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Tagore Law Lectures, 1899.

THE LAW RELATING TO EASEMENTS IN BRITISH INDIA.

BY

FREDERICK PEACOCK,

Barrister-at-Law, Advocate of the High Court at Calcutta.

Calcutta:
THACKER, SPINK AND CO.

1904.

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1904

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PREFACE.

THE present work is the embodiment and amplification of lectures delivered in connection with the Tagore Law Professorship on the subject of Easements in British India.

The lectures have been presented in the form of a treatise, with a view to greater practical utility than could have been obtained from preserving them in their original form, and have been amplified by the introduction of the cognate subjects of Nuisances, Rights in Gross, and Licenses (*see* Chapters IV and XII).

Part III of Chapter I contains a geographical summary of the law relating to Easement in British India as it rests in Statute, or otherwise, in the different provinces and Presidency-towns.

The whole of the English Prescription Act and Indian Easement Act, and the material portion of the other principal Indian enactments relating to Easements, have been incorporated in Appendices with references to the text.

At the head of each Chapter will be found paged headings of its contents, and marginal notes have been inserted throughout the chapters themselves, corresponding to the headings. This expedient has been adopted as a means of ready reference and as a partial substitute for a lengthy index.

The English and Indian Case law has been brought down to the end of 1903, but owing to the protracted, though unavoidable, delay in going through the press, the only means of including the more recent cases has been in the form of Addenda, and an Appendix containing a summary of the more important English rulings.

In this connection, and in reference to pages 80, 81, 85, to 87 of the text, should be specially noticed the very important

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decisions of the Appeal Court in *Warren* v. *Brown* (1902), 1 K. B., 15 (reversing Wright, J., and overruling *Lanfranchi* v *Mackenzie* and *Dickinson* v. *Harbottle*), and in *Home* v. *Colonial Stores, Ld.* v. *Colls* (1902), 1 Ch., 302, on the question of what amounts to a substantial interference with ancient lights. *See* Appendix XII, Case Nos. (2) and (3).

Further, the recent case of *Cowper* v. *Laidler* (1903), 2 Ch., 337, forms an instructive and interesting addition to the text in Chapter XI on the subject of relief by damages or injunction. *See* Appendix XII, Case No. 9.

The subject of Easements in British India has been dealt with from a practical, as well as an academical, point of view, and frequent and sometimes lengthy quotations have been made from English and Indian authorities in the hope of making the work not only of interest and value to students of law, but also of utility to the higher branches of the legal profession and to practitioners in the lower courts of the mofussil where extensive reference to law reports is impossible.

My thanks are specially due to Mr. P. O'Kinealy of the Calcutta Bar for his valuable advice and assistance, at all times most kindly and freely given, in the preparation of this work and the lectures on which it is founded.

I must also express the obligation I am under to Mr. Justice Henderson of the Calcutta High Court, and to Mr. Knight and Mr. J. G. Woodroffe of the Calcutta Bar, for having given me the benefit of their advice and experience on various matters connected with the text and scheme of the book.

I have further to acknowledge the assistance I have derived from such standard English works as " Gale on Easements " and " The Law of Easements " by Mr. J. L. Goddard.

In conclusion, I must thank Mr. R. Mitchell of the Calcutta Bar for his assistance in the correction of a large portion of the proofs and for supplying me with notes on the Indian cases for 1903.

F. P.

February 1904.

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ADDENDA.

P. 34. At end of footnote 3 read, "And see *Budhu Mandal* v. *Malint Mandal* (1903), I. L. R., 30 Cal. 1077."

P. 35. Between first and second paras. read, "And the inhabitants of a place may by custom have a right of way to a church or market, *Brocklebank* v. *Thompson* (1903), 2 Ch., 344."

P. 35. At end of footnote 5 read, "*See* also *Sri Narain Chowdhry* v. *Jodoonath Chowdhry* (1900), 5 Cal. W. N., 147.'

P. 36. At end of footnote 1 read, same as on p. 35 at end of footnote 5.

P. 50. As footnote to first para. read, "As to the power of a Magistrate under this section, see *Pasupati Nath Bose* v. *Nando Lall Bose* (1900), 5 Cal. W. N., 67; *Nalit Chandra Neogi* v. *Tarini Proshad Gupta* (1901), 5 Cal. W. N., 335."

P. 72. At end of footnote 1 read, "*See* also *Greenhalgh* v. *Brindlay* (1901), 2 Ch., 324. The right of the adjoining owner to obstruct the light within the prescriptive period can be exercised equally by a Railway Company as by a private individual, *Bonner* v. *G. W. R. Co.* (1883), L. R., 24 Ch. D., 1; *Foster* v. *London Chatham and Dover Ry. Co.* (1895), 1 Q. B., 711, but not by a public body in whom the adjoining land is vested for a purpose inconsistent therewith, *Boyce* v. *Paddington Borough Council* (1903), 2 Ch., 556."

P. 83. At end of footnote 1 read, "*See* further *Warren* v. *Brown* (1902), 1 K. B., 15; *Home and Colonial Stores, Ld.* v. *Colls* (1902), 1 Ch., 302."

P. 86. At end of footnote 2 read, "This decision has since been reversed, and *Lanfranchi* v. *Mackenzie* and *Dickinson*

v. *Harbottle* overruled, by the Appeal Court in (1902), 1 K. B., 15."

For a complete summary of the case "*See* Appendix XII, Case No. (2) and further on the same subject, *Home and Colonial Stores, Ld.* v. *Colls* (1902), 1 Ch., 302, and Appendix XII, Case No. (3)."

P. 95. At end of footnote 2 read, "*Kalu Khabir* v. *Jan Meah* (1902), I. L. R., 29 Cal., 100."

P. 98. At end of footnote 4 read, "*See* further *Bailey & Co.* v. *Clark, Son and Morland* (1902), 1 Ch., 649; *Budhu Mandal* v. *Malint Mandal* (1903), I. L. R., 30 Cal., 1077, Appendix XII, Case No. (4)."

P. 102. Between the first and second paras read, "And by the recent case of *Budhu Mandal* v. *Malint Mandal* (1903), I. L. R., 30. Cal., 1077, it was decided that the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation by means of embankments erected on the dominant tenement may be gained as an Easement."

P. 103. At end of footnote 1 read, "*Burrows* v. *Lang* (1901), 2 Ch., 502."

P. 103. At end of footnote 4 read, the same.

P. 177. As footnote to third para read, "An easement which is not a customary right need not be reasonable, *Budhu Mandal* v. *Malint Mandal* (1903), I. L. R., 30 Cal., 1077."

P. 177. At end of footnote 1 read, "And see *Brocklebank* v. *Thompson* (1903), 2 Ch., 344."

P. 186 At end of footnote 1 read, "For the view that actual continuous exercise is not essential to acquisition, see further, *Budhu Mandal* v. *Malint Mandal* (1903), I. L. R., 30 Cal., 1077."

P. 189. At end of footnote 6 read, "And see *Hanbury* v. *Jenkins* (1901), 2 Ch., 401. As to how a several fishery may be created by grant, and as to what process under the grant of a weir, see *Hanbury* v. *Jenkins*."

P. 189. At end of footnote 7 read, "See *Hanbury* v. *Jenkins*. This is so whether the river is navigable or neither public nor navigable, *Hanbury* v. *Jenkins*."

P. 193. As (ka) read, "Right to keep a bund at a particular height, *Narayana Reddi* v. *Venkata Chariar* (1900), I. L. R., 24 Mad., 202."

P. 195. At end of footnote 4 read, "But this does not prevent the presumption from long user of a legal origin by dedication or actual agreement, for the right to discharge water from a highway on to adjoining land, S. C. on appeal (1902), 1 K. B., 690."

P. 196. At end of footnotes 4, 5 and 6 read, "And see *Attorney-General* v. *Esher Linoleum Co., Ld.* (1901), 2 Ch., 647."

P. 197. At end of footnote 8 read, "*See* also *Campbell Davys* v. *Lloyd* (1901), 2 Ch. at p. 525."

P. 198. At end of footnote 8 read, "*Hanbury* v. *Jenkins.*"

P. 198. At end of second line of footnote 1 and at end of footnote 1 read, "And see *London & N.-W. Ry.* v. *Westminster Corporation* (1902), 1 Ch., 269."

P. 199. At end of footnote 3 read, "*See* also *Mappin Bros.* v. *Liberty & Co., Ld.* (1903), 1 Ch., 118."

P. 199. Between first and second paras. read, "Encroachment on such space by an adjacent landowner cannot be legalised by possession for any length of time, nor is the consent of the highway authority effectual for such purpose, *Harvey* v. *Truro Rural Council* (1903), 2 Ch., 638."

P. 199. At end of footnote 1 read, "*Harvey* v. *Truro Rural Council* (1903), 2 Ch., 638."

P. 199. At end of footnote 2 read, "*See* also *Harvey* v. *Truro Rural Council* (1903), 2 Ch., 638, where adjacent land has been laid out for the purpose, even of, private traffic along the line of a public footway, and there are no circumstances shewing an intention on the part of the owner to restrict the public to that particular line, a dedication to the public as a footway of all the surface of the new strip devoted to private traffic will be presumed, *Attorney-General* v. *Esher Linoleum Co., Ld.* (1901), 2 Ch., 647."

P. 199. At end of footnote 6 read, "If the obstruction specially affects an individual, and thereby becomes a private

nuisance, it may be removed by him, *Campbell Davys* v. *Lloyd* (1901), 2 Ch., 518, and *see* same case for the law as to abatement of a public nuisance on a highway, and Appendix XII, Case No. (5)."

P. 200. At end of footnote 3 read, "And see *Ferrand* v. *Burgley Urban Council* (1903), 2 K. B., 445."

P. 203. At end of footnote 2 read, "Nor can a projection erected merely for the purpose of ornamentation be the subject of a prescriptive right, *Nritta Kumari Dassi* v. *Puddomani Bewah* (1903), I. L. R., 30 Cal., 503, S. C., 7 Cal. W. N., 649."

P. 205. At end of footnote 2 read, "Neither the lapse of time nor the religious scruples of neighbours can affect the right to cut overhanging branches, *Behari Lal* v. *Ghisa Lal* (1902), I. L. R., 24 All., 499."

P. 220. At end of footnote 3 read, "And see *Bailey & Co.* v. *Clark, Son & Morland* (1902), 1 Ch., 649; and Appendix XII, Case No. (4)."

P. 222. As footnote to second para. read, "As to the rights of riparian proprietors in an artificial stream, generally, or as subject to some special or larger right of one of themselves, see *Bailey & Co.* v. *Clark, Son & Morland* (1902), 1 Ch., 649; and Appendix XII, Case No. (4)."

P. 228. At end of footnote 2 read, "See it also approved in the recent decision of *Bailey & Co.* v. *Clark, Son and Morland* (1902), 1 Ch., 649."

P. 235. At end of footnote 3 read, "And see *Narayana Reddi* v. *Venkata Chariar* (1900), I. L. R., 24 Mad., 202."

P. 254. As footnote to sixth para. read, "Under this section it would appear that if there has been user, a right enjoyed by a vendor by reason of such user, whether licensed or unlicensed, will pass to the purchaser. In such a case what has to be considered is the question of the fact of the user, *International Tea Stores Co.* v. *Hobbs* (1903), 2 Ch., 165."

P. 259. At end of footnote 3 read, "*See* also *Jeenab Ali* v. *Allabuddin* (1896), 1 Cal. W. N., 151; *Mani Chunder Chakerbutty* v. *Baikanta Nath Biswas* (1902), I. L. R.,

29 Cal. 363; 6. Cal. W. N, LXXVI. The principle applies equally to tenants with permanent rights; *Mani Chunder Chakerbutty* v. *Baikanta Nath Biswas*."

P. 260. As footnote to last para. read, "And see *Quicke* v. *Chapman* (1903), 1 Ch., 667, which decides that under an implied grant only such right of easement passes as the grantor then has."

P. 261. As footnote to second line of second para. read, "See *Mulliner* v. *Midland Ry. Co.* (1879), L. R. 11 Ch. D., 611; *Neaverson* v. *Peterborough Rural District Council* (1902), 1 Ch., 557. The same applies to any illegal grant. Prescription cannot run in such a case, *ibid*."

P. 277. At end of footnote 2 read, "And see *International Tea Stores Co.* v. *Hobbs* (1903), 2 Ch., 165.

P. 280. In footnote 3 after *Wheeldon* v. *Burrows* read, "*See* also per Stirling, L. J., in *Union Lighterage Co.* v. *London Graving Dock Co.* (1902), 2 Ch. at p. 573, and at end of same footnote read, *K. Chidambara Rao* v. *Secretary of State* (1902), I. L. R., 26 Mad., 66."

P. 287. At end of footnote 1 read, "But this rule is subject to the limitation that on a severance of tenements, the grantee of the dominant tenement is not entitled to any apparent and continuous easement, which would be inconsistent with the intention of the parties to be implied from the circumstances existing at the time of the grant. An illustration of this limitation is to be found in the case of a conveyance of a house with lights to the grantee under an agreement which also provides for the adjoining land being built upon, *Godwin* v. *Schweppes, Ld.* (1902), 1 Ch., 926."

P. 293. As footnote to end of second para read, "*See* the same rule applied in *Raja Suranani Venkata Papayya Rau* v. *Secretary of State* (1902), I. L. R., 26 Mad., 51."

P. 320. At end of footnote 1 read, "Affirmed on appeal (1902), 2 Ch., 557."

P. 364. At end of footnotes 3 and 4 read, "And see *Union Lighterage Co.* v. *London Graving Dock Co.* (1902), 2 Ch., 574."

P. 365. As footnote to the words *the enjoyment must be as of right*, read, "that is to say, *nec precario*." As to the meaning, of *precario*, see *Burrows* v. *Lang* (1901), 2 Ch., 510, and Appendix XII, Case No. (8).

P. 366. Between third and fourth paras. read, "And upon the same principle it has been decided that payment for leave to use a way, *Gardner* v. *Hodgson's Kingston Brewery Co.* (1903), App. Cas., 229, and agreement for access of light to a window, *Easton* v. *Isted* (1903), 1 Ch., 405, preclude the user being as of right."

P. 374. As footnote 5 to last line but two of text read, "And see *Damper* v. *Bassett* (1901), 2 Ch., 350."

P. 391. Between lines 4 and 5 read, "Further it has been held that the exercise of the right to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation need not be continuous, provided it has been exercised for the statutory period during seasons of drought, when it could be taken advantage of, *Budhu Mandal* v. *Maliat Mandal* (1903), I. L. R., 30 Cal., 1077."

P. 398. At end of footnote 1 read, "*See* further *Badhu Mandal* v. *Malint Mandal* (1903), I. L. R., 30 Cal., 1077, where the right in question was one to cause river water to flow across the servient tenement on to the dominant tenement for the purpose of irrigation."

P. 417. As footnote to first para. read, "See *Ram Pershad Narain Tewaree* v. *Court of Wards* (1874), 21 W. R., 152, and *infra* the English authorities."

P. 419. At end of footnote 2 read, "And see *International Tea Stores Co.* v. *Hobbs* (1903), 2 Ch., 165."

P. 420. At end of footnote 2 read, "And *Quicke* v. *Chapman* (1903), 1 Ch., 667."

P. 529. At end of footnote 3 read, "And see *Cowper* v. *Laidler* (1903), 2 Ch., 337, and App. XII, Case No. (9)."

P. 531. At end of footnote 3 read, "And see *Cowper* v. *Laidler* (1903), 2 Ch., 337, and App. XII, Case No. (9)."

P. 535. At end of footnote 11 read, "And see *Cowper* v. *Laidler* (1903), 2 Ch., 337, and App. XII, Case No. (9)."

CORRIGENDA.

P. 6. In last line of fifth para. read *of* in place of *by*.
P. 10. ,, footnote 2, read *52* in place of *62*.
P. 11. ,, ,, 4, ,, *(1873)* ,, ,, *(1893)*.
P. 15. ,, first marginal note, read *variety* in place of *varie*.
P. 35. ,, footnote 6, read *note 5* in place of *note 2*.
P. 49. ,, sixth marginal note, read *1882* in place of *1828*.
P. 57. ,, second heading, read *dissociated* in place of *dissasso ciated*.
P. 92. Delete fourth para. and in its place read, *If a public right of way already exists, no private right of way can be acquired in derogation of it, but if a private right of way already exists, the public right on coming into existence will not extinguish the private right, but will remain qualified to that extent unless there has been a release or abandonment of the private right, or a public user inconsistent therewith.*
P. 95. In l. 22, read *steam* in place of *spring*.
P. 105. ,, footnote 1, read *7 Mad. H. C.*, in place of *2 Mad. H. C.*
P. 131. ,, para (*b*), ,, *presumption* ,, ,, *prescription*.
P. 132. ,, first line, ,, *presents* ,, ,, *prevents*.
P. 145. ,, l. 8, read *what* in place of *which*.
P. 159 ,, l. 29, ,, *one degree of care* in place of *one degree of case*.
P. 175. ,, l. 29, ,, *dismissing* in place of *discussing*.
P. 179. ,, footnote 1, read *389* ,, ,, *16*.
P. 231. Delete third and fourth marginal notes.
P. 232. Insert at side of first and second paras. the marginal notes deleted from p. 231.
P. 340. In second line of fifth para. read *obscuration* in place of *observation*.
P. 363. ,, l. 19, read *cases* in place of *causes*.
P. 396. ,, l. 24, ,, *uninterrupted* in place of *interrupted*.

P. 405. Delete heading, *on repaired as soon after the injury as possible, 450.*

P. 433. In l. 20, read *in the grant* in place of *on the part.*

P. 434. ,, l. 5, ,, *extent* in place of *estate.*

P. 436. ,, l. 24, ,, *received* ,, ,, *realised.*

P. 444. ,, second line of fourth para. read *has* in place of *have*

P. 450. ,, l. 6, read *Pulman* in place of *Palman.*

P. 450. Delete marginal note, *or repaired as soon after injury as possible.* Delete also last para., and in its place read *It appears to have been a question at one time whether, the owner of the servient tenement was not under an obligation to repair corresponding to the servitude oneris ferendi in cases of support of one part of a building by another.*

P. 459. In l. 27, read *dormant* in place of *dominant.*

P. 463. ,, l. 22 ,, *right* ,, ,, *light.*

P. 470. ,, l. 31, delete full stop after *easements,* and read *that* in place of *That.*

P. 475. Read footnote 4 as footnote 5, and as footnote 4 read (1868), L. R., 6 Eq., 177.

P. 477. In last para. delete full stop after *non-user,* and in place of *Thereby* read *merely.*

P. 502. ,, last line of footnote 1, read *(1902)* in place of *(1901).*

P. 502. ,, first line of footnote 1, read 5 Car. and P. in place of 5C., p., and in second line of footnote 1, read 7 Car. and P. in place of 7C., p.

P. 533. ,, footnote 6, read *56* in place of *55.*

P. 535. ,, footnote 5, read *3* in place of *10.*

P. 536. ,, last line of footnote 1, read *(1902)* in place of *(1901).*

P. 541. Delete heading *In case of revocable license, licensor cannot revoke without reserving right,* and in its place read, *Reservation of right to revoke mere license, when necessary.*

P. 541. In last heading read *567* in place of *587.*

P. 556. ,, second line of third para, read *falling* in place of *fully.*

P. 562. Delete marginal note corresponding to deleted heading on p. 541, and in its place read substituted heading on p. 541, and delete the para. at its side and in its place

read, *In the case of a license to do something of a permanent character if the licensor desires to be able to revoke he must expressly reserve the right when he grants the license, or limit it as to duration, otherwise he cannot revoke the license after the work has been executed.*

P. 563. In l. 26, read *licensor* in place of *licensee.*

P. 563. ,, footnote 9, read *s. 61* in place of *s. 60.*

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EASEMENTS IN BRITISH INDIA.

CHAPTER I.

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Nature of Easements.

In addition to, and in restriction of, those ordinary rights of ownership, which every person is entitled to exercise over his own land, subject to the observance of the maxim *sic utere*

tuo ut alienum non laedas, the law allows and imposes, under certain conditions, the benefit of certain other rights and the burthen of certain obligations, whereby the enjoyment of a man's land is increased, and that of his neighbour correspondingly restricted.

Though the very nature of rights, which are exercised over the property of another, obviously excludes them from the category of the ordinary rights of ownership, yet the association of the two classes of rights may be such as to make the former accessory or appurtenant to the latter for the beneficial or necessary enjoyment of a man's property.

Correlative to these accessory, or appurtenant, rights are the obligations resting upon the land in, upon, or over, which the rights are exercisable. The augmentation of rights, on the one hand, must be accompanied by a restriction of rights on the other.

There must be a breaking off, or subtraction of, a right or rights from the *dominium* or full ownership of some person, and the annexation of such subtracted right, or rights, to the *dominium* of another person, for the better or necessary enjoyment of that person's property.

In this lies the true significance of the legal term "*Easement.*"

It is an essential feature of an easement that it should be appurtenant to land, and, in that connection, exercised by the owner thereof, or in English legal parlance, by the owner of one tenement over the land or tenement of his neighbour, and should, to that extent, impose a burthen upon it.

Such burthen consists in the obligation of the latter person to suffer something to be done or refrain from doing something in, or over, his land or property for the advantage or benefit of the tenement to which the right is appurtenant.

It is also an important characteristic of the right that it should be associated with two tenements. It is not sufficient for the validity of an easement that it should be exercised over the land of another; it must also be annexed to the land of the person exercising it.

The land to which it is annexed may be called the *Dominant Tenement* or *Heritage;* the land over which it is exercised may be called the *Servient Tenement* or *Heritage.*[1]

Here, then, we have some important conditions of a valid easement; the tenement in respect of which the right is exercised, and to which the right is annexed or appurtenant; the tenement over which the right is exercised; the benefit to the former tenement; the burthen on the latter tenement; on the one hand, the full rights of ownership supplemented; on the other hand, the full rights of ownership restricted.

As familiar instance of easements may be mentioned rights of way, rights to the passage of light, air, and water.

Taking a right of way as a familiar easement and applying thereto foregoing observations on the general nature of the right, we find that where a man acquires an easement of way over his neighbour's land, or, in other words, the right of passing and repassing over it, he, to that extent, abstracts a portion of the exclusive rights of ownership existing in his neighbour and adds them to his own.

Profits à Prendre.

Those rights appurtenant to land which are supplemented by the right to enjoy the profits of the land over which they are exercised are called *Profits à Prendre.*

As instances of profits à prendre, may be given the right of one person as the owner of a certain house or farm to graze his cattle on another person's field, to take for use in his own house by himself and the members of his household the fish out of another person's tank, or to take stones from another person's land for the purpose of mending his roads.

A profit à prendre has been described in English law as something taken from the soil,[2] or as the right to take a part of the soil, or the produce of the soil.[3]

Distinction between easements and profits à prendre.

This, though merely a partial explanation of the legal entity to which the term *Profits à Prendre* is applied, is

[1] See *infra*, Chap. II, and Indian Easements Act, V of 1882, s. 4.

[2] *Race* v. *Ward* (1855), 4 E. & B., 702.

[3] *Manning* v. *Wasdale* (1836), 5 A. & E. at p. 764.

sufficient to mark some distinctions between easements and profits à prendre.

It should be remembered that an easement, strictly speaking, is nothing more than a privilege appurtenant to land carrying with it the right to do something, or to require something not to be done, on the land of another.

But a profit à prendre includes not merely the privilege to do, but the right to take and use, and is therefore something more than an easement.

Further, while an easement, in its strictest sense, can never import an interest in land, a profit à prendre which gives a right to take away a portion, or the produce, of another's soil. may be said to be an interest in land to that extent. Moreover a profit à prendre, considered as a right, is an incorporeal hereditament equally with an easement, but considered as a tangible thing taken from the soil may be called a corporeal thing.

Another point of difference between profits à prendre and easements is that the former cannot be claimed by custom whereas the latter can arise by virtue of a custom.[1] Upon these distinctions and others hereafter to be noticed rests the separate existence which English law has always allowed to profits à prendre.

Analogy between easements and profits à prendre.

Though distinguishable from Easements in these and other respects, profits à prendre are analogous to the former rights in the sense of being associated with two tenements. As an easement is a right to do something upon, or over, another's land in respect of the land of the person exercising the right, so a profit à prendre must be not only something to be taken from one man's soil or the right to take something in such manner, but also something to be used, or the right to use something, on, or with reference to, the land of the person who takes it. In other words, these two classes of rights possess the common feature of being what are called "*rights appurtenant*," that is, rights annexed to one tenement and exercised over another.

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[1] See Chap. IV, Part I, B (1).

Thus it has been said that "the owner of an estate may claim, as appurtenant to that estate, a profit to be taken in the land of another, to be used upon the land of the party claiming the profits."[1]

Rights, otherwise easements or profits à prendre, but falling short of the requisite standard by being unattached to any land of the person claiming to exercise them over the land of his neighbour, have the terms Rights in Gross and Profits in Gross applied to them. This subject will again be referred to at a later stage.

Fusion of profits à prendre in easements in Indian law.

The unwillingness of the English law to treat easements and profits à prendre other than as separate rights has not been shared by the Indian Legislature, which by the Indian Limitation Act, XV of 1877, and the Indian Easements Act, V of 1882, has placed both classes of rights in the category of easements, and thus deprived profits à prendre of their distinctive personality.[2]

It is difficult to understand on what ground this fusion of the two classes of rights was intended to rest.

If the change was intended solely for the object of bringing the Indian law into conformity with the continental systems of jurisprudence, it is curious that in none of the proceedings accompanying the progress of the Indian Limitation Bill and the Indian Easements Bill towards maturity, is there to be found any statement as to why in this respect the continental system was preferable to the English, or more suitable to the requirements by this country.

But if, as is more probable, the intention was to identify, as a matter of method or arrangement, two classes of rights between which there was asserted to be but a slender distinction, and that, a distinction not always observed, the ground of the intention does not appear to rest on sound conclusions.

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[1] *Per* Erle, C. J., in *Bailey* v. *Stephens* (1862), 12 C. B. N. S. at p. 108.

[2] See Act XV of 1877, s. 3; Act V of 1882, s. 4, and *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945.

In the Statement of Objects and Reasons, accompanying the Indian Easements Bill of the 6th of November 1880,[1] the following passage occurs, namely :—

"This," referring to the explanation including profits à prendre in easements and following the definition of "Easement," "though in conformity with continental systems of jurisprudence, is in contravention of the English law, which reckons, for instance, as an easement, the right to take water from a spring on your neighbour's land, but denies that name to a right to take grass or gravel."

Now the assertion that the right to take water from a spring on a neighbour's land is an easement, appears to be based on what, it is respectfully submitted, is an erroneous view of the decision of the Queen's Bench in the case of *Race* v. *Ward*.[2] In that case the question was whether the action of the defendant in entering the plaintiff's close, doing various other acts incidental to such entry, and in taking water from a spring in the said close, could be justified by an easement founded on custom, whereby the inhabitants of the township from time immemorial used to take water from such spring and carry the same to their houses for domestic use.

It was argued on behalf of the plaintiff that the plea was bad since the right claimed was a profit à prendre and not an easement, and, therefore, could not, according to well-recognised principles, be claimed by custom.

But the Court held, and this is the key-note of the decision, that the water of a spring being *res nullius*, any one had a right to take it who could shew a right to enter the field from which it flowed, and that in the absence of any servitude or custom giving a right to others, the owner of the field, and he alone, had a right to appropriate it, for no one else could do so *without committing a trespass*.

The Court decided that an easement had been established by custom.

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[1] *Vide* Gazette of India, July—December 1880, Part V, p. 476.

[2] (1855) 4 E. & B., 702.

But the easement found in the case was not the combined right of going into the field and taking the water, but the right of the defendant to go into the field, when, having got there, he was at liberty to take the water of a spring which was no man's property.

If a spring cannot be the subject of property it follows that it cannot be the subject of an easement.

For an easement is a right or privilege affecting the property of another, and by no possibility of reasoning can be made anything else.

English definitions of "Easement."

Having considered the nature of easements it will be convenient to notice the definitions of "Easement" which are known to the English law, and which occur in the Indian Acts relating to Easements.

According to English law, an easement is a privilege without profit acquired in respect of one tenement by the owner thereof, whereby the owner of another tenement is restricted in the full enjoyment of the rights incident thereto to the extent of being obliged to suffer, or not to do, something thereon for the advantage or benefit of the former tenement.

The former tenement is called the "Dominant Tenement," and the latter the "Servient Tenement."

Briefly, therefore, an easement is a right which the owner of the dominant tenement has in, or over, the servient tenement for the better enjoyment of his land.

Hill v. *Tupper.*

In *Hill* v. *Tupper*, Martin, B., described an easement as a right ancillary to the enjoyment of land.[1]

The expression "privilege without profit" marks an important distinction in English law, already referred to, between Easements and Profits à Prendre.

Thus it was said in an old English case[2] that "the word 'easement' is known in the law; it is defined in the terms thereof; it is a genus to several species of liberties which one man may have in the soil of another without claiming any interest in the land itself. It was held to be a good custom for

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[1] (1863) 32 L. J. Exch., 217.

[2] *Peer* v. *Lucy* (1695), 4 Mod., 355.

an inhabitant of a certain parish to have a way over another man's ground because it is an *easement* and no *profit*."

Indian Limitation Act, XV of 1877, s. 3.

Turning to the interpretation contained in section 3 of the Limitation Act which applies to the whole of British India, except such portion thereof to which the Indian Easements Act applies, we find that "Easement" "includes a right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another."

In the territories to which the Act applies, the effect of this definition is to give to all easements a much more extensive meaning than that assigned to them by English law, and for the purposes of the Act to assimilate profits à prendre with Easements.[1]

As regards the Presidency of Madras, the Central Provinces and Coorg, the Limitation Act has been repealed by the Indian Easements Act, and Act VIII of 1891 has extended to the Presidency of Bombay, the North-Western Provinces and Oudh, the application of the Indian Easements Act and the repeal of the Limitation Act.

Indian Easements Act, s. 4.

Section 4 of the Indian Easements Act defines "Easement" as follows :--

"An easement is a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land to do and to continue to do something or to prevent and to continue to prevent something being done in, or upon, or in respect of, certain other land not his own."

The explanation to the section includes in the expression "land" things permanently attached to the earth, in the expression "beneficial enjoyment," possible convenience, remote advantage and even a mere amenity, and in the expression "to do something" the removal and appropriation by the dominant owner (that is the person exercising the right) of any part of

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[1] *Chundee Churn Roy* v. *Shib Chunder Mundal* (1880), I. L. R., 5 Cal., 945; 6 C. L. R., 269.

the soil of the servient heritage (that is the land over which the right is exercised), or anything growing or subsisting thereon.

This has the same effect with reference to profits à prendre as the above-mentioned clause of the Indian Limitation Act.

The words "possible convenience, remote advantage, or even a mere amenity" included in the term "beneficial enjoyment," appear to open the door to other forms of easements, besides those recognised by the English law.

What these new forms of easement may be, is a matter which is open to question, no cases having arisen on the subject. It is to be regretted that none of the illustrations to the section throws any light upon the possible application of such words, and the matter must therefore remain in doubt until set at rest by judicial or legislative authority.

It may be suggested that these words are wide enough to comprehend what may be called an *easement of prospect*, that is to say, a right to have a particular view unobstructed. The English law has refused to recognise such a right as an easement, distinguishing between matters of utility and necessity, and those of mere pleasure.[1] And this would appear to be still the law in Bengal and other parts of India to which the Indian Easements Act does not apply.[2]

This matter will be further discussed at a later stage.[3]

Result of Indian definitions.

The foregoing definitions show that easements in India are capable of being exercised not only over actual land itself, but over things permanently attached to the earth, such as houses or buildings of any kind, or over anything growing on, or attached to, or subsisting upon, land, such as woods, tanks, or rivers.

The Transfer of Property Act (IV of 1882) contains certain provisions relating to easements which will be considered in my sixth chapter, but it contains no definition of easements.

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[1] Aldred's Case (1738), 9 Coke's Rep., 58; *Attorney-General* v. *Doughty* (1752), 2 Ves. Sen., 453; and see *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 824.

[2] See the observations of Peacock, C. J., in *Bagram* v. *Khettranath Karformah* (1868), 3 B. L. R., O. C. J., 18 (46) (62).

[3] See Ch. p. IV, Part II, C.

Nor is the term "*Easement*" defined in the General Clauses Act, I of 1868.

Easements in Gross.

There are certain rights analogous in some respects to easements, but in other respects differing materially therefrom in connection with which the term *Easements in Gross* has been used as a mode of expression merely, and not as designating a class of rights known to the law.

A misnomer.

The term *Easements in Gross* is legally inaccurate, and reflection will show that the use of such term in connection with the particular class of rights under discussion is a contradiction in terms.

As distinguished from easements one of the main features of these rights is their independence of a dominant tenement.[1] Their enjoyment is altogether irrespective of the possession or ownership of land.[2]

Thus, given that an easement must be connected with two tenements, the dominant and the servient, it follows that these rights, by reason of being unattached to a dominant tenement, cannot be regarded as easements.

Moreover such rights being unconnected with the enjoyment or occupation of land cannot be annexed as incident to it.[3] They are merely personal rights, and are, therefore, incapable of assignment, whereas an easement is subject to no such disability.[4]

In the case of *Rangeley* v. *The Midland Railway Company*,[5] Lord Justice Cairns clearly pointed out that there could be no such thing as an Easement in Gross.

It will be of advantage to use his own words. He said:[6] "There can be no easement properly so called unless there be both a servient and dominant tenement. It is true that in the well-known case of *Dovaston* v. *Payne*, Mr. Justice Heath is reported to have said with regard to a public highway that the freehold continued in the owner of the adjoining land subject

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[1] *Rangeley* v. *The Midland Railway Co.* (1868), L. R., 3 Ch App., 306.

[2] *Ackroyd* v. *Smith* (1850), 10 C. B., 187; 19 L. J. C. P., 319.

[3] *Ackroyd* v. *Smith* (1850), 10 C. B., 187; 19 L. J. C. P., 319.

[4] *Ibid; Thorpe* v. *Brumfitt* (1893), L. R., 8 Ch., 650 (655).

[5] (1868), L. R., 3 Ch. App, 306.

[6] *Ibid* at p. 310.

to an easement in favour of the public, and that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression. There can be no such thing according to our law, or according to the Civil Law, as what I may term an Easement in Gross. An easement must be connected with a dominant tenement."

For these reasons the legal term ordinarily applied to these rights is not "*Easements in Gross*" but "*Rights in Gross.*" A familiar instance of a Right in Gross is a private right of way unconnected with a dominant tenement.[1]

Profits à prendre in gross.

Rights resembling profits à prendre, but falling short thereof in the particular of being unattached to the land of the person claiming them are called *Profits à Prendre in Gross.*

Thus the owner of land may grant to a man and his heirs the right to take all the wood or all the grass that shall grow upon the land of the grantor. The exercise of this right, irrespective of any tenement belonging to the grantee, would bring it within the category of profits à prendre in gross.[2]

And as a right in gross cannot be claimed as appurtenant to land and is, therefore, no easement, because it is wholly unconnected with a dominant tenement and its necessities, so profits à prendre in gross are similarly distinguishable from profits à prendre which are appurtenant to lands and limited to the wants of a dominant tenement.[3]

Restrictive nature of easements.

It has been seen that an easement while vesting a right in the owner of the dominant tenement imposes a burthen upon the land which is the subject of the servient tenement, and that, to the extent of such burthen or obligation, there is a curtailment or restriction of the rights of the owner of the servient tenement.

Definition of rights capable of restriction by Easements. I. E. Act, s. 7.

Section 7 of the Indian Easements Act defines and illustrates the rights which are capable of restriction through the operation of easements.

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[1] *Ackroyd* v. *Smith* (1850), 10 C. B., 187; 19 L. J. C. P., 319.

[2] *Bailey* v. *Stephens* (1862), 12 C. B. N. S. at p. 109. *Vide* also *Shuttleworth* v. *Le Fleming* (1865), 19 C.B. N. S., 687.

[3] *Bailey* v. *Stephens* (1862), 12 C. B. N. S., 91; *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S., 687.

The section runs as follows :—

Easements are restrictions of one or other of the following rights (namely) :—

(*a*) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all the products thereof and accessions thereto.

(*b*) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.

Exclusive rights restricted.

Clause (*a*) of the section deals with the exclusive right of every owner of immoveable property to enjoy the same and dispose thereof subject to any existing law.

"Natural rights" restricted.

Clause (*b*) deals with a class of rights which will constantly come up for discussion in this work, that is, "*Natural Rights.*"

Illustrations (*b*) to (*j*) provide instances of Natural Rights.

These rights are regarded by law as the ordinary incidents of property, and any tortious interference therewith is an unlawful act for which the law provides a remedy.

But all interference with these rights is not necessarily unlawful.

Such interference may be the subject of an easement and, if so, will operate as a lawful curtailment or restriction of such rights.

Illustration (*h*) to section 7 contemplates the case of a natural right being restricted by an easement known to the Civil Law as the *Servitus aquæ ducendæ*, that is to say, the right of diverting water which in its natural course would flow over or along the land of a riparian owner and of conveying it to the land of the party diverting it, that is, the dominant owner.

The restrictive nature of such an easement is shown by the curtailment of the rights of the owner of the servient tenement. It subjects him to disadvantage by taking from him the use of the water, for the watering of his cattle, the

irrigation of his land, the turning of his mill, or other beneficial use to which water may be applied.[1]

Ways in which easements can arise.

Having referred generally to the nature and some of the prominent features of easements, it may here be advisable to say a few words in answer to the natural inquiry as to how easements arise.

Created by act of man.

Natural rights given by law.

In referring to the creation and acquisition of easements, a distinction is to be observed between Easements and what are called "Natural Rights." Easements are created and acquired by the act or presumed act of man, whereas natural rights, as will hereafter be seen, are by law annexed to land, and are enjoyed as a matter of course without the aid or intervention of man by every owner of land.

Ways in which act of man can operate.

In British India easements may be created and acquired—

(1) By grant or covenant ;

(2) under the Indian Limitation Act and the Indian Easements Act by use or enjoyment of the right for a period of years or independently of such Acts by prescription ;

(3) by virtue of a custom ;

(4) by will ;

(5) by virtue of a legislative enactment.

Question whether in India acquisition of easements by grants must be evidenced by writing.

These modes of creation and acquisition of easements will be fully discussed hereafter. The question whether the acquisition of easements in India must be evidenced in writing depends upon various considerations. In the first place, there seems nothing in this country which requires that the actual creation of an easement, as distinct from its transfer, should be in writing.[2] As regards the transfer of an easement it may be said that, inasmuch as an easement cannot be transferred apart from the dominant tenement, the transfer of the easement must involve the transfer of the dominant tenement, and be

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[1] *Per* Cockburn, C. J., in *Mason* v. *Shrewsbury and Hereford Ry. Co.* (1871), L. R., 6 Q. B., 578 (587); 40 L. J. Q. B., 93 (2)).

[2] *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98 ; and *Gazette of India*, July—December (1880), Part V, p. 477.

subject to the same rules of writing and registration.[1] This matter will be further discussed in my sixth chapter.[2]

Variety of Easements.

As to the number of Easements which are capable of creation and acquisition, it has been said that there may be as many easements "as there are ways where by the liberty of a house or tenement may be restrained in favour of another tenement for liberty and servitude are contraries, and the abatement of the one is the being or enlarging of the other."[3] The word servitude is borrowed from the Roman or Civil Law wherein "servitus" or servitude meant an easement, though, as will be seen, the application of the term "*servitus*" is more extended than that of the term "*easement*."

No new kind of easement.

But the number of easements which are capable of enjoyment must not exceed in number those rights which the law has, in course of time, come to recognise as easements, and which the convenience or advantage of a man requires for the beneficial enjoyment of his property.

Keppel v. *Bailey*.

A novel species of easement cannot be arbitrarily created by an owner of land. This principle was first laid down by Lord Chancellor Brougham in *Keppel* v. *Bailey*,[4] which is a leading case on the subject. He said: "There are certain known incidents to property and its enjoyment; among others, certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognised by the law. . . . . . So in respect of enjoyment one may have the portion and the fee simple, and another may have a rent issuing out of it or the tithes of its produce or an easement as a right of way upon it or of common over it. And such last incorporeal hereditaments may be annexed to an estate which is wholly unconnected with the estate affected by the easement, although both estates were originally united in the same owner, and one of them was afterwards granted by him with the benefit, while the other was left subject to the burthen. All these kinds of property,

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[1] See Transfer of Property Act IV of 1882, ss. 54 and 123; Registration Act, III of 1877, s. 17.

[2] See Part II.

[3] Gale on Easements, 7th Ed., p. 19.

[4] (1834), 2 Myl. & K. at p. 535.

however, all these holdings are well-known to the law and familiarly dealt with by its principles. But it must not be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner . . . . but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property and to impress upon their lands and tenements a peculiar character, which should follow them into all hands however remote."

Ackroyd v. *Smith.*

And in the well-known case of *Ackroyd* v. *Smith*, Cresswell, J., said : "It is not in the power of a vendor to create any rights not connected with the use or enjoyment of the land and annex them to it : nor can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of an assignee."[1]

But a valid obligation can be created between grantor and grantee.

But although an unknown and unusual kind of easement cannot be made appurtenant to land so as to pass with it into whatever hands the land may go, there is nothing to prevent an owner of land creating a perfectly valid obligation as between himself and his grantee.[2]

For example, the right to enjoy an uninterrupted view from a drawing-room window over a neighbour's property is not a right which can be annexed to land so as to bind it in the hands of assignees. Such a right, though enforceable by the grantee against the grantor, is of no avail against the grantor's assignees unless they took with notice of the right. In *Leech* v. *Schweder*,[3] Lord Justice Mellhish said :—"The law will not allow the owner of land to attach an unusual and unknown covenant to the land, so that a man, who buys the property in the market without knowing that it is subject to any such burthen, would find that some previous owner had professed to bind all subsequent owners by an obligation not to obstruct the view which somebody else would have from the windows of his house. In such a case as that though the man who makes the

Leech v. *Schweder.*

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[1] (1850) 10 C. B., 188 ; 19 L. J. C. P., 315, 319.

[2] *Hill* v. *Tupper* (1863), 2 H. & C., 121 : 32 L. J. Exch., 217.

[3] (1874) L. R., 9 Ch App. at p. 475 ; 43 L. J., Ch., 491.

covenant is liable, yet those claiming under him are not liable at law, but the Court of Equity says that if a purchaser has taken the land with notice of that contract, it is contrary to equity that he should take advantage of that rule of law to violate the covenant."

But, says the Lord Justice in the case of well-known easements validly created, the right passes at law and the dominant owner may maintain an action against the servient owner if the right is interfered with.

Affirmative and Negative Easements.

The two principal classes into which easements by reason of their nature and the manner of their enjoyment conveniently fall are "affirmative" and "negative."

Having regard to the definition of easements and the obligation on the servient owner either to suffer something to be done, or not to do something, on or over the servient tenement, the classification of easements under the terms affirmative and negative appears to provide a practical and useful division of the subject and to be founded on a logical basis.

Origin of the division.

Moreover, this division of the subject was borrowed by the English law from the Civil Law as comprehending the most practical classification of easements, and until nearly the middle of this century remained unsupplemented.

"Continuous" and "Discontinuous," "Apparent" and "Non-apparent."

In the edition of 1839 of Gale on Easements is found the first mention of a further division of easements into "Continuous" and "Discontinuous," "Apparent" and "Non-apparent." The same division appears in the subsequent editions of the work, and has been adopted in the Indian Easements Act in which connection it will presently be noticed.

This division of the subject appears to have originated in the year 1804 in the Code Napoleon, and in this connection it will be of advantage to quote the words of Lord Blackburn in the case of *Dalton* v. *Angus*.[1] "Those who framed the *Code Napoleon* had to make one law for all *France*. To facilitate their task, they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that

[1] (1881) L. R., 6 App. Cas. at p. 821.

were apparent and non-apparent (Code Civil, Arts. 688, 689). Those divisions and the definitions were, as far as I can discover, perfectly new, for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English authority before Gale on Easements in 1839." One of the results of the French legislation founded on this division was a change in the French law of Easements relating to continuous and discontinuous easements. This change was not, and has never been, received in English law.[1]

Definition of Affirmative Easements.

