Marlow*, 4 T. R. 718; 1 Wms. Saund. 346, n.

(*b*) Vide supra, p. 413.

(*c*) See Com. Dig. Chemin, D. 2; Stephen on Pleading, 3rd ed. 305, Rule 5; 1 Wms. Saund. 346 a; *Bird* v. *Dickenson*, 2 Lutw. 1526; Per *Coleridge*, J., in *Bailey* v. *Appleyard*, 8 Ad. & Ellis, 167.

(*d*) See per *Doddridge*, J., in *Sloman* v. *West*, cited 1 East, 380.

which the way passes should be mentioned (*a*); and this is equally the case, though one of the intervening closes is shown to be in the defendant's own occupation (*b*) (39).

By the Prescription Act it is declared, "That in all pleadings to actions of trespass, and in all other pleadings, wherein before the passing of this act it would have been necessary to have alleged the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupier of the tenement in respect whereof the same is claimed, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely upon any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of *fact or of law *421 not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation." (s. 5).

The periods, (twenty or forty years), herein mentioned, must be those immediately preceding the bringing of some suit or action in which the claim shall be brought in question (*c*). The plea need not state the enjoyment to have been had during the requisite period "next" before the action brought, such words being nothing more than an exposition of the proof required to establish "the right (*d*);" but if the words "next before" are used, the enjoy-

(*a*) *Simpson* v. *Lewthwaite*, 3 B. & Ad. 226.

(*b*) *Jackson* v. *Shillito*, cited in *Wright* v. *Rattray*, 1 East, 381.

(*c*) *Monmouth Canal Company* v. *Harford*, 1 Cr. M. & Ros. 614; *Tickle* v. *Brown*, 4 Ad. & El. 369; *Wright* v. *Williams*, 1 M. & W. 77.

(*d*) *Jones* v. *Price*, 3 Scott, 376; S. C. 3 Bing. N. C. 52.

(39) If the defendant in an action of trespass *quare*, &c. plead a right of way: Held, that the plea admits the plaintiff's right to recover, unless the facts presented in the plea prevent it. He admits every thing that the plaintiff was bound to prove, had there been a special plea. *Law* v. *Hempstead*, 12 Conn. R. 23. By such plea, he admits that the plaintiff was in possession of the premises mentioned in the declaration; for it is a well settled principle, that trespass is a mere possessory action. This plea then admits all that is necessary for the plaintiff's recovery; and consequently, all that can be required. But if it is admitted, that the defendant, by his plea, acknowledges that the plaintiff is owner, as well as in possession, yet he does not admit, that the persons under whom he claims, owned the same ground 18 years before. And where *that* fact was denied by defendant; and not being alleged in the declaration, it was held not to be admitted by the plea.

ment must be alleged with reference to the bringing of the action, and not to the commission of the acts complained of (*a*).

It would seem that such a plea need not state the enjoyment to have been without interruption (*b*). Under a plea of forty years' user, according to the statute, evidence of what took place before that period is admissible as showing the state of things at the commencement of the forty years' enjoyment (*c*).

In pleading at common law a right to an easement by a modern lost grant, both the date and parties to the supposed instrument must be set out (*d*).

There appears to be no precedent for a plea of an easement arising from *422 the disposition of the owner of *two tenements; but it should seem, that, as in the easements of necessity, the right must be pleaded as arising by implied grant from the joint owner at the time of severance. The plea might allege the joint ownership and subsequent conveyance to the defendant, and aver the apparent and continuous nature of the easement, and its existence at the period of severance.

The plea of an easement of necessity must, in like manner, allege the joint ownership of the conveyance, and that the easement is essential to the full enjoyment of the principal thing conveyed or reserved.

By the new rules, H. T. 4 W. 4, it is declared, that "Where, in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle, and on foot, in the same plea, and issue is taken thereon, the plea shall be taken distributively; and if a right of way with cattle, or on foot only, shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified."

And in all actions in which such right of way or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively.

This has been held to apply to the case of a trespass committed on three closes, where no evidence of title was given as to one of them (*e*); and to a *423 claim of right to pass and repass for the purpose of carrying *water and goods, where the jury found for the defendant as to the former, but nega-

(*a*) *Richards* v. *Fry*, 3 Nev. & P. 67.

(*b*) Per *Patteson*, J., in *Richards* v. *Fry*, 3 Nev. & P. 67.

(*c*) *Lawson* v. *Langley*, 4 Ad. & Ellis, 890.

(*d*) *Hendy* v. *Stevenson*, 10 East, 55.

(*e*) *Phythian* v. *White*, 1 M. & W. 216.