Affirmative Easements have been defined as those which entitle the dominant owner to make active use of the servient tenement, or to do some act which, in the absence of an easement, would be a nuisance or a trespass.[2]

Definition of Negative Easements.

Negative Easements have been defined as those which restrain the servient owner from exercising an ordinary right of ownership over his land.[3]

In other words, an affirmative easement may be described as a right to *use* in a given manner the servient tenement, and a negative easement may be described as a right in the dominant owner to a *forbearance* on the part of the servient owner from using the servient tenement in a given manner.[4]

Divisions used by Indian Easements Act

The terms "continuous" and "discontinuous," "apparent" and "non-apparent" are used in the Indian Easements Act for the division of easements, but no mention is made in the Act of the terms "affirmative" and "negative," although they were contained in the bill of 1879,[5] and the bill introduced on the 6th November 1880.[6]

Disappearance of terms "Affirmative" and "Negative" from Indian Acts.

The terms "affirmative" and "negative" are also mentioned in section 26 of the Limitation Act XV of 1877, and were

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[1] (1881), L. R., 6 App. Cas. at p. 821.

[2] Sweet's Law Dict., p. 303.

[3] *Ibid.*

[4] See Austin, Juris., 1st Ed., Vol. III, p. 18; 2 Austin Juris., p. 836, 3rd Ed.; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 776, per Fry, J., and see *infra*, Chap. III, Part IV, under "question whether Easements of support affirmative or negative."

[5] One of the six codifying bills laid before the Indian Law Commission, 1879, see s. 5.

[6] See s. 5 at p. 476, *Gazette of India*, 1880, July—December, Part V.

to be found in the corresponding section, section 27, of the Limitation Act IX of 1871, which has been repealed by the former Act.

Continuous and Discontinuous Easements.

To borrow the definitions given in section 5 of the Easements Act, a continuous easement is one whose enjoyment is, or may be, continual without the Act of man.

Indian Easements Act, s. 5.

A discontinuous easement, on the other hand, is one that needs the act of man for its enjoyment.

Illustration (*a*) to the above section provides as an instance of a continuous easement the right annexed to a particular person's house to receive light by the windows without obstruction by his neighbour.

As an instance of a discontinuous easement, Illustration (*b*) gives a right of way annexed to one person's house over another person's land. Another instance of a discontinuous easement is the right to draw water.

Apparent and Non-apparent Easements, Indian Easements Act, s. 5.

Section 5 of the Indian Easements Act defines Apparent and Non-apparent Easements as follows :—

An apparent Easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him. A non-apparent easement is one that has no such sign.

The foregoing division of easements into "continuous" and "discontinuous," "apparent" and "non-apparent" appears to have been introduced into the Indian Easements Act more as a convenient method of classification than as a means of supplying a logical and practical division of the subject, though it is difficult to understand why the classification of "affirmative" and "negative" has been omitted.

Pyer v. *Carter.*

This definition of "Apparent Easement" was taken from the case of *Pyer* v. *Carter*, where it was said that by "apparent signs" must be understood not only 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.[1]

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[1] (1857), 1 H. & N. at p. 922.

Permanent and Limited Easements. Indian Easements Act, s. 6.

According to section 6 of the Indian Easements Act, an easement may be permanent or for a term of years, or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event, or on the performance or non-performance of a specified act.

Instances of limited easements occur in rights of way. A man may have a right of way for agricultural purposes only. Such a right is limited as it is not a right for all purposes,[1] and a man may grant a way for all purposes except that of carrying coals.[2] A right of way can also be granted subject to periodical obstruction or destruction by the grantor. In an old case it was held that "if a man have a right of way through another man's house, he cannot use it at unreasonable hours, nor bring an action for stopping the way without notice and request to have it opened."[3]

Inconsistent Easements.

It has been said that inconsistent easements cannot co-exist.[4]

In this respect easements and natural rights are alike though the origin of the similarity is different.

Natural rights, otherwise inconsistent, are through the operation of their legal origin, limited by each other so as to obviate such inconsistency.[5]

Where, for example, two adjoining landowners possess natural rights in water neither riparian owner can use the water in such a manner as to interfere with the equal common right of his neighbour ; the rights of each are limited by the rights of the other, and the limitations imposed arise out of the legal origin of the rights.

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[1] *Jackson* v. *Stacey* (1816), Holt N. P., 455 ; and see *Brunton* v. *Hall* (1841), 1 Q. B., 792. See further on this subject, Chap. VIII, Part I, C.

[2] *The Marquis of Stafford* v. *Coyney* (1827), 7 B. & C., 257 ; and see Chap. VIII, Part I, C.

[3] *Tomlin* v. *Fuller* (1681), 1 Mod., 27.

[4] See this subject fully considered in Goddard on "Easements," 5th Ed., p. 32.

[5] See *infra* under "Inconsistent Natural Rights."

On the other hand, the rule that easements inconsistent with each other cannot co-exist, does not depend upon the origin of the rights themselves, but upon the legal prohibition which disables a servient owner from creating in favour of a third person an easement which would be inconsistent with, or lessen the utility of, the easement already granted to the dominant owner.

This prohibition proceeds upon the legal principle that a man cannot derogate from his grant.

This principle will be noticed again in connection with the acquisition of *quasi*-easements.[1]

Subordinate Easements.

Although, as has been seen, inconsistent easements cannot co-exist, there is nothing to prevent a second easement being acquired as subordinate to, although in its nature inconsistent with, one already existing where the subject-matter admits of it.[2]

For example, where there is a right to a flow of water for the working of a mill, there is nothing to prevent a second easement being created for the diversion of the water in such manner as not to interfere with the full exercise of the first right.[3]

So in the case of rights in gross, it has been held in India, that the right of Mahommedans to erect a tazia on certain land and go thereon at the time of the Mohurrum was not incompatible with the right of Hindus to go on the same land at another period of the year.[4]

Indian Easements Acts, s. 9.

Subordinate Easements are contemplated by section 9 of the Indian Easements Act. Under this section subject to the provisions of section 8, which enable any one to impose an easement on his property according to the circumstances and extent of his transferable interest therein, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easements.

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[1] See Chap. VI, Part IV, B.

[2] *Mason* v. *Shrewsbury and Railway Co.* (1871), L. R., 6 Q. B., 578.

[3] *Rolle* v. *White* (1868), L. R., 3 Q. B., p. 302 ; 37 L. J., Q. B., 116.

[4] *Ashraf Ali* v. *Jagan Nath* (1884), I. L. R., 6 All., 497.

Ills. (*a*) and (*b*).

Illustrations (*a*) and (*b*) to the section are instances of subordinate easements.

A has in respect of his mill a right to the uninterrupted flow thereto, from sunrise to noon, of the water of *B's* stream. *B* may grant to *C* the right to divert the water of the stream from noon to sunset, provided that *A's* supply is not thereby diminished.[1]

A has in respect of his house a right of way over *B's* land. *B* may grant to *C*, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way, provided that *A's* right of way is not thereby obstructed.[2]

Accessory Easements.

Accessory Easements, or secondary rights as they are called by section 24 of the Indian Easements Act, or secondary easements as they are designated in Gale on Easements,[3] are rights to do acts necessary to secure the full enjoyment of the principal easement.

They must not be confused with subordinate easements which have already been described as independent and inconsistent easements capable of imposition upon the same servient heritage when the subject admits of it.

Indian Easements Act, s. 24.

Section 24 of the Indian Easements Act deals with accessory easements, and after defining the conditions under which they are to be exercised describes them as "rights to do acts necessary to secure the full enjoyment of an easement."

Ill. (*c*).

Illustration (*c*) to this section may be taken as an instance of accessory easements.

The illustration is as follows :—

A, as owner of a certain house, has a right of way over *B's* land. The way is out of repair, or a tree is blown down and falls across it. *A* may enter on *B's* land, and repair the way, or remove the tree from it.

This subject will be fully treated in my Chapter on the "Incidents of Easements."[4]

A brief allusion to it is all that is required here.

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[1] Ill. (*a*).

[2] Ill. (*b*).

[3] 7th Ed., p. 464.

[4] Chap. VIII, Part II.

Easements of necessity as comprising an important class of easements deserve notice here.

Easements of necessity.

The principles which govern their acquisition, transfer, mode and extent of enjoyment, and extinction will be fully discussed in later Chapters.[1]

It will be sufficient here to give a brief explanation of their nature.

Necessary right of way.

An easement of necessity is a right which an owner or occupier of land must of necessity exercise on, over, or in another's land for the enjoyment of his own.

The most ordinary instance of an easement of necessity arises where a man is unable to obtain any access to or derive any benefit from his own land without a right of way over his neighbour's land.

The general rule as to a way of necessity is given by Mr. Sergeant Williams in his note to the well-known case of *Pomfret* v. *Ricroft*.[2] "So when 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. This principle seems to be at the foundation of that species of way which is usually called a way of necessity."

Pomfret v. *Ricroft*.

This statement of the law has been followed by the English Courts in subsequent decisions."[3]

Other easements of necessity.

On the same principle of necessity a right to dig minerals or the soil of another has been held to carry with it the right to dig through the surface land to gain such minerals or soil, and when they have been gained to carry them away over the land.[4]

On the same principle a coal owner having the right to dig pits in another's land for the purpose of getting the coal

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[1] Chap. VI, Part IV, A; Chap. VIII, Part I, B.

[2] 1 Wms. Saund., 321, n. 6.

[3] See *Pinnington* v. *Galland* (1853), 9 Exch., 12; and *Gayford* v. *Moffatt* (1868), L. R., 4 Ch. App., 133.

[4] *Goold* v. *Great Western Deep Coal Co., Ld.* (1865), 13 L. T., 109; *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Ruabon Brick and Terra Cotta Company* v. *Great Western Railway Company* (1893), L. R., 1 Ch., 127.

was held entitled to the right, as incident thereto, of fixing such machinery as would be necessary to draw such coal from the pits.[1]

Indian Easements Act, s. 13 (*a*), (*c*) and (*e*).

Clauses (*a*), (*c*) and (*e*) of section 13 of the Indian Easements Act, deal with easements of necessity, reference to which will show that an easement of necessity can arise in favour of either the transferee of the dominant tenement or the transferor of the servient tenement according as the dominant or servient tenements is transferred or retained as the case may be and this is the case under the general law.[2]

Necessity must be absolute.

With reference to this class of easements, it is important to remember that the necessity which gives rise to them must be an absolute necessity, not a matter of mere convenience or advantage.

So far as the Indian Easements Act is concerned, reference to the Statement of Objects and Reasons of the Bill shews that easements of necessity are to be regarded as rights which are absolutely necessary for enjoying property.[3]

And this view has been taken by the Indian Courts in cases to which the Indian Easements Act has not applied.[4]

In England, though there is a conflict of judicial author ty on the point, the better opinion is thought to be the same way.[5]

That the necessity should be absolute seems consistent with the designation of the right and the requirements of reason.

For it may fairly be said that if a man is to have an obligation exacted from him whereby, as may be seen from the foregoing illustrations of easements of necessity, his land suffers detriment, and he himself is put to inconvenience, annoyance, and even loss, such obligation ought only to be permitted as a matter of necessity.

Mere inconvenience or disadvantage, suffered by the dominant owner or occupier, should not be the measure of the right.

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[1] *Dand* v. *Kingscote* (1840), 6 M. & W., 174.

[2] See Chap VI, Part IV, A.

[3] *Gazette of India*, July to December 1880, Part V, p. 477.

[4] *Purshotam* v. *Durgoji* (1890), I. L. R., 14 Bom., 452; *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1882), I. L. R., 8 Cal., 956.

[5] Goddard on Easements, 5th Ed. p. 38.

Thus a man cannot exercise an easement of necessity over his neighbour's property if there is any other means whereby he can enjoy his own property.[1] Nor can there be more than one way of necessity.[2]

Only one way of necessity.

That this rule might be incapable of application to the natives of India under all circumstances and subject to modification whenever the existence of only one way of necessity offered violence to the observances of caste has been mooted in a recent decision of the Bombay High Court.[3] But no case has as yet arisen calling for a direct decision on this point.

Query as to modification in India of rule of one way.

It is also a rule to be remembered in connection with easements of necessity that the extent and method of their enjoyment must be limited to the purposes for which the dominant heritage is transferred or retained. For the present, this will be sufficiently explained by reference to Illustrations *(a)*, *(b)* and *(n)* to section 13 of the Indian Easements Act.

Limits of extent and method of enjoyment.

Thus, if the dominant heritage be used for agricultural purposes only, the transferor retaining it or the transferee acquiring it can have a way of necessity thereto for agricultural purposes only.

It may be convenient to say a few words here on the subject of *quasi*-easements.

Quasi-easements.

It is mentioned at this stage as these rights are included with easements of necessity in section 13 of the Indian Easements Act.

Indian Easements Act, s. 13.

These rights may be described as conveniences to which an owner subjects one part of his property for the benefit of another. Whenever such parts are separated by grant or devise on the part of the owner of what is called the quasi-dominant heritage, these conveniences, in the absence of a stipulation to the contrary, are taken as easements by the grantee or devisee.[4]

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[1] *Wutzler* v. *Sharpe* (1893), I. L. R., 15 All., 270 : *The Municipality of the City of Poona* v. *V. Rajaram Gholap* (1894), I. L. R., 19 Bom., 797 ; *Holmes* v. *Goring* (1874), 2 Bing., 76 ; 6 Moore, 166.

[2] *Bolton* v. *Bolton* (1879), L. R., 11 Ch. D., 968 ; see further Chap. VI, Part IV, A, and Chap. VIII, Part I, B.

[3] *Esubai* v. *Damodar Ishwardas* (1891), I. L. R., 16 Bom., 552.

[4] See Statement of Objects and Reasons of Easements Bill of 1880 ; *Gazette of India*, July to December 1880, Part V, p. 477.

In like manner if the quasi-dominant heritage is retained, and the quasi-servient heritage is granted or bequeathed, these conveniences will *under the Act* in the absence of a contrary intention expressed or necessarily implied be reserved as easements by the person retaining the quasi-dominant heritage.[1]

In England, and in India where the Indian Easements Act is not in force, the law must be taken to be, that where the dominant tenement is retained, these conveniences will not be reserved as easements without express words of reservation.

These matters will be further considered in connection with the acquisition of easements.[2]

It is to be observed that, as soon as the parts to which the conveniences are attached, and on which they are imposed respectively, are separated, the conveniences become easements, but not till then. Hence, it is presumed, the term quasieasements.

Illustration (*c*) to section 13 of the Indian Easements Act may be taken as affording an instance of quasi-easements arising on the grant or devise of the dominant tenement.

That illustration is as follows :—*A* sells *B* a house with windows overlooking *A's* land which *A* retains. The light which passes over *A's* land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. *B* is entitled to the light, and *A* cannot afterwards obstruct it by building on the land.

Natural Rights.

I now come to the subject of *Natural Rights*, or as they are sometimes called *Natural Easements*.

Natural rights, as their name imports, are those incidents and advantages which are provided by nature for the use and enjoyment of a man's property.

These rights are treated by law as the ordinary incidents of property and annexed to land wherever land exists.

Generally speaking, it may be said that the function of natural rights is to secure to the owner of land the full enjoyment thereof undiminished by any tortious acts on the part of his neighbour.

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[1] *Ibid.*

[2] See Chap. VI, Part IV, B.

Instances of natural rights.

In illustration of these natural rights may be noticed the right of every owner of land to so much light and air as come vertically thereto ;[1] to the support of his land naturally rendered by the adjacent and subjacent soil of another person ;[2] and to the flow of water in a natural stream and to its transmission in its accustomed course.[3]

Indian Easements Act, s. 7.

Section 7 of the Indian Easements Act has already been set out in connection with the restrictive nature of easements, and it again comes under observation here in connection with natural rights.

The illustrations to the section furnish familiar examples of natural rights which it is not at present necessary to treat in detail.

Natural rights: rights ex jure naturæ.

It should be remembered that natural rights are by law annexed to and are inherent in land *ex jure naturæ*, of natural right. Wherever, therefore, natural conditions exist for the vertical passage of light and air, the support of land, or the flow of water, the law requires that these conditions should not be disturbed, and for their protection creates corresponding natural rights.

Exist primâ facie in all cases between landowner and neighbour.

These natural rights exist *primâ facie* in all cases as between a landowner and his neighbour, otherwise, as Mr. Goddard says in his work on Easements,[4] "no man would be assured that his land would not at any moment be rendered useless by a neighbour's act otherwise lawful, or a neighbour might deprive a landowner of the benefit of certain things which in the course of nature have been provided for the common good of mankind."

Are rights in rem.

Further, natural rights are rights *in rem*, that is, enforceable against all who may violate them, and they are affirmative either as rights to do something or negative as rights which every owner of immoveable property has, that his neighbour shall not disturb the natural conditions under which he enjoys his property.

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[1] Gale on Easements, 7th Ed., p. 286 ; Indian Easements Act, s. 7, Ill. (*d*).

[2] Gale, p. 328 ; Indian Easements Act, s. 7, Ill. (*e*).

[3] Gale, p. 213 ; Indian Easements Act, s. 7, Ill. (*h*).

[4] 5th Ed., p. 3.

It should be carefully borne in mind that natural rights, although they are rights in the nature of easements and resemble them in some respects, are distinct from them in origin and otherwise.

Essential distinction between easements and natural rights.

The essential distinction between easements and natural rights appears to lie in this that easements are *acquired restrictions* of the complete rights of property, or, to put it in another way, *acquired rights* abstracted from the ownership of one man and added to the ownership of another, whereas natural rights are themselves part of the complete rights of ownership, belong to the ordinary incidents of property and are *ipso facto* enforceable in law.

Natural Rights are themselves subject to restriction at the instance of easements.

Section 7 of the Indian Easements Act classifies the rights which are so capable of restriction. For example the natural right of support in a landowner may be restricted by virtue of an easement acquired by his neighbour or neighbours. Such right may take the form of doing something in the adjacent or subjacent soil so as to cause subsidence.[1]

So also the right to restrict the natural right to an uninterrupted flow of water may be the subject of an easement.[2]

The effect of the creation of an easement adverse to the natural right is to cause the suspension of the natural right during the continuance of the easement.

Upon the extinction of the easement the natural right revives.

Inconsistent Natural rights.

Inconsistent natural rights cannot co-exist. It has already been pointed out that there is a similarity between easements and natural rights in this respect, but that the principle on which the right is founded is different. The reason that natural rights can never be inconsistent is this, that the law for purposes of general benefit and convenience obviates any inconsistency which might arise by causing natural rights

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[1] See *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348. St., 190; 24 R. R., 169; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 590.

[2] *Wright* v. *Howard* (1823), 1 Sim. &

to fit into and be limited by each other in such manner as to avoid conflict.[1]

Thus " natural rights are subject to the rights of adjoining owners, who, for the benefit of the community, have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours, rights to use their property in the various ways in which property is commonly and lawfully used." [2]

Primâ facie in this country,[3] as in England, every proprietor of land on the banks of a stream or non-navigable river is entitled to that moiety of the soil of the river or stream which adjoins to his land, and the legal expression is, that each is entitled to the soil of the stream or river *usque filium aquae.* " Of the water itself, there is no separate ownership ; being a moving and passing body, there can be no property in it. But each proprietor of land on the banks has a right to use it ; consequently all the proprietors have an equal right, and, therefore, no one of them can make such a use of it, as will prevent any of the others from having an equal use of the stream, *when it reaches them.* . . . . " Each proprietor's " use of the stream must not interfere with the equal common right of his neighbours ; he must not injure either those whose lands lie below him on the banks of the river, or those whose lands lie above him."[4]

It being understood that natural rights can never be inconsistent with each other, it follows that natural rights cannot be affected by each other. The user of a natural right, however long continued, would not impose a burthen upon another's land or affect his natural rights in any way.[5]

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[1] See *supra* under Inconsistent Easements ; *Wright* v. *Howard* (1823). 1 Sim. & St., 190, 24 R. R., 169; 1 L. J. (O. S.) Ch., 94 ; *Bryant* v. *Leferer* (1879), 4 C. P. D., 172 ; 48 L. J. Q. B., 380 ; and *The First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1883), I. L. R., 9 Bom. at p. 212, and see the remarks in Goddard on Easements, 5th Ed. at p. 31.

[2] *Per* Bramwell, L. J., in *Bryant* v. *Leferer* (1879), L. R., 4 C. P. D. at p. 176.

[3] *Bhageeruthee Debea* v. *Greesh Chunder Chowdhry* (1863), 2 Hay, 541 ; *Hunooman Dass* v. *Shama Charn Bhutta* (1862), 1 Hay, 426 ; *Kali Kissen Tagore* v. *Joodoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97 ; and see Doss' Law of Riparian Rights, &c., p. 113.

[4] *Per* Leech, V.C., in *Wright* v. *Howard* (1828), 1 L. J. (O.S.) Ch. at p. 99.

[5] See Goddard on Easements, 5th Ed., p. 32 ; and *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S. at p. 611.

Licenses.

The topic of *Licenses* though forming the subject of an independent chapter deserves passing mention here.

Their nature.

In the first place, it should be carefully observed that there is a fundamental difference between Licenses and Easements.

Differences between Licenses and Easements.

A license passes no interest, nor alters or transfers property in anything, but is a mere personal right to do on the land of the grantor something which, without such license, would be unlawful; whereas an easement is attached to land, and so long as it continues, the benefit and burthen of it continue also, and are enforceable by all and against all into whose hands the dominant and servient heritages respectively come.

English definition of license. *Thomas* v. *Sorrell*.

A familiar definition of license in English law is to be found in an old English case[1] where it was said "a dispensation or license properly passes no interest, but only makes an action lawful which without it had been unlawful; as a license to hunt in a man's park; to come into his house; are only actions which, without license, had been unlawful."

Indian definition.

In the present Indian law a definition of license is given in section 52 of the Indian Easements Act and runs as follows:—

Indian Easements Act, s. 52.

"Where one person grants to another or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

The personal character which attaches to a license when not coupled with a grant renders it, with one exception, a subject for enjoyment by the licensee alone,[2] and for the same reason enforceable only against the licensor.[3]

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[1] *Thomas* v. *Sorrell* (1679), Vaughan Rep., 351, quoted by Tindal, C. J., in *Muskett* v. *Hill* (1839), 5 Bing. N. C. at p. 707, and by Alderson, B., in *Wood* v. *Leadbitter* (1845). 13 M. and W. at 844.

[2] *Ramakrishna* v. *Unni Chuck*, I. L. R., 16 Mad., 280; Gale on Easements, 7th Ed., p. 2.

[3] Gale on Easements, 7th Ed., p. 2; Indian Easements Act, s. 59; and see *Roffey* v. *Henderson* (1851), 15 Q. B. 574.

The exception abovementioned is provided by section 56 of the Indian Easements Act which lays down that in the absence of a different intention expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee, but that with that exception a license cannot be transferred by the licensee, or exercised by his servants or agents.

Licenses coupled with a grant.

When, however, a license is coupled with a grant to the licensee and his assigns, it is assignable.[1]

In the case already mentioned in connection with the English definition of license, instances are given of what a grant may be.

"But a license to hunt in a man's park and carry away the deer killed into his own use; to cut down a tree in a man's ground, and carry it away the next day after to his own use; are *licenses* as to the acts of hunting and cutting down, but as to carrying away the deer killed, and tree cut down, they are *grants*."

Thus a mere license is something quite different from a license coupled with the creation of an interest in immoveable property or right of easement. When that exists in a valid form, it operates as a contract or a gift or grant, and is subject to the same incidents, and is as binding and irrevocable as any other contract, gift or grant.[2]

Accessory licenses.

As the law provides for accessory easements or rights to do acts necessary to secure the full enjoyment of the principal easement, so the law provides for accessory licenses necessary for the enjoyment of any interest or the exercise of any right.

Indian Easements Act, s. 55.

Section 55 of the Indian Easements Act provides that all licenses necessary for the enjoyment of any interest or the exercise of any right are implied in the constitution of such interest or right and describes such licenses as accessory licenses.

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[1] See *Muskett* v. *Hill* (1839), 5 Bing., N. C. at p. 707.

[2] *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98.

Public Rights.

The next class of rights to be noticed are "Public Rights."[1]

By public rights, I mean rights acquired by the public in general and resembling easements by being exercised over what in this connection, may be called a servient tenement, but differing from easements, through being unconnected with a dominant tenement.

Public Rights of way.

Those public rights which, for the purposes of this work deserve special mention, are public rights of way.

It will be remembered that these rights being unconnected with a dominant tenement are not easements but rights in gross.

Rangeley v. *The Midland Railway Co.*

In the case already referred to of *Rangeley* v. *The Midland Railway Co.*, Cairns, L. J., said :[2] "In truth, a public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing . . . . . It is quite clear that it is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement."

Illustration (*e*) to section 4 of the Indian Easements Act shews that these rights are not recognised as easements by that Act.

Limit of the right.

These rights are limited to the right of the public in general to pass and repass along a road or highway.[3] Any member of the public using the road or highway for any other purpose would be in law a trespasser.[4]

Hence a public right of way does not affect a man's property except in so far as the public have the right of passing and repassing along it. Subject to the right of way, the soil of the road and every right incident to the ownership of the soil remains in the owner of the property.[5]

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[1] See these rights, specially dealt with in Chap. IV, Part II, A (2).

[2] (1868), L. R., 3 Ch. App. at p. 311.

[3] *The Queen* v. *Pratt* (1855), 4 E. & B., 860 ; *St. Mary Newington* v. *Jacobs* (1871), L. R., 7 Q. B., 47 ; 41 L. J. M. C., 72.

[4] *The Queen* v. *Pratt* (1855), 4 E. & B., 860.

[5] *Ibid*, per Campbell, C. J. at p. 865.

And in the case of *St. Mary Newington* v. *Jacobs* it was said :[1] "The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith."

St. Mary Newington v. *Jacobs.*

Public rights of way arise by dedication in favour of the public by the owner of the property over which the rights are exercised.[2]

How acquired.

It will be seen hereafter when further mention is made of the method of acquisition of this class of rights that the dedication from which they arise is founded on a presumption derived from long and uninterrupted user on the part of the public.[3]

Such public rights must not be confused with rights of way over land which are easements and acquired by a certain portion of the public, such as the occupants of a particular number of houses.[4]

Not to be confused with easements acquired by a portion of the public.

It is only by dedication that the general public can acquire a right of way[5]; whereas the inhabitants of a particular place can acquire rights of easement over land by grant, actual or presumed,[6] or by custom.[7]

Easements are capable of being acquired under and by virtue of a custom, but all customs relating to the use and enjoyment of land are not easements.

Customs and easements arising by custom.

From what has been already said as to the nature and qualities of an easement, it will be remembered that an easement is a right or privilege with or without profit which one or more individuals can exercise in respect of his or their land for the advantage or beneficial enjoyment thereof in or over the land of some other person.

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[1] (1871), L. R., 7 Q. B. at p. 53; 41 L. J. M. C. at p. 75.

[2] *Vestry of Bermondsey* v. *Brown* (1865), 35 Beav., 226; *Rangeley* v. *The Midland Railway Co.* (1868), 37 L. J. Ch. (316).

[3] *Ibid* and see *Poole* v. *Huskisson* (1843), 11 M. & W., 830; and *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1883), I. L. R., 7 Bom., 209, and Chap. IV.

[4] See *Duncan* v. *Louch* (1845), 6 Q. B., 904; and *Fatehyab Khan* v. *Muhammad Yusuf* (1887), I. L. R., 9 All., 434.

[5] *Poole* v. *Huskisson* (1843) 11 M. & W., 827; *Vestry of Bermondsey* v. *Brown* (1865), 35 Beav., 226.

[6] *Vestry of Bermondsey* v. *Brown.*

[7] Indian Easements Act, s. 18.

Differences between mere customs and easements.

An easement is not limited to one particular place or locality, but is capable of enjoyment wherever land, the subject of ownership, is to be found.

A custom, on the contrary, is a thing of local birth, of exclusive application to a particular locality and to a particular portion of the public, and in many cases exists independently of association with a dominant and servient tenement.[1]

Hammerton v. *Honey.*

In *Hammerton* v. *Honey*,[2] Jessel, M. R., in describing a custom, said :—"Now what is a custom? A custom, as I understand it, is local common law. It is common law because it is not statute law ; it is local law because it is the law of a particular place as distinguished from the general common law."

Moreover a custom is not subject in all respects to the same principles which apply to easements. For instance, the rule of reasonableness, which is one of the considerations in determining the validity of a custom, does not apply to easements.[3]

In England the distinction between easements and customs has been clearly defined by judicial authority.

Mounsey v. *Ismay.*

In the case of *Mounsey* v. *Ismay*,[4] where the question was whether a custom, for the freemen or citizens of Carlisle to enter upon another man's land for the purpose of holding horse-races there, was an easement, Martin, B., said :—"In the first place, we do not think that this custom is an easement. One of the earliest definitions of an easement with which we are acquainted is in the *Termes de la Ley*, and it 'is a privilege that one neighbour hath of another, by writing or prescription, without profit, as a way or sink through this land.' In this definition custom is not mentioned, prescription is ; and it therefore seems to point to a *privilege belonging to an individual*, not a *custom which appertains to many as a class.*"

And the inhabitants of a place may lawfully set up a custom to hold lawful sports on a village green or other piece of land.[5]

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[1] See *Ashraf Ali* v. *Jagan Nath* (1884), I. L. R., 6 All., 497.

[2] (1876), 24 W. R., 603.

[3] See Gale on Easements, 7th Ed., p. 3.

[4] (1865), 3 H. & C., 486 (497) ; J., Exch., 52 (56).

[5] *Abbot* v. *Weekly* (1677), 1 Lev., 176.

And "a custom for the inhabitants of a parish to enter upon certain land in the parish and erect a May-pole thereon, and dance round and about it, and otherwise enjoy on the land any lawful and innocent recreation at any time in the year is good."[1]

Ashraf Ali v. *Jagan Nath.*

In this country the principle differentiating easements and customs laid down in *Mounsey* v. *Ismay* was followed in a case where the right claimed by certain Hindus to go on a piece of land for the purpose of religious observances was held to be a right by custom rather than an easement, the right not being set up in respect of any dominant tenement[2] to which it was appurtenant, over a servient tenement subject to it.[3]

Easement acquired by custom.

But although easements and customs are distinct in the respects above noticed, there is nothing to prevent an easement being acquired in a particular locality under and by virtue of a custom.

This proposition will be found to be supported by decisions both in England[4] and in this country,[5] and has been endorsed by section 18 of the Indian Easements Act.

Indian Easements Act, s. 18.

This section lays down that an easement may be acquired by virtue of a local custom, and that such easements are called customary rights.

Right of privacy.

Illustration (*b*) provides for the acquisition of a right of privacy by virtue of the custom of a certain town.

The right of privacy arising by custom has been recognised by the Courts of this country.[6]

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[1] *Hall* v. *Nottingham* (1875), L. R., 1 Ex. D., 1.

[2] *Ashraf Ali* v. *Jagan Nath* (1884), I. L. R., 6 All., 497.

[3] *Ashraf Ali* v. *Jagan Nath* (1884), I. L. R., 6 All., 497.

[4] *Carlyon* v. *Lovering* (1857), 1 H. & N., 784; 26 L. J., Exch., 251; *Wright* v. *Williams* (1836), 1 M. & W., 77; 5 L. J. N. S., Exch., 107.

[5] *Mahomed Abdur Rahim* v. *Birju Sahu* (1870), 5 B. L. R., 676; *Manishankar Hargovan* v. *Trikam Narsi* (1867), 5 Bom. H. C. (A. C. J.), 42; *Kuvarji Premchand* v. *Bai Javer* (1868), 6 Bom. H. C. (A. C. J.), 143; *Shrinivas Udpirav* v. *Reid* (1872), 9 Bom. H. C., 266; *Gokal Prasad* v. *Radho* (1888), I. L. R., 10 All., 358; *Abdul Rahman* v. *Emile* (1893), I. L. R., 16 All., 69; *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87; *Sayyad Azuf* v. *Ameerabibi* (1894), I. L. R., 18 Mad., 163; and see Chap. IV, Part I.

[6] See the references in note 2.

But the right of privacy is not a right which is inherent in property, and unless established by prescription, grant, or express local usage, cannot be made the subject of an actionable wrong.[1]

In England the law appears to be that the Courts will not afford relief for the mere invasion of privacy[2] except on the ground of a breach of covenant.[3]

No period prescribed by Indian Legislature for establishment of Local custom.

The Indian Easements Act does not say how a local custom may be established. But it has been held by the Allahabad High Court in a recent case[4] that the principle of the English common law that a custom is not proved if it is shown not to have been immemorial does not apply in the North-Western Provinces, and that the application of such a principle would be to destroy many customary rights of modern growth in villages and other places. In the same case the Court, in laying down the principles upon which a local custom would hold good, and in observing that the Statute law of India does not prescribe any period for the establishment of a local custom, stated that "it would be inexpedient and fraught with the risk of disturbing perfectly reasonable and advantageous local usages regarded and observed by all concerned as customs to attempt to prescribe any such period.[5]

Part II—History of Easements.

Preliminary remarks as to method of treatment.

HAVING dealt generally, in the first part of this chapter, with the nature, some of the prominent features and divisions of easements, and with various other matters connected there-

[1] *Per* Markby, J., in *Mahomed Abdur Rahim* v. *Birju Sahu* (1870), 5 B. L. R., 676; and see *Shrinivas Udpirav* v. *Reid* (1872), 9 Bom. H. C., 266; and *Sayyad Azuf* v. *Ameerabibi* (1894), I. L. R., 18 Mad., 163; and see Chap. IV, Part I, B. (1), (*b*).

[2] *Chandler* v. *Thompson* (1811), 3 Camp., 80; *Turner* v. *Spooner* (1861), 30 L. J., Ch., 801; *Tapling* v. *Jones* (1865), 11 H. L., 290; and see *Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141, where the English law was followed; and see Chap. IV, Part I, B. (1), (*b*).

[3] *Lord Manners* v. *Johnson* (1875), L. R., 1 Ch. D., 673.

[4] *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87. This decision was approved in *Palaniandi Tevan* v. *Puthirangonda Nandan* (1897), I. L. R., 20 Mad., 389; *Mohidin* v. *Shivlingappa* (1899), I. L. R., 23 Bom., 666.

[5] At p. 92.

with, it is proposed to devote the second part of this chapter to a short study of the history of easements.

In the course of this historical sketch, reference will be made to the recognition of easements by the Roman law, their subsequent incorporation into English law, and their recognition by the purely Indian law, by which is meant Hindu and Mahomedan law.

Mention will then be made of the application of the English law to India prior to the passing of special Indian enactments relating to easements, and the course of Indian legislation will be traced.

A. Roman Law.—

Origin of Servitudes.

Easements or Servitudes, which are inclusive of easements, are rights of great antiquity.

"The laws of every country must necessarily recognise servitudes. It has been well said that the origin of servitudes is as ancient as that of property, of which they are a modification."[1]

Easements known to Roman Law as Servitudes.

By the Roman law to which it is now intended to refer on the subject of easements, is meant the fabric of law which originated in the Twelve Tables, was gradually developed through succeeding centuries and finally took codified form under the Emperor Justinian in the sixth century after Christ. Turning to the Roman or Civil law, as it is sometimes called, upon which the legal systems of most of the continental nations are based, and from which the English common law has borrowed many maxims of proved wisdom and utility, it is found that easements were recognised under the name of Servitutes or Servitudes.

Servitudes defined.

The whole bundle of rights which went to constitute the complete ownership of property was called *Dominium*, and servitudes were regarded as fragments of such *dominium* severed from the original stock, and granted to some person other than the original proprietor in restriction of the latter's absolute ownership. For this reason, rights of servitude were

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[1] *Bagram* v. *Khetternath Karformah* (1869), 3 B. L. R., O. C. J., *per* Norman, J., at p. 37.

called by the Roman lawyers, "*jura in re alienâ*," that is to say. rights over subjects of which the property or *dominium* was vested in another or others.[1]

Such fragmentary rights or portions of the whole rights or bundle of rights called *Dominium* were given the name of *Servitutes*, because the property, over which they were exercised, became subject to a sort of slavery, as it were. for the benefit of the dominant owner or the person entitled to exercise these separate rights over it.

Servitude a term of wider application than easement.

The term servitude, however, meant something more than the duty or obligation resting on the owner or occupier of the servient tenement, and had a wider application in Roman law than the term easement usually has in English : for it was used also to express the *jus servitutis*, or the right corresponding with the duty, the *jus in re alienâ*, whilst the term easement is generally used to express the right alone.[2]

Prædial Servitudes.

Rural and Urban Servitudes.

The Servitudes which corresponded with easements were called Prædial Servitudes, or servitudes relating to immoveables, and Prædial Servitudes were called Rural or Urban. according as they related to land or buildings wherever situated.[3]

For example, a rural servitude meant a right of way for man, a right of passage for animals, watercourses, etc.,[4] whereas an urban servitude meant a right of support to buildings, a right to light, etc.[5]

Prædial Servitudes could be acquired by prescription.

As an easement can be acquired by uninterrupted enjoyment of the right for a particular period of years, so, in Roman law, a title to a Prædial Servitude could be established in Roman law by uninterrupted enjoyment for a long period of time.[6]

Servitudes included profits à prendre.

According to Roman law, the term *servitus* had not only a wider meaning than that usually applied to English

[1] Austin on Jurisprudence, 2nd Ed., III, 14.

[2] Austin on Jurisprudence, 2nd Ed., III, 28 ; Gale on Easements. 7th Ed., p. 2.

[3] Inst. Lib. II, Tit. III.

[4] Inst. Lib. II, Tit. III.

[5] Inst. Lib. II, Tit. III, 1.

[6] *Ponnuswami Tevar* v. *The Collector of Madura* (1869), 5 Mad. H. C. at p. 20.

Easements, but a wider application also, for it included profits à prendre.[1]

B. English Law.—

Origin and early growth of English law of Easements.

The origin and early growth of the English law relating to Easements appears to be somewhat obscure.

There is no doubt that from the earliest times rights of easement were recognised by the ancient common law of England. There are cases in the Year Books in Michaelmas Term, 7th Edward III, and Michaelmas Term, 14th Hen. IV, fol. 25, in which the Court regarded it as settled law that if a man had an ancient house, with windows overlooking the land of his neighbour, through which light and air had been admitted from a time from which the memory of man ran not to the contrary, an action lay against any person who might obstruct such light and air.[2]

Easements at first subject to mixed influences.

It is certain that the English law of Easements has developed in a great measure under the influence of the common law of England, but if we are reminded of the struggles of the ancient common law to find national expression amidst the conflicting influences of the customs of the ancient Britons, the laws of the Romans, Saxons, Danes and Normans, the impossibility of assigning one fixed origin to easements will hardly be a matter of surprise to us.

And this impossibility will become the more apparent when it is remembered that "common law" is the custom of the realm, and grows out of those rules and maxims relating to the persons and property of men which receive the tacit assent of the people by long usage. The more varied, therefore, the influences affecting the origin of any law, the more varied such origin must be.

Whatever theories there may be as to the origin of the English law of Easements, there is no doubt that one effect of the Norman conquest was to impress the Norman jurisprudence strongly upon the common law of England, which, at that

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[1] Inst. Lib. II. Tit. III, 2.

[2] See *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 38.

time, must have represented a fusion of Roman, Danish and Saxon customs.[1]

Influence of Roman law on Easements.

Equally certain is it that at a later period, namely, in the reign of *Henry* III, when the laws of *Edward* the Confessor and the *Norman* customs were found insufficient to form a system of law suitable to the then existing state of society, both Courts of Justice and Law writers were obliged to adopt such of the rules of the digest or pandects of Justinian as were not inconsistent with English principles of jurisprudence.[2]

Moreover the favour which Roman law has found in the sight of English Courts of Justice is exemplified by the readiness of those tribunals to accept the guidance of the Roman law in cases where no direct authority could be cited from the English books.

To such effect are the observations of Tindal, C. J., in the well-known case of *Acton* v. *Blundell*,[3] to which reference will be made hereafter in connection with the underground flow of water.

For these reasons, there seems little doubt that some of the Roman law of Servitudes has found its way into the English law of Easements.

Influence of equitable doctrines on easements.

Returning to the days of Henry III, and assuming that from that time the Common Law of England began to take settled form, it behoves us to refer to the jurisdiction of the Chancellor's Court, and to consider the reason of its introduction and the effect that the doctrines of equity, which were the outcome of such jurisdiction, had on the law of the land.

Opinions differ as to when the Chancellor's Court, or to give it its other name, the Court of Chancery, was introduced, but it is certain that the jurisdiction of Chancery was in full operation during the reign of Richard II, and that its principal function was to remedy the defects of the common law.[4]

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[1] See Reeves History of the English Law.

[2] *Gifford* v. *Lord Yarborough* (1828), 5 Bing. at p. 167.

[3] (1843) 12 M. & W. at p. 353.

[4] See Story's Equity Jurisprudence, 2nd Eng. Ed., §§ 46, 49.

Thenceforward, until the passing of the Judicature Act, 1873, the doctrines of equity and the remedial powers of the Court of Chancery continued to expand and improve under the fostering care and skilful treatment of successive Chancellors, and the jurisdiction of the Court was applied to meet the necessities of the times by the mitigation of the extreme rigour of the common law, and the interposition of mild and beneficent doctrines suitable to the correction of injustice and the redress of grievances.

Judicature Act, 1873.

With the passing of the Judicature Act, 1873,[1] the present administration of law in England was established and the separate jurisdictions of the Chancery and Common Law Courts were united in the High Court of Justice for the purposes of the concurrent administration of law of equity.[2]

By the same Act it is provided that, when there is any conflict between the rules of Equity and Common Law, the rules of equity are to prevail,[3] and that the High Court has power to grant a mandamus or injunction in all cases where it appears to the Court just or expedient that such order should be made.[4] The Common Law Procedure Act, 1854,[5] and Lord Cairns' Act, 1858,[6] paved the way for the Judicature Act by respectively giving the Common Law Courts power to issue injunctions and receive equitable defences, and the Chancery Court power to give damages in addition to, or in substitution for, an injunction.

Common Law Procedure Act and Lord Cairns' Act.

The result of these Acts has been to abolish the distinction between law and equity in disputes relating to easements, and to make equity a part of the law.

Prior to these Acts the legal remedy for the disturbance of an easement was either by an action at law for *damages* or a suit in equity for an *injunction.* Under the present procedure, there may be a suit in the High Court for either purpose.

Instances of the effect of equitable doctrines.

As instances of the effect of equitable doctrines, as regards easements, may be noticed the case of an agreement in England,

[1] 36 & 37 Vict., c. 66.
[2] *Ibid*, s. 16.
[3] *Ibid*, s. 24.
[4] *Ibid*, s. 25.
[5] 17 & 18 Vict., c. 125.
[6] 21 & 22 Vict., c. 27.

based on good consideration, being held a good agreement, and as conferring a right of easement without writing, and the introduction of the doctrine of acquiescence in connection with the acquisition of an easement by constructive grant.

Earliest definition of "Easement."

The earliest definition in English law of the term "Easement" is to be found in an ancient work called Termes de la Ley,[1] where an easement is described to be "a privilege that one neighbour hath of another, by writing or prescription, without profit, as a way or sink through his land, or such like."

Origin of word "Easement."

The word "Easement" itself appears to be of French or Norman origin, and was probably introduced to the Common Law of England at the time when the Norman Jurisprudence began to make itself felt.

Origin of word "Profit à Prendre."

There is no doubt as to the term "Profit à Prendre" being of French origin.

C. Indian Law.—

Hindu law.

It seems clear that easements were known and recognised by Indian law, that is to say, Hindu and Mahomedan law. As to Hindu law, "in Halhed's Gentoo Law, p. 162, which is a translation of a compilation of the ordinances of the pandits, made under the direction of Warren Hastings, between 1773 and 1775, it is laid down that 'if a man hath a window in his own premises, another person having built a house very near to this, and living there with his family hath no power to shut up that man's window ; and if this second person would make a window to his own house, on the side of it, that is, towards the other man's house, and that man at the time of constructing such window forbids and impedes him, he shall not have power to make a window. If the drain of a man's house hath, for a long series of years, passed through the buildings belonging to another person, that person shall not give impediment thereto.' Many other species of servitudes are referred to in the same book."[2]

In another work, the Vivada Chintamani, various easements are mentioned at pages 124 and 125.