Justification under easement. Replication de injuria.

tived the latter right (*a*); but not to a case, where, on issue joined on a plea of right of way with carts, carriages, horses, and on foot, at all times, over the locus in quo, the jury found that the defendant had a right of way for the purpose of carting timber only (*b*).

Before the new rules of pleading there would have been no necessity to plead specially a justification in any action on the case for a nuisance; now, however, a party justifying under an easement to carry on an offensive trade must state his title with the same particularity as in actions of trespass.

The plea of not guilty, since the new rules, puts in issue the fact of nuisance, and that the defendant caused it (*c*).

Of the Replication.]—If the defendant justifies under a prescriptive title, the plaintiff cannot reply *de injuria*, generally, but must reply specially to some material allegation in the plea (*d*).

If issue be taken on the prescription, it seems the seisin of the que estate is admitted, and *vice versa* (*e*).

If the plaintiff does not contest the defendant's right, as stated in the plea, but contends that the acts complained of were not done in pursuance of the right; as, for instance, if a way has been used, not for the convenience of the dominant tenement, but for *other tenements belonging to the same *424 owner, such excess must be new assigned (*f*).

By the 5th section of the Prescription Act, already cited, "any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, shall be specially alleged and set forth."

Upon this clause it has been decided, in the case of *Tickle* v. *Brown* (*g*), that where a defendant justifies, under an enjoyment of twenty or forty years, if the plaintiff relies upon a license covering the whole of that period, he must reply such license specially; but a license granted and acted on during the period, may be given in evidence under the general traverse of the enjoyment "during the period alleged, showing that there was not, at the time when the

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(*a*) *Knight* v. *Moore*, 3 Scott, 326; S. C. 3 Bing. N. C. 3.

(*b*) *Higham* v. *Rabbit*, C. P. Trin. Term, 1839.

(*c*) *Dawson* v. *Moore*, 6 Car. & P. 25.

(*d*) *Crogate's case*, 8 Rep. 66 b; *Selby* v. *Bardons*, 3 B. & Ad. 2; S. C. in Error, 1 Cr. & Mee. 500.

(*e*) *Stott* v. *Stott*, 16 East, 348.

(*f*) Ibid. Vide ante, p. 330, (Extent and mode of enjoyment.)

(*g*) 4 Adol. & Ellis, 369.

agreement was made, an enjoyment as of right;" and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years."

In *Beasley* v. *Clark* (*a*), *Tindal*, C. J., said:—"Under a replication, denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and license, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section, not incon-

*425 sistent with the *simple fact of 'enjoyment,' being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised as of right."

In *Onley* v. *Gardiner* (*b*), the Court of Exchequer decided that unity of possession was "inconsistent with the simple fact of enjoyment as of right," and, therefore, need not be specially pleaded. "The simple fact of enjoyment," referred to in the fifth section, is an enjoyment as "of right;" and proof that there was an occasional unity of possession is as much in denial of that allegation, as the occasionally asking permission would be.

In pleadings at common law, it appears to have been held, that a prescription might have been avoided by an allegation of unity of possession, without a traverse; on the ground that it was not a bare matter of fact, but intermixed with matter of law (*c*). Thus, in 5 H. 7, 14, it is said, "Where one shall make justification for rent, and by prescription the plea shall say and allege a unity of possession in his (the plaintiff's) hand, or in his ancestor, or in another, through whom he claims, and shall take no traverse to the prescription; and yet the prescription is alleged to have continued all time, (*toul temps*), which cannot be, if there was unity of possession, which is contrary, and in the affirmative, and still he shall take no traverse; and the cause is, for that there is a difficulty for the jurors; and it is matter in law, whether, notwithstanding the unity of possession, the rent continues or not. The same is the law, where one prescribes for a common, unity of possession is a good plea" (40).

(*a*) 3 Scott, 258.

(*b*) 4 Mee. & W. 498.

(*c*) *Hussey* v. *Jacob*, 1 Lord Raym. 88.

(40) In *Spear* v. *Bicknell*, 5 Mass. 125:—Parsons, C. J. The defendant pleaded an easement, for the public in the plaintiff's land. This is not personal estate,

General rule as to interference by Courts of Equity.

§ 2.—*Remedy by Suit in Equity.*

* As a general rule, Courts of Equity will interfere by injunction *426 in those cases of disturbance of easements only—where the right of the party complaining is clearly established, and the injury which he must necessarily sustain, if the work be allowed to proceed, is of such a nature that no adequate compensation can be afforded by damages only, and "when delay itself would be a wrong (*a*)."

"The leading principle," said Lord *Brougham* in *Blakemore* v. *Glamorganshire Canal Navigation* (*b*), "on which I proceed, in dealing with this applica-

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(*a*) Per Sir *T. Plumer*, M. R., in *Winstanley* v. *Lee*, 2 Swans. 336.