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[1] P. 284.

[2] *Per* Norman, J., in *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 38.

As regards Mahomedan law, reference to the Hedaya, Hamilton's Edition,[1] shews that a right in the nature of an easement is acquired by one who digs a well in waste ground, *viz.*, that no one shall dig within a certain distance of it, so as to disturb the supply of water.

Mahomedan law.

Rights to the use of water for the purposes of irrigation are recognised and defined in the same work.[2]

Application of English principle in India.

The right to discharge water on the terrace of another is mentioned at page 146 of the same work.

That there can be a claim of servitude is recognised at page 71.

D. Anglo-Indian Law.—

Prior to the passing of special Acts relating to easements, the development of the law of Easements in British India was almost invariably accompanied by the application of English principles.

Generally speaking, as regards the mofussil, the rule which has been established by regulations in Bengal[3] and Bombay[4] and recognized by the Indian Courts,[5] that in the absence of any law or well-established custom existing in India, and applicable to the particular case, the principles of justice, equity and good conscience are to apply, appears to have for its corollary that, where the usages and habits of the people of India admit of it, the English law may well be taken as the measure and standard of such principles.[6] And on this subject

Law of mofussil.

"Justice, equity, and good conscience."

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[1] P. 132, and see judgment of Norman, J., in *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 37.

[2] Pp. 136—155.

[3] Ben. Reg. III of 1793, s. 21; Ben. Reg. VI of 1793, s. 31.

[4] Bom. Reg. IV of 1827, s. 26.

[5] *Bhageeruthea Debea* v. *Greesh Chunder Chowdhry* (1863), 2 Hay at p. 546; *Secretary of State* v. *Administrator-General of Bengal* (1868), 1 B. L. R., O. C. J., 87; *Mithibai* v. *Limji Nowroji Banaji* (1881), I. L. R., 5 Bom., 506; *Charu Surnokar* v. *Docouri Chunder Thakoor* (1882), L. R., 8 Cal. at p. 959; *Abdool Hye* v. *Mir Mahomed Mozuffer Hossain* (1883), L. R., 11 I. A., 10.

[6] See *Soroop Chunder Hazrah* v. *Troylokho Nath Roy* (1868), 9 W. R., 230; *Molloo March & Co.* v. *The Court of Wards* (1872), L. R., I. A., Sup. Vol. at p. 100; *Ram Lall Singh* v. *Lill Dhary Mahton* (1878), I. L. R., 3 Cal., 778; *Mathoora Kant Shaw* v. *The India General Steam Navigation Co.* (1883), I. L. R., 10 Cal. at p. 189; *Webbe* v. *Lester* (1865), 2 Bom. H. C., 55; *Mithibai* v. *Limji Nowroji Banaji* (1881), I. L. R., 5 Bom., 506; *Chunilal* v. *Manshankar* (1893), L. R., 18 Bom., 623: and see *Brojodurlabh Sinha* v. *Ramanath Ghose* (1897), I. L. R., 24 Cal. at p. 930.

it will be useful to quote from the judgment of Peacock, C. J., in the Full Bench case (on appeal from the mofussil) of *Soroop Chunder Hazrah* v. *Troylokho Nath Roy*,[1] in which the English law was applied.

"Now, having to administer equity, justice, and good conscience, where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the Courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them."

Law of Presidency-towns.

As regards the presidency-towns, however, a different rule has been observed under the jurisdiction of the Supreme and High Courts as to the law to be applied.

By virtue of the provisions contained in the Charters constituting these Courts, English law is to be administered in all cases except those relating to inheritance or succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu or Muhammadan is a defendant, in which case the Hindu or Muhammadan law, if any, must be applied.[2]

In conformity with these provisions, High Courts have felt themselves bound to apply the English law in cases of easements arising within their jurisdiction.[3]

General application of English principles in presidency-towns and mofussil.

And in further testimony to the application of English principles to the subject of easements in India, whether in cases arising in the presidency-towns or in the mofussil, may be noticed the observation of Mr. Whitley Stokes in the Statement of Objects and Reasons accompanying the introduction of the Easements Bill of 1880,[4] to the effect that the law of England

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[1] (1868), 9 W. R., 230.

[2] *Webbe* v. *Lester*, 2 Bom. H. C. at p. 56; see also, as to the extent of English law to be administered, Broughton's Civil Procedure Code, VIII of 1859, 4th ed., p. 893; and Morley's Digest, Vol. I, p. xxii of the Introduction.

[3] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Bhuban Mohan Banerjee* v. *Elliot* (1870), 6 B. L. R., 85; *Modhoosoodun Dey* v. *Bissonath Dey* (1875), 15 B. L. R., 361.

[4] *Gazette of India*, 1880, Part V, July—Dec., p. 476.

"being just, equitable, and almost free from local peculiarities, has, in many cases,[1] been held to regulate the subject in this country."

E. Repealed Indian Enactments relating to Easements.—

Under this head the Acts requiring notice are the Limitation Acts, XIV of 1859, IX of 1871, and XV of 1877.

Indian Limitation Acts.

Act XIV of 1859 was repealed by Act IX of 1871, which in turn was repealed by Act XV of 1877, which itself, so far as the definition of "Easements" and sections 26 and 27 are concerned, has been repealed by the Indian Easements Act, V of 1882, as regards the territories to which the latter Act applies.

Act XIV of 1859.

All these Limitation Acts applied to the whole of British India, and although Act XIV of 1859 contained no provision expressly referring to easements, it is noticed here as a matter of historical interest in connection with the inclination shown on the part of the High Courts of Bengal and Madras, at a time when there was no precise rule in the mofussil as to the period of uninterrupted enjoyment required to establish an easement, to avail themselves of the analogy offered by section 1, clause 12 of the Act, and to fix twelve years as the extent of such period.[2] But the Bombay High Court declined to accept such analogy on the ground that the long-established law of Bombay required a period of twenty years for the establishment of an easement.[3]

Act IX of 1871.

The first Indian Act which expressly recognized Easements was the Limitation Act, IX of 1871.

Section 27.

It contained no interpretation of "Easement" as is found in section 3 of the Limitation Act, XV of 1877, but by section

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[1] In Bengal, *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Bhuban Mohan Banerjee* v. *Elliot* (1870), 6 B. L. R., 85; *Modhoosoodun Dey* v. *Bissonath Dey* (1875), 15 B. L. R., 361. In Bombay, *Cullian Doss Kirparam* v. *Cleveland* (1862), 2 Ind. Jur., O. S., 16; *Ratanji H. Bottlewalla* v. *Edalji H. Bottlewalla* (1871), 8 Bom. H. C., O. C. J., 181. In the mofussil, *Ponnusawmi Tevar* v. *The Collector of Madura* (1869), 5 Mad. H. C., 6, 23, 24; *Krishna Ayyar* v. *Vencatachella Mudali* (1872), 7 Mad. H. C., 60; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46.

[2] *Joy Prokash Singh* v. *Ameer Ally* (1868), 9 W. R., 91; *Ponnusawmi Tevar* v. *The Collector of Madura* (1869), 5 Mad. H. C. at p. 21.

[3] *Narotam Bapu* v. *Ganpatrav Pandurang* (1871), 8 Bom. H. C., 69.

27 it provided for the acquisition of an easement, whether affirmative or negative, by the enjoyment of such easement, as of right and without interruption, for a period of twenty years.

Section 28.

By section 28 of the same Act in computing the said period of twenty years, provision is made for the exclusion, as against the reversioner, of the time for which any easement, other than easements of light and air, was enjoyed on or over his property during the continuance of the interest of his predecessor in title, whether for life or for a period exceeding three years.

And in the second schedule annexed to the Act, Articles 31, 32, 40, and 118 provided for the limitation of suits for the disturbance of easements by the period of two years and six years respectively, and Article 146 provided for the limitation of suits for declaration of rights to easements by the period of twelve years.

Article 31 related to a suit for damages for the obstruction of a way or watercourse, Article 32 to a suit for damages for the diversion of a watercourse, and Article 40 to suits for damages for the disturbance of other easements; whilst Article 118 related to suits for which no period of limitation was provided elsewhere in the schedule.[1]

Act XV of 1877, s. 3.

Act XV of 1877, which repealed Act IX of 1871, introduced into its interpretation clauses in section 3 the following paragraph relating to easements :—

Interpretation of "Easement."

"'Easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit, any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another."

As has already been seen, this provision has introduced into Indian law a fusion of easements and profits *à prendre*.

Sections 26 and 27.

Further, sections 26 and 27 of Act XV of 1877 contain the same provisions regarding easements as those which were embodied in the corresponding sections 27 and 28 of the Act of 1871, except that section 28 of the latter Act expressly

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[1] For the application of this article see Chapter XI, Part III (5).

excluded easements of light and air from its operation, and that section 27 of the Act of 1877 applies to *all* easements.[1]

Articles 36, 37, and 38 of the second schedule correspond with Articles 40, 31, and 32, respectively, of the previous Act, but differ in the respect that Articles 37 and 38 make three years instead of two years the period of limitation.

Further, Article 120 of the Act of 1877 corresponds with Article 118 of the Act of 1871.

Subject to the provisions of section 26 with reference to easements acquired by long enjoyment, Article 120 governs suits for injunction to restrain or remove the disturbance of easements.[2]

In Act XV of 1877 there is no article corresponding with Article 146 of Act IX of 1871. The articles of Act XV of 1877 have not been repealed by the Indian Easements Act, and therefore govern the limitation of suits relating to easements in the whole of British India. They are mentioned at this stage in a consideration of the whole Act.

Object of Acts IX of 1871 and XV of 1877. These Acts remedial, not prohibitory or exhaustive.

It has been laid down by the Privy Council that the object of Act IX of 1871 was to make more easy the establishment of rights of easements by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give without more, a title to easements, but that the Act was remedial, and was neither prohibitory nor exhaustive.

Under it a man might acquire a title who had no other right at all, but it did not exclude or interfere with other titles and modes of acquiring easements.[3]

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[1] From the statement of Objects and Reasons in the Indian Limitation Bill of 1877, it appears that the exception as to light and air was struck out of s. 28, because it was thought to complicate the law, and because the reasons which led to the insertion of a like exception in the English Prescriptive Act did not seem to apply to India (*Gazette of India*, Part V, January to June 1877, p. 113).

[2] See Chapter VII, Part II, and Chapter XI, Part III (5), and *Kanakasabai* v *Muttu* (1890), I. L. R., 13 Mad., 445.

[3] *Rajrup Koer* v. *Abdul Hossein* (1880), I. L. R., 6 Cal., 394; 7 C. L. R., 529; 7 I. A., 240; and see *Modhoosoodun Dey* v. *Bissonath Dey* (1876), 15 B. L. R., 361.

This decision has been followed by the Indian Courts with reference to the Act of 1877.[1]

F. Unrepealed Indian Enactments relating to Easements.—

It will be convenient to notice these Acts in chronological order.

Act VIII of 1873, s. 8, cls. (*h*) and (*i*), and s. 32, cl. (*b*).

The first Indian enactment we find on this subject is Act VIII of 1873, an Act of the Governor-General in Council entitled "The Northern India Canal and Drainage Act," and applying to the Punjab, North-Western Provinces and Oudh, and the Central Provinces.

Compensation.

By section 8, clause (*h*), it is provided that compensation will be awarded by Government as regards damage done in respect of any right to a watercourse or the use of any water to which any person is entitled under the Indian Limitation Act, 1871, Part IV (with which Part IV of the present Limitation Act, XV of 1877, corresponds).

Clause (*i*) of the same section provides how the amount of such compensation is to be determined.

Compensation when not awarded.

By section 32, clause (*b*), of the same Act no claim is to be made against Government for compensation in respect of loss caused by the failure or stoppage of the water in a canal by reason of any cause beyond the control of Government.

Bengal Act, III of 1876, s. 11, cl. (*g*).

The next Act in order of time is an Act of the Bengal Council, Act III of 1876, called "The Bengal Irrigation Act."

Compensation.

By section 11, clause (*g*), of this Act it is provided that compensation may be awarded as regards damage done in respect of any right to a watercourse or the use of any water to which any person is entitled under the Limitation Act of 1871, Part IV.

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[1] *Achul Mahta* v. *Rajun Mahta* (1881), I. L. R., 6 Cal., 812; *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281; *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1882), I. L. R., 8 Cal., 956; 10 C. L. R., 577; *Punja Kuvarji* v. *Bai Kuvar* (1881), I. L. R., 6 Bom., 20; *Srinivasa Rau Saheb* v. *The Secretary of State* (1880), I. L. R., 5 Mad., 226; *Sri Raja Verichcrla* v. *Sri Raja Satracherla* (1881), I. L. R., 5 Mad., 253; *Arzan* v. *Rakhal Chunder Chowdhry* (1883), I. L. R., 10 Cal., 214; and see *The Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839.

We then come to the Specific Relief Act, I of 1877, which extends to the whole of British India except the Scheduled Districts as defined in Act XIV of 1874. Sections 52 to 57 deal with the subject of preventive relief by temporary, perpetual, and mandatory injunctions to prevent and remedy the disturbance of easements.

Specific Relief Act, I of 1877.

Preventive Relief.

Section 54 of the same Act recognises the alternative method of relief by damages.

The next Act in order of time is the Indian Limitation Act, XV of 1877, the provisions of which, as relating to easements, have already been referred to.

Limitation Act, XV of 1877.

It will be remembered that this Act has been repealed by the Indian Easements Act only as regards the territories to which the latter Act applies.

It may, therefore, as regards easements, be said to apply to the whole of British India excepting those parts thereof to which the Indian Easements Act applies, that is to say, the Limitation Act, XV of 1877, applies to the whole of British India, except the Provinces of Bombay and Madras, the North-Western Provinces and Oudh, the Central Provinces, and Coorg.

Extent of Act as regards easements.

The next Act dealing with easements is the Transfer of Property Act, IV of 1882, section 6, clause (*c*), provides that an easement cannot be transferred apart from the dominant heritage, and section 8 of the same Act provides that unless a different intention is expressed or necessarily implied a transfer of land passes forthwith to the transferee the easements annexed thereto.

Transfer of Property Act, IV of 1882, s. 6, cl. (*c*), and s. 8.

Next in order comes the Indian Easements Act, V of 1882, which applied, in the first instance, only to Madras, the Central Provinces and Coorg until extended by Act VIII of 1891 to Bombay and the North-Western Provinces and Oudh. It came into force on 1st July 1882.[1]

Indian Easements Act, V of 1828.

The next Act to be noticed in any respect relating to easements is the Criminal Procedure Code, Act X of 1882.

Criminal Procedure Code, Act X of 1882, s. 147.

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[1] For the history of the Act, see Appendix VIII.

Section 147 of this Act prescribes the procedure to be followed by Magistrates in cases of disputes concerning easements.

Civil Procedure Code, Act XIV of 1882, ss. 492—497.

Next in order comes the Civil Procedure Code, Act XIV of 1882, of which Act sections 492—497 regulate the subject of temporary injunctions.

Act VIII of 1891.

Then comes Act VIII of 1891, entitled an Act to extend the Indian Easements Act, 1882, to certain areas in which that Act is not in force, whereby the Indian Easements Act was extended to Bombay, the North-Western Provinces, and Oudh.

It may here be mentioned that suits relating to easements instituted in Bombay, the North-Western Provinces, and Oudh after the passing of the Indian Easements Act but before the passing of Act VIII of 1891, have been held not to be governed by the Indian Easements Act.[1]

Land Acquisition Act, I of 1894. s. 3, cl. (*b*).

Lastly comes the Land Acquisition Act, I of 1894, by section 3, clause (*b*), whereof, it is provided that, for the purposes of the Act, a person shall be deemed to be interested in land if he is interested in an easement affecting the land.

Part III.—Present Law in force in British India relating to Easements.

In Part II of this chapter have been noticed generally, as to history and present application, the law statutory and other by which the subject of easements is regulated in this country.

Local divisions of the subject.

It may be useful here to summarize the law relating to easements in India in accordance with the local or geographical divisions of the subject.

Bengal.

1. *In Bengal*—

(*a*) The Bengal Irrigation Act, III of 1876, section 11, clause (*g*).

(*b*) The Specific Relief Act, I of 1877, sections 52—57.[2]

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[1] *Udit Singh* v. *Kashi Ram* (1892), I. L. R., 14 All., 185 ; *Wutzler* v. *Sharpe* (1893), I. L. R., 15 All., 283 ; *Chunilal* v. *Manishanker* (1893), I. L. R., 18 Bom., 616.

[2] Extended under the Scheduled Districts Act to—

(*a*) Western Jalpaiguri (see *Gazette of India*, 16th December 1882, Part I, p. 511).

(c) The Indian Limitation Act, XV of 1877, section 3 (interpretation of "easements"), sections 26 and 27, and Articles 36, 37, 38, 120.[1]

(d) The Transfer of Property Act, IV of 1882, section 6, clause (c), and section 8.

(e) Criminal Procedure Code, Act X of 1882, section 147.[2]

(f) Civil Procedure Code, Act XIV of 1882, sections 492—497.[3]

(g) Land Acquisition Act, I of 1894, section 3, clause (b).

(h) In Calcutta, as subject to the Original Civil Jurisdiction of the High Court; the principles of the English Law of Easements as developed out of the doctrines of the common law and equity and resting on judicial authority. In the High Court.

(i) In the mofussil, *i.e.*, Bengal outside the Original Civil Jurisdiction of the High Court; the principles of justice, equity and good conscience which have been interpreted to mean the English law where the application of such law is suited to the usages and habits of the people. In the mofussil.

2. *In Bombay*—

(a) The Specific Relief Act, I of 1877, sections 52—57.[4] Bombay.

(b) Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum in District of Singbhum (see *Gazette of India*, 16th February 1878, Part I, p. 82).

[1] As regards the Scheduled Districts in Bengal (for which see the Scheduled Districts Act, XIV of 1874, First Schedule and App. A) this Act has been declared in force—

(a) In the Sonthal Parganas by Reg. III of 1872 as amended by Reg. III of 1886, s. 6.

(b) Under the Scheduled Districts Act in the Districts of Hazaribagh, Lohardaga, and Manbhum, and Pargana Dhalbhum, and the Kolhan in the District of Singbhum (see *Gazette of India*, 22nd October 1881, Part I, p. 504).

[2] Declared in force in the Sonthal Pergunnahs by Reg. III of 1872, s. 3, as amended by Reg. III of 1886, s. 2.

[3] The whole Code (except ss. 1 and 3) has been extended to the Districts of Hazaribagh, Lohardaga and Manbhum, the Pargana of Dhalbhum in the District of Singbhum, and the Mahal of Angal, *Gazette of India*, 3rd June, 1882, Part I, p. 218.

[4] Extended to Sindh, one of the Scheduled Districts, Bombay (see *Gazette of*

(*b*) The Indian Limitation Act, XV of 1877, Articles 36, 37, 38, 120.

(*c*) The Transfer of Property Act IV of 1882, section 6, clause (*c*), and section 8.

This Act was extended to the whole of the territories (other than the Scheduled Districts) under the administration of the Government of Bombay from the 1st January 1893.[1]

(*d*) Indian Easements Act, V of 1882. The whole.

This Act was extended to the territories administered by the Governor of Bombay by Act VIII of 1891 which received the assent of the Governor-General in Council on the 6th March 1891.

(*e*) Criminal Procedure Code, Act X of 1882, section 147.

(*f*) Civil Procedure Code, Act XIV of 1882, sections 492—497.

(*g*) Land Acquisition Act I of 1894, section 3, clause (*b*).

The N.-W. P. and Oudh.

3. *In the North-Western Provinces and Oudh*—

(*a*) The Northern India Canal and Drainage Act, VIII of 1873, section 8, clauses (*h*) and (*i*), and section 32, clause (*b*).

(*b*) Otherwise the same law as in Bombay, Madras, the Central Provinces and Coorg, except that the Transfer of Property Act is not in force in the North-Western Provinces and Oudh.[2]

The Indian Easements Act was extended to the North-Western Provinces and Oudh by Act VIII of 1891.

Madras.

4. *In Madras*—

The same law as in Bombay, North-Western Provinces, Oudh, Central Provinces and Coorg, except that the Indian Easements Act was made applicable to Madras in the first

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India, 4th December, 1880, Part I, p. 676).

[1] See *Bombay Government Gazette*, 1892, Part I, p. 1071.

[2] The whole of the Civil Procedure Code (except ss. 1 and 3) has been extended to Pargana Jaunsar Bawar in the Dehra Dun District and the Scheduled portion of the Mirzapur District (*Gazette of India*, 3rd June, 1882, Part I, p. 217).

instance, and therefore came into force there on the 1st July, 1882, and that the Transfer of Property Act is not in force in Madras.

5. *In the Central Provinces and Coorg*—

The Central Provinces and Coorg.

The same law as in Madras,[1] excepting that the Northern India Canal and Drainage Act, VIII of 1873, section 8, clauses (*h*) and (*i*), and section 32, clause (*b*), applies to the Central Provinces and not to Madras or Coorg, and that the Indian Limitation Act, XV of 1877, is not in force in Coorg.

6. *In the Punjab*—

The Punjab.

(*a*) The Northern India Canal and Drainage Act, VIII of 1873, section 8, clauses (*h*) and (*i*) and section 32, clause (*b*).

(*b*) The Specific Relief Act, I of 1877, sections 52—57.[2]

(*c*) The Indian Limitation Act XV of 1877, section 3 (interpretation of "Easement"), and sections 26 and 27 and Articles 36, 37, 38, 120.[3]

(*d*) The Criminal Procedure Code, Act X of 1882, section 147.

(*e*) Civil Procedure Code, Act XIV of 1882, sections 492—497.[4]

(*f*) Land Acquisition Act, section 3, clause (*b*).

(*g*) The principles of justice, equity and good conscience had formerly to be applied by the Punjab Chief Court under Act IV of 1866, section 19, in the exercise of its original and appellate jurisdiction. Act IV of 1866 was repealed by Act XVII of 1877,

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[1] The Specific Relief Act I of 1877 has been extended to—

(*a*) The Scheduled Districts of the Central Provinces (see *Gazette of India*, 13th December, 1879, Part I, p. 772).

(*b*) Coorg (see *Gazette of India*, 3rd June, 1882, Part I, p. 217).

[2] Extended to the Scheduled Districts of the Punjab (see *Gazette of India*, September 22, 1877, Part I, p. 562).

[3] Declared in force in District of Hazara, one of the Scheduled Districts of the Punjab by Reg. II of 1874, s. 3.

[4] The whole Code except ss. 1 and 3 has been extended to the Scheduled Districts of the Punjab.

in turn repealed (except as regards section 18) by Act XVIII of 1884. In the last two Acts nothing is said as to the law to be applied, but the Court would no doubt follow the principles of English law in the absence of any Indian law or well-established custom.[1]

Assam.

7. *In Assam—*

Assam being one of the Scheduled Districts, none of the enactments in force in British India apply thereto unless specially declared to be in force, or extended by notification in the *Gazette of India* and the local Gazette (if any).[2]

(*a*) The only Acts relating to easements that at present appear to be in force in Assam are the Specific Relief Act, I of 1877 and Civil Procedure Code, Act XIV of 1882, extended to the Districts of Kamrup, Nowgong, Darrang, Sibsagar, Lakhimpur, Goalpara (excluding the Eastern Duars), Sylhet and Cachar (excluding the North Cachar Hills).[3]

(*b*) Generally speaking, under section 37 of Act XII of 1887,[4] the law to be administered in the Civil Courts of Assam, which are subject to the superintendence of the Calcutta High Court, is, in the absence of any other law, the law of justice, equity and good conscience.[5]

Burma.

8. *In Burma—*

By section 2 of Act XX of 1886, called the Upper Burma Laws Act, Upper Burma and Lower Burma, then known as British Burma, were constituted one province called Burma.

By section 4 of the same Act the expression "British Burma" occurring in any enactment in force at the passing of the Act is to be read as Lower Burma.

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[1] See Punjab Record, No. 80 of 1876, and *Gazette of India*, July to December, 1880, Part V, p. 476.

[2] See Scheduled Districts Act, XIV of 1874 ss. 3—5.

[3] See *Gazette of India*, 1877, Part I, p. 662, and *Assam Gazette*, 1877, Part I, p. 383.

[4] The Bengal, N.-W. P. and Assam Civil Courts Act, XII of 1887.

[5] *Ibid*, s. 37 (2).

When, therefore, in any Act, prior to Act XX of 1886, relating to easements, the expression "British Burma" is found, it must be taken as referring to "Lower Burma."

For present purposes, therefore, it will be convenient to take Lower Burma and Upper Burma separately.

(1) *In Lower Burma*—

Lower Burma.

Specific Relief Act I of 1877, sections 52—57.

Indian Limitation Act XV of 1877, section 3 (interpretation of "Easement"), and sections 26 and 27 and Articles 36, 37, 38, 120.

Transfer of Property Act, IV of 1882, section 6, clause (*c*), and section 8. This Act, as regards Lower Burma, is in force only in the area included within the local limits of the ordinary civil jurisdiction of the Recorder of Rangoon, and was extended thereto from the 1st January 1893.[1]

Criminal Procedure Code, X of 1882, section 147, Land Acquisition Act, I of 1894, section 3, clause (*b*).

In Upper Burma—

Upper Burma.

(*a*) Specific Relief Act, I of 1877, sections 52—57.[2]

(*b*) Indian Limitation Act, XV of 1877, section 3 (interpretation of "Easement"), and sections 26 and 27 and Articles 36, 37, 38, 120.[3]

(*c*) Criminal Procedure Code, Act X of 1882, section 147.

This Code has, with certain modifications, been extended to Upper Burma (except the Shan States) by Regulation VII of 1886.

(*d*) Civil Procedure Code, ss. 492—497.[4]

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[1] See *Burma Gazette*, 1892, Part I, p. 373.

[2] Extended to Upper Burma (except the Shan States), see *Gazette of India*, 1893, Part II, p. 272, and declared in force in Upper Burma by the Burma Laws Act, XIII of 1898, s. 4 (1), and First Schedule; declared in force in Upper Burma by Act XIII of 1898, s. 4(1) and First Schedule, repealing Act XX of 1886.

[3] Declared in force in Upper Burma by Act XIII of 1898 (s. 4 (1) and First Schedule), repealing Act XX of 1886.

[4] See Act XIII of 1898, s. 4 (1) and First Schedule, repealing Act XX of 1886.

(*e*) Land Acquisition Act, section 3, clause (*b*).[1]

Generally—By Regulation No. VIII of 1886, providing for the administration of Civil Justice in Upper Burma, section 87, sub-section (2), the Courts, in cases not provided for by sub-section (1) of the same section, which sub-section does not relate to easements, are to act according to justice, equity and good conscience.

Burma generally.

In Burma generally—

Act XIII of 1898, the Burma Laws Act, repealing section 4 of Act XI of 1889, provides as follows, by section 13, which reproduces the repealed section, for the law to be administered by the Courts in Burma, namely :—

Subject to the provisions of sub-section (1) (which does not apply to easements), and of any other enactment for the time being in force, all questions arising in civil cases instituted in the Courts of Rangoon shall be dealt with and determined according to the law for the time being administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.[2]

In cases not provided for by sub-section (1) or sub-section (2), or by any other enactment for the time being in force, the decision shall be according to justice, equity, and good conscience.[3]

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[1] See Act XIII of 1898, s. 4 (1) and First Schedule, repealing Act XX of 1886.

[2] S. 13, sub-section (2). Under Act VI of 1900, the Recorder's Court in Rangoon has ceased to exist, and a Chief Court for Lower Burma has been established.

[3] S. 13, sub-section (3).

CHAPTER II.

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Association of easements with dominant and servient tenements.

One of the essential qualities of an easement is its association with two distinct tenements or heritages as they are called in the Indian Easements Act, the *Dominant Tenement* to which the right is accessory or appurtenant, and the *Servient Tenement* in, upon, or over which the right is exercised and a corresponding burthen or obligation imposed. If there be no dominant tenement, there is no easement.[1]

In *Mounsey* v. *Ismay*,[2] Martin, B., states positively that to constitute an easement there must be two tenements, a dominant one to which the right belongs, and a servient one upon which the obligation is imposed.

In *Rangeley* v. *The Midland Railway Company*, Cairns, L. J., said : "There can be no easement properly so called unless there be both a servient and dominant tenement."[3]

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[1] *Mounsey* v. *Ismay* (1865), 34 L. J. Exch., 52 (56) ; *Rangeley* v. *The Midland Ry. Co.* (1868), L. R., 3 Ch. App., 306 (310) ; *Hawkins* v. *Rutter* (1891), 61 L. J., Q. B., 146 ; (1892) 1 Q. B., 668 ; *Chunder Charn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945 ; 6 C. L. R., 269 ; *Ashruf Ali* v. *Jaga Nath* (1884), I. L. R., 6 All., 497.

[2] (1865) 34 L. J. Exch. 52 (56).

[3] (1868) L. R., 3 Ch., 306 (310).

And in a later case it was said that the word "Easement" implies a dominant tenement in respect of which the easement is claimed, and a servient tenement over which it is claimed in respect of the dominant tenement.[1]

So, too, in the case of a *profit à prendre* there must be a dominant and servient tenement. A profit wholly unconnected with the enjoyment of the right of property in the dominant tenement cannot be claimed as appurtenant to the dominant tenement.[2]

Definitions in Indian Easements Act, s. 4.

The following definition of *dominant* and *servient* heritage is given in section 4 of the Indian Easements Act, namely :—

"The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner ; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner."

Thus where the owner of a house has, for the beneficial enjoyment thereof, a right of way over his neighbour's land, the house is the dominant heritage or tenement, and the neighbour's land is the servient heritage or tenement.

Easement cannot be dissociated from dominant tenement.

An easement cannot be dissociated from the dominant tenement. There cannot be an easement in gross.[3]

Thus a way appendant to a house or land cannot be granted away or made in gross ; for no one can have such a way, but he who has the land to which it is appendant.[4]

This is a fundamental principle in English law and has received recognition in India in section 6, clause (*c*) of the Transfer of Property Act, which provides that an easement cannot be transferred apart from the dominant heritage.

Dominant and servient tenement must belong to different persons.

It is further essential to an easement that the dominant and servient tenement should be in the ownership or possession of distinct persons.[5] It must be apparent that inasmuch as an

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[1] *Hawkins* v. *Rutter* (1891), 61 L. J. Q. B., 146.

[2] *Bailey* v. *Stephens* (1862), 12 C. B. N. S., 91 (110) ; *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S., 687 (709).

[3] See Chap. I.

[4] *Ackroyd* v. *Smith* (1850), 10 C. B., 164.

[5] *Obhoy Churn Dutt* v. *Nobin Chunder Dutt* (1868), 10 W. R., 298 ; *Sham Churn Auddy* v. *Tariny Churn Banerjee* (1876), I. L. R., 1 Cal., 422 (428) ; *Morgan* v.

easement implies a right to be enjoyed on the one side and an obligation to be borne on the other, the union of the right and the obligation in the absolute ownership or possession of the same person deprives the easement of its distinctive character and converts it into an ordinary right of property. "For none can have land and also an easement over it."[1]

In later chapters the difference between unity of absolute ownership and unity of possession as regards the effect thereby produced upon an easement will be discussed.[2] For the present it is sufficient to note that the existence of an easement depends upon the distinct ownership or possession of the dominant and servient tenements.

Easement must be beneficial to dominant tenement.

Another characteristic and essential feature is that an easement must be beneficial to the dominant tenement. In the leading case of *Ackroyd* v. *Smith*, it was said that a right unconnected with the enjoyment or occupation of land, cannot be annexed as an incident to it.[3]

In *Hill* v. *Tupper*,[4] the decision of the Court proceeded upon the recognition of the principle laid down in the last-mentioned case, with the result that the plaintiff who was the grantee of a canal company of the sole and exclusive right or liberty of putting or using pleasure boats for hire on their canal, and had sued the defendant for an alleged infringement of the right, was non-suited.

The Court decided that the grant merely operated as a license or covenant on the part of the grantors and was binding on them as between themselves and the grantee, but gave the grantee no right of action *in his own name* against the defendant. If the grantee had been disturbed in his enjoyment of the right his proper course was to obtain the permission of the canal company to sue in their name.

Kirby (1878), I. L. R, 2 Mad., 51, and see Gale on Easements, 7th Ed., p. 14.

[1] *Ladyman* v. *Grave* (1871), L. R., 6 Ch., App. (767).

[2] Chap. IX, Part IIA and Chap. X, Part II.

[3] (1850) 10 C. B., 164; 19 L. J. C. P., 315. See also *Bailey* v. *Stephens* (1862), 12 C. B. N. S., 91; and *Ellis* v. *The Mayor of Bridgnorth* (1863), 15 C. B. N. S., 52.

[4] (1863) 2 H. and C., 121.

The admission of the right as claimed by the plaintiff would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates.

Reference to the words " beneficial enjoyment of that land " contained in section 4 of the Indian Easements Act shows that the same principle is there recognised.

Easement conferring benefit on tenements other than dominant tenement not invalid.

It is no objection to the validity of an easement that in its exercise for the benefit of the dominant estate it confers some benefit upon other tenements.

It may frequently occur that the owner of an ancient light may by the exercise of his right prevent his opposite neighbour from building on his land so as to obstruct that window and thereby gain the benefit of an unobstructed access of light to his other windows which are modern, and benefit his next-door neighbour by the opposite land not being built on although he has no right.

And the owners of lands possessing the right to open gates of sluices or locks belonging to other persons in time of flood or likelihood of flood to prevent damage to those lands may thereby confer benefit on the lands of other persons.

Such easements are none the less good because they confer such additional benefit.[1]

Exercise of easement creates no right in favour of servientowner.

It is a fundamental principle that an easement exists for the benefit of the dominant tenement alone, and that the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment.[2]

Mason v. *Shrewsbury and Hereford Ry. Co.*

In *Mason* v. *The Shewsbury and Hereford Railway Company*,[3] Cockburn, C. J., gives a lucid exposition of this principle.

The plaintiff in that case, as the servient owner of lands from which the water had been diverted by the exercise of an easement which had existed in the defendants but had ceased to exist through powers conferred on them by Act of Parliament,

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[1] *Tapling* v. *Jones* (1865), 11 H. L. C., 290; *Simpson* v. *Godmanchester Corporation* (1897), App. Cas., 696.

[2] *Mason* v. *The Shrewsbury and Hereford Ry. Co.* (1871), L. R., 6 Q. B., 578, and see I. E. Act, s. 50.

[3] (1871) L. R., 6 Q. B., 578.

sued the defendants to recover damages for injuries caused to his lands by reason of the abandonment of the easement.

Cockburn, C. J., in giving judgment for the defendants, delivered the following statement of law[1] :—

"The right of diverting water which in its natural course would flow over or along the land of a riparian owner, and of conveying it to the land of the party diverting it, the *servitus aquæ ducendæ* of the civilians, is an easement well known to the law of England as of every other country. Ordinarily such an easement can be created, according to the law of England, only by grant, or by long continued enjoyment, from which the existence of a former grant may be reasonably presumed.

"But such a right may, like any other right, be created in derogation of a prior right by the action of the Legislature. It was thus created in the present instance. But however it may be called into existence, the right is essentially the same. The legal incidents connected with it are the same, whether the easement is created by grant or by statutory easement.

"Now it is of the essence of such an easement that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right its exercise may be discontinued, if it becomes onerous or ceases to be beneficial, to the party entitled.

"An easement like the present, while it subjects the owner of the servient tenement to disadvantage by taking from him the use of the water for the watering of his cattle, the irrigation of his land, the turning of his mill, or other beneficial use to which water may be applied, may, on the other hand, no doubt, be attended incidentally with equal or greater advantage to him, as, for instance, by rendering him safe from the danger of inundation. But this will give him no right to insist on the exercise of the easement on the part of the dominant owner, if the latter finds it expedient to abandon his right.

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[1] At p. 586.

"In like manner where the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire a right to have it discharged on to his land, if the dominant owner chooses to send the water elsewhere or apply it to another purpose ....
I am far from saying that the grant of an easement might not be accompanied by stipulations on the part of the grantor; as, for instance, that the easement should not be discontinued without his consent, or that on its discontinuance certain things should be done. I am far from saying that such a stipulation would not give a right of action. My observations are intended to apply to a case in which nothing appears beyond the existence of an easement. In such a case, it appears to me beyond doubt that the servient owner acquires no right to the continuance of an easement and the incidental advantages arising to him from it, if the dominant owner thinks proper to abandon it."

The same principle was applied in India in a case where the defendant, who owned an easement consisting of the right to dischagre over the plaintiff's land surplus water collected by the defendant for irrigation, discontinued the easement by diverting the surplus water.[1]

To the same effect is the provision contained in the first portion of section 50 of the Indian Easements Act.

Easement attaches to soil of servient tenement.

It is one of the qualities of an easement that it should attach itself to the soil of the servient tenement. In imposing itself thereon it lays a passive obligation upon the servient owner not to do anything which may interfere with the enjoyment of the dominant owner.[2] For instance, an easement of way does not impose upon the servient owner a general obligation to allow the dominant owner to walk wherever he pleases, but the passive obligation that he shall not interfere with "a special specific way" so as to affect the enjoyment of the dominant owner.[3]

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[1] *Khoorshed Hossein* v. *Teknarai Singh* (1878), 2 C. L. R., 141.

[2] Gale, 7th Ed., p. 7. And see definitions of easement in Chap. I and I. E. Act, s. 4.

[3] See *Taylor* v. *Whitehead* (1781), 2 Dougl., 745; *Doorga Churn Dhur* v. *Kally Coomer Sen* (1881), I. L. R., 7 Cal., 146.

Easement, a fractional right.

In order to appreciate the true character of an easement, and the definitions founded thereon, it is important to remember that an easement "is a *fractional* right, that is to say, a definite right of user subtracted or broken of from the indefinite right of user which resides in him or them who bear the dominion of the subject."[1]

For the same reason an easement has been called "a single or particular exception, accruing to the benefit of the party in whom the right resides, from the power of user and exclusion which resides in the owner of the thing."[2]

So again, rights of easement are called by French writers, "*démembremens du droit de propriéte*" ; that is to say, detached bits or fractions of the indefinite right of user which resides in him or them who own the subject of the servitude."[3]

It is in the fractional aspect of an easement that the rule that a valid easement does not *exclude* the ordinary rights of ownership, but only restricts them, becomes intelligible.[4]

Easement a right *in rem.*

Moreover an easement is not a right *in personam*, which is a right arising out of personal obligations and enforceable only against a particular individual or individuals, but belongs to the category of rights *in rem* or rights enforceable against all the world, that is, against any one who infringes the right whether he be servient owner or occupier, licensee or trespasser.

And a consideration of the nature of an easement will make this clear. If a man, for the advantage of his own land, has the right to walk across his neighbour's field or divert the water of his neighbour's stream he has the accompanying right that no one shall interfere with his easement whether the same arose out of contract or otherwise.

If this were not so, no easement would be secure.

For though an easement is not a right of property, it is a right appurtenant to property and is no less a right *in rem.*

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[1] Austin, Lectures on Jurisprudence, 1st Ed., Vol III, p. 14.

[2] *Ibid.*

[3] *Ibid.*

[4] See *Gooroo Churn Goon* v. *Gunga Gobind Chatterjee* (1867), 8 W. R., 269; *Joy Doorga Dossia* v. *Juggernath Roy* (1871) 15 W. R., 295; *Luchmeeput Singh* v. *Sadanth Nashyo* (1882), I. L. R., 9 Cal., 703; 12 C. L. R., 382; *Dyce* v. *Lady James Hay*, 1 McQ. Sc. App., p. 305.

Easement, an incorporeal right.

An easement is an incorporeal right exercised in or over corporeal property for the beneficial enjoyment of other corporeal property.[1]

"Corporeal things are tangible objects as land or gold; incorporeal things are those which are intangible, such as legal relations and rights including legal obligations and rights of action."[2]

The definition of easement reminds us that it is a right to do something or to prevent something being done in or over the land of another, and it becomes obvious that in such a character an easement must be an *incorporeal* thing. On the other hand, the land in or over which an easement is exercised is a *corporeal* thing.

In the case of *Clifford* v. *Hoare*,[3] Brett, J., observed that the privilege of walking over another man's land is an easement, but the right to the soil of the road would not be an easement but a corporeal right.

Easement not an interest in land.

Excluding for the moment the extended meaning given to an easement by the Indian Limitation Act and Indian Easement Act,[4] and confining the right within the limits of the English definition, it is apparent that an easement is not an interest in land,[5] but a mere privilege appurtenant to the dominant tenement and imposing upon the servient owner an obligation to suffer something to be done or not to do something in or upon the servient tenement.

This view of the real nature of an easement is not affected by section 3, clause (*b*) of the Land Acquisition Act (I of 1894), which provides that if a person is interested in an easement, he is to be deemed to be interested in land, such a provision applying merely to the purposes of the Act itself.

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[1] *Kristna Ayyar* v. *Vencatachella Mudali* (1872), 7 Mad. H. C., 60; *Hewlins* v. *Shippam* (1826), 5 B. & C., 221; 7 D. & R., 783; *Clifford* v. *Hoare* (1874), L. R., 9 C. P., 362.

[2] Williams on "Real Property," 17th Ed., p. 4.

[3] (1874), 43 L. J., C. P., 225; L. R., 9 C. P., 362.

[4] See Chap. I, Part I.

[5] *Godley* v. *Frith* (1610), Yelv., 159; *Parker* v. *Staniland* (1809), 11 East., 362; *Webb* v. *Paternoster* (1620), Palmer, 71; *Hewlins* v. *Shippam* (1826), 5 B. & C., 221; *Jones* v. *Flint* (1839), 10 A. & E., 753; *McManus* v. *Cooke* (1887), 35 Ch. Div., 681.

Lastly it should be observed that the effect of an easement is to restrict, not to preclude, the ordinary uses of property, and that, therefore, a right which operates in the latter manner is not an easement but a right to the land or soil itself.[1]

Easement a restrictive not exclusive right.

Thus the right to take all the minerals under a man's land is not an easement but a right to the soil itself.[2]

Conversely the *exclusive* use of land cannot be demised as appurtenant to other land, for this would be to demise one piece of land as appurtenant to another, which in law cannot be.[3] But the use and enjoyment of land can be demised as an easement or privilege, so long as the restrictive character of the right is not enlarged beyond its legal limits.[4]

And the operation of an easement is definite as well as limited. "By *servitus* or *easement* is meant any such right *in rem* as gives to the party in whom it resides a power of using the subject which is definite as well as limited. The power of using the subject (like that which is imported by the right of property) is limited by the sum of the duties which are incumbent on the party. But, unlike the power of user which is imported by the right of property, it is not *merely* circumscribed by the sum of his duties. The uses which he may derive from the subject, or the purposes to which he may apply it, are defined positively, or are susceptible of positive description. In short, the difference between property (in any of its modes) and of *servitus* (whatever be its class) would seem to be this:—The party invested with a right of *servitus*, may turn or apply the subject to a *given* purpose or purposes. The party invested with a right of property, may turn or apply the subject to *all* purposes whatsoever, *save* such purposes as are not consistent with any of his duties, relative or absolute."[5]

Easement definite and limited.

[1] *Dyce* v. *Lady James Hay*, 1 Macq., Sc. App., 305.

[2] *Willkinson* v. *Proud* (1843), 11 M. W., 33; and see *Clifford* v. *Hoare* (1874), 43 L. J., C. P., 225; L. R, 9 C. P., 362.

[3] *Buszard* v. *Capel* (1828), 8 B. & C., 141.

[4] *Dyce* v. *Lady James Hay*, 1 Macq., Sc. App. 305

[5] Austin on Jurisprudence, 1st Ed., p. 12.

CHAPTER III.

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Nature of such rights.

THE right to light and air may be either a natural right forming one of the incidents of property or it may be an easement.

The extent of the *Natural Right* which is the right of every owner of land to so much light and air as come vertically thereto will be discussed in a future chapter. The *easement* of light and air comprises a very important branch of the law of Ease-

ments and presents features of special interest in its nature and origin.

Starting with the proposition that the owner of land can take and use for his own property as much light and air as come within the boundaries of his land,[1] it is apparent that the quantity of light and air available for his use is in a large measure dependent upon the acts of his neighbour.

Supposing, therefore, that his neighbour should in the free enjoyment of his own property erect buildings thereon in such manner as to diminish the flow of light and air on to the other's land, the latter would have no redress unless he could show a right on his part precluding his neighbour from erecting such buildings. Such a right if it existed would clearly be restrictive of the other's right to enjoy his property as he pleased and could only arise as an easement.[2]

Must be acquired in respect of apertures in buildings.

It is essential to such an easement that it should be acquired in respect of buildings on the land of the person claiming it, for it is a well established principle that apart from any right arising out of special covenant between adjoining landowners, there can be no easement of light and air except in respect of buildings through the apertures of which such elements have been accustomed to pass in well defined channels for a given period of time There can be no easement of light and air flowing over open ground.[3]

Here, then, we come to the true nature of the easement. The restrictive nature of the right, for the quality of restriction exists in every easement, leads to the conclusion that the right, strictly speaking, is not one of light and air, but is analogous to what in Roman law was a negative servitude *ne facias*, burthening the servient tenement with a prohibition against the doing of anything interfering with the enjoyment of the right.[4]

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[1] *Bryant* v. *Lefevre* (1879), L. R., 4 C. P. D., 172 ; *Chastey* v. *Ackland* (1895), 2 Ch., 389.

[2] See Indian Easements Act, s. 7 and ill. (*a*) to the section, and *Sarubai* v. *Bapu* (1878), I. L. R., 2 Bom., 660; *Chastey* v. *Ackland* (1895), 2 Ch. at p. 402.

[3] See *infra*.

[4] Gale, 7th Ed., p. 287 ; *Smith* v. *Kenrick* (1849), 7 C. B., 515.

Strictly speaking, therefore, an easement of light and air is the right that the servient owner shall not by any act on the servient tenement diminish the quantity of light and air that the dominant owner has been accustomed to receive through his windows for the period of time required to establish the easement. In this view it becomes apparent that the easement is in fact the right to restrict a neighbour in his proprietary right of building.

Known to Hindu and Mahommedan law and recognised by the ancient common law of England.

Easements of light and air are known to the Mahommedan and Hindu law and have been recognised from the earliest times by the ancient common law of England. Cases in the year books in Michaelmas Term 7th Edward III, and Michaelmas Term 14th Henry IV fol. 25, shew it was treated as settled law that if a man had an ancient house with windows overlooking the land of his neighbour, through which light and air had been received from a time from which the memory of them ran not to the contrary, there was a good cause of action against any person obstructing the flow of such light and air.

In the Third Institute it is declared that "the common law prohibits the building of any edifice to a common nuisance or to the nuisance of any man in his house as to the stopping up of his light, or to any other prejudice or annoyance of him."

And in *Aldred's case*,[1] it was resolved that in a house four things are desired,—the habitation of man, the pleasure of the inhabitant, the light, and wholesome air, and for nuisance done to the habitation of a man, for that is the principal end of a house, an action lies, and so for the hindrance of light and air for both are necessary.

Arise under an implied covenant.

Though the acquisition of these rights in British India by enjoyment for a period of 20 years falls within the provisions of the Indian Limitation Act and Indian Easements Act,[2] yet, if, as may be the case, these rights were to arise independently of those two Acts,[3] similar considerations would present themselves as to the manner of their origin, as under the English

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[1] (1738) 9 Rep., 58*b*.

[2] See Chap. VII, Parts II & II

[3] See Chap. I, Part II E. and Chap. VII, Part II.

common law prior to the English Prescription Act which has no force in British India.[1]

Under the English common law the right to the uninterrupted flow of light and air through a definite channel has been said to arise by virtue of an implied covenant or the part of the servient owner, derived from user, whereby he was deemed to have precluded himself from thenceforth interfering with the access of light and air to the dominant tenement to the extent of such user.[2]

Moore v. *Rawson.*

In *Moore* v. *Rawson*, Littledale, J., in discussing the origin of the right to light and air expressed the opinion that there was a distinction between the mode of acquiring a right of way and the mode of acquiring an easement of light and air.[3]

A right of way he declared, apart from any express or implied grant could arise by prescription or the presumption of a lost grant founded on user for a particular period of time accompanied with the consent, express or implied, of the owner of the land, whereas a right to light and air was acquired by mere occupancy under an implied covenant by the servient owner not to interrupt the free use of light and air. The judgment is also instructive as to the nature and origin of the right, and contains the following passage.[4] "Every man on his own land has a right to all the light and air which will come to him, and he may erect even on the extremity of his land buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light he does not require any consent from the owner of the adjoining land. He therefore begins to acquire the right to the enjoyment of the light by mere occupancy. After he has erected the building the owner of the adjoining land may, afterwards, within 20 years, build upon his own land, and so obstruct the light which would otherwise

[1] See *Elliott* v. *Bhoobon Mohan Bonnerjee* (1873). 12 B. L. R., 406.

[2] *Moore* v. *Rawson* (1824), 3 B. & C., 332 ; 27 R. R., 375 ; *Hall* v. *Lichfield Brewery Co.* (1880), 49 L. J., Ch., 655 ; 43 L. J., 380 ; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., pp 776, 782 ; *Scott* v. *Pape* (1886), L. R., 3 Ch. D., 554.

[3] (1824) 3 B. & C. at p. 339 ; 27 R. R. at p. 381.

[4] 3 B. & C. at p. 340 ; 27 R. R. at p. 382.

pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant, for although a right of common (except as to common appendant) or a right of way being a privilege of something positive to be done or used in the soil of another man's land, may be the subject of legal grant, yet light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by covenant which the law would imply not to interrupt the free use of the light and air."[1]

Pranjivandas v. Meyaram.

In India the principle thus clearly stated, was applied in India by the Bombay Hight Court in the case of *Pranjivandas v. Meyaram*,[2] and in Bengal the opinion of Littledale, J., as to the nature of the right to light and the manner of its acquisition was adopted by Norman, J., in the case of *Bagram v. Khettranath Karformah.*[3]

Bagram v. Khettranath Karformah.

Hall v. Lichfield Brewery Co.

The same view was taken by Fry, J., in *Hall v. Lichfield Brewery Co.*[4]

He thought the right to have air coming to a window was not the subject of prescription because prescription was the implication of a grant, and such a right was not one which could be claimed by grant, and he agreed with the opinion expressed by Littledale, J., in *Moore v. Rawson* that the right

[1] This opinion was noticed with approval by Wightman, J., in *Webb v. Bird* (1861), 13 C. B. N. S. at p. 843; by Brett, L. J., in *Angus v. Dalton* (1878), L. R., 4 Q. B. D. at p. 196; by Pollock, B., in *Dalton v. Angus* (1881), L. R., 6 App. Cas. at p. 749, 750; by Field, J., *Ibid*, pp. 756, 757; by Fry, J., *Ibid*, pp. 771, 776, and see Lord Selborne's observations on the *dictum*, Ibid, p. 794.

[2] (1862) 1 Bom. H. C. at p. 151.

[3] (1869) 3 B. L. R., O. C. J. at p. 43.

[4] (1880) 49 L. J., Ch., 655; 43 L. T., 380.

should be put upon an implied covenant not to interrupt the free access of air.

On the reasoning of *Moore* v. *Rawson* and *Hall* v. *Lichfield Brewery Co.* an implied covenant derived from user of the dominant tenement for the period and in the manner required by law, would appear to be the only logical ground upon which the origin of the easement of light and air can be based, for the obligation imposed on the servient tenement, being of a negative character entirely, cannot accurately form the subject of a *grant*, whether express or implied, by the servient owner to the dominant owner.

This seems to be the meaning of the learned judges in emphasising the fact that the right is not acquired by the dominant owner doing something on the land of the servient owner, but arises out of the occupancy of the dominant tenement.[1]

Bass v. *Gregory*.

In *Bass* v. *Gregory*,[2] the right was claimed by the plaintiff to have a passage for air from his cellar through a ventilating shaft, and out through a disused well belonging to the defendant, and was allowed by the Court on the assumption of a lost grant founded on user for forty years. This case might at first sight appear to conflict with the opinions expressed in *Moore* v. *Rawson* and *Hall* v. *Lichfield Brewery Co.*, but it will be seen that *Bass* v. *Gregory* was not a case of access of light and air to the dominant tenement through a defined channel on the servient tenement, and the novel and special circumstances of the case appear to make the right claimed not one to prevent the defendant from interfering with the flow of air to the plaintiff's premises, but to enjoy the servient tenement as a means of ventilating the dominant tenement.

How the right should be claimed.

The right to light and air should usually be claimed as a right to light only for the reason that where light goes air

[1] In considering the principle of an implied covenant derived from user as applying to the case of easements of light and air the distinction between affirmative and negative easements is important. This distinction was not referred to in *Moore* v. *Rawson* and *Hall* v. *Lichfield Brewery Co.*, see Gale, 7th Ed., 288.

[2] (1890) L. R., 25 Q. B. D., 481 ; 59 L. J. Q. B., 574.

will also go and that the two rights are co-extensive in the sense that where there is a sufficient adit for light a sufficient adit for air also will be presumed,[1] and for the further reason that it is only in very rare and special cases involving danger to health or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air.[2]

And here it may be observed that cases to prevent, or to claim damages for, interference with ancient lights,[3] are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air, but this is inaccurate,[4] for though the words light and air have crept together into pleadings[5] and have been inserted together in decrees as though the two things went *pari passu*,[6] it will be seen that the principles upon which the Courts grant relief in the respective cases of diminution of light and diminution of air, are clearly distinct.[7]

Are negative and continuous Easements.

Easements of light and air fall within the category of negative easements, as being privileges acquired in respect of buildings by the dominant owner whereby the servient owner is obliged *not to do* something on the servient tenement for the advantage or benefit of the dominant tenement.[8]

They are also continuous easements.[9]

Cannot be acquired in respect of open ground.

The right to light and air cannot be acquired in respect of open ground.[10]

Roberts v. *Macord.*

In *Roberts* v. *Macord*,[11] the defendant sought to justify a trespass for breaking down the plaintiff's wall by pleading a

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[1] See *Barrow* v. *Archer* (1863), 2 Hyde, 129; *The Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 439.

[2] *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App. (221).

[3] "Ancient Lights" are windows which have existed more than 20 years. *Turner* v. *Spooner* (1861), 30 L. J. N. S., Ch., 801; 1 Dr. and Sim., 467.

[4] *Bryant* v. *Lefever* (1880), L. R., 4 C. P. D. at p. 180.

[5] *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App. (221).

[6] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq. at p. 252.

[7] See *infra* and Chap. XI, Part II.

[8] See *Angus* v. *Dalton* (1878), L. R., 4 Q. B. D. at p. 196; Gale, 7th Ed., p. 288.

[9] Indian Easements Act, s. 5.

[10] See cases *infra*, and Indian Easements Act, s. 17.

[11] (1832) 1 M. and R., 230.

right to light and air in respect of a open space of ground at the side of his timber yard for the drying of the timber and the more convenient use of the timber yard and a saw-pit. *Patteson, J.*, said the plea was a very novel one and one which could not be supported in law. If such a plea could be sustained it would follow that a man might acquire an exclusive right to light and air, not only as theretofore in respect of buildings, 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.

Potts v. *Smith.*

In *Potts* v. *Smith*,[1] a similar opinion was expressed by *Malins*, V. C., who pointed out that if a right to light and air were once admitted with regard to open land, the consequence would be that no man could ever build to the edge of his own land, because the owner of the next land might say : "It is very true I have never used this land for building purposes, but I have been in the habit of laying out linen or timber to dry there, and if you build a house next to it, I can no longer use it for the same purpose." Such a restriction, he said, would be highly inconvenient and contrary to the rule of law.

Apertures should be definite and permanent.

It is essential to the acquisition of rights to light and air that the apertures in respect of which they are claimed should be definite and permanent and intended for the access of light and air.[2]

Webb v. *Bird.*

In *Webb* v. *Bird*,[3] the plaintiff claimed to be entitled to the free and uninterrupted passage of the currents of wind and air over the defendant's land to his mill.

It was decided that the right claimed was too indefinite to be the subject of an easement. Willes, J., said : "That which is claimed here amounts to neither more nor less than this—that a person having a piece of ground, and building a windmill upon it, acquires by twenty years' enjoyment a right to prevent the proprietors of all the surrounding land from building upon

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[1] (1868) L. R., 6 Eq., 311.

[2] See *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H C. (O. C. J.) at p. 190. In India a doorway may be as effective for the admission of light and air as a window. *Ibid.*

[3] (1861) 10 C. B. N. S., 268 ; (1863) 13 C. B. N. S., 841.

it, if by so doing the free access of the wind from any quarter should be impeded or obstructed. It is impossible to see how the adjoining owners could prevent the acquisition of such a right except by combining together to build a circular wall round the mill within twenty years."[1]

Bryant v. Lefever.

In *Bryant* v. *Lefever*,[2] where the plaintiff complained that the defendants had raised their house which adjoined the plaintiff's house in such a manner as to prevent the free access of air to the plaintiff's chimneys which had been enjoyed for more than twenty years and thereby to cause the chimneys to smoke, it was held that no action was maintainable by the plaintiff against the defendants, for the access of air to the chimneys of a building could not as against the occupier of neighbouring land be claimed as an easement capable of acquisition otherwise than possibly by an express grant or covenant. It was said that the right claimed was too vague and uncertain; one against the acquisition of which the adjoining owner could not defend himself, and that the remedy of the plaintiff in such a case was to build higher.

Scott v. Pape.

In *Scott* v. *Pape*,[3] it was explained that the defined channel through which light has to pass over the servient tenement is to be measured by the apertures which lets that element into the dominant tenement, or speaking more strictly and accurately that the measure of the enjoyment, and the measures of the right acquired are not the windows and apertures themselves, which would involve a continuing structural identity of the windows, but the size and position of the windows, which necessarily limit and define the amount of light that arrives ultimately for the house's use. It follows that where there are no definite apertures in the dominant tenement there can be no defined channels on the servient tenement, and no prescriptive acquisition of the right.

Harris v. De Pinna.

In *Harris* v. *De Pinna*,[4] the plaintiff had erected certain timber stages or structures for storing and seasoning timber

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[1] 10 C. B. N. S. at p. 284.

[2] (1879) L. R., 4 C. P. D., 172.

[3] (1886) L. R., 31 Ch. D., 554.

[4] *Harris* v. *De Pinna* (1886), L. R., 33 Ch. D., 238.

which were left open on the sides abutting on the defendant's premises for the purpose of admitting light and air, and the defendants having erected buildings on his land up to the boundary of the plaintiff's premises, the plaintiff sued to restrain the defendant from interfering with the access of light and air to his said timber stages. The suit failed as to light on the ground that the plaintiff had not given evidence of the continuous enjoyment of any definite amount of light in respect of any of the apertures to the said timber stages, and as to air because its access was not confined within a definite channel over the servient tenement.

Bowen, L. J., said, "Then we come to the air. It seems to me that the only claim for air which could be supported here is a claim to the passage of undefined air over the premises of the defendant until it reaches the plaintiff's property. It would be just like an amenity of prospect, a subject-matter which is incapable of definition. So the passage of undefined air gives rise to no rights and can give rise to no rights for the best of all reasons, the reason of common sense, because you cannot acquire any rights against others by a user which they cannot interrupt."[1]

In the same case the observations of Cotton, L. J., are important as to the manner in which light arrives at the dominant tenement as distinct from air. In this respect light, he says, is an entirely different matter from air. Light, the principal light which is enjoyed, comes to the dominant tenement in a direct line in direct pencils, and the light which is thrown over a neighbour's land goes over a very short space indeed.[2]

In the case of air the right may be acquired by user either in respect of a definite aperture in the dominant tenement or through a definite channel over adjoining property.[3] The latter method of acquisition applies to the case of an easement of air for the purpose of ventilation such as was claimed in *Bass* v. *Gregory*.

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[1] At p. 262.

[2] At p. 259.

[3] See *Aldin* v. *Latimer* (1894), 2 Ch., 87. This case was decided on the ground of an implied grant, but reference was made in the judgment to the principles upon which the right to air is acquired.

Chastey v. *Acland.*

Chastey v. *Acland*[1] is the latest authority for the proposition that a right to have air come over a neighbour's land in a particular channel may be established by immemorial user, but that in the absence of actual contract, no one can claim a right to have the general current of air over his neighbour's property to his property kept uninterrupted.

English principles recognised in India. *Barrow* v. *Archer.*

In India the principle established in *Webb* v. *Bird* was recognised in the case of *Barrow* v. *Archer*[2] where the plaintiff claimed the right to have the south wind blow on to his premises free from all obstruction. It was urged on his behalf that the climate was an important consideration, and that according to the circumstances of the country and the particular winds prevailing, a direct breeze from the south was almost a necessity, but the Court declined to give effect to this argument on the ground that it was necessary for it to see that the servient tenement was not made subservient to more than the law required.

Bagram v. *Khettranath Karformah.*

And in *Bagram* v. *Khettranath Karformah*[3] where a similar claim was put forward, Peacock, C. J., said : "I am of opinion that by the use of the south window uninterruptedly for twenty years, the plaintiff did not acquire a right to enjoy the south breeze in that obstruction. Such a right may be acquired by express grant, but it cannot be acquired merely by prescription arising from user whether the presumption is a presumption of prescription or not."

Delhi and London Bank v. *Hem Lall Dutt.*

The same principle was followed in the case of *The Delhi and London Bank* v. *Hem Lall Dutt.*[4]

Measure of the enjoyment and the acquired right. *Scott* v. *Pape.*

The judgments of the Lord Justices in the case of *Scott* v. *Pape*,[5] already referred to, shew that the measure of the enjoyment and the measure of the right acquired are the size and position of the windows which necessarily limit and define the amount of light that arrives ultimately for the house's use.

I. E. Act, s. 28, cl. (*c*).

Section 28, clause (*c*) of the Indian Easements Act, provides that the extent of a prescriptive right to the passage of light

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[1] (1895) 2 Ch. 389.
[2] (1863) 2 Hyde, 125.
[3] (1869) 3 B. L. R., O. C. J. at p. 47.
[4] (1887) I. L. R.. 14 Cal., 839.
[5] (1886) L. R., 31 Ch. D., 554.

and air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used.

This would shew that the section makes the measure of the acquired right the amount of light and air which has *entered* the window or other opening during the prescriptive period, and not the size and position of the window.

Turner v. *Spooner*.

In this respect the section appears to be at variance with the English law as laid down in *Scott* v. *Pape*, already referred to, and in *Turner* v. *Spooner*.[1] In the last-mentioned case the dominant owner was allowed to alter the construction of his window in such a manner as to increase the amount of light and air entering thereat without enlarging the size of the aperture.

According to section 28, clause (*c*), he would not have been allowed to do so in India under the Indian Easements Act.[2]

Effect of increasing size of aperture during period of acquisition.

As regards the enjoyment of light during the period of acquisition a question arises as to what would be the effect of increasing the size of the aperture, that is to say supposing a man after ten years' use of a window enlarged it during the remaining ten years to double its former size. Would he lose the right altogether, and, if not, what would be the measure of the acquired right?

Scott v. *Pape*.

In *Scott* v. *Pape*, Bowen, L. J., took the view that such alteration of the window would not have the effect of destroying the right to all access of light whatsoever, but would limit the extent of the acquired right to the minimum portion of the parcels of light which had passed through the smaller structure.[3]

Actual user not essential to acquisition.

For the acquisition of rights to light and air there need be no *actual* user of the dominant tenement. The existence of the aperture and the possibilities of user are sufficient.

Hence as soon as a house is structurally completed and the windows put in, or when a house has assumed the appearance and outward aspect of a dwelling-house and is so far completed

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[1] (1861) 30 L. J. N. S. Ch., 801; 1 Dr. and Sm., 467.

[2] See also Chap. VIII, Part I.

[3] (1886) L. R., 31 Ch. D. at p. 572.

as to show an intention to use it as a dwelling-house with certain windows, enjoyment for the purposes of acquisition starts from that time and is not dependent on personal occupation.[1]

Future and possible user a test of the extent of the acquired right.

It appears at one time to have been the opinion of the Courts that *actual* user and not future or possible user was a test of the extent of the acquired right.[2] But later decisions have departed from this view and established the rule that the Courts must in every case of interference consider the possibility of the dominant tenement or particular portion thereof being used for some other purpose than that for which it was used at the moment the relief was applied for.

Aynsley v. *Glover.*

This was the decision of Jessel, M. R., in *Aynsley* v. *Glover*,[3] an important case in which all the previous authorities on the subject were reviewed. In the opinion of the Master of the Rolls, *Jackson* v. *Duke of Newcastle*[4] was overruled by *Yates* v. *Jack*[5] in which the decision of Lord Cranworth conflicting with the decision of Lord Westbury in the former case contained a statement of the law which the Master of the Rolls felt himself bound to follow.

Moore v. *Hall.*

In *Moore* v. *Hall*[6] the Court approved of the decision in *Aynsley* v. *Glover* and dissented from the decision in *Martin* v. *Goble.*[7]

Ratanji H. Bottlewalla v. *Edalji H. Bottlewalla.*

The principle of these later decisions was adopted in India in the case of *Ratanji H. Bottlewalla* v. *Edalji H. Bottlewalla*,[8] where in respect of the right of light and air claimed for a dwelling-house it was laid down that a right to light and air must at least be a right to such light and air as are necessary for the enjoyment of the particular room as part of a dwelling-house

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[1] *Pranjivandas* v. *Megaram* (1862), 1 Bom. H. C., 148; *Courtauld* v. *Legh* (1869), L.R., 4 Exch., 126; and see *Elliott* v. *Bhoobun Mohan Bonerjee* (1873), 12 B. L. R., 406; and *Smith* v. *Baxter* (1900), 2 Ch., 138 (143).

[2] *Martin* v. *Goble* (1808), 1 Camp., 320; *Jackson* v. *Duke of Newcastle* (1864), 3 D. J. & S., 275; 10 Jur. N. S., 680, 810; 33 L. J. Ch., 698.

[3] (1874) L. R., 18 Eq., 548; affirmed on appeal, L. R., 10 Ch. App., 283.

[4] (1864) 3 D. J. & S., 275; 10 Jur. N. S., 688, 810; 33 L. J. Ch., 698.

[5] (1866) L. R., 1 Ch. App., 295.

[6] (1878) L. R., 3 Q. B. D., 178; and see *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238; *Calcraft* v. *Thompson* (1867), 15 W. R., 387; *Young* v. *Shaper* (1872), 21 W. R., 135.

[7] (1808) 1 Camp., 320.

[8] (1871) 8 Bom. H. C. (O. C. J.), 181.

and for such purposes as it may reasonably be put to. It was said that such purpose will vary from time to time according to the exigencies of the family ; but that the mere circumstance that a room is used as a lumber-room or godown at the time of obstruction cannot affect the question of enjoyment which is the right to its enjoyment for all reasonable purposes to which it may be put as a room in a dwelling-house.

The fallacy of making actual user the measure of the acquired right is seen by taking the case of a dominant owner who after acquiring a right to all the light that could be obtained uses his house for a purpose to which the whole of the light is not essential, and is so using it at the time of obstruction. The consequence of applying the argument of actual user to a case of that kind would be to allow the wrong-doer to measure out the exact quantity of light required for the particular use of the dominant tenement and to deprive the dominant owner of the excess to which he had already acquired an absolute right.[1]

These decisions shew that in cases where the amount of light claimed exceeds the amount of light actually being used, the measure of the acquired right is not the actual use which is made of the dominant tenement at the time of the obstruction, but the amount of light which has been uniformly enjoyed during the period of acquisition without reference to the purpose for which the light has been used.[2]

The full right subject to limitation in respect of the remedy for obstruction.

But though the extent of the full right to light and air may in one sense be said to be the amount of those elements which has been uniformly enjoyed in respect of the dominant tenement,[3] yet supposing a man has enjoyed the free access of light and air to his windows for the prescriptive period and acquired an easement in respect thereof, is he entitled to relief for any interference whatsoever with the access of such light and air ?

[1] See *Calcraft* v. *Thompson* (1867), 15 W. R., 387, *per* Lord Chelmsford.

[2] S. 28, cl. (*c*) of the Indian Easements Act, also provides that the purpose for which the light has been used is not to be taken into consideration in estimating the measure of the light.

[3] See the cases above cited, and *Paran Maddack* v. *Ooday Chand Mullick* (1865). 3 W. R., 29.

The answer is that a man cannot insist necessarily upon the continuance of *all* the light and air to which he has been accustomed.

Relief will be given to him only where the obstruction has passed the region of harmlessness and become an appreciable interference with his comfort, his business, or his health.

Distinction between light and air in the application of the remedy.

In the application of this principle the law distinguishes between light and air permitting a greater latitude for interference with air than for interference with light.

In the case of light the remedy for the disturbance of the right depends upon the obstruction of such light as is sufficient for the comfortable use and enjoyment of the dominant tenement, if a dwelling-house, or for its beneficial use and occupation, if a place of business.

Back v. *Stacey.*

The rule has been well stated in *Back* v. *Stacey* [1] where Best, C. J., said that it was not sufficient to constitute an illegal obstruction that the party complaining had *less* light than before, but that in order to give a right of action there must be a substantial privation of light sufficient to render the occupation of the dominant tenement uncomfortable and to prevent the carrying on of the business therein as beneficially as before.

This statement was adopted by Pagewood, V. C., in *Dent* v. *Auction Mart Co.*,[2] with the single exception of reading "*or*" for "*and.*" In *Kelk* v. *Pearson* [3] the rule was laid down by James, L. J., in the following words [4] :—"Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of the right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house, if it were a dwelling-house, or for the beneficial use and occupation of the house, if it were a warehouse, or shop, or other place of business.

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[1] (1826) 2 C. & P., 465.
[2] (1866) L. R., 2 Eq., 238 (245).
[3] (1871) L. R., 6 Ch. App., 809.
[4] At p. 811.

To constitute an actionable obstruction of ancient lights it is not enough that the light is less than before. There must be a substantial privation of light, enough to render the occupation of the house uncomfortable according to the ordinary notions of mankind, and (in the case of business premises) to prevent the plaintiff from carrying on his business as beneficially as before. The nature of the right to light and of an infringement was not altered by the Prescription Act (2 & 3 Will. 4, c. 71). The decision of the Court of Appeal [1902], 1 Ch., 302, reversed, and the decision of Joyce, J., restored. The decision of the Court of Appeal in *Warren* v. *Brown* [1902], 1 K. B., 15, overruled.

Colls v. *Home and Colonial Stores, Limited* [1904, A. C., 179].

That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, and to such an extent as to render the house substantially less comfortable and enjoyable."

This interpretation of the law was approved by Lord Selborne, L. C., in *City of London Brewery Co.* v. *Tennant*,[1] and to the same effect are the decisions in India outside the Indian Easements Act.[2]

City of London Brewery Co. v. Tennant.

On the other, hand, the remedy for the disturbance of the right to air, whether enjoyed for the purposes of habitation or trade, proceeds on the ground of nuisance or injury to health. In *City of London Brewery Co.* v. *Tennant*,[3] Lord Selborne, L. C., said : "Now the nature of the case which would have to be made for an injunction by reason of the obstruction of air is *toto cœlo* different from the case which has to be made for an injunction in respect of light. It is only in rare and special cases involving danger to health, or at least something very nearly approaching it, that the Court would be justified in interfering on the ground of diminution of air. Therefore, when witnesses say that there is a material diminution of light and air and say no more, they are in truth reducing the value of their evidence as to light to the standard which must be applied to their evidence as to air, as to which such evidence is of no value whatever." And the same principle has been applied in India in cases not governed by the Indian Easement Act.[4]

In England natural conditions and other causes have made light of more account than air. In India air is of as much and often of greater importance than light. On this ground

Considerations affecting light and air in England and India.

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[1] (1873) L. R., 9 Ch. App., 212 ; and see *Lady Stanley of Alderley* v. *Earl of Shrewsbury* (1875), L. R., 19 Eq., 616.

[2] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18 ; *Modhoosoodun Dey* v. *Bissonauth Dey* (1875), 15 B. L. R., 361 ; *The Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839 ; *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., 133. For the law under the Indian Easements Act, see *infra*.

[3] (1873), L. R., 9 Ch. App. at p. 221.

[4] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18 ; *Modhoosoodun Dey* v. *Bissonauth Dey* (1875), 15 B. L. R., 361 ; *The Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839 ; *Nandkishor* v. *Bhagubhai* (1883), I. L. R., 8 Bom., 97. For the law under the Indian Easements Act, see *infra*.

arguments have been used in the Indian Courts in cases not governed by the Indian Easements Act advocating the application of the same principles of relief for the obstruction of air as for the obstruction of light.

Modhoosoodun Dey v. Bissonauth Dey.

In *Modhoosoodun Dey* v. *Bissonauth Dey*,[1] Markby, J., admitted the force of these arguments but felt himself precluded by the English and Indian authorities from adopting them. He said: "Here also I must apply the rules of English law. No doubt this leads to some inconvenience. The reasons for which apertures are made in the walls of houses in the two countries are very different.

In England an aperture is made chiefly for light; the sun being less bright and the air colder there, we desire to obtain all the light we can, and only to admit just so much air as is necessary for wholesome ventilation, for which reason we always use glass in our windows. In this country the object is precisely the reverse—to get as much air as possible, and to exclude the superfluous light. A comparatively small aperture will in this country light a room, but without a free current of air a room would very often be uncomfortable, and even unhealthy. . . . . But unfortunately the law of England being fashioned upon the wants of the inhabitants of that country has specially favoured the acquisition of the right to free access of light, but has taken very little notice of the right to free access of air."[2]

The same inconvenience appears to have been felt by the Legislature in passing the Indian Easements Act with the result that section 33 of that Act has made the right to light and air and the remedies for their obstruction co-extensive.[3]

Question of material diminution affected by existence of other windows.

In deciding the question whether there has been a material diminution of light and air, the Court should take into consideration the light and air afforded to the room by windows other than the window or windows obstructed.[4]

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[1] (1875), 15 B. L. R., 361.

[2] At p. 367; and see the observations of West, J., in *Nandkishor* v. *Bhagubhai* (1883), I. L. R., 8 Bom. at p. 97.

[3] See *Gazette of India*, 1880, Part V, p. 478, and Stokes, 1 Anglo-Indian Codes, p. 885.

[4] *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., 252 (262).

But it is no defence to an action for the disturbance of ancient lights to plead that the plaintiff or party complaining has windows in another part of his house from which he can get his light and air.[1]

Easements of extraordinary light.

There has been a conflict of opinion in the English Courts as to whether the use of light for ordinary purposes during the prescriptive period entitles the owner of the easement to claim the use of the light for special or extraordinary purposes.

Lanfranchi v. *Mackenzie.*

In *Lanfranchi* v. *Mackenzie*,[2] the plaintiffs sued to restrain the defendants from erecting a new building in such a manner as to interfere with the access of light to a window which they alleged was an ancient light and which admitted light to a room specially used by them for fourteen years for the examination of samples of raw silk for which a steady uniform light was required.

It was contended by the defendants that the plaintiffs having an ancient window could not by any peculiar user of it for less than the prescriptive period acquire a right to a special amount of light, and they relied on *Martin* v. *Goble* for the principle that the plaintiffs could not by any act on their part impose a new restriction on the defendants.

This contention was adopted by Malins, V. C., who decided that when a man had used a window for ordinary purposes during the prescriptive period, he could not claim the use of it for extraordinary purposes unless such user could be proved during a further period of twenty years.

Dickinson v. *Harbottle.*

In *Dickinson* v. *Harbottle*[3] the same Judge came to a similar decision.

It seems impossible to reconcile these decisions with the principle established in *Yates* v. *Jack*,[4] *Calcraft* v. *Thompson*,[5] *Aynsley* v. *Glover*,[6] and the other cases before mentioned for the reason that the real test in cases of this kind is not the

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[1] *Puran Mudduck* v. *Ooday Churn Mullick* (1865), 3 W. R., 29, and see *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq. at p. 251.

[2] (1867), L. R., 4 Eq., 421.

[3] (1873), 28 L. J. N. S., 186.

[4] (1866), L. R., 1 Ch. App., 295.

[5] (1867), 15 W. R., 387.

[6] (1874), L. R., 3 Eq., 548.

user of the dominant tenement at the time of obstruction, but the amount of light uniformly enjoyed for the prescriptive period in respect of the particular aperture.

The alteration in *Lanfranchi* v. *Mackenzie* was not in respect of the aperture, but merely in respect of the purpose for which the aperture had been used. If a man after acquisition of an easement of light cannot by subsequent user requiring less light be deprived of the full measure of light he has acquired, it should follow that he cannot be deprived of his right of user for a purpose requiring more light than formerly provided the prescriptive amount of light is not exceeded.

To hold otherwise would be to put an alteration of the use of the window on the same footing as an alteration of the window itself, two very different things between which the law clearly distinguishes.

Later decisions[1] based, as it is respectfully submitted, on a correct view of the law are at variance with the dicta in *Lanfranchi* v. *Mackenzie* and *Dickinson* v. *Harbottle*.

Warren v. *Brown.*

The most recent decision in *Warren* v. *Brown*[2] so far from reconciling this diversity of opinion has made the subject one of greater complexity than before.

This case goes further than either *Lanfranchi* v. *Mackenzie* or *Dickinson* v. *Harbottle*, and lays down that material diminution of extraordinary light received for 20 years and used for a purpose requiring such extraordinary light at the time of the obstruction complained of, but not for the whole prescriptive period, gave the owner of the easement no cause of action, provided sufficient light was left for all ordinary purposes. It was further questioned whether extraordinary user for the full 20 years would have made any difference in the result of the case.

The proposition that, no matter what amount of light a man has received during the prescriptive period, he cannot

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[1] *Mackey* v. *Scottish Widow's Society* (1877), Ir. R., 11 Eq., 541; *Att. Genl.* v. *Queen Anne's Gardens Mansions* (1889), 5 Times L. R., 430; *Lazarus* v. *Artistic Photographic Co.* (1897), 2 Ch., 314.

[2] (1900) 2 Q. B., 722.

use that light for any but ordinary purposes, presents a marked and serious departure from the principle enunciated in *Aynsley* v. *Glover* and the other cognate cases,[1] and, as already pointed out, places in the hands of the servient owner the means of dictating to the dominant owner the purposes for which he shall or shall not use the light which he has gained, a result which must unduly restrict the operation of the easement and against which the observations of the judges in the earlier cases appear to have been specially directed.[2]

Protection against obstruction extended to Churches and decorations inside Churches. *Att.-Genl.* v. *Queen Anne's Mansions.*

The case of the Attorney-General v. *Queen Anne's Mansions*[3] is interesting as deciding that the principles by which the Court has been guided in the protection of access of light to buildings used for domestic and commercial purposes are applicable to a building used for ecclesiastical purposes, and that material interference with the comfort of worshippers is liable to be restrained as much as interference with the comfort of inmates of houses.

In this case the defendants had obstructed the access of light to six windows on the south side of the Guards Memorial Chapel, Westminster, and materially interfered not only with the comfort of the worshippers in the chapel, but with the illumination of the mosaics and stained glass windows with which the chapel was adorned. In giving protection to the mural decorations and stained glass windows, the Court considered that they were as much entitled to protection in the circumstances of the case as either a picture gallery in a private house or a picture gallery in a public building appropriated to that purpose.

No easement that light shall not be increased or reflected.

The owner of an easement of light cannot complain of any act on the servient tenement whereby the quantity of light coming to his windows is increased or converted into what is called "reflected light" or into an extraordinary supply of light of a glaring character.[4] No case has occurred where under

[1] See *supra*.

[2] *Yates* v. *Jack*; *Calcraft* v. *Thompson*; *Aynsley* v. *Glover*.

[3] (1889) 5 Times L. R., 430.

[4] *Lanfranchi* v. *Mackenzie* (1867), L. R., 4 Eq., 421; *Lazarus* v. *Artistic Photographic Co.* (1897), 2 Ch., 214; *Boyson* v. *Deane* (1899), I. L. R., 22 Mad., 251 (253).

these circumstances the Court has interfered in favour of the dominant owner.

But if ancient light disturbed dominant owner not bound to accept reflected light.

But where there has been a disturbance of ancient lights the dominant owner is not bound to put up with reflected light, even if it would not be incomparably less than the light obstructed.[1]

Besides what security has the dominant owner that the reflected light will continue? He is entitled to *stand* on his right, and not to depend upon the degree of consideration which the other party may shew him from time to time.[2]

Easement of air for purposes of ventilation.

It has been seen that there can be an easement with respect to the passage of air through the windows of the dominant tenement or along definite channels on the servient tenement and that the grounds for the interference of the Court in such cases are either nuisance or injury to health.[3]

It is usually in cases affecting the ventilation of houses that the Court is called upon to interfere.

Gale v. *Abbott.* *Dent* v. *Auction Mart Co.* *Hall* v. *Lichfield Brewery Co.*

The free passage of air both into and out of the dominant tenement and the proper circulation of air in the dominant tenement are essential to ventilation. The cases of *Gale* v. *Abbott*,[4] *Dent* v. *Auction Mart Co.*,[5] and *Hall* v. *Lichfield Brewery Co.*,[6] are instances of the interference of the Courts to protect the free access of salubrious air to the dominant tenement.

Bass v. *Gregory.*

The case of *Bass* v. *Gregory*,[7] already noticed at some length, is an instance of the interference of the Court to protect the wholesome ventilation of the dominant tenement by the free passage of air through a defined channel on the servient tenement.

Right to pollute air, an Easement.

The right of every man to have air come to him in a pure condition is a natural right and not an easement.[8]

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[1] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238; *Staight* v. *Burn* (1869), L. R., 5 Ch. App., 163; *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181 (191).

[2] *Ibid.*

[3] See *supra.*

[4] (1862), 8 Jur., N. S., 987.

[5] (1866), L. R., 2 Eq., 238.

[6] (1880), 49 L. J., Ch, 655.

[7] (1890), L. R., 25 Q. B. D., 481; 59 L. J., Q. B., 574.

[8] See Indian Easements Act, s. 7, ill. (*b*), and Chap. V, Part II, B.

But such natural right can be restricted by an easement giving the right to pollute air.[1]

Part II.—Easements of Way.

Divisible into two classes.

Rights of way are divisible into two classes ; Public rights of way[2] and Private rights of way. Private rights of way in turn are capable of division into two classes, Easements of way, and Rights in gross.[3]

Nature of Easement of way.

Easements of way form the most important class of affirmative easements. They are rights which enjoy a wider familiarity than perhaps any other kind of easement.

A right or easement of way is a right, appurtenant to the dominant tenement, of passage over a neighbour's land to and from the dominant tenement. It is not, as will be seen, a right to wander at pleasure, but a right to pass along a particular route from the *terminus a quo* to the *terminus ad quem*.[4]

How the Easement may arise.

An easement of way may arise in India either by grant of the owner of the soil,[5] or by prescription,[6] or by necessity,[7] or under the Indian Limitation Act,[8] or the Indian Easement Act.[9]

With reference to the acquisition of the right by prescription it will be remembered that easements of way are governed by different principles to easements of light and air, the former arising by user accompanied in the first instance with the

[1] *Bliss* v. *Hall* (1838), 4 Bing. N. C., 183 ; *Flight* v. *Thomas* (1839), 10 A. & E., 590 ; *Crump* v. *Lambert* (1867), L. R., 3 Eq. (413), and see Indian Easements Act, s. 7, ill. (*b*).

[2] See Chap. IV, Part II, A. (2).

[3] See Chap. IV, Part II, A.

[4] *Goluck Chunder Chowdhry* v. *Tarnee Churn Chuckerbutty* (1865), 4 W. R., 49 ; S. C. Sub nom. *Tarnee Churn Chuckerbutty* v. *Tarnee Churn Chuckerbutty* (1866), 1 Ind. Jur., N. S., 6, and see *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875). L. R., 1 Ch. D., 362 ; 45 L. J., Ch , 353.

[5] See Chap. VI

[6] ,, ,, VII

[7] ,, Chaps. I & VI

and see *Imambandee Begum* v. *Sheo Dyal Ram* (1870), 14 W. R., 199 ; *Ram Gunga Doss* v. *Gobind Chunder Doss* (1871), 16 W.R., 284 ; *Savalgiapa* v. *Basvanapa* (1873), 10 Bom. H. C., 399.

[8] See Chap. VII.

[9] See Chap. VII.

consent of the servient owner, the latter by implied covenant on the part of the servient owner derived from user.[1]

The former are unlawful in their origin. The first of the acts is a trespass; whereas, in the case of light, the acts are in themselves lawful acts, done in the lawful occupation and user of a man's own land.[2]

Rights of way must be definite.

Rights of way must not be vague or indefinite, that is to say, they must be limited to a particular route over the servient tenement. An easement of way confers no right to wander at pleasure over any part of the servient tenement for whatever purpose.[3]

It is no valid objection to the acquisition of a right of way by prescription that there is another means of access to, or egress from, the dominant tenement of which the dominant owner might have availed himself, for where the necessary time and user have conferred a prescriptive right, the servient owner cannot complain of its inconvenience.[4]

Easements of way of great variety.

Easements of way are in their extent capable of great variety. They may be acquired either for present purposes, or they may be limited to particular purposes, or to a particular point, or period of time, or subject to particular conditions.[5] These limitations in point of time and conditions would not arise where the acquisition was derived from prescription or enjoyment for the necessary period of time under the Indian Limitation Act or Indian Easements Act, though they might be made the subject of grant or covenant.

What is the precise limit of the right in any particular case depends upon the manner of acquisition and will hereafter be considered in discussing the extent and mode of enjoyment of the right.[6]

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[1] See *Cross* v. *Lewis* (1824), 2 B. & C., 686; *Moore* v. *Rawson* (1824), 3 B. & C., 339, referred to with approval in *Webb* v. *Bird* (1863), 13 C. B. N. S., 841, and see Part I, *supra*.

[2] See *per* Field, J., in *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., 759.

[3] *Gooroo Churn Goon* v. *Gunga Gobind Chatterjee* (1867), 8 W. R., 269; *Joy Doorga Dassia* v. *Juggernath Roy* (1871), 15 W. R., 295; *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), L. R., 1 Ch. D., 362; 45 L. J. Ch., 353.

[4] *Sham Bagdee* v. *Fakir Chand Bagdee* (1866), 6 W. R., 222; *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302.

[5] See Chap. I, Part II, and Indian Easements Act, s. 6.

[6] See Chap. VIII, Part I, C.

A right of way is an affirmative easement entitling the dominant owner to have active use of the servient tenement in the manner above indicated.

Affirmative easement.

It is also a discontinuous easement depending as it does for its exercise on the act of the dominant owner.

Discontinuous easement.

Section 5 of the Indian Easements Act defines a discontinuous easement as one that needs the act of man for its enjoyment.[1]

Easements being restrictions of the ordinary rights of property, a right of way is restrictive of a man's right in his soil and of his liberty to enjoy and dispose of his land as he pleases.[2]

Easement of way in what respect restrictive.

Easements of way do not confer rights to the ownership of the soil.[3] There cannot be a claim to the ownership of land and to a right of way over it at the same time.[4] In the respect of not being rights to the ownership of the soil, private rights of way resemble public rights of way.[5]

Are not rights to ownership of soil.

The presumption with regard to the ownership of the soil is that it belongs *usque ad medium filum viae* to the owners of the adjoining lands, and such presumption applies equally to a private as to a public road.[6]

Presumption as to ownership of soil in case of private way.

There is a similar presumption in India.[7] In India there may be a right of way by boat in the rainy season over a particular channel. Such a right may be acquired by enjoyment for the necessary period in spite of the interruption in the actual user caused by lack of water.[8]

Right of way by boat.

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[1] *Quere* if this is an accurate definition. The act of man is required for the exercise or actual user of the easement, but, not necessarily, for the enjoyment of the easement, *cf.* the remarks of Garth, C. J., in *Koylas Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281, in connection with s. 26, ill. (*b*) of the Indian Limitation Act, and see Chap. VII, Part II.

[2] Indian Easements Act, s. 7.