(*b*) 1 My. & Kee. 185.

but is a real franchise, holden by the Commonwealth for the benefit of all the citizens, and which greatly affects the plaintiff's interest in the close. And although in common parlance, a right of way over the land of others may not be called real estate; yet, I think it must be so considered within the intent of the statute, excluding justices from taking cognisanze of actions in which the title to real estate shall be in question.

"It is objected that the defendant having prescribed for a highway in his bar, and the plaintiff having set up another prescription in his replication, he ought to have traversed the defendant's prescription; and it is contended that this exception may be taken on general demurrer. If well founded, the objection may be so taken without doubt; for it is a substantial fault. If the plaintiff does not, when replying another prescription, traverse the defendant's, the pleadings can never be brought to an issue. The defendant cannot traverse the prescription set up by the plaintiff in his replication, because it would be a departure from his bar; and if he rejoined his own prescription, the plaintiff might surrejoin his prescription, and the pleadings might be endless.

"But is this objection well founded? The defendant, in his bar, pleads no prescription, but only alleges an highway for all persons. This allegation the plaintiff is not disposed to deny, but to qualify. He confesses the highway, but prescribes for a gate, to be opened and shut by all persons passing through. The prescription may be good in law, for it might have a lawful commencement. And a replication of this kind is in principle like the case of *Kenckin* v. *Knight*, 1 Wils. 253. There the defendant in trespass quare clausum fregit justified by a custom to put all cattle levant and couchant, and that he accordingly put in his swine. The plaintiff replies, and admits the custom to be true as far as it goes, but alleges that, by the custom, the swine must be rung. On demurrer it was holden that the plaintiff need not traverse the custom pleaded by the defendant, because his replication is only a qualification of it.

tion—the principle which, I humbly conceive, ought, generally speaking, to be the guide of the Court, and to limit its discretion in granting injunctions, at least where no very special circumstances occur—is, that such a restraint shall be imposed as may suffice to stop the mischief complained of, and, where it is to stay injury, to keep things as they are for the present."

If the nuisance complained of be in its nature useful and necessary to the public, though productive of inconvenience to individuals, as a small-pox hospital, the Court will not interfere by injunction (*a*): so, too, where the injury is of a temporary nature only (*b*).

Where the right claimed is clearly shown to exist by contract, express or implied, and the contract can only be effectually enforced by injunction, a Court of Equity will interpose.

* 427 * In *Marten* v. *Nutkin*, (*c*), a bill was filed for an injunction against

(*a*) *Baines* v. *Baker*, Ambler, 158.

(*b*) *Coulson* v. *White*, 3 Atkins, 21.

(*c*) 2 P. Wms. 266.

"If it be true that the plaintiff might have traversed that the gate was wrongfully on the way, and that on this traverse an issue might have been joined, this objection is certainly formal; because the defendant might have regularly averted the wrongful erection of the gate, and traversed the plaintiff's prescription, on which a regular issue might have been joined on the merits.

"This objection ought not to prevail. And on this point there is much doubt whether this traverse of the wrongful erection of the gate would have been good. For the defendant in his bar, pleads it not directly, but as a mere inference, because it was on an highway.

"Another objection is, that the plaintiff has not brought himself within his own prescription he cannot erect a gate at all seasons of the year at his pleasure, but only when it shall be found necessary to preserve the close, and the grass, and the emblements; and the words "when it shall be found necessary" must be understood as equivalent to the words "when it shall be necessary." But he alleges that in July, 1799, the plaintiff finding it necessary, erected the gate. This is certainly an informality in his averment, but I think not matter of substance; for if the defendant had traversed that the plaintiff found it necessary, the issue would have been with him, unless in fact the gate had been necessary. For if it had not, the jury would not return that the plaintiff found it so.

"Another objection is, that the plaintiff alleges that from that time the gate had been kept up and maintained to the time when, &c. in manner aforesaid, for the purpose aforesaid, without alleging that at the time when, &c. even he, the plaintiff, had found it necessary to do so.

the churchwardens, &c., of Hammersmith, "to stay the ringing of the 5 o'clock bell: the Court granted the injunction during the lives of the plaintiffs and the survivors of them, as it appeared that the defendants had agreed not to ring the five o'clock bell upon consideration that the plaintiffs should build a cupola to the church, which he accordingly did, and the bell was silenced for two years, after which the annoyance complained of took place.

Unless, however, the plaintiff's title appears on the face of the bill to be fully established, the defendant may demur to the bill for want of equity: thus, in the case of *Weller* v. *Smeaton*, (*a*), the bill stated the plaintiff to be the lessee of an ancient mill, and that the defendant had erected flood-gates, and other works, on the river, which obstructed the plaintiff's mill, and prayed they might be removed: the Court allowed a demurrer for want of equity, it appearing that the works had been erected for upward of three years, and no steps had been taken to establish the plaintiff's right at law; and, in all cases in which doubt exists as to the legal right, the Court will compel the parties to go to trial at law, either by action or indictment, without delay, either dis-

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(*a*) 1 Cox, 102.

"There appears to be great weight in this objection. The plaintiff may be considered as averring that he kept up and maintained the gate, to be shut by all persons who opened and passed through it, for the purpose of preserving the close, and the grass, and the emblements. All this may be true, and yet, at the time when, &c. the gate might not be necessary for that purpose. And the replication is certainly defective for not averring that at the time of the trespass, the gate was found necessary for the preservation of the close, and of the grass and emblements. And of this defect the defendant might have availed himself by demurring to the replication. But there are faults in pleading, bad on demurrer, which may be waived by the adverse party pleading over. The rule seems to be correctly stated in 1 Lev. 194, *Cutler* et al. Where the plaintiff in his replication makes a title, and it thereby appears he has a bad title, no rejoinder can by any implication make it good. But when it appears that he has a title, but it is defectively pleaded, the rejoinder admitting this matter, and tendering an issue on other matters, will make the replication good.

"In the present case, the plaintiff avers that at the time when, &c. he kept up the gate for the preservation of the close, and the grass and emblements. The implication is strong, that the gate was then necessary for this purpose; and if the defendant had traversed the necessity of the gate at that time, a material issue might have been joined, and judgment might have been entered on the verdict for the party prevailing. But the defendant neither demurs, nor makes the traverse; but traverses several other distinct matters, so that his rejoinder is bad on special demurrer for duplicity. By not traversing the necessity of the gate, he has admitted it, when he traverses other matters, and does not demur.

solving the injunction or maintaining it until such trial has taken place, as the justice of the case, and the interests to be affected by the determination, appear to require (*a*).

So, in *Robinson* v. *Lord Byron* (*b*), where an injunction was prayed for
*428 aagainst the plaintiff's using * the water of a stream in any other manner than it had been used before, and it appeared that the defendant sometimes withheld the water, and at others discharged it in such quantities as to create a danger of sweeping away the plaintiff's mills; the injunction was granted as prayed, until an action then pending for the injury complained of was decided; and the right being found for the plaintiff, the injunction was made perpetual.

In *The Attorney-General* v. *Cleaver* (*c*), where the application was for an injunction to prevent the defendant carrying on his trade as a soap boiler and black ash manufacturer, the Court refused the injunction, but accelerated the trial of the indictment then depending.

So, also, in *Crowder* v. *Tinkler* (*d*), where the injunction was prayed to prevent the plaintiffs from using a certain building, when completed, as a powder magazine, which would be productive of great danger to the plaintiff's house, though no actual injury had been sustained, Lord *Eldon*, after considering and commenting on most of the previous decisions, and observing that there was contradictory evidence as to the right of the defendant to build a powder-mill upon the spot in question, and also as to the actual amount of danger to the plaintiffs from the erection, if completed, said, "Upon the whole, the proper course is, that the plaintiffs shall indict this building as a nuisance, and the defendants shall plead without traversing, so that it may be tried at the next assizes, and put the concern in such circumstances that it may be carried on without imminent danger. If they will undertake to carry it on so that no more powder shall be kept there than is necessary for the purpose of carry-
*429 ing on the trade, with *liberty to apply on the result of the trial, that appears to be the best way to dispose of this case." Injunction dissolved accordingly.

The principles which regulate the procedure of Courts of Equity, in applications of this nature, are fully laid down by Lord *Eldon* in *The Attorney-General* v. *Nichol* (*e*). The object of the information filed in that case was to re-

(*a*) Vide *Winstanley* v. *Lee*, 2 Swans. 336-7.

(*b*) 1 Bro. C. C. 588.

(*c*) 18 Ves. 211.

(*d*) 19 Ves. 647.

(*e*) 16 Ves. 338

strain the defendant "from building up a certain wall, erection, or building above the height of sixteen feet, and thereby obscuring and darkening the ancient lights of the Scottish Hospital.

The defendant, although he had received notice not to raise his wall above the height of sixteen feet, had carried it up to twenty feet, by which the windows of the hospital were darkened; and it appeared, that, in case of a further elevation by him, the windows would be so obscured as materially to affect the value of the property. An action had been brought by the relators.

On a motion to dissolve the injunction, it was contended, that, to sustain an injunction, there ought to be an "irreparable injury for every useful purpose," such as a total deprivation of light, and not merely an obstruction, for which the party must be left to his common law remedy only; and the reasoning of Lord *Hardwicke* in *The Fishmongers' Company* v. *The East India Company* (*a*), was relied on. For the relators it was urged, that no total interception of light was requisite, "if the effect is, that these ancient lights are darkened and obscured, and, if the building shall be carried higher, will be in a greater degree darkened and obscured, so much as materially to affect the value of the premises."