[3] *Clifford* v. *Hoare* (1874), 43 L. J. C. P., 225; L. R. E. C. P., 362; *Sham Churn Auddy* v. *Tarini Churn Banerjee* (1876), 25 W. R., 218; I. L. R., 1 Cal., 422.

[4] *Ibid.*

[5] *St. Mary Newington* v. *Jacobs* (1871), L. R., 7 Q. B., 47; 41 L. J. M. C., 72.

[6] *Holmes* v. *Bellingham* (1859), 7 C. B. N. S., 329, and see as to public roads, Chap. IV, Part II, A (2).

[7] *Mobarruck Shah* v. *Toofany* (1878), I. L. R., 4 Cal., 206.

[8] *Ramsoondar Burral* v. *Woomakant Chuckerbutty* (1864), I W. R., 217; *Koylash Chunder Ghose* v. *Sonatun*

Private right of way may be common to several persons.

A private right of way is not necessarily confined to a way used by one person; it may be common to several persons.[1]

Question whether private and public rights of way can exist simultaneously.

It may be convenient here to consider the question as to whether a private right of way and a public right of way can exist simultaneously over the same soil.

The answer depends on the time at which the two rights come into existence.

If a public right of way already exists, no private right of way can be acquired in derogation of it, but if a private right of way already exists, the requisition of the public right will not extinguish the private right, but remain qualified to that extent unless there has been a release or abandonment of the private right, or a public user inconsistent therewith.[2]

The right to a private way and the right to a public way over the same soil cannot be pleaded together as the two are inconsistent,[3] but the private right if pre-existing can be relied on, for there is no compulsion in such a case to resort to the public right which might possibly be disputed by conflicting evidence,[4] and the remedy for the obstruction of which is by indictment only unless special damage can be shewn.[5]

When once a right of way has been acquired, the servient owner cannot object to it on the ground of inconvenience, nor can he put an end to the right by shewing that there is another pathway which the dominant owner might use.[6]

A right of way is a right of use of land within the meaning of section 320 of the Criminal Procedure Code. The exclusive possession of land not subject to such a servitude becomes something short of exclusive possession when the easement arises.[7]

Baroie (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281; and see *infra*, Part III, A, Chap. IV, Part I, B (2) (*a*), Chap. VII, Part II.

[1] *Semple* v. *The London and Birmingham Ry. Co.* (1838), 9 Sim., 209; *Sham Soonder Bhattacharjee* v. *Monee Ram Dass* (1876), 25 W. R., 233.

[2] *Brownlow* v. *Tomlinson* (1840), 1 M. & G. at p. 486; *Duncan* v. *Louch* (1845), 6 Q. B., 904; *Queen* v. *Chorley* (1848), 12 Q. B., 515.

[3] *Chichester* v. *Lethbridge* (1738), Willes, 71.

[4] *Allen* v. *Ormond* (1806), 8 East., 3.

[5] *Chichester* v. *Lethbridge* (1738), Willes, 71.

[6] *Sham Bagdee* v. *Fukeer Chand Bagdee* (1866), 6 W. R., 222.

[7] (1868), 4 Mad. H. C. Rulings xi.

A party who consents to the alteration of an existing path by the Magistrate to one more convenient to the public generally cannot afterwards come forward and claim such right of way as private.[1]

Part III.—Easements in Water.

Nature of easements in natural streams.

The nature of the right conferred by the acquisition of an easement in water is to restrict in some particular respect the enjoyment of those natural rights in water which form part of the ordinary incidents of property.[2]

Those natural rights may be described as the right of every riparian proprietor to use the water which flows past his land equally with other proprietors, to have the water come to him undiminished in flow, quantity, and quality, and unaffected in temperature, and to go from him without obstruction.[3]

Classification of easements in water.

It will be convenient to classify the different easements relating to water in accordance with the special nature of the right acquired.

Easements in water are affirmative easements and may be divided into the following classes, namely :—

A. Easements relating to the flow of water in natural watercourses.

B. Easements relating to the flow of water in artificial watercourses.

C. Easements relating to the subterranean flow of water.

D. Easements relating to the discharge of rain water upon adjoining land.

E. Easements relating to water requiring the use of the servient tenement for their enjoyment.

F. Easements affecting the natural state of water by pollution or alteration of temperature.

These easements may arise either by grant, express or implied,[4] by prescription or enjoyment for the necessary period,[5]

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[1] *Muddun Gopal Mookerjee* v. *Nilmonee Banerjee* (1869), 11 W. R., 304.

[2] See Chap. I under "Natural Rights" and Chap. V, Part III.

[3] See Chap. V, Part III, and Indian Easements Act, s. 7, ill. (*h*).

[4] See Chap. VI.

[5] See Chap. VII.

or by custom,[1] and in India also under the Indian Limitation Act, and the Indian Easements Act.[2]

A.—Easement relating to the flow of water in natural water-courses.

Easements in natural streams flowing in known and defined channels.

Easements can be acquired in natural streams flowing in known and defined channels.

In this connection are to be noticed those easements that give riparian owners the right to divert water from its accustomed course and thus diminish the quantity which would otherwise descend to the proprietors below, or to throw the water back upon the proprietors above.[3] These rights, being clearly restrictions of the ordinary rights of property,[4] require that the burthen of proof of them should rest upon the proprietor claiming them[5]; as was said by Leach, V. C., in *Wright* v. *Howard*

Wright v. *Howard.*

"Either proprietor who claims the right either to 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 proprietor affected by the operations, or must prove an uninterrupted enjoyment of twenty years."[6]

Bealey v. *Shaw.*

In *Bealey* v. *Shaw*.[7] Lord Ellenborough said: "The general rule of law as applied to this subject is, 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 exercise of certain trades, yet if the occupation of the party so taking it have

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[1] See Chap. IV, Part I, B (1)

[2] See Chap. VII, Parts II & III.

[3] See *Bealey* v. *Shaw* (1805,) 6 East., 209; *Wright* v. *Howard* (1823), 1 Sim. & St., 190; 24 R. R., 169; *Embrey* v. *Owen* (1851), 6 Exch at p. 370; *Subramaniya* v. *Ramachandra* (1877), I. L. R, 1 Mad., 335; *Debi Pershad Singh* v. *Joynath Singh* (1897), I. L. R., 24 Cal. (P. C.), 865.

[4] Indian Easements Act, s. 7, ill. (*h*).

[5] See Chap. V, Part I.

[6] (1823) 1 Sim. & St., 190, 24 R. R., 169. And so under s. 26 of the Indian Limitation Act, XV of 1877, and see Chap. VII, Part II.

[7] (1805) 6 East., 209.

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. I take it, that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of the right in the party so enjoying it, derived from grant or Act of Parliament."[1]

The facts in *Bealey* v. *Shaw* were that the defendant and his predecessors in title had been accustomed for over sixty years to divert water from the River *Irwell* by means of a weir of a given height, and sluice of given dimensions. In this state of things the plaintiff came to a spot lower down the river, erected a weir, mill, and other works on his own land, and commenced to enjoy the natural rights in respect of so much of the water as the defendant had not been accustomed to divert. The defendant subsequently enlarged his sluice, and the question arose whether he had a right to do so.

It was held that in the absence of enjoyment for the necessary period of the enlarged sluice the defendant was confined to his original easement, and could claim nothing more.

In India, as in England, the right to divert and impound the water of a natural spring for purposes of irrigation can only be acquired by virtue of an easement.[2]

Dominant tenement must abut on stream.

It is important to remember that the obstruction or diversion of water for the necessary period must be to a tenement abutting on the stream. Otherwise no easement will be acquired.[3]

No right acquired by servient owner that the exercise of the easement shall be continued.

With reference to this topic the important question arises as to whether a servient owner whose natural rights have been restricted by the diversion of water from its natural course or by the discharge of water on to his land can require the dominant owner to continue the exercise of the Easement, or, in other words whether he thereby acquires a reciprocal easement as against

[1] See Chap. VII, Part II.

[2] *Debi Pershad Singh* v. *Joy Nath Singh* (1897), I. L. R., 24 Cal. (P.C.) at p. 874 ; and see *Babu Chumroo Singh* v. *Mullick Khyret Ahmed* (1872), 18 W. R., 525.

[3] *Stockport Water Work Co.* v. *Potter* (1864), 3 H. & C., 300.

the dominant owner that the latter shall continue the diversion or discharge of the water.

The question has been fully discussed in the Courts, and it has been decided that the servient owner cannot acquire any such right.[1]

The principles established in the decisions proceed upon two grounds, firstly, upon the ground that the enjoyment of the servient owner would be incapable of interruption at the hands of the dominant owner by any reasonable mode,[2] and secondly, upon the broader ground, that it is of the essence of an easement that it exists for the benefit of the dominant tenement alone, and that the servient owner can acquire no right to insist on the exercise of the easement on the part of the dominant owner if the latter finds it expedient to abandon the right.[3]

Arkwright v. Gell.

The first mentioned ground was elucidated by Lord Abinger, C. B., in *Arkwright* v. *Gell*.

In that case the plaintiff sued to recover damages from the defendants for the diversion by them of a portion of the water flowing to certain cotton mills erected by the plaintiff, from a mineral sough constructed by a company of adventurers for the drainage of a mineral field under license from the mine owners. Subsequently to the construction of this mineral sough another company composed of the defendants commenced the construction of another sough on a lower level for the purpose of draining a larger portion of the mineral field under a similar license from the same mine owners who had previously used the former sough, and the result of their operations was to cause the diversion complained of. The judgment of the Court of Exchequer Chamber was delivered by Lord Abinger, C. B., who in dismissing the suit pointed out that the acquisition of such

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[1] *Arkwright* v. *Gell* (1839), 5 M. & W., 203; *Wood* v. *Waud* (1849), 3 Exch., 748; *Mason* v. *Shrewsbury and Hereford Ry. Co.* (1871), L. R., 6 Q. B., 578; *Khoorshed Hossein* v. *Teknarain Sing* (1878), 2 C. L. R., 141; and see Indian Easements Act, s. 50, and *supra*, Chap. II.

[2] *Arkwright* v. *Gell*; *Wood* v. *Waud*, and see the judgment of Blackburn, J., in *Mason* v. *Shrewsbury and Hereford Ry. Co.*

[3] See the judgment of Cockburn, C. J., in *Mason* v. *Shrewsbury and Hereford Ry. Co.*

a right as was claimed by the plaintiff would depend on the capability of submission on the part of the defendants, as dominant owners, to the enjoyment of the water by the plaintiff as servient owner, and that as there was no reasonable mode of interruption open to the defendants, there could be no submission on their part, and therefore no acquisition of the right by the plaintiff. The futility of the plaintiff's case becomes all the more apparent when it is considered that the acquisition of the right claimed by him would have imposed an obligation on the mine owners not to work their mines by the ordinary mode of getting minerals, and been founded on a mode of prevention of the plaintiff's enjoyment of the stream, not only highly expensive and inconvenient to the mine owners, but absolutely destructive to their interests.

Wood v. *Waud.*

In *Wood* v. *Waud*[1] the Court expressed itself satisfied that the principles laid down in *Arkwright* v. *Gell*, as applying to the particular matter now under discussion, were correct. Pollock, C. B., in the course of his judgment used the following argument in explaining the legal position in such a case as the present. He said, " the flow of water of twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of the drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right."[2]

Acquisition of easement in natural but intermittent streams.

If easements can be acquired in natural streams flowing in known and defined channels is it essential to the acquisition of such rights that the streams should be flowing perpetually? Would any intermission in the flow prevent the acquisition of the easements? The cases of *Trafford* v. *The King*,[3] and *Drewett* v.

Trafford v. *The King*. *Drewett* v. *Sheard*.

[1] (1849) 3 Exch., 748.
[2] At p. 778.
[3] (1832) 8 Bing., 204.

Sheard,[1] point to the conclusion that where the stream has a permanent and natural origin, and flows in a defined channel, but at any point of its course assumes a character which renders its existence dependent upon the recurrence of floods at certain seasons, as in the case of an overflow, or on the doing of any act regulating the supply of water at its source, it may become the subject of easements.

Trafford v. *The King* supplies the instance of a watercourse caused by overflow water from a brook in times of flood.

In *Drewett* v. *Sheard* Littledale, J., said there was no objection to enjoying the benefit of water which flowed into a ditch from a natural stream at all times or only at such times as the stream was swollen by water let by means of sluices into the river with which the stream communicated.

The principle in these cases that any intermission in the subject of the easement beyond the control of the dominant owner does not prevent the acquisition of the right appears to find its analogy in cases arising in India where the dominant owner has a right of way by boat over his neighbours' tank or through definite channels exercisable during the rainy season only by reason of the quantity of water required.[2]

No easements in intermittent artificial streams.

But easements cannot be acquired in artificial streams, if intermittent, at any rate against the person creating them.[3]

B.—*Easements relating to the flow of water in artificial watercourses.*

Easements in artificial watercourses.

The right to water flowing through *artificial* watercourses is a right of easement, and must rest on some grant or arrangement either proved or presumed from or with the owners of the lands from which the water is artificially brought, or on some other legal origin.[4]

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[1] (1836) 7 C. & P., 465.

[2] See *Koylas Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132 ; 8 C. L. R., 281 ; and *supra*, Part II, and *infra*, Chap. IV, Part I, B 2 (*a*), and Chap. VII, Part II.

[3] See *infra*.

[4] *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H.C., 6 ; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46 : *Rameshur Prasad* v. *Koonj Behari Pattuck* (1878), L. R., 4 App. Cas., 121 : I. L. R., 4 Cal., 633 ; and see *Kensit* v. *Great Eastern Railway Co.* (1884), L. R., 27 Ch. D. at p. 134.

It is quite distinct from the natural right which, as a natural incident to the ownership of land, entitles *primâ facie* each successive riparian proprietor to the unimpeded flow of water of a *natural* channel in its *natural* course, and to its reasonable enjoyment as it passes through his land.[1]

Artificial channels in connection with irrigation.

In India the law of easements, as relating to artificial watercourses, has frequent application to the subject of irrigation, a method largely employed in most parts of the country for the purposes of cultivation.

Indian cases.

It may be useful, therefore, to study closely some of the cases that have occurred in India connected with this branch of the law.

Ponnusawmi Terar v. *Collector of Madura.*

In *Ponnusawmi Terar* v. *Collector of Madura*,[2] the plaintiff sued to establish his right to an uninterrupted flow of water through a channel which ran into a tank, the property of the plaintiff, and to compel the removal of sluices erected across the said channel by the first defendant's predecessor in office, and used for the purpose of diverting the flow of water.

The first Court dismissed the suit, but, on appeal, the Madras High Court reversed that decision and gave judgment for the plaintiff.

The High Court[3] who at some length and with great care discussed the nature of the right claimed and the manner of its acquisition, expressed the opinion that the right claimed was in an artificial stream, and that the plaintiff to succeed must shew he possessed an easement. In deciding that the plaintiff had acquired such an easement the Court said, "I think that the circumstances in evidence justify the inference that the right claimed has been gained by the plaintiff; the conduct of the Government showing as it seems to me that the water has been allowed to flow to the plaintiff's village and other villages on the understanding that it was to continue to

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[1] *Rameshur Prasad* v. *Koonj Behari Pattuck; Kensit* v. *Great Eastern Railway Co.*

[2] (1869) 5 Mad. H. C., 6.

[3] Scotland, C. J., and Innes, J.

flow on for the exclusive use and benefit of these villages and not be liable to obstruction or suffer diminution for the advantage of other district villages.

"I quite admit that the Government of this country has at all times assumed to itself and has the right in the interests of the public to regulate the distribution for use of any portion of the water flowing in the natural channels in which rights have not as yet been acquired, and to this extent, the claim of the first defendant on behalf of the Government cannot be gainsaid. But where a channel has been constructed by Government acting as the agent of the community to increase the well-being of the country by extending the benefit of irrigation, and in pursuance of that purpose a flow of water is directed to the villages designed to be benefited, it becomes simply a question upon the circumstances of the case whether there has not been a conveyance to such villages in perpetuity of a right to the unobstructed flow of water by the channel. Looking at the permanency of such works and to the permanency attaching to the object, that there was a transfer in perpetuity would seem an almost necessary conclusion, unless there were other circumstances to lead to one of an opposite character. It might of course be capable of being shown that the privilege was granted as a mere license, and that before the water was allowed to flow to the villages, it had been left open to Government by arrangements then made to obstruct the flow at will at any future period. In the case before us, however, nothing of the kind is apparent."[1]

Morgan v. Kirby.

In *Morgan* v. *Kirby*,[2] the plaintiff sought to restrain the defendant from interfering with, and diverting, the flow of water through an artificial channel opened by the plaintiff for the conveyance of water for the use of his tea estate. The Court decided that the right claimed was an easement and that the plaintiff was entitled to the uninterrupted flow of water as claimed subject to the defendant's right to make reasonable use of it as it flowed through his grounds.

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[1] *Per* Innes, J., at p. 29.

[2] (1878) I. L. R., 2 Mad., 46.

Rameshur Prasad v. Koonj Behari Pattuck.

In *Rameshur Prasad* v. *Koonj Behari Pattuck*,[1] the appellant claimed an alleged ancient right as against the respondents, his neighbouring proprietors, to have certain of the villages, five in number, irrigated out of a "tâl" or artificial reservoir of water existing on the respondents' land, and he further sued to have certain dams erected, and channels of water cut, by the respondents removed and filled up, and to have a channel by which he alleged he had been in the habit of receiving water for irrigation reopened, and the respondents perpetually restrained from wasting the waters of their "tâl" or from even discharging its waters except towards the appellants' villages and in that particular channel. The respondents, in substance, resisted the appellants' claim on the ground that the "tâl" in question was kept up by them on their own land for their own irrigation, and was supplied by "collected rain water" which ran into it, and that they were entitled to use that water for their own benefit, and that the appellant had no such right as be claimed.

It was held by the Privy Council that the appellants' legal right to the enjoyment of water flowing from an artificial reservoir through an artificial watercourse should be presumed from the circumstances under which the same were presumably created and actually enjoyed, subject to the respondents' right to the use of the water for the purpose of irrigating his lands by proper and requisite channels and other proper means.

The Privy Council treated as clearly established the distinction between the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it though an artificial watercourse.

Their Lordships referred with approval to the principle established in *Wood* v. *Waud* and other cases that the acquisition of the right to water flowing in an artificial channel as against the originator depends upon the permanency of the channel, and they found that the character of the reservoir and watercourse in dispute, and the circumstances under which they were presumably created and actually enjoyed indicated that a

[1] (1878) I. L. R., 4 Cal., 633; L. R., 4 App. Cas., 121.

permanent and connected system of irrigation for the appellant's and respondent's mouzahs beneficial to both estates was by those means provided.

They were of opinion that it was not correct to insert in the decree, as the first Court had done, a declaration of the appellant's right to scour the channel through which the water from the reservoir flowed. They observed that *primâ facie* and in the absence of evidence to the contrary, such a right is presumed by law to be incident to the right to the flow of water,[1] but no issue was raised on that point, nor did it appear that any effort of the appellant to cleanse the watercourse had been obstructed by the respondent.

If artificial watercourse *permanent*, easements can be acquired in it against originator.

A prescriptive right to the uninterrupted flow of water in artificial channels cannot be acquired as against the party creating them unless the channel is permanent.[2]

Wood v. *Waud*.

In *Wood* v. *Waud*[3] the Court said, "We entirely concur with Lord Denman, C. J., that 'the proposition, that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible;' but, on the other hand, the general proposition, that *under all circumstances*, the right to watercourses arising from enjoyment, is the same whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character, and liable to variation."

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[1] See Chap. VIII, Part II.

[2] *Arkwright* v. *Gell* (1839), 5 M. & W., 203; *Wood* v. *Waud* (1849), 3 Exch., 748; *Rameshur Prasad* v. *Koonj Behari Pattuck* (1878), I. L. R., 4 Cal., 633; L. R., 4 App. Cas., 121.

[3] (1849) 3 Exch. at p. 777.

In a subsequent case, *Greatrex* v. *Hayward*,[1] Baron Parke shortly stated the principle to be that the right of a party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created.

Question whether artificial watercourse *permanent or temporary*, how to be decided. *Greatrex* v. *Hayward.*

The facts in *Arkwright* v. *Gell*[2] shewed that the artificial channel there in question was of a purely temporary character, having its continuance only whilst the convenience of the mine owners required it.

Arkwright v. *Gell.*

And an underground sough or drain made for the purpose of carrying water off land for its better cultivation and subject to occasional interruptions from getting choked up by the roots of trees or otherwise, is clearly a watercourse of a temporary nature only.[3]

But in all such cases the question whether a stream is permanent or temporary depends upon the circumstances under which it was created and the intention of the party creating it.[4]

Though the law requires an artificial stream to be permanent for the acquisition of an easement therein as against the person creating it, the same principle does not apply to riparian proprietors *inter se.*

Same principle does not apply to riparian proprietors *inter se.*

Arkwright v. *Gell* is an authority for the proposition that the right to the uninterrupted flow of water in artificial streams can be acquired against the person through whose land the stream flows, whether the stream be *permanent* or *temporary.*[5]

Arkwright v. *Gell.*

An easement in an artificial watercourse is as good against Government as against a private individual.[6]

Good against Government.

It is settled law both in India and England that water must flow in a defined channel, whether natural or artificial, to become the subject of an easement by prescription.[7]

Defined channel necessary to acquisition by prescription of easements in water.

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[1] (1853) 8 Exch., 293.

[2] (1839) 5 M. & W., 203.

[3] *Greatrex* v *Hayward* (1853), 8 Exch., 293.

[4] *Wood* v. *Waud* (1849), 3 Exch., 748; *Greatrex* v. *Hayward* (1853), 8 Exch., 293; *Beeston* v *Weate* (1856), 5 E. & B., 986; 25 L. J. Q. B., 115; and see *Rameshur Prasad* v. *Koonj Behari Pattuck* (1878), I. L. R., 4 Cal., 633; L. R., 4 App. Cas., 121.

[5] (1839) 5 M. & W. at p. 233, *per* Lord Abinger, C. B.

[6] *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6.

[7] *Rawstron* v. *Taylor* (1855), 11 Exch., 369; 25 L. J. Exch., 33; *Broadbent* v. *Ramsbotham* (1856), 11 Exch. 603; 25 L.

Surface drainage water.

This principle has marked application to the case of surface drainage-water, an element frequently of great importance in agriculture.

Every landowner has a natural right to deal with his surface drainage water as he pleases.[1] He can either let it find its way to his neighbour's land if that is at a lower level than his own,[2] or he can collect it or use it as he pleases on his own land,[3] subject always to the reservation that if he allows it to flow for the prescriptive period through defined and artificial channels on to his neighbour's land, his neighbour will acquire a right to its continuance,[4] and, conversely, if he enjoys a right of outlet for his surplus water for over twenty years through defined artificial channels, he will acquire a right to the continuance of the outlet.[5]

But if drainage water, whether caused by rainfall,[6] or from oozings of a spring,[7] or from the overflow of a well,[8] does not follow any defined channel, but percolates through and flows over the surface, it is considered in law too vague and indefinite a thing to be made the foundation of a prescriptive right.[9]

Thus where the plaintiff in a case claimed a prescriptive right to have water arising from surface drainage off the defendant's land thrown back from the bund bounding the

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J. Exch., 115; *Kena Mahomed* v. *Bohatoo Sircar* (1863), Marsh., 506; *Imam Ali* v. *Poresh Mandal* (1882), I. L. R., 8 Cal., 468; *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16; Indian Easements Act, s. 17. But surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise may be the subject of an express grant or contract. *Perumal* v. *Ramasami*.

[1] *Rawstron* v. *Taylor; Broadbent* v. *Ramsbotham; Robinson* v. *Ayya Krishnama* (1872), 2 Mad. H. C., 37.

[2] *Smith* v. *Kenrick* (1849), 7 C. B., 468; *Kali Pooree* v. *Manick Sahoo* (1873), 20 W.R., 287; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335: *Imam Ali* v. *Poresh Mandal* (1882), I. L. R., 8 Cal., 468; and see Indian Easements Act, s. 7 ill. (*i*).

[3] *Rawstron* v. *Taylor; Broadbent* v. *Ramsbotham; Perumal* v. *Ramasami* (1887) I. L. R., 11 Mad., 16.

[4] *Kena Mahomed* v. *Bohatoo Sircar.*

[5] *Imam Ali* v. *Poresh Mandal.*

[6] *Kena Mahomed* v. *Bohatoo Sircar* (1863), Marsh., 506; and see *Robinson* v. *Ayya Krishnama* (1872), 7 Mad. H. C., 37.

[7] *Rawstron* v. *Taylor* (1855), 11 Exch., 369; 25 L. J. Exch., 33.

[8] *Broadbent* v. *Ramsbotham* (1855), 11 Exch., 603; 25 L. J. Exch., 115.

[9] *Kena Mahomed* v. *Bohatoo Sircar; Robinson* v. *Ayya Krishnama; Peruma* v. *Ramasami; Rawstron* v. *Taylor; Broadbent* v. *Ramsbotham.*

plaintiff's tank on to the defendant's land and kept there until required for use, it was decided there could be no prescriptive right for such an object.[1]

C.—*Easements relating to the subterranean flow of water.*

This branch of the law of easements applies to underground springs, streams, watercourses, and percolations, and makes it necessary to consider whether water flowing underground is on the same footing as water flowing aboveground, and whether, if easements can be acquired in the latter case, they can also be acquired in the former.

Same principles of law do not apply to water flowing underground in unknown channels as to water flowing aboveground in known and visible channels.

In this respect the case of *Acton* v. *Blundell*[2] which has settled the law in regard to natural rights to underground water is an important guide. The Court of Exchequer Chamber decided that a man has no natural right to water under his own ground, whether collected in a well or passing through springs or streams flowing in no defined or known course, and that any diminution of such water by his neighbour can be treated only as *damnum absque injuriâ*, and gives no ground of action. In that case the plaintiff declared in the first count for the disturbance of the right to the water of certain underground springs, streams, and watercourses, which, as he alleged, ought of right to run, flow, and percolate into the closes of the plaintiff, for supplying certain mills with water ; and in the second count for the draining off the water of a certain spring or well of water in a certain close of the plaintiff by reason of the possession of which close, as he alleged, he ought of right to have the use, benefit and enjoyment of the water of the said well for the convenient use of his close. The plaintiff proved that less than twenty years before the commencement of the suit, a former owner and ocupier of certain land and a cotton mill now belonging to the plaintiff, had sunk and made in such land a well for raising water for the working of the mill, and that the defendants had subsequently sunk a coal pit

Acton v. *Blundell.*

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[1] *Robinson* v. *Ayya Krishnama;* and see *Peramal* v. *Ramasami.*

[2] (1843) 12 M. & W., 324.

in the land of one of the defendants at about three-quarters of a mile from the plaintiff's well, and about three years after sunk a second at a somewhat less distance; the consequence of which sinkings was, that by the first, the supply of water was considerably diminished, and, by the second, was rendered altogether insufficient for the purposes of the mill.

Tindal, C. J., who delivered the judgment of the Court, said: "The question argued before us has been in substance this: whether the right to the enjoyment of an underground spring, or of a well supplied by such underground spring, is governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface. The rule of law which governs the enjoyment to a stream flowing in its natural course over the surface of land belonging to different proprietors is well established. Such proprietor of the land has a right to the advantage of the stream flowing in its actual course over his land, to use the same as he pleases for any purposes of his own not inconsistent with a similar right in the proprietors of the land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the license or the grant of the proprietor above.

"The law is laid down in these precise terms by the Court of King's Bench in the case of *Mason* v. *Hill*,[1] and substantially is declared by the Vice-Chancellor in the case of *Wright* v. *Howard*,[2] and such we consider a correct exposition of the law. And if the right to the enjoyment of underground springs, or to a well supplied thereby, is to be governed by the same law, then undoubtedly the defendants could not justify the sinking of the coal pits, and the decision given by the learned Judge would be wrong. But we think, on considering the grounds and origin of the law which is held to govern running streams, the consequences which would result if the same law is made

[1] (1833) 5 B. & Ad., 1; 2 Nev. & M., 747.

[2] (1823) 1 Sim. & St., 190.

applicable to springs beneath the surface, and, lastly, the authorities to be found in the books, so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law."

The learned Chief Justice after observing that the ground and origin of the law relating to streams running in their natural course rests upon the publicity and notoriety of the right, upon long continued and uninterrupted enjoyment, and upon either the implied assent and agreement of the proprietors of the different lands from all ages or on the rights themselves being an incident to the land, proceeds as follows :—" But in the case of a well sunk by a proprietor in his own land, the water which feeds it from a neighbouring soil does not flow openly in the sight of the neighbouring proprietor, but through the hidden veins of the earth beneath its surface. No man can tell what changes these underground sources have undergone in the progress of time. It may well be that it is only yesterday's date, that they first took the course and direction which enabled them to supply the well. Again, no proprietor knows what portion of water is taken from beneath his own soil, how much he gives originally, or how much he transmits only, or how much he receives : on the contrary, until the well is sunk, and the water collected by draining into it, there cannot properly be said, with reference to the well, to be any flow of water at all. In the case, therefore, of the well there can be no ground for implying any mutual consent or agreement, for a year past, between the owners of the several lands beneath which the underground springs may exist, which is one of the foundations on which the law as to running streams is supposed to be built ; nor, for the same reason, can any trace of a positive law be inferred from long-continued acquiescence and submission, whilst the very existence of the underground springs or of the well may be unknown to the proprietors of the soil.

" But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner

of the soil merely transmits the water over its surface ; he receives as much from his higher neighbour as he sends down to his neighbour below ; he is neither better nor worse ; the level of the water remains the same.

"But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well.

"He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil ; and this, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purpose of mining, and discovers when too late, that the appropriation of water has already been made. Further, the advantage on the one side, and the detriment to the other may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle ; whilst the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value, and lastly, there is no limit of space within which the claim of right to an underground spring can be confined : in the present case the newest coal pit is at the distance of half a mile from the well ; it is obvious the law must equally apply if there is an interval of many miles. Considering, therefore, the state of circumstances upon which the land is grounded in the one case to be entirely dissimilar from that which exist in the other ; and that the application of the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust ; we feel ourselves warranted in holding, upon principle, that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith." . . . .

. . . "It is scarcely necessary to say, that we intimate no opinion whatever as to what might be the rule of law, if there

had been an uninterrupted user of the right for more than the last twenty years; but, confining ourselves strictly to the facts stated in the bill of exceptions, we think the present case, for the reasons above given, is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath its surface; that the land immediately below is his property, whether it be solid rock, or porous ground, or venous earth, or part soil, part water: that the party who owns the surface may dig therein and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damum absque injuria*, which cannot become the ground of an action."

Although the Court expressed no opinion as to what would have been the legal result if the plaintiff could have shewn user of the right claimed for more than the past twenty years, the reasoning of the Chief Justice seems clearly to militate against the acquisition of an easement under those circumstances.

The concealment of the course and channels in which the underground water may flow, the possibility of its percolations in numberless unascertained directions, the impossibility of telling what changes in the underground sources may take place from time to time, the ignorance of the landowner as to how much water he receives and how much is taken away from him by adjoining landowners, the difficulty or impossibility consequent upon all these circumstances, of any interruption on the part of the proprietor against whom the right might be claimed, are all powerful arguments against the acquisition of an easement in the flow of underground water, the sources and direction of which are hidden and unknown.

Chasemore v. Richards.

The principle to be inferred from *Acton* v. *Blundell* has since been clearly established by the House of Lords in the leading case of *Chasemore* v. *Richards*.[1]

[1] (1859) 7 H. L. C., 349.

In this case the facts were that the plaintiff was the occupier of an ancient mill on the River *Wandle* and that for more than sixty years, before the action, he and his predecessors had used and enjoyed as of right the flow of the river for the purpose of working their mill.

The River *Wandle* had always been supplied above the plaintiff's mill, in part, by the water produced by the rainfall on a district of many thousand acres in extent comprising the town of *Croydon* and its vicinity. The water of the rainfall sank into the ground to various depths and then flowed and percolated through the strata to the River *Wandle*, part of it rising to the surface, and part of it finding its way underground in continually changing courses.

The defendant represented the Local Board of Health at *Croydon* who, for the purpose of supplying the town of *Croydon* with water, and for other sanitary purposes, sank a well in their own land in the town of *Croydon*, and about a quarter of a mile from the River *Wandle*, and pumped up large quantities of water from their well for the supply of the town of *Croydon* and thereby diverted and abstracted the underground water that would have flowed and found its way into the river *Wandle*, and so to the plaintiff's mill.

The substance of the plaintiff's claim was that after a possession of twenty years he was absolutely entitled to all the water which he had been accustomed to use at his mill, from whatever sources derived, whether passing through known and defined channels above the surface of the ground, or passing through unknown and undefined channels underground.

The Lord Chancellor (Lord Chelmsford) proposed for the opinion of the judges the question whether, under the circumstances of the case, the Croydon Local Board of Health was " legally liable to the action of the appellant for the abstraction of the water in the manner described." The unanimous answer of the judges was in the negative.

It will be convenient to cite *verbatim* the essential passages in the judgment of the judges delivered by Mr. Justice Wightman on one of the most important questions that ever came under the consideration of a Court of Justice :

"The law respecting the right to water flowing in definite visible channels may be considered as pretty well settled by several modern decisions, and is very clearly enunciated in the judgment of the Court of Exchequer in the case of *Embrey* v. *Owen*.[1]

"But the law, as laid down in those cases, is inapplicable to the case of subterranean water not flowing in any definite channel, nor indeed at all, in the ordinary sense, but percolating or oozing through the soil, more or less, according to the quantity of rain that may chance to fall."

After a review of the authorities the judgment proceeds: "In such a case as the present, *is any right derived from the use of the water of the River Wandle for upwards of twenty years for working the plaintiff's mill?* Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what sometimes is called the servient tenement.

"But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendants or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise by the subject of the presumed grant; but how could he prevent or stop the percolation of water? The Court of Exchequer, indeed, in the case of *Dickinson* v. *The Grand Junction Canal Co.*,[2] expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is *jure naturae*. If so, *a fortiori*, the right, if it exists at all, in the case of subterranean percolating water, is *jure naturae*, and not by presumed grant, and the circumstance of the mill being ancient, would in that case make no difference."[3]

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[1] (1851) 6 Exch., 353; 20 L. J. Exch., 212.

[2] (1852) 7 Exch., 282.

[3] *Chasemore* v. *Richards*, though, to this qualified extent, in agreement with *Dickinson* v. *The Grand Junction Canal*

The question is then discussed as to whether there was any *natural right* in the plaintiff to prevent the defendant from committing the act complained of. The judges repudiated the notion that there could be any such natural right on the ground that it was impossible to reconcile such a right with the natural and ordinary right of land-owner or to fix any reasonable limits to the exercise of such a right.

The judgment concludes with these words "Such a right as that claimed by the plaintiff is so indefinite and unlimited that, unsupported as it is by any weight of authority, we do not think that it can be well founded, or that the present action is maintainable; and we therefore answer your Lordship's question in the negative."

This answer of the judges was accepted by the House of Lords.

The result of *Chasemore* v. *Richards* has been to establish beyond all doubt that the principles regulating the rights of land-owners in water flowing in known and defined channels whether upon or below the surface of the ground, do not apply to underground water which merely percolates through the strata in unknown channels.

Easements can be acquired in underground water flowing in known and defined channels.

This settlement of the law makes it clear that while easements are incapable of acquisition in the latter case, they can be acquired in the former case, for one of the propositions which *Chasemore* v. *Richards* has sanctioned, is that where underground water is found to be flowing in a certain, defined, and well-known channel, the usual considerations affecting the flow of underground water and negativing the existence of natural rights or the acquisition of easements do not apply.

This was the opinion of Lord Chelmsford, L.C., in *Chasemore* v. *Richards*,[1] when he says: "The law as to water flowing in a certain and definite channel, has been conclusively settled by a series of decisions, in which the whole subject

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Co. altogether dissents from its proposition that a natural right can exist in the case of subterranean percolating water, and overrules its decision that an action would lie for the diversion of underground and percolating water which would otherwise have gone into a stream which flowed to the plaintiff's mill and was applied to the working of it.

[1] (1859) 7 H. L. C., at p. 374.

has been very fully and satisfactorily considered, and the relative rights and duties of riparian proprietors have been carefully adjusted and established.

The principle of these decisions seems to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream or in a known subterranean channel; and I agree with the observation of Lord Chief Baron Pollock, in *Dickinson* v. *The Grand Junction Canal Co.*, that if the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it never could be contended that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground."

D.—Easements relating to the discharge of rain water upon adjoining land.

Easement of eaves-dropping.

Under this classification reference is intended to be made to the rights which can be acquired by user or other methods applicable to easements, of discharging rain water on to another's land from a wall or roof of a house.[1]

This is known in England as the easement of eaves-dropping.

In connection with or independently of such easements a prescriptive right can be acquired to the projection of the wall or eaves over adjoining land.[2]

Jus projiciendi.

This is the *jus projiciendi.*

The right to discharge rain water upon adjoining land may be either—

Stillicidium.

(1) The right to the dripping of rain water from such projection [3] (*stillicidium*); or

Flumen.

(2) The right to discharge rain water in a flow [4] (*flumen*).

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[1] *Thomas* v. *Thomas* (1835), 2 Cr. M. & Ros., 34; *Mohanlal* v. *Amratlal* (1878), I. L. R., 3 Bom., 174; *Bala* v. *Maharu* (1895), I. L. R., 20 Bom., 788; *Hayagreeva* v. *Sami* (1891), I. L. R., 15 Mad., 286.

[2] *Ibid.*

[3] *Thomas* v. *Thomas* (1835), 2 Cr. M. & Ros., 34.

[4] *Foy* v. *Prentice* (1845), 1 C. B., 828; *Mohanlal* v. *Amratlal* (1878), I. L. R., 3

Extent of the easements.

The right does not extend to obliging the servient owner to keep his land open for the reception of the water by not building on it, for the servient owner can build on his land as he pleases, provided he makes the necessary arrangements to receive the water discharged and carry it away.[1]

No reciprocal easement in servient owner.

On the principle that the servient owner cannot acquire a reciprocal easement against the dominant owner, the flow of water for twenty years from a house could not give a right to the servient owner to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof.[2]

E.—Easements relating to taking water from, or conducting water from or over, the servient tenement.

(1) Under the former head falls the right of the dominant owner to go on the servient tenement, and take away water from a spring,[3] a well, or a tank for use in his house or on his land.[4]

(2) Under the latter head falls the right of the dominant owner to conduct water from or over the servient tenement through a pipe or other means of transit for use in his own house or on his own land.[5]

Confer a double right.

These easements in fact confer a double right. There is first the right to go on the servient tenement, and secondly, the right to take or conduct the water. The second right would only come into existence as an easement if the spring, well, or tank, from which the water was taken, was the

Bom., 174; *Hayagreeva* v. *Sami* (1891), I. L. R., 15 Mad., 286.

[1] *Bala* v. *Maharu* (1895) I. L. R., 20 Bom., 788.

[2] See *Wood* v. *Waud* (1849), 3 Exch. at p. 778; 18 L. J. Exch. at p. 313; and see *supra* A, and Chap. II.

[3] Indian Easements Act, s. 4, ill. (*b*). If the spring were not the product of the servient tenement, the easement would be confined to going on the servient tenement, and the stream would be *res nullius*. *Race* v. *Ward* (1855), 4 E. and B., 702; 24 L. J. Q. B., 153.

[4] *Manning* v. *Wasdale* (1836), 5 A. and E., 758; 6 L. J. N. S. K. B., 59; *Race* v. *Ward*.

[5] Indian Easements Act, s. 4, ill. (*c*). For instances of the exercise of the easement for domestic or other like purposes, see *Sutcliffe* v. *Booth* (1863), 9 Jur. N. S., 1037; *Holker* v. *Porritt* (1875), L. R., 10 Exch., 59; *Roberts* v. *Richards* (1881), 50 L. J. Ch., 297, and for instances of the exercise of the easement for purposes of irrigation, see *supra*, B, under "Artificial channels in connection with irrigation."

product of the servient tenement, or the water taken therefrom was confined within some cistern or vessel for the use of the servient owner making it his property.[1] A spring flowing from a distance and supplied or renewed by nature is not the subject of property. It is *res nullius* open to all who have the right to go on the land.[2]

In England also the right to take water from a pond or tank is not a *profit à prendre* but an easement, as a *profit à prendre* must be something taken from the soil.[3]

F.—Easements affecting the natural condition of water by pollution or alteration of temperature.

(1) *Easements relating to pollution of water.*

Every landowner has a natural right to the purity of water passing by or over or percolating through his land.[4]

This right can be restricted by the acquisition of an easement either by user or grant entitling adjoining land-owner to pollute such water.

In what the easement can be acquired.

The easement can be acquired not only in the case of streams flowing in defined channels,[5] but in the case of water percolating through the soil.[6]

Distinction between flow and *purity of* percolating water. *Ballard* v. *Tomlinson.*

The case of *Ballard* v. *Tomlinson*[7] makes it clear that, as regards the existence of natural rights and consequently the acquisition of easements, the flow of percolating water is governed by different principles from the *purity* of percolating water.

In the one case percolating water below the surface of the earth is a common reservoir or source in which nobody has any property but of which everyone, as far as he can, has the right of appropriating the whole.[8]

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[1] *Race* v. *Ward.*

[2] *Race* v. *Ward.*

[3] *Manning* v. *Wasdale,* and see *Race* v. *Ward.*

[4] Indian Easements Act, s. 7, ill. (*f*), and see Chap. V, Part III, A (3) & D.

[5] *Bealey* v. *Shaw* (1805), 6 East. at p. 214; *Wright* v. *Williams* (1836), 1 M. & W., 77; 5 L. J. N. S., Exch., 107; *Wood* v. *Waud* (1849), 3 Exch., 748; 18 L. J. Exch., 305.

[6] *Ibid.*

[7] *Ballard* v. *Tomlinson* (1885), 29 Ch. D., 115.

[8] (1885) 29 Ch. D., 115.

In the other case, the right to appropriate gives no right to pollute, and a land-owner can object to pollution on the part of his neighbour where he cannot object to appropriation.[1]

For the purposes of the acquisition of the right by user the pollution cannot be said to commence until the stream is first prejudicially affected,[2] and the extent of the acquired right is to be measured by the user which originated the right.[3]

Extent of pollution should be defined and regular.

It appears that the pollution must be defined and regular in extent and referable to a particular source, such as in the case of a private sewer pouring its drainage, or in the case of a manufactory discharging its refuse, into the stream, otherwise it is doubtful whether any prescriptive right will be acquired.[4]

Thus it seems that a process of pollution which is indefinable in its extent and source, such as that which is caused by the gradually increasing discharge of the sewage of a town into the particular stream can create no prescriptive right in that respect in favour of the urban sanitary authorities, at any rate until the full measure of pollution has been accomplished and enjoyed for the necessary period.[5]

But under the same circumstances a prescriptive right might arise in favour of the inhabitants of the town individually, where each had drained in a particular manner into the stream for the necessary period.[6]

(2) *Easements affecting the temperature of water.*

Every riparian owner and every owner of land abutting on a natural lake or pond into or out of which a natural stream flows has a natural right that the water transmitted to him shall not be affected in temperature.[7]

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[1] See the judgment of Brett, M. R., at p. 119.

[2] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1865), L. R., 1 Ch. App., 349. See I. E. Act, s. 15, Expl. IV.

[3] See *Crossley* v. *Lightowler* (1867), L. R., 2 Ch. App , 478, and Chap. VIII, Part I, B.

[4] See *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1865), L. R., 1 Eq., 161 ; on App. L. R., 1 Ch. App., 349 ; *Crossley* v. *Lightowler* (1867), L. R., 2 Ch. App., 478.

[5] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners.*

[6] *Att.-Genl.* v. *Acton Local Board* (1882), L. R., 22 Ch. D., p. 229.

[7] See Indian Easements Act, s. 7, ill. (*i*) ; *Sutcliffe* v. *Booth* (1863), 9 Jur. N. S. 1037.

Any act affecting the natural state of the water is an infringement of the natural right[1] and can be supported only by proof of an easement.

Extent of Easements in water.