*"The foundation of the jurisdiction of this Court," said Lord *Eldon*, *430
"in interfering by injunction, is that head of mischief alluded to by Lord *Hardwicke*, that sort of material injury to the comfort of the existence of those who dwell in the neighboring house, requiring the application of a power to prevent, as well as remedy, an evil, for which damages, more or less, would be given in an action at law. The question is, whether the effect (of the building) is such an obstruction as the party has no right to erect, and cannot erect without those mischievous consequences, which, upon equitable principles, should be not only compensated by damages, but prevented by injunction.

"Assuming, therefore, that, from circumstances of enjoyment, usage, or interest, some contract could be implied, that this defendant should not build upon the premises he occupies to the east of the hospital, and that an action on the case could be maintained upon that ground, that would not induce this Court to interpose by injunction, unless the consequences of the act, which may be resisted as illegal, being a violation of the contract, either express or implied, appeared to be such as should be not merely redressed, but prevented, by application of the peculiar means of this Court.

"I repeat the observation of Lord *Hardwicke*, that a diminution of the value of the premises is not a ground; and there is as little doubt that this Court will not interpose upon every degree of darkening ancient lights and windows There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained, or an

(*a*) 1 Dick. 163.

action on the case; which, however, might be maintained in many cases *431 which would not support an *injunction. These affidavits, therefore, stating only that the ancient lights will be darkened, but not that they will be darkened in a sufficient degree for this purpose, will not do."

His Lordship dissolved the injunction upon the defendant undertaking, in case a verdict should be against him in the action at law, to remove such building "as should be proved to affect the ancient lights in a material and improper degree."

In *Winstanley* v. *Lee* (*a*), the plaintiffs sought to prevent the defendant from re-building a wash-house (originally of the height of about nine feet) to such an elevation as would obstruct the plaintiffs' ancient windows, and thereby materially diminish the value of their property.

Sir *Thomas Plumer*, M. R., said, "The first question is, whether, supposing the plaintiffs to have established their legal right to remove this building, begun by the defendant, they have entitled themselves to the preventive interposition of the Court? The injury of postponing a building, which the party is entitled to erect, may not, in every instance, be equal to the injury of permitting him to proceed with one which is a nuisance. Cases arise in which courts of equity, seeing that the injury might be irreparable, as where loss of health, loss of trade, destruction of the means of existence, might ensue from erecting a building, would exercise its jurisdiction of preventing injury, without waiting the slow process of establishing the legal right, when delay would itself be a wrong. On the other hand, it may be perfectly clear, that the *432 plaintiff is entitled* to succeed in an action, and yet a court of equity will not interfere by injunction. The plaintiff is bound to show, not only a legal right to the enjoyment of the ancient lights (*b*), but that, if the building of the defendant is suffered to proceed, such an injury will ensue as warrants the Court to interpose, and at once take possession of the subject by injunction." His Honor was of opinion, that the plaintiffs were not entitled to an injunction, as both their right, and the actual amount of injury likely to be caused, were disputed by the defendant's affidavits: the expression, as to the injury which would result to the plaintiffs, was, "that the premises would be greatly injured and deteriorated; and this allegation he held not sufficiently precise to warrant the interference by injunction. In addition to this, the custom of the City of London appeared to be a bar to the plaintiffs both at law and in equity.

(*a*) 2 Swanst. 333.

(*b*) *Weller* v. *Smeaton*, 1 Cox, 102

In *Back* v. *Stacey* (*a*), the bill, and affidavit in support of it, stated the defendant was about to re-build his house "in such a manner as to darken and obstruct certain ancient lights and windows in the plaintiff's houses adjoining; that the eaves of the ancient roof of the defendant's house were not more than seventeen feet from the ground; that, according to the mode in which the defendant was re-building the premises, the roof would be eighteen feet higher than it was before; and that the effect of the alteration would be to darken entirely one of the plaintiff's ancient windows, which had formerly been altogether unobstructed, and to injure materially his other ancient windows, as well as to impede the free admission of light and air *into *433 his premises. The defendant had made considerable progress in the alterations complained of, and the timbers were fixed for erecting the new roof.

Lord *Eldon* granted the injunction upon an *ex parte* application.

In *Sutton* v. *Lord Montfort* (*b*), an injunction was granted to restrain the building of a wall, which would obstruct certain ancient windows: upon a motion to dissolve it, Sir *L. Shadwell*, V. C., after referring to the case of *The Attorney-General* v. *Nichol*, and remarking, that the building would materially affect the comforts of the houses in which the windows were, said, "I have, therefore, a case before me in which, according to my opinion, upon the simple question of nuisance, the building, if completed, would be a nuisance, and in which it is not by any means clear that the Dean and Chapter of Westminster would have a right to erect the building proposed, and in which it appears that Lady Montfort may not have that right, even though the Dean and Chapter may have it. I think, therefore, the injunction should be continued, though the matter must be tried."

The mere fact that a nuisance is of a public nature will not in equity more than at law prevent individuals from applying to the Court for protection, if they sustain special damage thereby. "It is going too far," said Lord *Eldon*, in *Crowder* v. *Tinkler*, "to say that if a plain nuisance is attended with particular and special damage to an individual, producing irreparable damage, that individual shall not be at liberty to *come here unless the Attorney- *434 General chooses to accompany him" (*c*).

Thus, too, in the recent case of *Spencer* v. *London and Birmingham Railway Company* (*d*), it was held, that where individuals sustained injury from a pub-

(*a*) 2 Russell, 121.

(*b*) 4 Simons, 569.

(*c*) 19 Ves. 621; vide etiam *Mayor of London* v. *Bolt*, 5 Vesey, 129; *Attorney-General* v. *Forbes*, 2 My. & Cr. 123.

(*d*) 8 Simons, 193; see, also, *Sampson* v. *Smith*, Ibid. 272.

lic nuisance, quite distinct from that which was inflicted on it by the public, a bill might be filed by those individuals to be relieved from the nuisance.

A distinction has been taken in some cases between those injunctions which merely prevent the doing of an act, and those the consequence of which, either directly or indirectly, will be to compel a party to do some act, as to fill up a ditch (*a*) or pull down a wall (*b*); the former being granted on motion, the latter on decree only.

This distinction, however, though recognized, does not appear to have been strictly attended to: indeed, in one case (*c*), Lord *Eldon*, though he refused the order as prayed, "to restrain the defendant from continuing to keep certain works out of repair," purposely made an order in such a form as to have the same effect, by making it difficult for the defendant to avoid completely repairing his works.

"I take leave," said Lord *Brougham*, in commenting on this case, in his judgment in *Blakemore* v. *Glamorganshire Canal Navigation* (*d*), "to agree with *435 Lord *Lyndhurst* in the opinion, that, if this Court has this jurisdiction, it would be better to exercise it directly and at once; and I will further take leave to add, that the having recourse to a round-about mode of obtaining the object seems to cast a doubt on the jurisdiction." The question of jurisdiction his Lordship does not expressly decide, "although," he continues, "we have no right to say there is not a precedent for taking a similar course here; yet surely we may pause, and, without denying the jurisdiction, decline to exercise it" (41).

(*a*) *Robinson* v. *Lord Byron*, 1 Bro. C. C. 589.

(*b*) *Ryder* v. *Bentham*, 1 Ves. Senr. 543.

(*c*) *Lane* v. *Newdigate*, 10 Ves. 192.

(*d*) 1 My. & Kee. 184.

(41) *Injunction against tenant in common when his acts tend to the destruction of the joint property.*—The late case of *Kennedy* v. *Scovil*, 12 Conn. R. 317, was one which related to the right to water and privileges affecting mills held in common. The important facts appear from the following judgment of the Court.

Bissell, J. The questions of law growing out of the facts found by the court and reserved for our advice, arise principally upon the deed of the 8th of June, 1832, and the circumstances connected with that conveyance. That clause in the instrument, which is most intimately connected with the question now before us, and to which our attention has been particularly directed, is in these words:— "Always provided, and this deed is given on condition, that the grantors are to have and retain the privilege of conveying water from said dam, through a conductor, similar to the one now in use, till the same shall arrive at the East end of

the new shop aforesaid, and thence, either by a conductor, race or otherwise, to the old shop, East of the new shop, for the necessary accommodation and use of the old shop." Upon this conveyance, and the facts found in the case, it is objected, that the present bill cannot be sustained, for the following reasons.

1. "It is said, that under the above reservation in their deed, Brainard and Woodruff had no right to take water from the flume for the use of the lower mill.

2. "Admitting they had the right, yet it was personal to them, and not assignable.

3. "Allowing them to have had an assignable interest, it is still insisted, that the plaintiffs are not entitled to an injunction, because they are tenants in common with Scovil, one of the defendants, of the lower mill, and of the privilege in controversy.

"These several objections will be considered in their order.