The extent of prescriptive rights in water except as regards easements relating to the pollution of water is to be measured by the user as proved. Where the easements are acquired by grant, their extent is limited by the terms of the grant.[2]

Part IV.—Easements relating to support.

Two classes of Easements relating to support.

Easements relating to support are of two kinds :

A.—Easements conferring rights to have support, or shortly, easements of support.

B.—Easements conferring rights to take away support.

They are restrictions, in the one case, of the natural right which allows a man to enjoy and dispose of his property according to the ordinary rights of ownership, and, in the other, as the case may be, either of the natural right of support, or of the easement of support.

They usually relate to the support of buildings by land, and the support of buildings by buildings.

It will be seen hereafter that there is a natural right of support for land by land, imposing an obligation on adjoining landowners that they shall not in the free enjoyment of the property infringe the maxim *Sic utere tuo ut alienum non lædas.* With that reservation every land-owner is entitled to the free use and enjoyment of his property. He may do on it what he pleases, he may build on it, he may dig mines in it, he may excavate it for any purpose, so long as he does not interfere with the support which his neighbour's land or building may require of his land or building either as a natural right or as an easement.

The true nature of the right conferred by an easement of support is not that the adjacent and subjacent soil shall not be disturbed, but that the disturbance shall not cause injury to

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[1] See *Mason* v. *Hill* (1833), 5 B. & Ad., 1 ; *Wood* v. *Waud* (1849), 3 Exch., 748 ; 18 L. J. Exch., 305 ; *John Young & Co.* v. *Bankier Distillery Co.* (1893) App. Cas., 691, and Chap. V, Part III, A (2).

[2] See Chap. VIII, Part I, B.

the dominant tenement.[1] The same principle applies to the natural right of support for land.[2]

Question whether Easement of support, affirmation or negative.

At this point the question conveniently arises as to whether easements of support are to be described as affirmative or negative easements. The question is one which is involved in considerable doubt and difficulty and was first raised in the celebrated case of *Angus* v. *Dalton*[3] to which fuller reference will be made later on.

In one sense easements of support may be called *negative* easements as being rights that the servient owner shall not do anything on the servient tenement which deprives the dominant tenement of its support. In another sense may not they be called *affirmative* easements as involving pressure on, and actual use of, the supporting soil ?

Dalton v. *Angus.*

This was the opinion of four of the judges[4] in the above-mentioned case when, as *Dalton* v. *Angus*, it was heard by the House of Lords on appeal, and the opinion of seven judges of the High Court was taken on the questions raised in the case.

The judges of the Queen's Bench Division,[5] and of the Appeal court,[6] do not appear to have contemplated the possibility of an easement of support being regarded otherwise than as a negative easement. for, as will presently be seen, they discussed the mode of acquisition of the easement from the view of its analogy to the easement of light which is undoubtedly a negative easement.

Fry, J., said,[7] " The right to support and the right to the access of light and air are very similar the one to the other, and are broadly distinguished from most other easements. They are analogous with *servitutes ne facias* in the Civil Law. Such rights when they arise spring, not from acts

[1] *Bonomi* v. *Backhouse* (1859), E. B. & E., 655 ; *Backhouse* v. *Bonomi*, 9 H. of L., 503 ; and see *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. 808, and see Chap. V, Part IV, where this question is fully discussed in connection with natural rights of support.

[2] *Bonomi* v. *Backhouse* ; *Backhouse* v. *Bonomi*.

[3] (1878-1881) L. R., 3 Q. B. D., 85 ; L. R., 4 Q. B. D., 162 ; *Dalton* v. *Angus*, L. R., 6 App. Cas., 740.

[4] Lindley, J., Bowen, J., Lord Selborne, L. C., and Lord Watson.

[5] L. R., 3 Q. B. D., 85.

[6] L. R., 4 Q. B. D., 162.

[7] L. R., 6 App. Cas. at p. 776.

originally, actionable or unlawful on the part of the dominant owner, but from acts done on his own land and within his own rights ; they confer on the dominant owner not the right to use the subject, but a right to forbearance on the part of the owner from using the subject, *i.e.*, they create an obligation on the owner of the servient tenement not to do anything on his own land inconsistent with a particular user of the dominant tenement. They rest on a presumption or inference, not of a grant by the neighbour of a right to do something on the grantor's land, but of a covenant by the owner not to do something on his own land."

In the House of Lords, however, two of the seven judges (Lindley and Bowen, JJ.)[1] and the Lord Chancellor (Lord Selborne, L.C.)[2] though not repudiating the negative character of the easement, gave it as their opinion that it was both scientifically and practically inaccurate to limit it to that definition, whilst another of the Law Lords (Lord Watson)[3] went so far as to say that he was unable to regard the rights of support to a building, as a negative easement at all,[4] but admitted that he was influenced in that opinion by the consideration that a decision to the effect that the easement was negative would form an unsatisfactory precedent in Scotland, where only affirmative easements could be acquired by prescription.

A difficulty in the way of regarding the easement as wholly affirmative is suggested in the judgments of Lindley, J., and Bowen, J.,[5] who admit that the pressure of a man's building upon his neighbour's soil has never been known to give rise to a right of action on the neighbour's part (Bowen, J., recognising that practical reasons of convenience are adducible against it), though they incline to the opinion that an action ought on principle to lie against a person who uses his neighbour's land to support his house without his neighbour's consent.

The same difficulty appears to have been felt by Fry, J., another of the seven judges. He was unable to adopt the view

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[1] L. R., 6 App. Cas., pp. 763, 764, 784.

[2] *Ibid*, p. 793.

[3] *Ibid*, p. 831.

[4] Lord Watson thought it as much an affirmative easement as the well-known servitude *oneris ferendi*, when a wall or beam is rested on the servient tenement.

[5] *Ibid*, pp. 764, 784.

that the act of building a house on land which derives support from the adjoining soil of a different owner was actionable. He was of opinion that the lateral pressure of a heavy building on a neighbour's soil causing ascertainable physical disturbance would no doubt be trespass, but that an action for the mere increment caused by a new building to the pre-existing lateral pressure of the soil and producing no ascertainable physical disturbance was unheard of.

If that were the law, not only could no one build on the edge of his land except on a rock, but the erection of a house would give a right of action not only to adjoining land-owners, but to every land-owner within the unascertainable area of whose land the increase of pressure must extend.

The law, he said, takes no heed of such lateral pressure when unattended by ascertainable physical consequences, and in his opinion the distinction between the principles applicable to water flowing in visible channels above ground and water flowing in invisible channels underground afforded a good analogy to the distinction drawn by him between lateral pressure followed by ascertainable physical disturbance and lateral pressure which produces no such result.[1]

In this respect an easement of support can hardly be said to be on the same footing as an affirmative easement such as a right of way, with reference to which it would always be in the power of the servient owner before the right had matured to prevent the acquisition of the right by actual interruption or by civil action in the courts for trespass.

The result is that easements of support must be considered as of mixed character, undoubtedly negative, but capable also of being affirmative.

Modes of acquisition of easements of support.

The acquisition of easements of support is founded on grant, express or implied, or covenant, or on user of the dominant tenement for the period and in the manner required by law.[2]

In India the acquisition of these easements is also governed by the Indian Limitation Act and the Indian Easements Act.[3]

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[1] L. R., 6 App. Cas., p. 775.

[2] See *infra*, according to the classification of the subject.

[3] See Chap. VII, Parts II and III.

Easements of support may conveniently be divided into two classes according to the nature of the support afforded, namely :—

Classification of easements of support.

(1) Rights to support in excess of Natural Rights.

(2) Rights to support where Natural Rights do not exist.

In the first class may be grouped—

(*a*) Rights to support for excavated land from adjacent land.

(*b*) Rights to support for buildings from adjacent and subjacent land.

Within the second class fall—

(*a*) Rights to support for buildings by buildings.

(*b*) Right to support for surface land by subjacent water.

A.—*Easements of support.*

(1) Rights to support in excess of natural rights.

(*a*) *Right to support for excavated land from adjacent land.*

Right to support for excavated land from adjacent land.

The right of support for land in its natural condition from adjacent land is a natural right and incidental to the ownership of property.[1] Any change in the land supported which converts its natural character into an artificial character, such as would be caused by placing buildings upon it or excavating it, would obviously impose a changed or increased burthen upon the adjoining land, the effect of which would be in no way to alter or increase the previous obligation unless the existence of an easement could be proved.

The natural right does not in such cases disappear. The right of support to the extent of the natural right remains to which is superadded the right of support conferred by the easement.[2]

Partridge v. *Scott.*

The case of *Partridge* v. *Scott*,[3] though not a direct authority upon the subject of the support of excavated land by adjacent

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[1] See Chap. V, Part IV.

[2] See Chap. V, Part IV.

[3] (1838) 3 M. & W., 220.

land, serves to shew that the act of excavation would change the former character of the land so as to make the acquisition of an easement essential to a right of support from the adjacent land.

In the case just referred to it was held that the plaintiff, who had built a house on his own land previously excavated to its extremity for mining purposes, did not acquire a right to support for the house from the adjacent land at least until twenty years had elapsed since the house first stood on the excavated land, from which a grant by the owner of the adjoining land might be inferred.

Though this was a case of support to a house, it seems clear that the decision would have been the same, if the house had not been built, and the right of support had been claimed for the excavated land alone.

(b) Rights to support for buildings from adjacent and subjacent land.

Right to support for buildings from adjacent and subjacent nd.

Of the two kinds of easements of support these rights are the more usual and the more important.

They may be called easements of natural support as distinguished from easement of support for buildings by buildings which may be described as easements of artificial support.

They have been said to hold an intermediate place between the artificial right and the natural right of property, by which a man is entitled to have his soil supported laterally by his neighbour's soil.

They have an affinity to the natural right if the means of support be considered; they are more akin to the artificial right, if the object of support be considered.[1]

They have been the subject of frequent litigation in the courts from the earliest times and have given rise to a considerable diversity of judicial opinion.

It may now be taken as settled law that the right of support for a building from subjacent or adjacent land or in the other words, the right of vertical or lateral support, is not a

[1] See *per* Thesiger, L. J., in *Angus* v. *Dalton* (1878), L. R. 4 Q. B. D. at p. 169.

natural right incidental to the ownership of land, but an easement.[1]

In *Wilde* v. *Minsterley*[2] it is said : "If *A* seized in fee of land next adjoining land of *B*, erect a new house on the land, and part of the house is erected on the confines of his land next adjoining the land of *B*, if *B* afterwards digs his land near to the foundation of the house of *A*, but not touching the land of *A*, whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of *A* against *B*, because this was the fault of *A* himself that he built his house so near to the land of *B*, for he could not by his act hinder *B* from making the most profitable use of *B's* own land. But *semble* that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit ; and for this if an action were brought it would lie."

Wilde v. *Minsterley.*

In *Partridge* v. *Scott*,[3] Alderson, B., said, "If a man builds his house at the extremity of his land, he does not thereby acquire any right of easement, for support or otherwise, over the land of his neighbour. He has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. *Wyatt* v. *Harrison*[4] is precisely in point as to this part of the case, and we entirely agree with the opinions then pronounced."

Partridge v. *Scott.*

This case shews that the right is an easement, but there can be no easement until there has been a grant. It will presently be seen how the grant may be made.

In *Humphries* v. *Brogden*,[5] which was a case of natural support of land, Lord Campbell, C. J., said, "This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by

Humphries v. *Brogden.*

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[1] *Wilde* v. *Minsterley* (1640), 2 Rolle's Ab., 564, tit. Trespass (I), pl. 1. ; *Wyatt* v. *Harrison* (183?), 3 B. and Ad., 871 ; *Partridge* v. *Scott* (1838), 3 M. and W., 220 ; *Humphries* v. *Brogden* (1850), 12 Q. B., 739 ; *Gayford* v. *Nicholls* (1854), 9 Exch., 702 ; *Bonomi* v. *Backhouse* (1859), E. B. and E., 654 ; *Angus* v. *Dalton* (1878-1881), L. R., 3 Q. B. D., 85 ; L. R., 4 Q. B. D., 162 ; *Dalton* v. *Angus*, L. R., 6 App. Cas., 740.

[2] (1640) 2 Rolle's Ab., 564, tit. Trespass (I), pl. 1.

[3] (1838) 3 M. & W., 220.

[4] (1832) 3 B. & Ad., 875.

[5] (1850) 12 Q. B., 739; 10 L.J., Q. B., 10.

the erection of *buildings ;* for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the globe existed in its present form."

Gayford v. Nicholls.

In *Gayford* v. *Nicholls*,[1] which was the case of a new building, Parke, B., said, "This is not a case in which the plaintiff has the right of the support of the defendant's soil either by virtue of a twenty years' occupation, or by reason of a presumed grant, or by a presumed reservation where both houses were originally in possession of the same owner; for, unless a right of support can by some such means be established. the owner of the soil has no right of action against his neighbour who causes the damage by the proper exercise of his own right."

Bonomi v. Backhouse.

In *Bonomi* v. *Backhouse*[2] Willes, J., expressed the opinion that the right to support of land and the right to support of buildings stood upon different footings, the former being *primâ facie* a right of property analogous to the flow of a natural river, or air, whilst the latter must be founded upon prescription or grant, express or implied.

Angus v. Dalton.

Lastly in *Angus* v. *Dalton*[3] (*Dalton* v. *Angus*, on appeal to the House of Lords) all the judges took the view that the right to support for a house from land was an easement, though they differed materially as to the mode of the acquisition of the right by lapse of time.

It being then undoubted that the right of support for a building from land is an easement, it remains to be considered by what means such an easement can be acquired otherwise than by grant, express or implied.[4]

Acquisition by user.

As to this, all the authorities are agreed that after user for twenty years the right is acquired, though they differ materially as to the quality of the user required for such purpose.

The quality of the user.

In this connection it is important to examine the course of judicial opinion culminating in the leading case of *Angus & Co.* v. *Dalton and the Commissioners of Her Majesty's Works*,

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[1] (1854) 9 Exch., 702.

[2] (1859) E. B. & E., 654.

[3] (1878-1881) L. R., 3 Q. B. D., 85 L. R., 4 Q. B. D., 162; L. R. 6 App. Cas., 740.

[4] These methods will be considered in a later chapter, see chap. VI.

and Public Buildings[1] in which the subject was fully considered and discussed by many eminent judges.

Examination of authorities.

The first case of importance is *Palmer* v. *Fleshees*,[2] which was an action for the obstruction of the plaintiff's lights; but the Judges in their first resolution say "that if a man, being seized of land leases forty feet to *A* to build a house thereon, and forty feet to *B* for a like purpose, and one of them builds a house and then the other digs a cellar in his land which causes the wall of the first adjoining house to fall, no action will lie, for every one may deal with his own to his best advantage, but *semble*, that it would be otherwise if the wall or house were an ancient one."

Palmer v. *Fleshees.*

In *Stansell* v. *Jollard*,[3] Lord Ellenborough directed the jury that "where a man has built at the extremity of his land, and has enjoyed his building above twenty years, by analogy to the rule as to lights, he has acquired a right to support, or, as it were, of leaning to his neighbour's soil, so that his neighbour cannot dig so near as to remove that support; but it is otherwise of a house newly built."

Stansell v. *Jollard.*

In *Wyatt* v. *Harrison*,[4] the plaintiff's claim for a right of support to his house failed because it was not an ancient house, but Lord Tenterden in giving judgment suggested that if the damage complained of were in respect of an ancient building possessed by the plaintiff at the extremity of his own land, such circumstance of antiquity might imply the consent of the adjoining proprietor, at a former time, to the erection of a building in that situation.

Wyatt v. *Harrison.*

The case of *Partridge* v. *Scott*[5] is important in many respects. There the building, though ancient, had been erected on ground excavated within twenty years of the suit; and, if there had been no excavation, the mining operations of the defendants on the adjacent land would not have injured the

Partridge v. *Scott.*

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[1] (1878-1881) L. R., 3 Q. B. D., 85; L. R., 4 Q. B. D., 162; *Dalton* v. *Angus*, L. R., 6 App. Cas., 740.

[2] (15, Charles II) 1 Sid., 167. Cited in Comyn's Digest, action on the case, Nuisance C.

[3] (1803) 1 Selw. N. P., 457 (11th Ed.); referred to in notes to *Ashby* v. *White*, 1 Sm., L. C., 10th Ed., p. 269.

[4] (1832) 3 B. & Ad., 875.

[5] (1838) 3 M. & W., 220.

house. The Court decided that the plaintiff had under these circumstances acquired no right to support for his house from the adjacent soil ; but the judgment practically affirms the proposition that, but for the excavation of the soil on which the house stood, an easement of support would have been acquired after twenty years by implied grant, and that a grant might have been inferred from twenty years' enjoyment of the house, although standing on the excavated ground, after the defendants were or might have been fully aware of the facts.

The judgment appears to assume that in the case of a house standing upon land in its natural condition, the servient owner has sufficient notice of the fact of support being enjoyed to raise the presumption of acquiescence, and the consequent implication of a grant by him, when the enjoyment has continued for twenty years.

Hide v. *Thornborough.*

In *Hide* v. *Thornborough*,[1] Baron Parke held that support of the plaintiff's house for twenty years to the knowledge of the defendant created an easement in favour of the plaintiff to whom the defendant was liable in damages for injury resulting to the plaintiff's house from withdrawal of the support.

Humphries v. *Brogden.*

In *Humphries* v. *Brogden*,[2] which was a case of the natural right of support for land by law, the Court in discussing the principles relating to lateral support treated it as settled law that a right of lateral support of a house by adjacent land was acquired like other easements by twenty years' uninterrupted enjoyment of the house.

Gayford v. *Nicholls.*

In *Gayford* v. *Nicholls*,[3] the building was not an ancient one, and Parke, B., said: "This is not a case in which the plaintiff has a right of the support of the defendant's soil, either by virtue of a twenty years' occupation, or by reason of a presumed grant, or by a presumed reservation where both houses were originally in the possession of the same owner ; for unless a right of support can by some such means be established, the owner of the soil has no right of action against his neighbour who causes the damage by the proper exercise of his own right."

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[1] (1846) 2 C. & K., 254.
[2] (1850) 12 Q. B., 749.
[3] (1854) 9 Exch., 708.

In *Rowbotham* v. *Wilson*,[1] where the questions before the Court involved the right to the support of houses by adjacent soil, some of the judges considered it as undoubted that after a house had stood for twenty years an easement of support was acquired.[2]

Rowbotham v. *Wilson.*

In *Rogers* v. *Taylor*,[3] which was a case of vertical support, it was proved that the defendant in working quarries on adjacent land had so weakened the foundations of the plaintiff's house that it fell, and Cockburn, C. J., told the jury that he thought at the end of twenty years after the house had been built, the plaintiff would have acquired a right of support, unless in the meantime something had been done to deprive him of it, and that the jury must presume that the additional burthen was put upon the plaintiff's land by the assent of the adjoining owner, and that there had been a grant by such owner of a right of support. He left it to the jury to say whether the plaintiff had enjoyed the support for the foundation of the house for twenty years, and the verdict found for the plaintiff upon the direction was upheld by the Court.

Rogers v. *Taylor.*

In *Bonomi* v. *Backhouse*,[4] the judgment of the Exchequer Chamber was delivered by Willes, J., who said, "The right to support of land, and the right to support of buildings stand upon different footings as to the mode of acquiring them, the former being *primâ facie* a right of property analogous to the flow of a natural river, or of air; *Rowbotham* v. *Wilson*; although there may be cases in which it would be sustained as a matter of grant (see *The Caledonian Railway Co.* v. *Sprot*);[5] whilst the latter must be founded upon prescription or grant, express or implied; but the character of the rights when acquired, is in each case the same."

Bonomi v. *Backhouse.*

The result of these authorities is to show that the acquisition of a right of support for buildings by adjacent soil is one

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[1] (1856-1860) 6 E. & B., 593; in error 8 E. & B., 123; in error 8 H. L C., 348.

[2] 8 E. & B., *per* Watson, B., at p. 142, and *per* Bramwell, B., at p. 147.

[3] (1858) 2 H. & N., 828.

[4] (1859) E. B. & E., 654.

[5] 2 McQ. Sc. App., 449. This refers to a case where there has been a severance of land originally in the possession of the same owner and a conveyance of the surface for the express purpose of building. See *infra*.

subject to the same conditions, and may be attained in the same manner, as easements generally, by proof of uninterrupted enjoyment for twenty years.

Angus v. *Dalton.*

This brings the examination of the authorities down to the leading case of *Angus & Co.* v. *Dalton and the Commissioners of Her Majesty's Works and Public Buildings.*[1]

This celebrated case occupied the attention of the Courts between the years 1878 and 1881. It was first before the Queen's Bench Division, then before the Court of Appeal, and finally before the House of Lords. The case was twice argued before the latter tribunal, and on the second occasion in the presence of the following judges:—Pollock, B., Field, Lindley, Manisty, Lopes, Fry and Bowen, JJ.

In this case the plaintiffs sued the defendants for excavating the soil of an adjoining house in such a manner as to leave the foundation of part of the plaintiff's building without sufficient lateral support and thereby causing it to fall.

The plaintiffs were the owners of a building at Newcastle converted by them from a dwelling-house into a coach factory twenty-seven years before the act complained of in the suit. The building had stood for about a hundred years and had apparently been built at the same time as a building standing on adjoining land to which it was contiguous.

There was no party wall between the buildings; each rested on its own walls, was built to the extremity of the soil of the respective owner, and depended for its lateral support on the soil upon which the other rested. In the course of the conversion of the plaintiff's dwelling-house into a coach factory whereby the character and construction of the building had been altered, the internal walls, which had previously existed, were removed, and girders supporting the upper floor of the factory were on one side let into a large chimney stack, which extended along a portion of the dividing wall, and on the opposite side took their bearings from the plaintiff's wall. The effect of this change of construction was to throw about one-fourth

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[1] (1878-1881) L. R., 3 Q. B. D., 85; L. R., 4 Q. B. D., 162; *Dalton* v. *Angus*, L. R., 6 App. Cas., 740.

of the weight of the factory upon the chimney stack, the foundations of which being in contact with the soil under the adjoining house, the lateral pressure upon that soil was materially increased. No express assent to the alteration was given by the owner of the adjoining house, but he must have been aware of the conversion of the dwelling-house into a factory, although there was nothing to shew his having been aware of the precise nature of the internal alterations or of the exact effect they would have as regards the lateral pressure.

The adjoining house continued in its character of a dwelling-house until shortly before the commencement of the action, when the defendants, the Commissioners, acquired it and engaged the defendant, Dalton, to pull it down, excavate to such a depth as would enable the cellerage, which had not previously existed, to be made, and to erect upon the site of the old house a building to be used as a Probate Office. Dalton in his turn employed sub-contractors to do the work.

In the course of excavation which had been carried to a depth of several feet below the level of the foundation of the plaintiff's chimney stack,and notwithstanding that a thick pillar of the original clay had been left round the stack for its support during the erection of the new dividing wall, the clay gave way after exposure to the air, and the stack sank and fell, carrying with it a considerable portion of the factory, and causing damage to the plaintiffs in respect of which the action was brought.

The defendants, the Commissioners, denied the right of support and contended that they were not responsible for the acts of their contractor.

The defendant Dalton took the same defence as regards the sub-contractors. These points were reserved at the trial which took place before Lush, J., and a verdict was entered for the plaintiffs subject to the questions of law and to a reference to an arbitrator to assess the damages, in case the verdict should stand against both or either of the defendants.

Opinion of the Queen's Bench Division.

The plaintiffs moved for judgment before the Queen's Bench Division. The Court by a majority came to the conclusion that

a verdict should be entered for the defendants. All the judges were agreed that on the authority of *Bower* v. *Peate*,[1] the defence that the defendants were not liable for the acts of the contractors failed, that the right of support claimed was an easement, and that such an easement was not one which was within the Prescription Act, but they differed on the point as to whether the plaintiffs had made out a good title to the easement.

Lush, J.

Lush, J., adhered to the opinion that a verdict should be entered for the plaintiffs as he thought they had established their claim to a right of support which had been infringed by the act of the defendants.

He based his view of the law partly on the ground of prescription and partly on the necessary effect of the Limitation Act upon the easement in suit, a view which he thought might enable what he stigmatised as the revolting fiction of a lost grant to be discarded. He thought it would be a strange anomaly to hold that a title to a house should be acquired after twenty years, and not a title to that which was essential to its existence. He said, however, that it was not necessary to base his judgment on that ground, and he was content to rest it on the doctrine of an unrebutted presumption, and he concluded that the mere absence of assent, or even the express dissent of the adjoining owner, would not prevent the acquisition of the right by uninterrupted enjoyment, and that nothing short of an agreement either express or to be implied from payment or other acknowledgment, that the adjoining owner should not be prejudiced by abstaining from the exercise of his right, would be sufficient to rebut the presumption.

Cockburn, C. J., Mellor, J.

Cockburn, C. J., on the other hand, Mellor, J., agreeing with him, was of opinion that by mere enjoyment of the lateral support of their factory by the adjacent soil for the time stated, without more, the plaintiffs had not acquired an easement which prevented the defendants from dealing as they pleased with their own land for legitimate purposes. He took the view that any presumption arising from length of enjoyment with respect to the easement in suit was one which, both at

[1] (1876) L. R., 1 Q. B. D., 321, and see *infra* under negligence.

Common law and since the Prescription Act, was open to rebuttal, and as no grant had been established in the case, and none could be implied from the circumstances, the presumption not only failed but had never in fact arisen.

The important factor in the case on which his decision turned was the conversion of the plaintiffs' building into a factory.

The absence of any assent by the adjacent owners, express or implied, to the new enjoyment of lateral support caused by such conversion, and of any reasonable means on his part of resisting or preventing such enjoyment, was, in his opinion, a bar to the acquisition of the right.

Opinion of the Appeal Court.

On appeal, Brett, L. J., dissenting, this decision was reversed except as regards those points upon which the judges of the Queen's Bench Division were agreed. It is, therefore, only necessary to notice the judgment of the Court of Appeal on the question of the mode in which, and the circumstances under which, the right claimed may be acquired.

Thesiger, L. J.

Thesiger, L. J., in a most carefully considered and exhaustive judgment in which all the authorities were examined came to the following conclusions :—

(*a*) That the right claimed must be founded on prescription or grant, express or implied. In this respect the Lord Justice found himself unable to agree with the view taken by Lush, J., that an absolute right to an easement uninterruptedly enjoyed for twenty years might be obtained by analogy to the Statute of Limitation.

(*b*) That the prescription of a lost grant is not a *presumptio juris et de jure*, that is, not an absolute and conclusive bar, and that the correct view on this point is that the presumption of acquiescence and the fiction of an agreement deduced therefrom in a case, where enjoyment of an easement has been for a sufficient period uninterrupted, is in the nature of an *estoppel by conduct*, which, while it is not conclusive so far as to prevent denial or explanation

of the conduct, prevents a bar to any simple denial of the fact, which is merely the legal inference drawn from the conduct.

(*c*) That the cases of *Barker* v. *Richardson*,[1] *Chasemore* v. *Richards*,[2] and *Webb* v. *Bird*,[3] as direct authorities go no further than to show that a legal incompetence as regards the owner of the servient tenement to grant an easement, or a physical incapacity of being instructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements will prevent the presumption of an easement by lost grant ; and, on the other hand, indirectly, they tend to support the view, that as a general rule where no such legal incompetence, physical incapacity, or peculiarity of enjoyment, as was shewn in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant, upon the principle expressed by the maxim, "*Qui non prohibet quod prohibere potest assentire videtur.*"

(*d*) That the same principles and presumptions of law are applicable to the acquisition of easements of support of buildings from adjoining soil as to that of easements generally, and that there is a close analogy in this respect between the easement in question and the easement of light.

(*e*) That the answer to the question whether the right of support acquired by user is an absolute one or subject to limitations is to be found in reference to the rule that user which is secret raises no presumption of acquiescence on the part of the servient owner.

It was upon the application of this rule to the fact of the undoubtedly unusual construction of the plaintiffs' factory, to

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[1] (1821) 4 B. & A., 579.
[2] (1859) 7 H. L. C., 349.
[3] (1863) 13 C. B., N. S., 841.

the possibility of such construction being unreasonable, and to the doubt raised in the case as to whether the stack of brick-work would have fallen in consequence of the excavation without the extra weight of the upper floor of the factory upon it, that the Lord Justice considered the jury should have been directed to find whether the weight which had been put on the adjoining soil was such as the owner of the soil could, under the peculiar circumstances of the case, be reasonably expected to be aware of and provide for.[1]

Cotton, L. J.

Cotton, L. J., expressed the opinion that twenty years' enjoyment does not confer an absolute right but raises a presumption of a modern lost grant which is not capable of being rebutted by an admission of evidence that there was in fact no grant unless supported by additional evidence that the adjoining owner was incapable of making a grant, or by any other rebuttable evidence. There being no evidence that the owner of the adjoining house knew of the particular construction of the plaintiff's house, he thought the question ought to have gone to the jury to find whether the support required for the plaintiff's house was more than reasonably required by a house of the apparent dimensions and character of the house of the plaintiff if used for the purpose for which the house was used.

He agreed with Thesiger, L. J., in thinking that if the defendants desired it, there must be a new trial.

Brett, L. J.

Brett, L. J., thought the judgment of the Queen's Bench Division should be affirmed on the ground that there was conclusive evidence or an admission that there never had been a grant, a circumstance which he considered fatal to the acquisition of the right. All the Lord Justices were at one that the right claimed was an easement, that it was not within the Prescription Act, and that it presented an analogy to the easement of light, and they all, Thesiger and Brett, L. JJ., expressly and Cotton, L. J., impliedly, dissented from the doctrine deduced by Lush, J., from the Statutes of Limitation of the acquisition of the absolute right.

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[1] This subject will again be noticed at a later stage, See *infra* under "Easements of extraordinary support."

The result was that the Court of Appeal, Brett, L. J., dissenting, reversed the judgment of the Queen's Bench Division and ordered that the defendants should elect within fourteen days whether they would take a new trial, and, if they did not so elect, that judgment should be entered for the plaintiff. The defendants having failed to elect, judgment was entered for the plaintiffs for £1,943, the amount of damages assessed by the special referee, and the defendants appealed to the House of Lords.

Opinions in the House of Lords.

The appeals were twice heard,[1] the second time in the presence of seven judges of the High Court (Pollock, B., Field, Lindley, Manisty. Lopes, Fry and Bowen, JJ.) to whom five questions were put embodying the material points in the case.

The judges were unanimous in deciding that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment and could sue the owners of the adjoining land and the contractor for the damage caused by the excavation of the adjoining soil.

They concurred in affirming the proposition of law that a right of support for a building by adjoining land could be acquired by open uninterrupted enjoyment for twenty years, but they differed as to the nature and origin of the right acquired.

It will be useful to notice their opinions in detail.

Pollock, B., Field and Manisty, JJ.

The opinions of Pollock, B., Field and Manisty, JJ., proceeded not upon the ground of fiction or implied grant, but of a proprietary right rendered absolute and indefeasible after twenty years' uninterrupted enjoyment, and the first-mentioned judge expressed himself in favour of the view taken by Lush, J., as to the application by analogy of the Statutes of Limitation to the light in question.

They agreed that in any view the enjoyment must not be *clam*, for no man could be bound by a right of the growing

[1] They were first heard on Nov. 13th, 14th and 17th, 1879, before Lord Cairns, L. C., Lord Penzance and Lord Blackburn.

They were heard the second time on Nov. 18th, 19th, 22nd and 23rd, 1880.

acquisition of which he had neither knowledge nor the means of knowledge.

They did not consider that actual assent or acquiescence on the part of the adjoining owner was a necessary ingredient in the process of acquisition, or that, with reference to the point raised in the third question put to the judges and treated by the Court of Appeal as a ground for a new trial, it was necessary to prove that the defendants or their predecessors in title had knowledge or notice of the alterations, in order to make the injury to the plaintiff's building by removing the lateral support after a lapse of twenty-seven years an actionable wrong.

Finally they thought that the learned judge's direction to the jury was correct.

Lindley, J.

Lindley, J., with whom Lopes, J., agreed, while deprecating a state of the law which required the adjoining owner to remove the soil used for support in order to preserve his unrestricted right, and, in this respect, differentiating the acquisition of an easement of support from that of an easement of light, admitted that all the authorities treated the two rights as analogous and capable of being acquired in the same way.

In the face of the current of authority he was unable to come to the conclusion that the physical difficulty of obstruction brought the right to lateral support within the cases of *Webb* v. *Bird*,[1] *Chasemore* v. *Richards*,[2] and *Sturges* v. *Bridgeman*;[3] for if those cases applied, the right to lateral support could not be acquired at all by mere enjoyment however long continued.

He felt himself bound by the authorities to hold that a right to lateral support could be acquired in modern times by an open uninterrupted enjoyment for twenty years unless the adjoining owner could shew that the enjoyment had been on terms which excluded the acquisition of the right.

The assent or acquiescence on the part of the servient owner to the erection of the supported building, with a knowledge of its particular mode of construction, would, notwithstanding

[1] (1863) 13 C. B., N. S., 841.

[2] (1859) 7 H. L. C., 349.

[3] (1879) L. R., 11 Ch. D., 852.

the absence of any deed under seal, permit of an action for support being maintained—*Brown* v. *Windsor*.[1]

Assent or dissent on the part of the servient owner appeared to be immaterial unless he had disturbed the continued enjoyment necessary to the acquisition of the right. He thought the question whether the enjoyment in the case had been open was one of fact which, in view of the peculiar circumstances of the case, ought to have been left to the jury, and that in this respect the course taken by the learned judge at the trial in directing a verdict for the plaintiff was not correct.

Fry, J.

Fry, J., thought that the right in suit rested on a covenant by a neighbour not to use his own land in any manner inconsistent with the support of the adjoining buildings, and that such a covenant might be either express or to be referred from the object and purport of the instrument. He assumed acquiescence to be at the root of prescription, and the fiction of a lost grant, and that the acts or user which went to the proof of it must be *nec vi*, *nec clam*, *nec precario*, but he was unable to regard the right in question as anything but the result of an artificial rule of law with which knowledge and acquiescence had nothing to do.

He felt the same difficulty as Lindley, J., in approving a state of the law which permitted the acquisition of a right which could be prevented by no reasonable means.

He considered that, though it was of course physically possible for one man so to excavate his own soil as to let down his neighbour's building, and a man might or might not have occasion to excavate his own land for his own purposes, such an excavation for the sole purpose of letting down a neighbour's house was of so expensive, so difficult, so churlish a character, that it was not reasonably to be required in order to prevent the acquisition of the right, and that in fact in the case of adjoining houses, it would be to require a man to destroy his own property in order to protect his rights to it.

He thought the analogy to the Statute of limitations suggested by Lush, J., was sound to the extent of holding that if the

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[1] 1830) 1 Cr. & J., 20.

rights were to be acquired at all by lapse of time, twenty years was a reasonable period to confer the right, but that it went no further, for it was one thing to take away a right of action if not put in force within a reasonable time, and quite another thing to take away a man's right in his property, because he does not bring an action which he cannot bring.

He was of opinion that the course taken by Lush, J., in directing a verdict for the plaintiffs was in accordance with the law as it then stood, but expressed his strong reluctance to accede to the proposition that by the mere act of his neighbour and by lapse of time, a man might be deprived of the lawful use of his own land.

Bowen, J.

From the opinion of Bowen, J., remarkable for its lucidity and closeness of reasoning, the following propositions may be collected :—

(*a*) An ancient house is entitled to such support from the adjacent soil as it has immemorially enjoyed.

(*b*) The right of support for a house from adjacent soil, as involving something beyond the natural use of a man's soil, namely, a collateral burthen upon his neighbour, limiting, after a defined interval of time, the otherwise lawful user of the neighbour's own property, is a right which cannot be natural, but must be acquired.

(*c*) In the case of affirmative easements and of window lights, after twenty years user of a special kind a presumption of right arises, a possible lawful origin is inferred.

(*d*) The twenty years' rule, which is of comparatively recent application, is not a positive proprietary law, but is in truth nothing but a *canon of evidence.*

(*e*) The form in which the presumption built upon a twenty years' enjoyment has usually been framed is that of a lost grant or covenant according as the right claimed is to the affirmative or negative easement.

(*f*) In the case of affirmative easements the presumption recommended by the law is founded not on the consent of the adjoining owner, first given during

the twenty years' user, but on some lawful origin preceding the earliest act of enjoyment ; in which sense it is inaccurate to speak of such rights arising from the twenty years' acquiescence of the servient owner. His acquiescence for twenty years is nothing more than evidence of the previous existence of the right.

(*g*) The presumption of a lost grant or covenant is nothing more than a rebuttable presumption of fact or an artificial canon of evidence.

(*h*) The twenty years' rule is as applicable to the claim of support for modern buildings, as to affirmative easements and window lights.

(*i*) Presumed consent on the part of the adjoining owner is the foundation of the modern, as well as the ancient, title to support for buildings.

(*j*) The law deals with support to buildings and with light in the same way, regarding them as resting on enjoyment capable on the whole of interruption, and capable, therefore, of ripening into a right where interruption does not occur.

(*k*) The enjoyment must be *nec vi*, *nec clam*, *nec precario*. The user must be open whether the support required remains the same as at the commencement of the user, or the weight of the building is increased in any respect. The publicity or openness of the user is the real test.

(*l*) The defendant may disprove the user, or its quality, or in the last resort he can, while admitting the user, attempt to answer the presumption of some lawful origin, a task which he will find difficult inasmuch as the mere proof of the absence of any covenant under seal is not conclusive against the plaintiff.[1]

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[1] The same would be the case in India where the *creation* of an easement need not be in writing. See *Krishna* v. *Rayappa* (1868), 5 Mad. H. C., 98 ; *Ponnusawmi Tevar* v. *Collector of Madura* (1869) 5 Mad. H. C., 22 ; *Gazette of India* (1880) July to December, Part V, p. 477, and see Chap. VI, Part II.

Finally Bowen, J., considered that the course which Lush, J., had taken was wrong, and that he should have directed the jury to find whether the enjoyment was in fact open.

The House of Lords was unanimous in affirming the judgment of the Court of Appeal.

It now becomes necessary to examine the judgments of the Lords.

Lord Selborne, L. C., expressed the opinion that the right claimed in suit was an easement and one not merely of a negative kind, but also of an affirmative character, in which view the right might be deemed within the Prescription Act.

Lord Selborne, L. C.

He agreed with the view taken by Lush, J., by the majority of the judges in the Court of Appeal, and by all the seven judges—unless Bowen, J., who preferred to rely upon the equitable doctrine of acquiescence was an exception—that a grant, or some lawful title equivalent to it, ought to be presumed after twenty years' user.

With reference to the doctrine of *clam* on which there had been much difference of opinion, and to the inquiry on this part of the case as to the nature and extent of the knowledge or means of knowledge which a man ought to be shewn to possess, against whom a right of support for another man's building is claimed, it may be useful to summarize the Lord Chancellor's conclusions as follows :—

(*a*) A man cannot resist or interrupt that of which he is wholly ignorant. But a man ought to be presumed to have knowledge of the fact, that, according to the laws of nature, a building cannot stand without vertical or, ordinarily, without lateral support.

(*b*) When a new building is openly erected on one side of the dividing line between two properties, its general nature and character must be visible to and ascertainable by the adjoining proprietor during the course of its erection.

(*c*) And so, as in the present case, where a private dwelling-house is pulled down and a building of an entirely different character erected in its place,

the adjoining owner must have imputed to him knowledge that a new and enlarged easement of support, whatever may be its extent, is going to be acquired against him, unless he interrupts or prevents it.

(*d*) Possessing this knowledge it is not necessary that the adjoining owner should have particular information as to those details of structure on which the amount or incidence of the weight of the building may more or less depend.

(*e*) It is open to him to make inquiries, and he has his remedy if information is improperly withheld, false or misleading information given, things done secretly or surreptitiously, or material facts suppressed.

(*f*) When a building is adapted to a particular use it is always liable to happen that the construction of the building requires more lateral support than would be necessary if it were otherwise constructed, and the knowledge that this may or may not happen is enough, if the adjoining owner makes no inquiry.

The Lord Chancellor in conclusion thought that the kind and degree of knowledge which the defendants must necessarily have had was sufficient; that nothing was done *clam*, and that the evidence did not raise any question which ought to have been submitted to the jury.

Lord Penzance.

Lord Penzance considered that Lush, J., had drawn the correct inference from the authorities, though they were by no means uniform, that an absolute right to support is acquired by twenty years' enjoyment, independent of grant, acquiescence or consent.

In agreement with Fry, J., he was not satisfied that the principles upon which such authorities rested were satisfactory or justifiable, but he felt the less difficulty in acquiescing in them as they established the existence of the right after twenty years which, if the matter were *res integra*, he should have held to exist as soon as the plaintiff's house was built.

Lord Blackburn.

Lord Blackburn took the view that the right in suit could be more properly described as a right of property, which the adjoining owner is bound to respect, than as an easement, or a servitude *ne facias* restricting the mode in which the adjoining owner is to use his land, but thought it made little difference as to which name it was called by.

He agreed that a building which had enjoyed support for more than twenty years under the circumstances and conditions required by the law of prescription, acquired the same right to such support as an ancient house would have done.

He thought that the fiction of a lost grant was a long-established law that the Courts were bound to administer, and that where the evidence made it questionable whether the enjoyment had been open peaceable and continual, the jury might be asked to find, as a fact, whether the enjoyment was of that kind.

But he could not agree that the jury should be told that if the enjoyment had been such as to raise a presumption of a right they might find a grant whether they believed in its existence or not ; but if they chose to be scrupulous, they need not so find.

He considered that the principle upon which prescription was founded extended beyond the ground of acquiescence or laches, that prescription was a positive law, and that a *de facto* enjoyment of a house for the period and under the conditions prescribed by law, could not be negatived by proof that a grant had not been made.

As regards the principle of open enjoyment, he considered it sufficient that the enjoyment should be sufficiently open to make it known that some support was being enjoyed by the building.

That would be enough to put the adjoining landowner on the exercise of his rights, if he desired to prevent a restriction of them, not usually of any consequence. On this ground he thought the only question for the jury was whether the building had for more than twenty years openly and without concealment, stood as it was, and enjoyed without interruption the support of the neighbouring soil.

Lord Watson was of opinion that the right in question was an easement and could be acquired by peaceable and uninterrupted enjoyment for the prescriptive period of twenty years.

As already mentioned he regarded the easement as an affirmative one.

He agreed with the House in thinking that the enjoyment of the plaintiffs had been such as to create the easement.

Lord Coleridge contented himself with expressing his concurrence in the conclusions arrived at by the House.

Propositions deducible from *Angus* v. *Dalton*.

The following propositions of law may be deduced from *Angus* v. *Dalton* :—

(*a*) That the right to vertical or lateral support for a building by land is an easement.[1]

(*b*) That the right may be acquired by enjoyment for twenty years, either of the support required by a house as it was originally built, or of any increased support required by a change in its construction.

(*c*) That the enjoyment must be peaceable, uninterrupted, as of right, without concealment, and without deception, and sufficiently open to make it known that some support is being enjoyed by the building.

(*d*) That if the enjoyment possesses those elements of publicity and honesty, the erection of the building, or a change in its construction increasing the pressure on the servient tenement, is sufficient notice of the original or increased amount of support required.

(*e*) That a *de facto* enjoyment of a house for the period and under the conditions prescribed by law raises an absolute presumption in favour of the dominant owner which cannot be rebutted by proof that a grant has not been made.

(*f*) That (excepting the opinion of Lord Selborne) an easement of support for a building by land is more

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[1] The rights to vertical and lateral support must stand on the same footing. See *Rogers* v. *Taylor* (1858), 2 H. & N., 828 ; 27 L. J. Exch., 173 ; *Backhouse* v *Bonomi* (1861), 9 H. L. C., 503 ; and *Angus* v. *Dalton* (1878), L. R., 3 Q. B. D., p. 99.

properly to be regarded as a negative easement than as an affirmative easement, and, that, in view of its special negative character,[1] it does not fall within the Prescription Act, but arises from a presumption of grant or covenant from which prescription under the Act is quite distinct.[2]

(*g*) That the easement of support for a building by land and the easement of light are analogous and their acquisition is governed by the same principles.

Easements of extraordinary support for buildings from land.