1. "And in regard to the first, it may here be remarked, that the right of Brainard and Woodruff to one half of the dam and pond, is wholly independent of the reservation in their deed. They were owners of the whole; and they never conveyed but a moiety for the use of the upper mill. Of the other moiety they, of course, remained owners; and had an undoubted right to one half of the water, to be taken, in some way, from the pond. The question, then, is narrowed down to this: whether, by reason of the reservation in their deed, or otherwise, they had a right to take the water through the flume? Suppose there had been no reservation in their deed; how then would have stood the right? It is found in the case, that when the upper mill and flume were erected, and at all times before the 8th of June, 1832, the water for the use of the lower mill was taken from the flume, by means of a conductor therefrom, in the manner, and of the character, and for the purposes stated in the bill, and so continued until the acts complained of, were committed, by the defendants. Such was the manner in which the water for the use of the lower mill, was taken, when the conveyance in question was made. The grantors still retained the right to take a moiety of the water, for the use of that establishment. In what mode was it to be taken? Would not the law imply, that it was to be taken in the mode in which it always had been taken? And would the grantors have had a right to resort to any other mode? Would they have had a right to erect a new flume? It seems to us, that they would not; but that, in the absence of any stipulation, as to the mode, the irresistible influence would have been, that they not only had the right, but were obliged to take the water in the accustomed manner.

"Does, then, the language of the reservation in the deed, vary the case? What did the parties intend, by the reservation, is the question: and for the purpose of ascertaining that intention, it is proper to take into consideration the condition of the property, and the circumstances of the parties in relation thereto. *Strong* v. *Benedict*, 5 Conn. Rep. 210. 1 Phil. Ev. 417, and the cases cited in the note.

"It is very obvious, that it was not the intention of the grantors to divest themselves of any privilege appertaining to the lower mill, of which they still retained the exclusive ownership. It was not necessary for them to stipulate, that the

lower mill should have the privilege of a moiety of the water, or that it should receive it in the usual mode; for both these privileges it would have had, without any stipulation. And it surely was not the intention of the parties, that the reservation should work a prejudice to the existing right of the grantors. They are to have and retain the privilege of conveying water to the lower mill, in the mode specified, for its necessary accommodation and use. This language would certainly seem to imply very strongly, that some additional benefit was intended, to the lower mill; and that, in times of scarcity, it should enjoy a priority in the use of the water. But however this may be, it is very clear, that the grantors meant to retain to that mill, all the privileges which is then enjoyed.

But it is said, that by the terms of reservation, the grantors are to convey the water, not from the flume, but from the dam; and it is insisted, that this language is to receive a strict and literal construction. Were we to yield to this argument, we should, as we think, and for the reasons which have already been given, do manifest violence to the intention of the parties. The argument assumes the fact, that the flume constitutes no portion of the dam: a position which may well be questioned. It is certainly used to confine, as well as to draw off the water; and it might as well be contended, that a water-gate, used for drawing off the water occasionally, constitutes no part of the dam. But upon the construction contended for, other parts of this reservation are entirely senseless. The grantors are to retain the privilege of taking water from the dam—a privilege, on the principle assumed, never yet enjoyed by them. The truth is, the words "pond," "dam," and "flume," seem to be used, by these parties, as equivalent. And when we take into consideration the entire language of the reservation, in connection with the situation of the parties, and the former use of the water, we can entertain no doubt in regard to their intention. And this view of the case is strongly fortified, by the particular construction which the parties themselves have given to the grant. It is found, that never, until some time in the year 1835, was the right of the plaintiffs and those under whom they claim, to take water through the flume, denied; and that never, until that time, did the defendants claim the right to use the water in the flume, as they pleased: that, frequently, when the water was low, and was wanted for the use of the lower mill, Woodruff requested Allison, who had charge of the upper mill, to shut the gates and let the water pass through the conductor to the lower mill; with which request he always complied.

"Upon these grounds, we are of opinion that this objection cannot prevail.

2. "Had Brainard and Woodruff an assignable interest in this use of the water? It has been contended, that the clause in their deed, upon which we have already commented, is a reservation, and not an exception: and several authorities have been cited to show, that a reservation in a deed, is to be most strictly construed. We do not deem it very material to enquire, for we are decidedly of opinion, that, upon every principle of interpretation, Brainard and Woodruff had an assignable interest in this use of the water. That they had such an interest in a moiety of it, to be used in some manner, is unquestionable; for, as we have seen, they were owners of the whole; of a moiety of which they had never parted with. The

question, then, is reduced to this; whether they had an assignable interest in this particular use of the water? The objection is, that the use is reserved to them, without naming their heirs and assigns. Now, if we are right in the ground already taken, that their right to this use of the water was perfect, independently of the reservation in their deed, and that such right is not impaired by the reservation, there is an end of the question. But let us, for a moment, examine the language of the reservation, and see what are the rights of the grantors, under that. It is true, that the right is reserved to them, without words of inheritance, and without naming their assigns. But it becomes material to enquire for what purpose the reservation was made. It was "for the necessary accommodation and use of the old shop." Of this they were the owners in fee simple; and can it be supposed, that they meant to limit the use of the water, without which the establishment was of no value, to their own personal occupancy? And can it be believed, that such was the intention of the parties to this deed? The idea is opposed to every presumption, and to all probability. Are we, then, prevented, by any rigid rule of construction, from giving effect to the intention of the parties? We know of none; and we think this part of the case entirely free from doubt.