The question remains to be considered as to whether any limitation is to be put on the principles governing the right of support for buildings from land in connection with the acquisition of what may be termed easements of extraordinary support claimed in cases where the amount of support required is of an unusual and extraordinary kind.

Here the question turns on the application of the rule that user which is secret raises no presumption of knowledge on the part of the adjoining owner.

Partridge v. Scott.

The case of *Partridge* v. *Scott*,[3] cited with approval by the judges in *Angus* v. *Dalton*, has an important bearing on this point. There a right of support was claimed in respect of an ancient house standing on land which had been excavated within twenty years of the institution of the suit. There was no evidence to show when the excavation had taken place, but it was obvious that the effect of the excavation had been to throw a greater burthen of support on the adjoining land than if the subjacent soil had remained in its natural position. Both parties were ignorant of the excavation. The Court in dismissing the suit expressed the opinion that the plaintiff in order to succeed was bound to prove an enjoyment for twenty years of the increased support after the defendants might have been, or were, fully aware of the facts.

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[1] See particularly the opinion of Fry, J., L. R., 6 App. Cas., at p. 776.

[2] See *per* Lord Westbury in *Tapling* v. *Jones* (1868), 11 H. L. C., 304.

[3] (1838) 3 M. & W., 220. See also *Hide* v. *Thornborough* (1846), 2 C. & K., 250; and *Humphries* v. *Brogden* (1848), 12 Q. B., 739; 20 L. J. Q. B., 10, where knowledge is spoken of as a necessary condition of the easement of support.

From this expression of opinion and the observations of the judges in *Angus* v. *Dalton*, it may fairly be inferred that assuming the knowledge or presumed knowledge of the adjoining owner, an easement of extraordinary support may be acquired by twenty years' uninterrupted enjoyment.

To the foregoing subject is closely allied that of the dominant owner's liability for his own acts or omissions to which before the enlarged easement is acquired, the injury caused by the withdrawal of support is referable. The dominant owner has no right to increase the burthen imposed on the servient tenement. If by an omission to repair or by a changed construction of the house, or by some other act or omission, he increases the amount of support required from the adjacent land, and if, during the period of acquisition of the enlarged easement, an injury, by withdrawal of support, is done to the dominant tenement which would not have happened, but for such act or omission on the part of the dominant owner, no right of action arises against the adjoining owner.[1] But, if after the acquisition of the right, a withdrawal of support causes an injury to the house,or if before such acquisition a negligent withdrawal causes such injury, the defendant in a claim for damages is liable, and it is no answer to say that the house was so infirm it would soon have fallen of itself, for no man has a right to accelerate the fall of his neighbour's house.[2]

Upon the principle of the dominant owner being responsible for his own acts or omissions for the reasons abovementioned, it appears to follow that there is no liability on the part of an owner, not an adjoining owner, whose acts on his own land by reason of acts done on the intervening land by the adjoining owner, have caused the withdrawal of the support afforded by the adjoining land.[3]

Acquisition by presumption of law on a severance of the tenements.

An easement of support for a house by adjacent land also arises in a case where both house and land belong to the same

[1] *Partridge* v. *Scott* (1838), 3 M. & W., 220; *Corporation of Birmingham* v. *Allen* (1877), L. R., 6 Ch. D., 293; 46 L. J. Ch., 678.

[2] *Partridge* v. *Scott*, *Dodd* v. *Holme*, (1834), 1 A. & E., 493.

[3] *Corporation of Birmingham* v. *Allen* (1877), L. R., 2 Ch. D., 293; 46 L. J. Ch., 678.

owner and the house is conveyed and the land retained. In such a case the grantee by implication, without express words, acquires a right of support for the house by the adjacent land on the principle that the grantor grants to the grantee all that is necessary and essential for the enjoyment of the house, and that neither he, nor any who claim under him can derogate from his grant by using the land in such a way as to injure which is necessary and essential to the house.[1]

Further an easement of support for a house by adjacent land can arise by implication on a severance of the tenements, not only where the house is already in existence, but where the surface is conveyed for the expressed purpose of building.[2]

Presumption rebuttable.

The presumption may be rebutted by any express words in the deed, or by necessary intendment from anything contained in the deed shewing it was not the intention of the parties that there should be any right to support.[3]

Application of same principle to division of building into floors or flats.

Upon the same principle if a building is divided into floors or "flats" separately owned, the owner of each upper floor or flat is entitled to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself.[4]

The proprietor of the ground floor is bound to keep it in such repair as is necessary for it to support the superincumbent weight, and the owner of the upper story or flat is bound to maintain that as a roof or cover for the lower.[5]

Right of support limited to adjoining land.

The right of support for a house from land is limited to that extent of land, whether wide or narrow, the existence of

[1] *Dugdale* v. *Robertson* (1857), 3 K. & J., 695; *Caledonian Ry. Co.* v. *Sprot*, 2 Macq. Sc. App., 449; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., p. 792, 826: and see Chap. VI, Part IV, B. I. (*a*)(2). As to what is the law if the grantor retains the house and grants the adjacent land, see Chap. VI, Part IV, B. I. (*b*).

[2] *Elliott* v. *North-Eastern Railway Co.* (1860—1863), 29 L. J. Ch., 808; on App., 30 L. J. Ch., 160; 10 H. L. C., 333; *Caledonian Ry. Co.* v. *Sprot*, 2 Macq. Sc. App., 449; *Siddons* v. *Short* (1877), L. R., 2 C. P. D., 572; *Angus* v. *Dalton* (1877), L. R., 3 Q. B. D., 116; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., 792; *Rigby* v. *Bennett* (1882), L. R., 21 Ch. D., 559.

[3] *Aspden* v. *Seddon* (1875), L. R., 10 Ch. App., p. 401.

[4] *Humphries* v. *Brogden* (1850), 12 Q. B., 747, 756; *Caledonian Ry. Co.* v. *Sprot*, 2 Macq. Sc. App., 449; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., 793.

[5] *Humphries* v. *Brogden* (1850), 12 Q. B., 756.

which in its natural state is necessary for the support of the house.[1]

Beyond this limit the land which is liable for the support does not extend. and land owners whose lands are situated beyond this limit, cannot be rendered liable for operations on their own lands which, by reason of acts committed on the intervening land, have injured the dominant tenement.[2]

Extent of prescriptive right to support.

The extent of the prescriptive right to support is to be measured by the degree of support enjoyed during the period of acquisition.[3]

(2) Rights to support where natural rights do not exist.

(a)—*Right to support for buildings by buildings.*

Right to support for buildings by buildings.

The right to support for buildings by buildings has been termed an easement of a highly artificial character, and of infrequent occurrence, inasmuch as properly constructed houses do not, as a rule, depend for their stability upon the existence of adjoining houses.[4]

From this point of view the often unavoidable secrecy of the user demonstrates the difficulty, if not impossibility, of acquisition.[5]

But there is no doubt that the easement may be acquired under special circumstances, by enjoyment, open and uninterrupted, and as of right, and had for a period of twenty years.[6]

In such cases the principles which apply to the easement of support for a building by land are equally applicable to this easement.[7]

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[1] *Corporation of Birmingham* v. *Allen* (1877), L. R.,6 Ch. D., 284; 46 L. J. Ch., 673

[2] *Ibid.*

[3] See *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., 752, 779, and Chap. VIII, Part I, B.

[4] *Angus* v. *Dalton* (1878), L. R., 4 App. Cas., p. 167.

[5] *Ibid.*

[6] *Peyton* v. *Mayor of London* (1829), 9 B. & C., 736; *Brown* v. *Windsor* (1830), 1 C. & J., 20; *Solomon* v. *Vintners Co.* (1859), 4 H. & N, 585; *Angus* v *Dalton* (1878), L. R., 4 Q. B. D., p. 168; *LeMaitre* v. *Davis* (1881), L. R., 19 Ch. D., 281; *Tone* v. *Preston* (1883), L. R., 24 Ch. D., 739: *Gordhan* v. *Chotalal* (1888), I. L. R., 13 Bom., 79.

[7] *LeMaitre* v. *Davis* (1881), L. R., 19 Ch. D., 281.

In *Peyton* v. *Mayor of London*,[1] the decision turned in a great measure upon the form of the declaration which was defective, but the judgment points to the conclusion that upon proper evidence directed to a properly drawn declaration a grant of the right of support claimed might have been presumed.

Peyton v. Mayor of London.

In *Solomon* v. *Vintners Co.*,[2] where the right of support for a house from another house not immediately adjoining was claimed, Pollock, C. B., in giving the judgment of the Court excepting that of Bramwell, B., though himself not in favour of the right under any circumstances, admitted that if the house removed had been next adjoining the plaintiff's, he would have felt a difficulty upon the cases and dicta in deciding against the right claimed.

Solomon v. Vintners Co.

Bramwell, B., decided the case upon the ground that the facts as proved did not disclose an open enjoyment.

In *LeMaitre* v. *Davis*,[3] the plaintiff's vault extended to and underlay the defendant's premises. Adjoining the vault was a cellar appertaining to, and occupied with, the defendant's premises, the eastern wall of the vault being supported by the western wall of the cellar to the knowledge of both parties. Both tenements were ancient. It was decided that a right of support for the plaintiff's vault by the defendant's cellar had been acquired.

LeMaitre v. Davis.

In *Tone* v. *Preston*,[4] the support was obvious, and had the enjoyment been as of right, an easement would have been acquired. But the Court thought it impossible to affirm the acquisition of an easement where a building stands upon land as to a portion of which the party claiming the easement admits that at any time upon three months' notice, he is bound to do something which is inconsistent with the continuance of the building.

Tone v. Preston.

In *Gordhan Dalpatram* v. *Chotalal Hargovan*,[5] the acquisition of an easement of support for a building by a building is

Gordhan v. Chotalal.

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[1] (1829) 9 B. & C., 725.
[2] (1859) 4 H. & N., 598.
[3] (1881) L. R., 19 Ch. D., 281.
[4] (1883) L. R., 24 Ch. D., 739.
[5] (1888) I. L. R., 13 Bom., 79.

recognised, though the relative position and structure of the two buildings in that case made a decision in favour of an easement impossible.

There was clearly no support of the plaintiff's house by the defendant's wall, and the mere fact of building a house close to the defendant's wall gave the plaintiff no right over the wall.

Acquisition by presumption of law on severance of the two tenements.

Though easements of support for buildings by buildings may undoubtedly arise in the foregoing manner, the origin of the rights may usually be said to lie in the disposition of the two tenements by the original owner of both.

On a severance of the two tenements reciprocal easements of support arise by implication of law in favour of grantor and grantee.[1]

Such rights are in the nature of easements of necessity.[2]

Richards v. *Rose.*

In *Richards* v. *Rose*,[3] it was decided that where a number of houses belonging to the same person are built together, and obviously require mutual support for their common protection and security, the right of mutual support equally exists, and that whether the owner parts with one, then with another or two together, the ownership of the latter being subsequently divided by sale, mortgage, devise or other means, the legal presumption arises that the owner reserves to himself such right or grants an equal right to the new owner.

The right is wholly independent of the question of the priority of the grantee's titles.[4]

Presumption rebuttable.

The presumption in favour of the right can be rebutted by express words in the deed, or by necessary intendment from anything contained in the deed shewing it was not the intention of the parties there should be any right to support.[5]

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[1] *Richards* v. *Rose* (1853), 9 Exch., 218; *Gayford* v. *Nicholles* (1854), 9 Exch., p. 708; *Angus* v. *Dalton* (1877), L. R., 3 Q. B. D., p. 116; (1878), L. R., 4 Q. B. D., pp. 168, 182; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., 792, 826; *Wheeldon* v. *Barrows* (1879), L. R., 12 Ch. D., p. 59.

[2] See Chap. VI, Part IV, B. I. (*a*) (2).

[3] (1853) 9 Exch., 218.

[4] *Ibid.*

[5] *Aspden* v. *Seddon* (1875), L. R., 10 Ch. App., 394.

(b)—Right to support for surface land by subjacent water.

Right to support for surface land by subjacent water.

The natural right which exists for the support of surface land by subjacent land does not exist where the surface law is supported by water.

There is nothing to prevent a man draining his land if he considers it necessary or convenient to do so, and thus drawing off the subjacent water from under his neighbour's surface land.[1]

Methods of acquisition.

By implication of law on a severance of the tenements.

In such a case the right to support must be founded on an easement which, it seems, may be acquired either by express grant, or, under special circumstances, by implication of law on a severance of the two tenements.[2]

In the latter case the existence of the easement must depend on an obligation arising out of the rule that a man cannot derogate from his own grant, and preventing the grantor from doing anything whatever with his own land which might have the effect of rendering the land granted less fit for the special purpose for which it had been granted, than it otherwise might have been.[3]

Such an obligation will only be implied where it is contemplated by both parties at the time of the severance that a particular act complained of will not be done upon the adjoining land.[4]

The creation of the obligation must depend on the special circumstances of each case, on the possibilities, or probabilities, of a particular use being made of the adjoining land which results in the injury complained of, and of the grantee's state of knowledge with reference to such possibilities or probabilities.[5]

Law if existence of the water is accidental.

Where, however, the existence of the subjacent water is due to accident, the party claiming the support has no right

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[1] *Popplewell* v. *Hodkinson* (1869), L. R., 4 Exch., 248. But an exception to this arises where a stream flowing in a defined channel depends as it were for its support on subjacent water. See *Grand Junction Canal Co.* v. *Shugar* (1871), L. R., 6 Ch. App., 183, and Chap. V, Part III, D.

[2] *Elliot* v. *North-Eastern Ry. Co.* (1860—1863), 29 L. J. Ch., 808; on App., 30 L. J. Ch., 160; on App., 10 H. L. C., 333; *Popplewell* v. *Hodkinson* (1869), L. R., 4 Exch., 248.

[3] *Popplewell* v. *Hodkinson.*

[4] *Ibid.*

[5] *Ibid.*

to speculate on its retention and consequently no right to complain of its withdrawal, unless its retention be expressly provided for, in the conveyance.[1]

B.—Easements conferring rights to take away support.

Easements to let down the surface.

As already observed the right to take away support may be restrictive either of the natural right to support for land by land,[2] or of the easement of support for buildings by land. The easement may be described as the right to withdraw support from land, or from land and buildings resting thereon by the disturbance of subjacent or adjacent soil.[3] The right is also called an easement to let down the surface.

Usually acquired in mining operations.

The right to take away vertical support chiefly arises in connection with mining operations carried on below the surface of the land in cases where the surface and the mining rights have passed into different hands.[4]

Acquisition of the rights.

The respective rights of the owners of surface lands, and of the owners of subjacent minerals have been the subject of considerable discussion in the Courts, and it has been clearly established by a series of decisions, that although the *primâ facie* right of the owner of the surface is to have his surface supported, and the *primâ facie* right of the owner of the minerals to get them is limited to getting them in such a manner as not to occasion injury to the owner of the surface, such *primâ facie* rights may, nevertheless, be materially modified, to the extent even of authorising the owner of the minerals to disturb or let down the surface, by contract between the respective owners or those through whom they claim: and that it is immaterial whether such contract arises out of a covenant or reservation in a deed or out of an enactment of the Legislature, giving effect to arrangements

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[1] *Elliot* v. *North-Eastern Ry. Co.* (1860-1863), 29 L. J. Ch., 808; on App., 30 L. J. Ch., 160; on App., 10 H. L. C., 333.

[2] See Indian Easements Act, sec. 7, ill. (*e*).

[3] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Aspden* v. *Seddon* (1875), L. R., 10 Ch. App., 394; *Bell* v. *Love* (1883), L. R., 10 Q. B. D., 547; *Dixon* v. *White* (1883), L. R., 8 App. Cas., 833.

[4] *Ibid.*

come to or presumed to have been come to, between the parties.[1]

Origin, nature, and extent of rights must be defined by deed.

In every case in which the owner of the minerals claims any rights in respect of getting them, which are in excess of, or other than, the *primâ facie* right of getting them without causing injury to the owner of the surface, the origin and nature and extent of such rights must be clearly defined by some grant or equivalent assurance; in the absence of which the presumption in favour of the owner to have support for the surface remains.[2]

In such cases the question usually resolves itself into one of construction for the purpose of ascertaining the intention of the parties.[3]

Power reserved by owner of minerals to let down surface not void.

It was thought at one time that where the owner of the land reserved the minerals and granted the surface, a power reserved by him to take the minerals so as to destroy the surface by taking away all support was void, as being repugnant to, and derogating from, the grant, though it was always undoubted that a similar power granted in the converse case of the owner retaining the surface and granting the minerals would be good.

But it is now clearly established that the right to let down the surface may exist, not only where the minerals are granted, but where they are retained, by the owner of the land, and the grant may shew that the surface is held on the terms that the owner of the minerals is free to remove the whole of them without leaving any support to the surface, either, according as may be stipulated, with or without making any compensation for the damage thus occasioned.[4]

Possible acquisition by user.

It appears that long enjoyment of minerals will raise the presumption of a legal right to them, added to a legal right to

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[1] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Duke of Buccleugh* v. *Wakefield* (1870), L. R., 4 H. L., 377; *Buchanan* v. *Andrew* (1873), L. R., 2 H. L. Sc., 286; *Aspden* v. *Seddon* (1875), L. R., 10 Ch. App., 394; *Bell* v. *Love* (1883), L. R., 10 Q. B. D., 547; *Dixon* v. *White* (1883), L. R., 8 App. Cas., 833. As to easements arising by virtue of legislative enactment, *see* Chap. VI, Part VI.

[2] *Ibid.*

[3] *Ibid.* As to the mode of construction, *see* Chap. VI, Part III.

[4] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Buchanan* v. *Andrew* (1873), L. R., 2 H. L. Sc., 286; *Dixon* v. *White* (1833), L. R., 8 App. Cas., 833.

get them, and that the question whether there is acquired the accompanying rights to take away the support of the surface land must depend on the particular circumstances of the case, such as whether or not the right to get the minerals could have been exercised without disturbing the surface, and without the possibility of supporting the surface by artificial means.[1]

C.—The Doctrine of Negligence.

Negligence.

Before closing this chapter it may be useful to summarize the law relating to negligence as applying to the question of support.

After the acquisition of an easement of support the question of negligence is immaterial, for it is clear law that if, in such case, the disturbance of the subjacent or adjacent soil or of the building standing thereon, either actually causes injury to the dominant tenement or affords reasonable apprehension of the occurrence of such injury, the dominant owner is entitled to the protection of the Court,[2] notwithstanding the utmost care and skill exercised, and every precaution taken, by the person responsible for such disturbance.

Briefly, after the acquisition of the easement there is an absolute liability for the withdrawal of the support.

It is before, however, the right to support has matured that the question of negligence becomes material in determining whether the disturbance complained of is an actionable wrong. Although before the acquisition of the easement, there is no obligation to support, and consequently no absolute liability for the withdrawal of support, yet there must always be an observance of the maxim *Sic utere tuo ut alienum non lædas*, and it is by the observance or breach of that maxim coupled with the use of, or the omission to use due care and precaution, that the question of negligence has to be determined.

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[1] This method of acquisition was suggested by Lord Wensleydale in *Rowbotham* v. *Wilson* (1860), 8 H. L. C. at p. 363, though a decision on the point was unnecessary owing to the existence of a deed by which the plaintiffs were held bound.

[2] *Nichlin* v. *Williams* (1854), 10 Exch., 259 ; *Bonomi* v. *Backhouse* (1859), E. B. & E., 655 ; 27 L. J. Q. B., 278.

But it must not be forgotten that *damnum sine injuriâ* gives no cause of action. There must be the wrong done as well as the damage sustained. Thus, if a man removes his neighbour's support to which his neighbour has no right in a proper and lawful manner and thereby causes him damage, his neighbour has no ground of action. But if he be negligent in removing such support, and damage be caused to his neighbour, then the latter has good ground of action as there are both *damnum* and *injuriâ*.[1]

Rylands v. *Fletcher.*

The case of *Rylands* v. *Fletcher*,[2] though not a case relating to support, is important as illustrating the principles upon which the doctrine of negligence is founded.

These principles are that where the owner of land uses it, without wilfulness or negligence, for any purpose for which it may in the ordinary and natural course of the enjoyment of land, be used, he will not be liable if the result of such user is to cause damage to his neighbour.[3]

If, however, he makes of his land a use which is not natural, or brings something upon it which was not naturally upon it, and is in itself dangerous, and likely to do mischief if not kept under proper control, though in so doing there be no personal wilfulness or negligence on his part, he is liable for all the damage which is occasioned by his acts.[4]

The latter proposition, though undoubtedly connected with the application of the abovementioned maxim to the enjoyment of property, refers rather to the improper or non-natural use of a man's property than to negligence in the proper or natural use of it, and is consequently outside the scope of the present topic. Incidental reference to it here is necessary only so far as it bears on the question of one neighbour's liability to another for damage to the latter's building by an improper use of the former's property, such as, for example, the storage of explosive or inflammatory substances to the existence of which the

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[1] *Rex* v. *Pagham Commissioners* (1828), 8 B. & C. at p. 362.

[2] (1868) L. R., 3 H. L., 330.

[3] See *Smith* v. *Kenrick* (1849), 7 C. B., 515.

[4] See *Baird* v. *Williamson* (1863), 15 C. B. N. S., 376.

damage or destruction of neighbouring buildings is to be attributed.

Question of negligence uncertain and difficult.

The question of negligence in relation to the removal of support for buildings is not free from difficulties and uncertainties.

Out of the decisions bearing on this subject the following questions arise—

(*a*) As to whether the person repairing or pulling down his own house or excavating on his own ground is under any obligation to do more than exercise due care, skill, and caution within the limits of his own land, or whether it is his duty under particular circumstances to protect his neighbour's house from the consequences of the operations ;

(*b*) as to whether he is bound to give his neighbour notice of his intention to repair, pull down, or excavate, as the case may be, so as to afford his neighbour the opportunity of taking the necessary precautions against damage ; and

(*c*) as to whether the state of knowledge on his part as to the existence or method of construction of his neighbour's house affects the amount of care, skill, and caution to be exercised by him.

In each case negligence is a question of fact depending on all the surrounding circumstances of the case and may be rebutted.

It appears to be an open question as to how far the doctrine of negligence is to apply in cases where a man is doing something for the ordinary, convenient, comfortable, or necessary enjoyment of his own property, and whether some of the precautions which he may take, in so doing, with regard to his neighbour, are not to be referred to considerations of neighbourliness rather than to any legal obligation.

In such cases the extent of his liability would depend on the extent of his legal duty, for the question of liability for negligence does not arise until it is established that the man

who has been negligent owed some duty to the person who seeks to make him liable for his negligence. A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.[1]

It seems impossible to deduce any fixed rule from the authorities, except in one or two special respects, or to state any other conclusion than that it is for the Court to decide on the particular facts in each case whether there has or has not been negligence.

Jones v. Bird.

In *Jones* v. *Bird*,[2] it appeared that a sewer which it became necessary for the defendants as Commissioners of sewers to repair, passed close to five houses adjoining that belonging to the plaintiff, and that a stack of chimneys belonging to one of those houses was built upon the arch of the sewer. In the execution of the work it became necessary to rebuild this arch, and in order to support the chimneys in the meantime, a transom and two upright posts were placed under them in order to support them, but without success. The chimneys fell and in consequence of their fall, the adjoining houses including the plaintiff's house fell also.

There was no specific notice given to the owner of the house to which the chimneys belonged, of their dangerous state, or that it would be necessary for him to take them down. But there was a general notice to the inhabitants to secure their houses whilst the sewer was repairing.

The questions were whether the defendants had been negligent in securing the chimneys as they did, and whether they were under any obligation either to shore up the surrounding buildings, or to give specific notice to the owner of the chimneys of their peculiar construction and the danger arising from it.

The Court decided all three questions against the defendants. Bayley, J., said: "Now the facts are, that the defendants worked under a stack of chimneys, without either properly securing them, or giving notice of their danger to the owner, in order that he might take them down ; this was improperly and negligently

[1] *Le Lievre* v. *Gould* (1893), 1 Q. B., 497.

[2] (1822), 5 B. & Ald., 837.

working the sewer, for if a party does an act which is improper, unless certain previous precautions are taken, he may fairly be said to do that act improperly. As to the merits of the case it is contended that the defendants are protected, if they acted *bonâ 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."

This case goes further than the later authorities on the subject of protecting neighbour's houses and giving notice, but it may well be argued that a public sanitary body has a higher duty to perform than a private individual as well as greater power and liberty in its performance, such as the power to go into adjoining houses and the liberty to defray any expenses caused thereby out of the rates.

These considerations were probably present to the Court and influenced its decision.

Peyton v. *Mayor of London.*

Peyton v. *Mayor of London*,[1] decided first that, as the declaration had not charged want of notice of taking down the defendants' house as the injury complained of, the action could not be maintained upon the want of such notice supposing that, as a matter of law, the defendants were bound to give notice beforehand—a point upon which the Court was not called upon to express any opinion; secondly, that as the plaintiff had not alleged or proved any right to have his house supported by the defendants, he was bound to protect himself by shoring, and could not complain that the defendants had neglected to do it.

It appeared in evidence that the two houses were very old and decayed, and that the state of the house was known to both parties.

Walter v. *Pfeil.*

In *Walter* v. *Pfeil*,[2] although it was considered as settled that the owner of premises adjoining those pulled down must shore up his own and do everything proper for their preservation, yet the omission on his part to do so does not necessarily defeat an action, if the pulling down of the defendant's house

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[1] 1829) 9 B. & C., 725.

[2] (1829) 1 M. & M., 362.

be done irregularly and negligently so as to occasion greater risk to the plaintiff that in the ordinary course of the performance of the work would have been incurred.

This case appears to shew that in these actions contributory negligence is no defence.

Massey v. *Goyder.*

Massey v. *Goyder*,[1] shews that a party giving notice to the occupier of the adjoining premises of his intention to pull down and remove the foundations of a building on part of the footing of one of the walls of which one of the walls of such adjoining premises rests, is not bound to use more than reasonable and ordinary care in the work or in any other way to secure the adjoining premises from injury, although from the peculiar nature of the soil he was compelled to lay the foundation of his new building several feet deeper than that of the old.

The case does not decide that the defendants were bound in point of law to give notice, but that having done so and having used reasonable and ordinary care in the work, they were not liable.

Brown v. *Windsor.*

In *Brown* v. *Windsor*[2] where the plaintiff's house was built against the pine-end wall of the defendant's house by permission, and the defendant more than twenty years afterwards made an excavation in a careless and unskilful manner in his own land, near to this pine-end wall, whereby he weakened such wall and injured the plaintiff's house, it was held that an action on the case was maintainable for the injury, and Garrow B., said, "There may be cases where a man altering his own premises cannot support his neighbour's, and that the support, if necessary, must be supplied elsewhere ; in such case he must give notice, and then, if any injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take the precaution."

This is the only case on the question of notice in which notice is made a matter of legal obligation as between private individuals, and its effect must be regarded as considerably weakened by the later decision in *Chadwick* v. *Trower*.

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[1] (1829) 4 C. & P., 161.

[2] (1830) 1 Cr. & J., 20.

Dodd v. Holme.

In *Dodd* v. *Holme*[1] it was found that by reason of the negligence of the defendant in excavating his soil adjoining the ground upon which the plaintiff's house stood, the said house had been injured, and the Court decided that the defendant was liable, and that it was no answer on his part to say that the house would have fallen soon independently of the excavation, as a man has no right to accelerate the fall of his neighbour's house.

Chadwick v. Trower.

In *Chadwick* v. *Trower*,[2] above referred to, the facts were that the plaintiff and defendant were owners of adjoining vaults and that the defendant had pulled down his vaults without giving notice to the plaintiff of his intention to do so, and that the demolition of the defendant's vaults had caused injury to the plaintiff.

The questions before the Court were first whether the defendant was bound to give the plaintiff notice of his intention to pull down his vaults and, secondly, whether he was obliged to take such care in pulling down his vaults as that the adjoining vault should not be injured having regard to the fact that there was no averment that the defendant had knowledge of its existence, or of the nature of its construction.

In the course of the argument for the plaintiff Park, B., observed that the duty of giving notice seemed to be one of those duties of imperfect obligation which are not enforced by the law,[3] and in the judgment of the Court which he delivered reversing the judgment of the Court of Common Pleas, he said: "The Lord Chief Justice in delivering the judgment of the Court, says, "There is no allegation in this Court of any right of easement in *alieno solo*, which forms the ground of the plaintiff's action in the first Court. And, as to the allegation that it was the duty of the defendant to give notice to the plaintiff of his intention to pull down his wall, if he did not shore up himself, it is objected, *and we think with considerable weight*, that no such obligation results, as a mere inference of law, from the mere circumstance of the juxtaposition of the walls of the

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[1] (1834) 1 A. & E., 493. [2] (1839) 6 Bing. N. C., 1. [3] P. 6.

defendant and the plaintiff." We also think it impossible to say that under such circumstances the law imposes upon a party any duty to give his neighbour notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantive ground for damage : and the probability is that that the main damage did result from the want of notice ; for it is obvious, that, if notice had been given, the plaintiff might have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think the judgment must be corrected and a *venire de novo* awarded. But supposing that the improperly pulling down the defendant's vaults and walls may be treated as the substantive cause of action, and that the second branch of the argument that has been urged on the part of the plaintiff is well founded (which we think it is not), then the question arises whether any such duty as that which is alleged to have been violated is by law cast upon the defendant."

After setting out the plaintiff's allegations of the duty cast on the defendant by reason of the proximity of his premises to those of the plaintiff's, and the alleged breach on the part of the defendant, the judgment proceeds : "The question is whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls as that the adjoining vault should not be injured. Supposing that to be so, where the party is cognisant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence, for, one degree of case would be required where no vault exists, but the soil is left in its natural and solid state ; another where there is a vault ; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure ?

"We think no such obligation as that alleged exists in the absence of notice, and, therefore, upon this ground also we

think the Count is bad : and, consequently, there must be a *venire de novo.*"

Fairbrother v. Bury Rural Sanitary Authority.

In *Fairbrother* v. *Bury Rural Sanitary Authority*,[1] the plaintiff's house was built in 1874, and the defendant in 1883, acting under statutory powers, constructed a sewer under the road near the plaintiff's house, which, owing to the defendant's negligence in the construction of the sewer, was cracked and damaged. It was held that although the plaintiff was not entitled to any right of support for his house by way of easement, yet the defendants were bound to use due care in the exercise of their powers, and were, therefore, liable for negligence.

Effect of defendant's repairing damage before suit.

If there has been negligence, it is no answer to an action brought for damage caused thereby, to plead that the damage has been repaired.

That would be merely evidence in reduction of damages.[2]

Duty of adjoining owner as to the preservation of is house.

The duty of the adjoining owner while repairing his house has been considered ; it now remains to inquire whether there is any obligation towards his neighbour cast upon him by law merely as the owner of a house, to keep it repaired in a lasting and substantial manner. The answer is in the negative. The only duty of the owner of a house, as such, is to keep it in such a state that his neighbour may not be injured by its fall.[3]

Liability for negligence of contractor.

On the question whether a man is responsible for the negligence of his agent, such as when a contractor is employed to do the particular work required, the conclusion to be drawn from the authorities appears to be that one person employing another is not liable for his casual or collateral negligence unless the relation of master and servant existed between them,[4] but that when a man causes something to be done, the doing of which casts on him a duty, he cannot avoid the

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[1] (1889) 37 W. R., 544.

[2] *Taylor* v. *Stendall* (1845) 7 Q. B., 634.

[3] *Chauntler* v. *Robinson* (1849), 4 Exch., 163.

[4] *Quarman* v. *Burnett* (1846), 6 M. & W., 499 ; *Hole* v. *Sittingbourne Ry. Co.* (1861), 6 H. & N., 488 ; *Pickard* v. *Smith* (1861), 10 C. B. N. S., 470 ; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., p. 829.

responsibility of seeing the duty performed by delegating it to a contractor.[1]

He may bargain with the contractor that he shall perform the duty and stipulate for an indemnity from him, if it is not performed, but he cannot relieve himself from liability to those injured by the failure to perform it.[2]

And it makes no difference whether the duty is imposed by the legislature or existed at law.[3]

Joinder of parties.

In an action for negligence against an adjoining owner where a contractor has been employed, it is the usual practice to join both employer and contractor as parties defendants, in which case the plaintiff, if successful, would be entitled to a decree against both of them.[4]

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[1] *Hole* v. *Sittingbourne Ry. Co.* (1861), 6 H. & N., 488; *Pickard* v. *Smith* (1861), 10 C. B. N. S., 470; *Gray* v. *Pullen* (1864), 5 B. & S., 970; *Terry* v. *Ashton* (1876), L. R., 1 Q. B. D., 314; *Bower* v. *Peate* (1876), L. R., 1 Q. B. D., 321; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 829; *Le Maitre* v. *Davis* (1881), L. R., 19 Ch. D., 292.

[2] *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., 829.

[3] *Hole* v. *Sittingbourne Ry. Co.* (1861), 6 H. N., 488; *Gray* v. *Pullen* (1864), 5 B. & S., 970; *Bower* v. *Peate* (1876), L. R., 1 Q. B. D., 321.

[4] *Bower* v. *Peate* (1876), L. R., 1 Q. B. D., 321; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas., 821, 831; *Le Maitre* v. *Davis* (1881), L. R., 19 Ch. D., 292.

CHAPTER IV.

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Miscellaneous Easements and Miscellaneous Rights not amounting to Easements.

It is proposed to devote this chapter to an examination of those rights which, by reason of not falling within the four well-known classes of easements which formed the subject of the last chapter, may be described as "Miscellaneous Easements," and as "Miscellaneous Rights not amounting to Easements."

In the former category it is intended to deal with those easements which are of the character of nuisances, and those miscellaneous easements which are not of the character of nuisances, and comprise easements arising by custom such as rights of privacy and of other kinds, and the no less important easements of Fishery and Pasturage.

In the latter category will be discussed rights in gross, such as public and private rights of way and profits à prendre in gross, rights of prospect and other rights which, though partaking of the nature of easements, do not amount to easements in contemplation of law.

Part I.—Miscellaneous Easements.

A.—Easements of the character of nuisances.

Easements of the character of nuisances.

The comfortable and wholesome enjoyment of property requires that neighbours should mutually abstain from committing injurious, noxious or offensive acts, or carrying on injurious or offensive trades, or occupations, on their respective premises.

On the principle that every man is bound to use his property in such a manner as not to injure his neighbour, the doing of such acts and the carrying on of such trades are regarded by the law as nuisances, [1] which it will restrain as soon as they are found to prejudicially affect any person to an appreciable extent.

Acquired by prescription.

But nuisances may be protected, or, as has been quaintly said, "hallowed"[2] by prescription.

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[1] See Indian Easements Act, s. 7, Ill. (*e*) and (*f*)

[2] *Per* Vaughan, J., in *Bliss* v. *Hall* (1838), 5 Scott, 500 ; 4 Bing. N. C., 183.

The exercise of a noxious, injurious or offensive act, trade, or occupation for a period of twenty years will create a prescriptive right to the continuance of the nuisance.[1]

Time from which prescription begins to run.

The period of prescription will begin to run, not necessarily from the time that the particular act, trade, or occupation commenced, but from the time that the nuisance first became perceptible as an actionable wrong to the party complaining.[2]

And this rule proceeds on the principle that user which is secret and, therefore, incapable of interruption creates no prescriptive right.[3]

From this rule it follows that a man has no right to complain of a nuisance which has not matured into an easement until he is prejudicially affected by it.[4] Mere prospect of injury is not sufficient.[5]

As to what constitutes an actionable nuisance will be considered hereafter.[6]

But it is only in respect of private nuisances that prescriptive rights can be acquired.

No easement in case of public nuisance.

No easement arises where the nuisance is a common or public nuisance.[7]

Weld v. *Hornby*.

In *Weld* v. *Hornby*,[8] Lord Ellenborough said "and however twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing."

Rex v. *Cross*.

And in *Rex* v. *Cross*,[9] the same Judge said "and is there any doubt that if coaches, on the occasion of a rout, wait an

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[1] *Elliotson* v. *Feetham* (1835), 2 Bing. N. C., 134; 2 Scott, 174; *Bliss* v. *Hall*: *Tipping* v. *St. Helen's Smelting Co.* (1863), 4 B. & S., 608; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 413.

[2] *Flight* v. *Thomas* (1839), 10 A. & E., 590; *Murgatroyd* v. *Robinson* (1857), 7 E. & B., 391; *Goldsmith* v. *Tonbridge Wells Improvement Commissioners* (1866), L. R., 1 Ch. App., 349; *Sturges* v. *Bridgman* (1879), L. R., 11 Ch. D., 852.

[3] *Sturges* v. *Bridgman* (1879), L. R., 4 Ch. D., 852.

[4] See cases mentioned in notes (4) & (5).

[5] *Ibid.* and see *Att.-Genl.* v. *Council of Borough of Birmingham* (1858), 4 K. & J., 528.

[6] See *infra* under "Grounds and nature of relief for a nuisance before easement acquired."

[7] *Weld* v. *Hornby* (1806), 7 East., 195; *Rex* v. *Cross* (181), 3 Camp., 225; *Att.-Genl.* v. *Corporation of Barnsley* (1874), 9 W. N., 37; *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R., 499.

[8] (1806), 7 East at p. 199.

[9] (1812), 3 Camp. at p. 226.

unreasonable length of time in a public street, and obstruct the transit of His Majesty's subjects who wish to pass through it on carriages or on foot, the persons who cause and permit such coaches so to wait are guilty of a nuisance? . . . . . The King's highway is not to be used as a stable yard. It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance."

Instances of easements of character of nuisances.

Mention may be made of the following easements of the character of nuisances :—

(1) Easements to pollute or taint air.[1]

(2) Easements to pollute or taint water.[2]

(3) Easements of noise or vibration.[3]

Grounds and nature of relief for nuisances before easement acquired.

It may be useful at this stage to recite the principles by which the Courts are guided in granting relief for nuisances unfortified by easements, though this is a subject which is more properly connected with the disturbance of natural rights in which respect it will be again considered in a later chapter.

The principles established by the authorities will be conveniently grouped under the respective headings of (1) Interference with comfort, (2) Injury to health, (3) Injury to property ; and appear to be the following :—

(1) *Interference with comfort.*

Grounds of relief for interference with comfort.

The question whether the Court will restrain a nuisance productive of nothing more than sensible personal discomfort must depend on the circumstances of the place where the thing complained of occurs.[4]

If a man lives in a town he must submit to the discomfort arising from those operations which may be carried on in his immediate locality and which are actually necessary for trade and commerce, and also for the enjoyment of property,

[1] See Chap. III, Part I.

[2] See Chap. III, Part III, F (1).

[3] See *Elliotson* v. *Feetham* (1835), 2 Bing. N. C., 134; 2 Scott, 174; *Soltau* v. *De Held* (1851), 2 Sim. N. S., 133; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 413; *Sturges* v. *Bridgman* (1879), L. R., 11 Ch. D., 852.

[4] *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. C., 642; 35 L. J. Q. B., 66; and see *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R., p. 508.

and for the benefit of the inhabitants of the town and the public at large.[1]

On the other hand, when these considerations do not apply, the Court will restrain a nuisance productive of material discomfort, whether such nuisance takes the form of smoke unaccompanied by noise or noxious vapours,[2] noise alone,[3] or offensive vapours not injurious to health.[4]

For injury to health.

2. *Injury to health.*—Where there is material injury to health the Court will always restrain the continuance of a nuisance.[5]

And it is no answer that the public are benefited by the carrying on of the particular act or trade,[6] or that the person carrying it on derives no profit from it.[7]

For injury to property.

3. *Injury to property.*—Material injury to a man's property caused by the carrying on of another's trade or occupation gives rise to a very different consideration from that which arises in the case of mere personal discomfort. The submission required from person living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of property.[8]

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[1] *St. Helen's Smelting Co.* v. *Tipping*; and see *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R., p. 509.

[2] *Crump* v. *Lambert* (1867), L. R., 3 Eq., 409; *Salvin* v. *North Brancepeth Coal Co.* (1874), L. R, 9 Ch. App., 705; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., p. 54.

[3] *Elliotson* v. *Feetham* (1835), 2 Bing. N. C. 134; *Soltau* v. *De Held* (1851), 2 Sim. N. S., 133; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 409; *Broder* v. *Saillard* (1876), L R., 2 Ch. D., 692; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., p. 54.

[4] *Walter* v. *Selfe* (1851), 4 DeG. & S., 315; 20 L. J. Ch., 433; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 409.

[5] *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300; *Goldsmid* v. *Tonbridge Wells Improvements Commrs.* (1866), L. R., 1 Ch. App., 349; *Att.-Genl.* v. *Mayor of Basingstoke* (1876), 45 L. J. Ch., 728, and see *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R. at p. 509.

[6] *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300, and see *Att.-Genl.* v. *Council and Borough of Birmingham* (1858), 4 Kay. & J., 528.

[7] *Att. Genl.* v. *Mayor of Basingstoke* (1876), 45 L. J. Ch., 728.

[8] *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. C, 632; 35 L. J. Q. B., 66, and see *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R. at p. 509.

Where there is material injury to property the Court will always grant relief.[1]

Specific Relief Act and Civil Procedure Code.

In all cases of nuisance in India the nature of the relief to be granted is governed by the provisions of the Specific Relief Act[2] and the Civil Procedure Code.[3]

Nature of relief.

These provisions, as applying to the present state of the law in India, will be fully considered in connection with the "Disturbance of Easements"[4] and it is not necessary to do more than incidentally notice them here.

The principles upon which they rest are drawn from English sources,[5] and may be shortly stated as follows :—

1. The Court will not grant an injunction where the injury is merely temporary or trifling, but will do so in cases where the injury is permanent and serious.[6]

2. In determining whether the injury is serious or not, regard must be had to all the consequences that flow from it, not merely as to the comfort or convenience of the occupier, but also as to the effect of the nuisance upon the value of the estate and upon the prospect of dealing with it to advantage.[7]

3. Injury rendering property materially unsuitable for the purpose to which it is applied, or lessening considerably the enjoyment its owner derives from it, will be relieved by injunction and not by damages,[8] provided always that the nuisance is one which it is possible to remove.[9]

4. Although the fact of prospective nuisance is not in itself a ground for the interference of the Court, yet if some degree

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[1] *Ibid : Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35, and see *Municipal Commissioners of suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R., A. C. J., 499.

[2] Act I of 1877, ss. 52-57.

[3] Act XIV of 1882, ss. 492—497.

[4] See Chap. XI, Part III (4) (a) and (b).

[5] *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35.

[6] *Goldsmid* v. *Tonbridge Wells Improvements Commrs.* (1866), L. R., 1 Ch. App., 349 ; *Lillywhite* v. *Trimmer* (1867), 36 L. J. Ch., 530 ; *Att.-Genl.* v. *Gee* (1870), L. R., 10 Eq., 131 ; *Att.-Genl.* v. *Mayor of Basingstoke* (1876), 45 L. J. Ch., 728, and see *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), L. R., 8 Bom., 35.

[7] *Goldsmid* v. *Tonbridge Wells Improvement Commrs.* : *Att.-Genl.* v. *Gee* : *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), L. R., 8 Bom., 35.

[8] See *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., at p. 67, and the cases there collected.

[9] See *Att.-Genl.* v. *Colney Hatch Lunatic Asylum* (1868), L. R., 4 Ch. App., pp. 154, 157.

of present nuisance exists, the Court will take into account its probable continuance and increase.[1]

5. The balance of convenience must be considered where the circumstances of the case demand it. Relief by way of injunction will not be granted where the exigencies of the case are altogether disproportionate to the consequences that would result to the defendant or other persons from the granting of such relief.[2]

6. If the case be one where scientific or expert evidence is given, the Court ought mainly to rely upon the facts which are proved and not upon the conclusions drawn from scientific investigations however valuable they may be in aid, or in explanation and qualification of, the facts which are proved.[3]

7. Acquiescence[4] in the nuisance, or undue and misleading delay in bringing the action,[5] will deprive the plaintiff of his remedy.

For the Court to refuse relief on the ground of acquiescence a much stronger case requires to be made out at the hearing than on an interlocutory application.[6]

8. If the circumstances of the case require it, both injunction and damages may be awarded together under the Specific Relief Act.[7]

9. The injunction granted should be directed to restraining not only the particular act complained of, but also the use of

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[1] *Goldsmid* v. *Tonbridge Wells Improvement Commrs.*; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom. at p. 63.