3. "We enquire whether the plaintiffs are entitled to the relief sought by the bill? The only objection interposed, in this part of the case, is, that the plaintiffs and Hezekiah Scovil, one of the defendants, are tenants in common of the mill, as well as the water privilege.

"It has hardly been contended, that in no case, will a writ of injunction lie, in favor of a tenant in common, against his co-tenant. Such a position cannot be sustained. It is opposed, not only to the well established principles of chancery proceedings, but to the authority of decided cases. A bill for an injunction is always addressed to the discretion of the court. Yet the exercise of that discretion is to be governed by some settled and known rules. The general principle is, that a writ of injunction lies to prevent a person from doing an act which appears to be against equity or conscience. 1 Mad. Ch. 104. And the writ may be obtained, by one tenant in common against another, to prevent a destruction of the joint property, and also to restrain malicious waste. *Hale* v. *Thomas*, 7 Ves. 589. 1 Mad. Ch. 122. 2 Swift's Dig. 136. *Hawley* v. *Clowes*, 2 Johns. Ch. Rep. 122.

"The only remaining enquiry is, whether the case before us falls within the general principle. And to show that it does, it can only be necessary to advert, very briefly, to the facts found by the court.

"It is found, that the defendants, by means of a new orifice, made lower down in the flume, have almost entirely diverted the water from the plaintiff's works; and that they have denied, and do deny, the right of the plaintiffs to take any water for the use of the lower mill, by means of a conductor placed in the flume. It is further found, that, by means of these acts of the defendants, the plaintiffs are unable to operate their works more than about three hours in a day; and during a great portion of the time, not at all. Now, that these acts tend not only to injure, but to destroy the property, cannot admit of a doubt. A mill can be of

no value, when the water, by which it is operated, is wholly diverted: and we all know, that a manufactory that cannot be operated more than three hours in a day, and that at intervals, cannot be operated to any purpose. It is of no possible value.

"But it has been urged, that the remedy of the plaintiffs is by writ of partition. And suppose they have the remedy, and that the writ were now pending; this would furnish no reason, according to the case cited from 2 Johns. Ch. Rep., why the present application should not be sustained: why the waste should not, in the meantime, be stayed. But how can this property be aparted? Can the privilege of the water, the whole of which is necessary for carrying on the works, be divided? And how is this manufacturing establishment and its implements, to be set out in severalty? Will you give the trip-hammer to one; to another, the anvil; and to a third, the bellows? The property is, in its nature, indivisible; and it is a mockery in these defendants, after having ruined the establishment, to talk of partition. Upon the whole, we are of opinion, that the plaintiffs are entitled to the relief sought by their bill; and would accordingly advise the superior court to pass a decree, that the defendants be enjoined against preventing the plaintiffs from taking one half the water from the flume, for the use and accommodation of the mill below, by means of the conductor mentioned in the bill, or one similar thereto, which may hereafter be constructed.

In this opinion the other Judges concurred. Decree for plaintiffs.

To a bill in equity, in which it was alleged that the plaintiff was the owner of a water power, and that he had leased a part of it, and that the defendant had by a nuisance diminished the water power, the defendant demurred because the lessee was not made a party plaintiff; but as it did not appear on the face of the bill, that the interest of the lessee would be affected by the diminution of the water power, there being a surplus beyond the quantity leased, the demurrer was not sustained. *Boston Water Power Co.* v. *Boston and Wor. R. R. Corp.* 16 Pick. 512.

Specific performance.—The plaintiff entered into a contract with the defendants, by which it was agreed, that the defendants should remove a bank of gravel from the land of the plaintiff, and pay him therefor at the rate of one dollar a square, but that they should not pass across the plaintiff's land in effecting such removal. The defendants obtained a license to cross the adjoining land, over which it become necessary to pass in removing the gravel; but after a portion thereof was removed the license was revoked. The plaintiff thereupon offered to permit the defendants to pass over his own land; but it appeared that this would be attended with great expense to them. The Court refused to compel a specific performance of the contract by the defendants, on the grounds, that the performance had become unlawful by the revocation of the license, and that the plaintiff had a plain, adequate and complete remedy at law. *Sears* v. *Boston*, 16 Pick. 357.

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