[2] *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. C. at p. 641; *Lillywhite* v. *Trimmer* (1867), 36 L. J. Ch., 530; *Att.-Genl.* v. *Guardians of Poor of Union Working* (1881), L. R., 20 Ch. D., 595.

[3] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1866), L. R., 1 Ch. App., 349.

[4] *De Bussche* v. *Alt.* (1878), L. R., 8 Ch. D., p. 314. *Ibid* as to what constitutes "acquiescence."

[5] See *Johnson* v. *Wyatt* (1863), 2 De G. J. & S., 18; *Hogg.* v. *Scott* (1874), L. R., 18 Eq., 444; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom. at p. 85. And see further on the subject of acquiescence and laches, Chap. IX, Part II B. and Chap. XI, Part III (4) (*b*).

[6] *Johnson* v. *Wyatt*; *Hogg* v. *Scott*, and see *Att.-Genl.* v. *Colney Hatch Lunatic Asylum* (1868), L. R., 4 Ch. App., p. 160. These cases shew that mere delay in bringing the action is not sufficient *per se* to defeat the right to relief. And see further Chap. XI, Part III B.

[7] *Land Mortgage Bank of India* v. *Ahmedbhoy*, supra.

the subject of the nuisance in any other manner so as to cause damage or material discomfort and annoyance to the plaintiff.[1]

10. It is in the discretion of the Court to grant an injunction where it is necessary to prevent the multiplicity of judicial proceedings,[2] and the exercise of this discretion is called for in cases where a man in order to assert his right would, unless relieved by injunction, be obliged to bring a series of actions for every additional and necessarily recurring injury or annoyance that he might sustain.[3]

General principles summarized in *Shelfer v. City of London Electric Lighting Co.*

The general principles upon which the Court should act in deciding whether it will grant an injunction or award damages are concisely summarized by A. L. Smith, L. J., in *Shelfer* v. *City of London Electric Lighting Company*,[4] when he says :— "In my opinion it may be stated as a good working rule that (1) If the injury to the plaintiff's legal rights is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction may be given.

When plaintiff entitled to injunction, defendant not to be considered except under special circumstances.

It should be observed that where the party complaining has proved his right to an injunction against a nuisance, it is no part of the duty of the Court to inquire in what way the party committing the nuisance can best remove it. The plaintiff is entitled to an injunction at once unless the removal of the nuisance is physically impossible, and it is for the defendant to find his way out of the difficulty irrespective of the inconvenience or expense to which he may be subjected.[5]

Under special circumstances where the difficulty of removing the nuisance is very great, the Court will suspend the

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[1] *Fleming* v. *Hislop* (1886), L. R., 11 App. Cas., 686; and see *Walter* v. *Selfe* (1851), 20 L. J. Ch., 434; 4 DeG. & S., 315; *Roskell* v. *Whitworth* (1871), 19 W. R., 805; *Gose* v. *Bedford* (1873), 21 W. R. (Eng.), 449.

[2] Specific Relief Act, s 54 (*e*).

[3] *Att.-Genl.* v. *Council of Borough of Birmingham* (1858), 4 K. & J., 528 (546); *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), L. R., 8 Ch. App., 125 (142); *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 (68).

[4] (1895), 1 Ch. at p. 322.

[5] *Att.-Genl.* v. *Colney Hatch Lunatic Asylum* (1868), L. R., 4 Ch. App., 146.

operation of the injunction for a period with liberty to the defendant to apply for an extension of time.[1]

Who are liable for a nuisance.

Liability for the creation or continuance of a nuisance depends upon the obligation of the defendant to prevent or remove it. If there is no such obligation or duty on his part he is not liable for the nuisance.[2]

The existence of such obligation or duty makes the person continuing the nuisance as liable as the person creating it.[3]

But no liability for the continuance of a nuisance arises if there is no evidence that it was sanctioned, approved, or adopted by the defendant or that he derived benefit from it.[4]

Nor is there any liability for a nuisance the real cause of which lies in some existing state of things, on the plaintiff's land, or in something which the plaintiff has himself done on his land.[5]

Untenable pleas.

The plea that the nuisance commenced before the party complaining of it came in its way is no legal justification of the wrong.[6]

If the result of the nuisance be to cause injury to health or property, the plea that the business out of which the nuisance arose is being carried on in a suitable locality is unsustainable.[7]

Duties, responsibilities and liabilities of public sanitary bodies in relation to nuisances.

It would not be expedient to leave the subject of nuisances without some reference in connection therewith to the principles which govern the duties, responsibilities and liabilities of public sanitary bodies. An examination of these principles becomes material in relation to Municipalities and Local Boards in India.

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[1] *Ibid;* and see *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1865), L. R., 1 Eq., 161 ; L. R., 1 Ch. App., 349.

[2] *Rex* v. *Pedly* (1834), 1 Ad. & E., 822 ; 40 R.R., 444 ; *Todd* v. *Flight* (1860), 9 C. B. N. S., 377 ; *Pretty* v. *Bickmore* (1873), L. R., 8 C. P., 401 ; *Greenwell* v. *Low Beechburn Coal Co.* (1897), 2 Q. B., 165 ; *Hall* v. *Duke of Norfolk* (1900), 2 Ch., 493.

[3] *Broder* v. *Saillard* (1876), L. R., 2 Ch. D., 692.

[4] *Saxby* v. *Manchester and Sheffield Ry. Co.* (1869), L. R., 4 C. P., 198.

[5] *Chastey* v. *Ackland* (1895), 2 Ch., 389.

[6] *Bliss* v. *Hall* (1838), 5 Scott, 500 ; 4 Bing. N. C., 183 ; *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L R. at p. 508.

[7] *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L.C., 642 ; *Municipal Commissioners of Suburbs of Calcutta* v. *Mahomed Ali* (1871), 7 B. L. R. at p. 509.

t occasionally happens that nuisances are created by these municipal bodies in the sanitation, or attempted sanitation, of some particular locality, or in the performance of other municipal work, and questions commonly arise in such cases as to the duties and responsibilities of these public functionaries to the general body of rate-payers on the one side, and their liabilities to the injured party on the other.

Att.-Genl. v. Council of Borough of Birmingham.

In *Attorney-General* v. *Council of Borough of Birmingham*,[1] the plaintiff and relator was the owner of a large estate through which, and on either side of which, flowed a river which some miles above the plaintiff's estate joined another river. Into this latter river, at different points, the drainage of the town of Birmingham and its neighbourhood passed by means of various small sewers, and the sewage owing to the distance which it had to travel, and to its flowing through a variety of small outlets, became gradually purified by filtration before reaching the plaintiff's estate and had perceptibly no effect upon the waters of the former river which were comparatively pure and clear, were well filled with fish, and from time immemorial had been used by the proprietors of land along the river for brewing, and for agriculture and domestic purposes.

By a local Act the defendants were empowered to effectually drain the town of Birmingham, and, in the professed discharge of such powers, they constructed a large main sewer through which the whole, or by far the greater portion, of the sewage of the town of Birmingham and its neighbourhood. was emptied and discharged into the former river by which means a very considerable additional area of sewage, as compared with the old system, was carried off from the town and its neighbourhood.

The result of the new system of sewage was to cause serious injury to the plaintiff by such pollution of the water of the former river that fish could no longer live there, cattle could no longer drink of the water, and sheep could no longer be washed there.

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[1] (1858) 4 K. & J., 528.

In granting relief to the plaintiff by *interim* injunction, the Court arrived at the following conclusions :—

1. That public works ordered by legislative enactment must be so executed as not to interfere with the private rights of individuals ; and that in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer unless his rights are invaded is one which the Court cannot take into consideration.[1]

2. That in such circumstances it is not the function of the Court to sit as a committee for public safety, but to interpret what powers have been given to the defendants, and to decide what the rights of private individuals are, and whether such rights have been infringed.

3. That the defendants were not justified in so carrying out the operations required of them as to produce the results complained of by the plaintiff.

4. That assuming the inhabitants of Birmingham to have possessed the right before the passing of the Act in question, to drain their houses into the former river, such circumstance would not authorise the defendants to employ a new system of drainage causing injury to the plaintiff.

Att.-Genl. v. Colney Hatch Lunatic Asylum.

In *Attorney-General* v. *Colney Hatch Lunatic Asylum*,[2] it was decided that it is the duty of the Court in each case to determine what powers have been given to public bodies by the particular enactment under which they profess to act, and to see that those functions are duly administered, and that unless the act done causing the nuisance was absolutely necessary for the purpose of the object of the enactment and clearly provided for by the legislature, the public body doing such act is responsible for the injury resulting therefrom.

In such a case it is no answer to an information at the relation of a Local Board of Health to abate a nuisance arising

[1] But see infra *Att.-Genl.* v. *Guardians of Poor of Union of Dorking* for the circumstances under which the Court will be justified in refusing an injunction on the principle of the balance of convenience.

[2] (1868) L. R., 4 Ch. App., 146.

from sewage, that the Board of Health has power itself to remedy the evil by making sewers ; because it is the duty of the Board to prevent a nuisance arising in its district instead of putting the ratepayers to the expense of additional works.

Att.-Genl. v. *Mayor of Basingstoke.*

In *Attorney-General and Dommes* v. *The Mayor of Basingstoke*,[1] it was held that a corporation which suffered sewage to continue to run from a drain in the town into the plaintiff's canal, and thereby created a nuisance, and caused damage to the plaintiff, was liable to be restrained by injunction from continuing such nuisance and damage, and that the plea that the defendants derived no profit from the works causing the nuisance was no answer to the plaintiff's case.

Att.-Genl. v. *Guardians of Poor of Union of Dorking.*

Attorney-General v. *Guardians of Poor of Union of Dorking*,[2] is an important case.

The information and action were brought by the owner of a house and grounds in the parish of Dorking for the purpose of restraining the defendants, as the local authority under the *Public Health Act*, 1875, from causing or permitting the sewage from the town of Dorking, other than sewage so conveyed by prescriptive right before the commencement of the action, to flow in an impurified state into the brook which bounded the plaintiff's land so as to create a nuisance.

It was alleged in the statement of claim that the sewage of the town which drained into the aforesaid brook had greatly increased by reason of the growth of the town, and was becoming more and more of a nuisance and an injury to the neighbourhood and to the plaintiff himself and his family ; that the defendants were using sewers, drains, and outfalls connected with the town for the purpose of conveying sewage into the said brook without such sewage being purified or freed from foul matter ; that the principal sewers were vested in the defendants, and that new buildings were continually erected in the town, and new drains from them were connected with the sewers vested in the defendants, so that the quantity of filthy sewage was continually increased ; and that the persons by whom such connections were made had not

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[1] (1876) 45 L. J. Ch., 726.

[2] (1882) L. R., 20 Ch. D., 595.

acquired any prescriptive right to drain into the sewers ; that the defendants had made bye-laws obliging persons building new houses to connect their drains with the sewers and forbidding them to drain into cess-pools ; and that the defendants had attempted to carry out a scheme for constituting a united district for dealing with sewage which had proved abortive, and were taking no other measures to remedy the nuisance and injury complained of.

The defendants denied the nuisance ; they asserted that the principal sewers had been made and used for at least twenty-four years, and long before the plaintiff came to reside in his house ; that the sewers were not vested in them but in the Highway Board ; that they had not used or made any sewers, drains, or outfalls connected with the town of *Dorking*, and that they had no power to prevent owners of houses from making connections with the public sewers or using the sewers ; and that the bye-law directing builders to make a connection with the sewers had not been, and would not be, acted upon until some proper scheme of drainage had been completed. They stated the efforts they had made and were making to constitute a system of drainage, and alleged that a scheme for such purpose was before the Local Government Board.

It was found that the defendants, in order to construct a new system of drainage, which is what they had to do and what they intended to do when they could, were obliged to acquire land, and that they had endeavoured to acquire land, but unfortunately had not been successful.

The Appeal Court in dismissing the plaintiff's appeal from the judgment of Hall, V. C., discussing the information and action with costs, decided the following points :—

(1) A Local Sanitary Authority in whom the sewers are vested have only a limited ownership in them.

(2) They are not in the same position as to responsibility for fouling a stream as a private individual, inasmuch as they cannot stop up the sewers and thereby cause a frightful nuisance to the inhabitants of the district whose drainage it is their duty to protect and perfect.

(3) Although, perhaps, the Local Sanitary Authority might obtain an injunction to restrain persons from using the sewers who had no right to do so, a landowner complaining of the nuisance cannot bring an action against them for not doing so ; because an action cannot be maintained either at law or in equity to compel a person to bring an action for the purpose of restraining a nuisance which he cannot himself prevent.

Distinction between actively causing the nuisance and merely permitting a previous state of things to continue.

(4) There is a clear distinction between a case, where the Local Sanitary Authority does something actively to turn sewage into a private stream or on to private land, and such an act on their part is a thing they are not authorised to do, if they cannot do it without committing a nuisance, and a case where the Local Authority is doing nothing, but merely permitting sewers to be used as formerly by the inhabitants. In the former circumstances they would be as liable to be restrained as an individual doing a wrong to his neighbour without any legislative authority.

Remedy by mandamus.

(5) If the Local Sanitary Authority are neglecting their duties in providing a sufficient sanitary scheme for the neighbourhood the remedy of the aggrieved landowner is by mandamus.

Balance of convenience.

(6) In dealing with the question of granting an injunction to restrain a continuance of an existing state of things which can only be stopped by the exercise of parliamentary power, the Court must always consider the balance of convenience.

It would not be right to grant an injunction when the exercise of the parliamentary power cannot be compelled, the effect of which would be to cause a frightful nuisance and injury to a town or district and its inhabitants.

Easements not of the character of nuisances.

B.—Easements not of the Character of Nuisances.

These may be divided into the following classes :—

(1) *Easements arising by custom.* (2) *Easements of Fishery in India.* (3) *Easements of Fishery in England.* (4) *Easements of Pasturage,* and (5) *Other Miscellaneous Easements.*

(1)—*Easements arising by custom.*

Easements arising by virtue of a custom.

General reference has been made to these easements in the first part of my first chapter. Here it is not intended to do

more than to amplify what has already been said on the subject.

Difference between prescription and custom.

The difference between the acquisition of an easement by prescription and the acquisition of an easement by virtue of a custom appears to be this, that the easement by prescription belongs to the single individual, whereas the custom on which an easement is founded must appertain to many as a class.[1]

This distinction also appears in the case of a *profit à prendre* which, according to English law, can be acquired by prescription in the case of a single individual, but not by custom, since the subject of the *profit à prendre* in that case would be liable to be entirely destroyed.[2]

Gateward's case.

In *Gateward's case* it was said, "another difference was taken, and agreed, between a prescription which always is alleged in the person, and a custom, which always ought to be alleged in the law: for every prescription ought to have by common intendment a lawful beginning, but otherwise it is of a custom; for that ought to be reasonable, *ex certâ causâ rationabili* (as Littleton saith) *usitata*, but need not be intended to have a lawful beginning."

Custom must be reasonable and certain.

As partially excluding or restricting the ordinary rights of property the custom by virtue of which the easement is claimed must be reasonable and certain, otherwise no easement will be acquired.[3]

Hilton v. Earl of Granville.

Thus in *Hilton* v. *Earl of Granville*,[4] it was determined that a custom to work mines and minerals in such a manner as to destroy the surface which had been granted out to another

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[1] *Abbot* v. *Weekly* (1677), 1 Lev., 176; *Mounsey* v. *Ismay* (1865), 3 H. & C., 486; 34 L. J., Exch., 52.

[2] *Gateward's case* (1607), 3 Coke's Rep., Part vi, 59; *Grimstead* v. *Marlowe* (1792), 4 T. R., 717; *Blewett* v. *Tregonning* (1835), 3 A. & E., 554; *Race* v. *Ward* (1858), 4 E. & B., p. 705; *Luchmeeput Singh* v. *Sadaulla Nushyo* (1882), I. L. R., 9 Cal., 698.

[3] *Gateward's case* (1607), 9 Rep., 59; *Broadbent* v. *Wilks* (1742), Willes, 360; *Arlett* v. *Ellis* (1827), 7 B. & C., 365; *Hilton* v. *Earl of Granville* (1844), 7 Q.B., 701; *Hall* v. *Nottingham* (1875), L. R., 1 Exch. D., 1; *Bell* v. *Love* (1883), L. R., 10 Q. B. D., p. 561; *Luchmeeput Singh* v. *Sadaulla Nashyo* (1882), I. L.R., 9 Cal., 698; *Gokal Prasad* v. *Radho* (1888), I. L. R., 10 All., 358; *Kuar Sen* v. *Mamman* 1895), I. L. R., 17 All., 87; *Mohidin* v. *Shirlingappa* (1899), I. L. R., 23 Bom., 666. A custom excluding all the right of property would *ipso facto* be bad. *Dyce* v. *Hay*, 1 Macq., 305.

[4] (1844), 7 Q. B., 701.

without making compensation for the injury and damage done, is not a reasonable custom.

So too a custom to dig for coal at pleasure, and to lay the coal on any part of the land near coal pits at any time of year, and to let it lie there as long as is pleased is a bad custom as being uncertain and unreasonable.[1]

And in Bengal it has been held that a custom claimed by the inhabitants of villages to fish in the bhils of a private owner is void for unreasonableness on the ground of the fluctuating character of the claimants.[2]

But a custom which allows on certain land a lawful and innocent recreation at any time in the year,[3] and a custom of going on certain land for the purpose of religious observances,[4] or of burying dead[5] are good customs.

Proof of custom.

Where it is sought to establish a local custom by which the residents, or any section of them, of a particular district, city, village, or place are entitled to the exercise of an affirmative easement, the custom must be proved by reliable evidence of similar acts of user repeatedly and openly done which have been assented or submitted to, before the Court can come to the conclusion that the usage relied on has by agreement or otherwise become the local law of the place.[6]

Custom cannot override the Legislature.

A custom, however otherwise valid, cannot be allowed to override the provisions of the Legislature. If the latter come into conflict with the former, the former must give way. As where a custom is alleged against the acquisition of a right by adverse possession under the Indian Limitation Act.[7]

Easements arising by virtue of a local custom are recognised by section 18 of the Indian Easements Act which in the illustrations to that section contemplates a custom of pasturage and a custom of privacy.

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[1] *Broadbent* v. *Wilks* (1742), Willes, 360.

[2] *Luchmeeput Singh* v. *Sadaulla Nashyo* (1882), I. L. R., 9 Cal., 698.

[3] *Hall* v. *Nottingham* (1875), L. R., 1 Exch. D., 1.

[4] *Ashruf Ali* v. *Jaga Nath* (1884), I. L. R., 6 All., 497 : and see *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87.

[5] *Mohidin* v. *Shivlingappa* (1899), I. L. R., 23 Bom., 666.

[6] *Kuar Sen* v. *Mamman* ; *Mohidin* v. *Shivlingappa*.

[7] *Mohanlal* v. *Amratlal* (1878), I. L. R., 3 Bom., 172.

These *customary easements* as they are called in the Act should be distinguished from the customary rights referred to in section 2, clause (*b*) of the Act.[1] These are rights arising by custom, but unappurtenant to a dominant tenement.[2] No fixed period of enjoyment is necessary to establish these rights,[3] but the custom must be reasonable and certain.

Easements arising by custom may be conveniently classified as follows :—

(*a*) Right of pasturage, (*b*) right of privacy, (*c*) rights of sport and recreation, (*d*) rights connected with religious observances.

(*a*) *Rights of Pasturage.*

Right of pasturage.

Apart from the right of grazing cattle on a neighbour's land contemplated by section 4, clause (*d*) of the Indian Easements Act, which is that of an ordinary easement, there is also a right of pasturage which may arise by local custom.

Secretary of State for India v. Mathurabai.

In *the Secretary of State for India* v. *Mathurabai*,[4] it was held that the objection, good in English law, and as against individuals, to a right of pasture being acquired by custom did not apply to villages in the Bombay Presidency as against the Government, and that the right of free pasturage had always been recognised by Government as a right belonging to certain villages, and must have been acquired by custom or prescription.

(*b*) *Rights of privacy.*

Rights of privacy.

This right is recognised by the Indian Easements Act in section 5, ill. (*d*), and in section 18, ill. (*b*), as an easement which may be acquired in virtue of a local custom.

Negative easement.

It is a negative easement preventing an adjoining owner from building on his land so as to interfere with his neighbour's privacy.

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[1] *Palaniandi Tevar* v. *Pathirangonda Nadan* (1897), I. L. R., 20 Mad., 16.

[2] *Ibid*. For instances of customary rights as distinct from easements see *Ibid;* and *Mohidin* v. *Shivlingappa* (1899), I. L. R., 23 Bom., 666.

[3] *Ibid ;* and see *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87 ; *Mohidin* v. *Shivlingappa* (1899), I. L.R., 23 Bom., 666.

[4] (1889), I. L. R., 14 Bom., 213.

In India, as Dr. Whitley Stokes points out in his Anglo-Indian Codes,[1] the right of privacy founded as it is on the oriental custom of secluding females, is of great importance. This, no doubt, was the reason of its introduction into the Act.

It has been recognised also in the continental systems of jurisprudence founded on the Civil law.[2]

The acquisition of the right as an easement has been affirmed by High Courts of Calcutta, Bombay, and the North-Western Provinces, both prior and subsequent to the passing of the Indian Easements Act.

Law in Bengal.

In the Presidency of Bengal the views expressed by the Calcutta High Court are against an inherent right to privacy in property, but favour the acquisition of a right of privacy by prescription, grant, or express local usage.[3]

To say that the right can arise by prescription or grant seems hardly accurate or correct in view of the fact that the acquired right of privacy is a negative easement which would arise, as such, by implication derived from user of the dominant tenement for the necessary period, of a covenant on the part of the servient owner not to interfere with the privacy of the dominant owner.[4] As to the right arising by prescription the meaning of the learned Judges appears to have been that there could be such a thing as a prescriptive right of privacy, using the word "prescriptive" in the general sense in which it is sometimes applied both to affirmative and negative easements as rights acquired by active user in the one case, and passive user or occupation in the other.

But it is difficult to see how, in any view, a right of privacy can be acquired by *grant*, a proposition altogether opposed to eminent consensus of opinion in England.[5]

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[1] Vol. 2, p. 881.

[2] See *Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141: *Mahomed Abdur Rahim* v. *Birju Sahu* (1870), 5 B. L. R., 676.

[3] *Mahomed Abdur Rahim* v. *Birju Sahu* (1870), 5 B. L. R., 676: *Shaikh Golam Ali* v. *Kazi Mahomed Zahur Alum* (1871), 6 B.L.R., App., 76: *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (1872), 18 W. R., 14: and see *Sri Narina Chowdhry* v. *Jadoo Nath Chowdhry* (1900), 5 Cal. W. N., 147.

[4] *See* Chap. I, Part I, and Chap. III, Parts I and IV.

[5] *See* Chap. I, Part I, and Chap. III, Parts I and IV.

In *Mahomed Abdur Rahim* v. *Birju Sahu*[1] the Court expressed the opinion that to hold privacy a natural right, and the invasion of it an *injury*, would lead to the most alarming consequences to the owners of house property in towns, since by erecting female apartments a man could prevent his neighbours building as they wished, and the erection of such apartments by two or three different persons might render all the surrounding land useless for habitation.

Mahomed Abdur Rahim v. Birju Sahu.

The view that a right of privacy can be acquired by prescription or custom is not supported by English law,[2] though doubtless justified in India by the habits and notions of the people.

In Bombay the right of privacy has been allowed in accordance with the usage prevailing in Guzerat, and the invasion of such privacy has been treated as an actionable wrong.[3]

Law in Bombay.

In Madras the reported case law on the subject is limited to decisions that there is no natural right of privacy.[4] Though in that Presidency the right of privacy could no doubt be acquired in virtue of a custom under the Indian Easements Act it is doubtful whether, having regard to the observations of the Judges in the abovementioned cases, the Courts would sanction the acquisition of the rights by prescription.[5]

Law in Madras.

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[1] (1870) 5 B.L.R., 675, and see *Shrinivas* v. *Reid* (1872), 9 Bom. H. C., 266.

[2] *See* Chap. 1, Part 1; and *Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141, a case which followed the English law. In *Tapling* v. *Jones* (1865), 11 H. L., at p. 305. Lord Westbury said: "Again, there is another form of words which is often found in the cases on this subject, namely, the phrase "invasion of privacy by opening windows." That is not treated by the law as a wrong for which any remedy is given. If A is the owner of beautiful gardens and pleasure grounds, and B is the owner of an adjoining piece of land, B may build on it a manufactory with a hundred windows overlooking the pleasure grounds, and A has neither more nor less than the right, which he previously had, of erecting on his land a building of such height and extent as will shut out the windows of the newly erected manufactory.

[3] *Manishankar* v. *Trikam* (1867), 5 Bom. H. C. (A. C. J.), 42; *Kuvarji* v. *Bai Jacer* (1869), 6 Bom. H. C. (A. C. J.), 143; *Keshav* v. *Ganpat* (1871), 8 Bom. H. C., 87; *Shrinivas* v. *Reid* (1872), 9 Bom. H. C., 266; *Mangaldas* v. *Jewaram* (1899), I. L. R., 23 Bom. (675).

[4] *Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141; *Sayyad Azaf* v. *Ameerabibi* (1894), I. L. R., 18 Mad., 163.

[5] *Ibid.*

Law in N.-W. Provinces.

In the North-Western Provinces a right of privacy has been recognised when established by custom.[1]

Gokal Prasad v. Radho.

The case of *Gokal Prasad* v. *Radho*[2] in which the whole of the Indian case law on the subject of the right of privacy was reviewed, decides that the question whether an easement of privacy has or has not been acquired must depend on the reasonableness or unreasonableness of the custom alleged, and that the conditions of English domestic life as regards privacy being essentially different from those of native domestic life in India, the fact that there is no such custom as the custom of privacy known in England has no bearing on the question whether there can be such a custom in India.

Each case in which such a right is in dispute must be decided upon its own facts, the primary question in all cases being, whether the privacy in fact and substantially exists and has been in fact enjoyed.[3]

If this question is answered in the negative no further question arises.

If in the affirmative, the next question is whether the privacy has been substantially interfered with by acts done by the defendant, without the consent or acquiescence of the person seeking relief against those acts.[4]

Remedy for invasion of privacy where no easement exists.

Where no easement of privacy exists the person complaining of invasion of privacy has no other remedy but to screen himself from observation by building on his own land or otherwise.[5]

Costs when disallowed to defendant where no easement of privacy.

But even if there be no right of privacy evidence that the defendant opened the offending door or window from motives of ill-will or malice will deprive him of his costs.[6]

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[1] *Gokal Prasad* v. *Radho* (1888), I. L. R., 10 All., 358; *Abdul Rahman* v. *Emile* (1893), I. L. R., 16 All., 69.

[2] (1888) I. L. R., 10 All., 358.

[3] *Ibid.*

[4] *Ibid.*

[5] *Mahomed Abdur Rahim* v. *Birju Saha* (1870), 5 B. L. R., 676; *Sheikh Golam Ali* v. *Kazi Mahomed* (1870), 6 B. L. R., App., 76; *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (1872), 18 W. R., 14; *Komathi* v. *Gurunada Pillai* (1866), 3 Mad. H. C., 141; *Sayyad Azuf* v. *Ameerabibi* (1894), I. L. R., 18 Mad., 163; *Tapling* v. *Jones* (1865), 11 H. L., p. 305.

[6] *Kalee Pershad Shaha* v. *Ram Pershad Shaha* (1872), 18 W. R., 14.

(c) *Rights of sport and recreation.*

Rights of sport and recreation.

There are many rights of this kind which, though not strictly speaking easements, yet in the manner of their enjoyment, may be said to assume the character of easements.

For example, a custom may be lawfully set up by the inhabitants of a place to hold lawful sports and games on a village green or other piece of land at all times of the year,[1] or to enjoy any innocent or lawful recreation,[2] or to hold horse-races upon another's land.[3]

In such cases there is no necessity to allege the custom at seasonable times.[4]

(d) *Rights connected with religious observances.*

Rights connected with religious observances.

In oriental countries the acquisition of rights relating to the performance of religious ceremonies or funeral obsequies may obviously be a matter of great importance to the native communities.

It is apparently in this view that the Courts have favoured the acquisition of such rights as customary easements.

The right of Hindus to celebrate the *Holi* festival, or of Mahommedans to celebrate the *Mohurrum*, on another's land has been regarded as a right partaking of the character of an easement and capable of acquisition by virtue of a custom.[5]

And the right claimed by a certain section of the Mahommedans of burying their dead in a particular locality has been regarded in the same light.[6]

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[1] *Abbot* v. *Weekly* (1677), 1 Lev., 176; *Fitch* v. *Rawling*, 2 A. Bl., 393.

[2] *Hall* v. *Nottingham* (1875), L. R., 1 Exch. D., 1.

[3] *Mounsey* v. *Ismay* (1865), 3 H. & C., 486; 34 L. J. Exch., 52.

[4] *Abbot* v. *Weekly*; *Fitch* v. *Rawling*; *Mounsey* v. *Ismay*; *Hall* v. *Nottingham*.

[5] See *Ashraf Ali* v. *Jaga Nath* (1884), I. L. R., 6 All., 497; *Kuar Sen* v. *Mamman* (1895), I. L. R., 17 All., 87.

[6] *Mohun Lall* v. *Sheikh Noor Ahmud* (1869), 1 All.H.C., 116; and see *Mohidin* v. *Shirlingappa* (1899), I. L. R., 23 Bom., 666, in which a customary right to the same effect as distinct from an easement was established.

(2) Easements of Fishery in India.

(a) *Private rights of fishery in private waters.*

Private rights of fishery in private waters.

Rights of fishery, or *jalkar*, are rights of great importance to the village communities in Bengal, and, in many cases, are of great antiquity.

Prior to the Indian Limitation Act XI of 1871, these rights were treated as rights to be exercised on the soil of another and as incorporeal hereditaments not necessarily importing any rights in the soil.[1]

Under Act XI of 1871 rights of fishery were not considered easements but interests in immoveable property for the purposes of limitation.[2]

Easements under Act XV of 1877.

With the passing of the Indian Limitation Act XV of 1877 and the introduction of the interpretation clause as to easements in section 3 came a change in the law, and it was held that rights of fishery *in alieno solo* must be regarded as profits *à prendre*, and hence easements within the meaning of section 3 of the Act, and easements not only for the purpose of limitation, but also in regard to their nature and mode of acquisition.[3]

The authorities shew that these easements can be acquired not only by individuals but by the inhabitants of a village or district.[4]

In the latter respect this is a clear departure from the English law under which the inhabitants of a parish or village would be debarred from acquiring a right of fishery by prescription,[5] and a custom to such effect would be void for unreasonableness.[6]

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[1] *Baroda Kant Roy* v. *Chandra Kumar Roy* (1868), 2 B. L. R., P. C., 1; *Forbes* v. *Meer Mahomed Hossein* (1873), 12 B. L. R., P. C., 210; *Fada Jhala* v. *Gour Mohun Jhala* (1892), I. L. R., 19 Cal., 562.

[2] *Parbutty Nath Roy Chowdhry* v. *Madho Paroe* (1878), I. L. R., 3 Cal., 276; *Fada Jhala* v. *Gour Mohun Jhala*.

[3] *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 C. L. R., 269; *Luchmeeput Singh* v. *Sadaulla Nushyo* (1882), I. L. R., 9 Cal., 703; 12 C. L. R., 382; *Fada Jhala* v. *Gour Mohun Jhala*; and see *Dukhi Mullah* v. *Halway* (1895), I. L. R., 23 Cal., 55; and Chap. VII, Part II.

[4] *See* the cases in the last preceding note.

[5] See *supra* under "Easements arising by custom."

[6] *Bland* v. *Lipscombe* (1854), 4 E. & B., 713 n.

Further in Bengal the Court has gone so far as to hold that profits *à prendre* in gross are also within the Indian Limitation Act, XV of 1877.[1]

Profits *à prendre* in gross also within the Act.

Under the present law the method of acquisition of *jalkar* may be either by prescription, or grant, or, as already seen, under the Indian Limitation Act, XV of 1877.

Mode of acquisition.

When *jalkar* is acquired by prescription the extent of the right is to be measured by the user.[2]

The term *jalkar* appears to include not only the right of fishery but other purely aqueous rights such as gathering of rushes and other vegetation which arise from and are connected with water.[3]

Meaning of *jalkar*.

In India and in England the law is the same that the moiety of the soil of non-navigable rivers is presumed to belong to the owners of land on each side of the river.[4]

Presumption of ownership of soil of non-navigable rivers.

In England each owner would be entitled in common with the other to fish in the river or stream.[5] In India there is no decided case exactly establishing this right, though it has been decided that there is a presumption against either owner having an exclusive right of fishing in the dividing water.[6] It may however be inferred from this decision that should occasion arise the English law on the point would be followed in India.

Rights of fishery in opposite owners.

When private rights of fishery or *jalkar* are acquired, as they usually are, in *bhils*, *jheels*, or small streams liable to disappearance and re-appearance in the dry weather and rainy season, the question arises as to whether such fluctuations would have any effect on the acquisition of the easement; whether in fact such interruption in the exercise of the easement as would be caused by such fluctuations, would be fatal to the acquisition of the right.

Acquisition of *jalkar* not affected by interruption in the exercise of the right through lack of water.

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[1] *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945 : 6 C. L. R., 269.

[2] *See* Chap. VII, Part I B.

[3] *Radha Mohun Mundul* v. *Neel Madhub Mundul* (1875), 24 W. R., 200.

[4] *Hunooman Dass* v. *Shama Churn Bhatta* (1862), 1 Hay., 426 ; *Bhageerruthee Debee* v. *Grish Chunder Chowdry* (1863), 2 Hay., 541 ; *Kali Kissen Tagore* v. *Jadoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97 ; Williams on Rights of Common, p. 269.

[5] Williams, p. 269.

[6] *Forbes* v. *Meer Mahomed Hossein* (1873), 12 B. L. R., P. C., at p. 216.

Although this point in the case of *jalkar* has not been the subject of judicial decision, a parallel is to be found in the case of a right of way by boats exerciseable only during the rainy season.

In such a case it has been held that an interruption in the actual *exercise* of the easement through lack of rain would not of itself prevent its acquisition, and that unless the right were interfered with whenever there was occasion to use it, the enjoyment must be taken to be continuous and sufficient to establish it.[1] Unless this were so a person claiming an easement which could only be exercised during a period of the year, could never gain a prescriptive right at all.[2]

Public cannot acquire right to fish in private waters.

Though private individuals can acquire a prescriptive right to fish in non-navigable rivers or other private waters, it is undoubted that the public cannot acquire such right.[3]

Private rights of fishery or *jalkar* may be either easements or rights in gross according as they are or are not appurtenant to a dominant tenement.[4]

(b) *Private rights of fishery in public waters.*

Private rights of fishery in public waters.

It being established that rights of fishery can be acquired in private waters, it remains to be seen whether they can be acquired in public waters, such as public navigable rivers and in the seas.

Hari Das Mal v. Mahomed Jaki.

The most important case bearing on this subject as it affects the law in Bengal is the Full Bench case of *Hari Das Mal v. Mahomed Jaki*,[5] in which it was decided that private rights of fishery or *jalkar* can be acquired in public navigable rivers either by a direct grant from the Crown or by prescription.

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[1] *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281. And see *Ram Soonder Barooie* v. *Wooma Kant Chuckerbutty* (1864), 1 W.R., 217: *Oomar Shah* v. *Ramzan Ali* (1868), 10 W. R., 363: *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302: *Sheikh Mahomed Ansur* v. *Sheikh Seefatoollah* (1874), 22 W. R., 340.

[2] *Ibid.*

[3] *Hudson* v. *Macrae* (1863), 4 B. and S., 585.

[4] *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 C. L. R., 269; and *see* Indian Easements Act, s. 4, ill. (*d*).

[5] (1885) I. L. R., 11 Cal., 434.

The important propositions in the judgment of the majority of the Court delivered by Garth, C. J., are—

(1) That the law of England[1] that the public have the right of fishing in all tidal navigable rivers and that the Crown has no power to interfere with such right by making exclusive grants to private individuals in derogation of it, has not been introduced into India.

(2) That the law of England in this respect is a branch of the territorial law of England, and that the territorial law of England does not prevail in the Indian mofussil.

(3) That whether the actual proprietary right in the soil of British India is vested in the Crown or not (a point upon which there is a diversity of opinion) the Crown has the same power of making settlements of *jalkar* rights and of lands covered by water as it has of making settlements or grants for purposes of revenue of all unsettled and unappropriated lands.

(4) That no special rules of construction or evidence are to be applied in determining the nature and extent of a grant of *jalkar* in tidal navigable rivers as distinguished from those applicable to any other grant.

(5) That many of the grants of *jalkar* in tidal navigable rivers are very ancient, and that although at the time when the settlements were made *pottahs* were granted, the fact that such *pottahs* have in most cases ceased to exist, has given rise to the mode of proving such grants by secondary evidence of the grant itself, and by such evidence as can be be obtained of the user and extent of the rights conveyed by it.

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[1] *Malcolmson* v. *O'Dea* (1863), 10 H. L. (618).

The minority of the Court while agreeing that rights of fishery could be acquired by private individuals in tidal navigable rivers by grant from the Crown or prescription, disagreed with the majority as to the kind of grant required to establish such rights.

Prinsep and Pigot, JJ., agreed with the majority of the Court on all points except as to the kind of grant required to create a right of fishery or *jalkar* in tidal navigable rivers.

As *jalkar* is usually limited to *jheels*, *bheels* or small streams, and a grant thereof in tidal navigable rivers is exceptional, they considered that such a grant should be express in its terms, and that unless the boundaries given in the grants clearly indicated to the contrary, the mere use of the term *jalkar* would not be sufficient to create the right in tidal navigable waters.

Viresa v. *Tatayya.*

In the case of *Viresa* v. *Tatayya*[1] the Madras High Court took the same view as the Calcutta High Court in the last mentioned case.

As to the acquisition of the right by prescription they thought that the prescriptive right could be acquired by a period of enjoyment which would suffice for the acquisition of an easement against the Crown.

Baban Mayacha v. *Nagu Shravucha.*

In *Baban Mayacha* v. *Nagu Shravucha*,[2] a case in the Bombay High Court, Sir Michael Westropp appears to have taken it for granted that the English law[3] prohibiting the acquisition of private rights of fishery in the sea, or in creeks or arms of the sea applied to India, though a determination of that point was not necessary for the purposes of the case as the defendants did not claim an exclusive right of fishery.

But that case related to the exercise of the respective rights of two sets of fishermen to fish and use their stakes and nets two miles from land in the open sea, an entirely different case from that in the Calcutta High Court where the rights were claimed in what was as much a river as a branch of the sea, a ground upon which the two cases might be distinguished.

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[1] (1885) I. L. R., 8 Mad., 467.

[2] (1876) I. L. R., 2 Bom., 19.

[3] *Malcolmson* v. *O'Dea* (1863), 10 H. L. (618).

(c) Public rights of fishery.

It would seem to be the law in India as in England that the public have the right of fishing in the sea and tidal navigable rivers.[1]

Public rights of fishery.

Such rights must be exercised in a reasonable and proper manner so as not to interfere with the rights of other members of the public.[2]

(3) Easements of Fishery in England.

(a) Private rights.

Rights of fishery in England may be divided into two classes[3] : —

Private rights of fishery.

(*a*) Common of piscary.

(*b*) Rights of several or free fishery.

Common of piscary is the liberty of fishing in another man's water in common with the owner of the soil, and perhaps also with others who may have the same right.[4]

Common of piscary.

The right is not one of frequent occurrence. It can be acquired either by grant or prescription, and it may be either a right appurtenant, or a right in gross, not attached to any tenement.[5]

Several or free fishery is an exclusive right to fish in a given place either with or without the property in the soil.[6]

Several or free fishery.

It *primâ facie* imports ownership of the soil,[7] but it may exist apart therefrom and be appurtenant to a manor,[8] or be a right in gross.[9]

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[1] *Baban Mayacha* v. *Nagu Shravucha* (1876), I. L. R., 2 Bom., 19. *See* also *infra* under Easements of Fishery in England—Public Rights. These rights are strictly rights in gross, but are mentioned here to complete the subject.

[2] *Baban Mayacha* v. *Nagu Shravucha.*

[3] *Malcolmson* v. *O'Dea* (1863), 10 H. L. (619).

[4] Williams on Rights of Common, p. 259

[5] *Ibid.*

[6] *Malcolmson* v. *O'Dea.*

[7] *Marshall* v. *Ulleswater Steam Navigation Co.* (1862), 3 B. & S., 732.

[8] *Rogers* v. *Allen* (1808), 1 Camp. (312) ; *Duke of Somerset* v. *Fogwell* (1826), 5 B. & C., 875.

[9] *Shuttleworth* v. *Le Fleming* (1865), 19 C. B. N. S., 697.

The right may be confined to certain fish.[1] The right may arise either by grant or prescription, but the power of acquiring the prescriptive right is confined to private individuals to the exclusion of the public.[2]

(b) *Public rights.*

Public rights of fishery.

Public rights of fishery are strictly speaking in the nature of rights in gross as they are not appurtenant to any tenement. They are referred to here for the sake of convenience.

The public have by law the right of fishing in the sea and also in all tidal navigable rivers.[3]

In the right of fishing in the sea is included the right of fishing on the foreshore, the soil of which is ordinarily and *primâ facie* vested in the Crown for the benefit of the public.[4] And so with regard to the soil of all tidal navigable rivers so far as the tide flows and reflows.[5]

Private persons cannot acquire an exclusive right of fishing in such waters in derogation of the public right.[6]

(4) **Easements of Pasturage.**

Easements of pasturage.

The right of one man to pasture his cattle or sheep or goats on another's land is undoubtedly a right which can be acquired as an easement in India.[7]

May be acquired by prescription in India by inhabitants of villages.

It has been held in Bombay, contrary to the English law, that such a right can be acquired by prescription by the inhabitants of villages.[8]

Pasture, what it comprises.

Pasture, in its widest sense, comprises all vegetable products that may be eaten, such as grass, nuts, &c., and even leaves and boughs.[9]

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[1] *Rogers* v. *Allen.*

[2] *Hudson* v. *Macrae* (1863), 4 B. & S., 585.

[3] Williams on Rights of Common, pp. 265, 266.

[4] *Ibid.*

[5] *Malcolmson* v. *O'Dea* (1863), 10 H. L., 593.

[6] *Malcolmson* v. *O'Dea* (1863), 10 H. L. (618).

[7] Indian Limitation Act XV of 1877, s. 3 ; Indian Easements Act V of 1882, s. 4, ill. (*d*).

[8] *Secretary of State for India* v. *Mathurabai* (1889), I. L. R., 14 Bom., 213.

[9] Williams on Rights of Common, p. 21.

In England rights of pasture and other kindred rights are *profits à prendre.*[1]

Rights of pasture in England may be divided into two classes :—

(*a*) Sole pasture.[2]

Sole pasture.

(*b*) Common of pasture.[3]

Common of pasture.

The right of sole pasture may be the subject of prescription.[4]

May be acquired by prescription.

The right of common of pasture is the right to pasture in common with the owner of the soil.[5]

Like the right of sole pasture it can be acquired by prescription.[6]

The other kindred rights to which I have referred to are :—

Other kindred rights.

(*a*) Common of *estovers* (French) or *botes* (Saxon), which is the right of cutting timber or underwood for fuel to be used in the house (*fire bote*) or for repairs of hedges or fences (*hedge bote*), or for repairs of house or farm buildings (*house bote*), or for repairs of agricultural implements (*plough bote*).[7]

Common of *Estovers* or *Botes.*

(*b*) Common of Turbary which is the right of cutting peat or turf.[8]

Common of Turbary.

(*c*) Common of shack,[9] a peculiar right existing in certain parts of England, particularly in the county of Norfolk.[10] It is the right of individuals who occupy adjoining lands in the same common field to turn out their cattle or other beasts after harvest to feed promiscuously in that field.

Common of shack.

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[1] *Bailey* v. *Appleyard* (1838), 8 A. & E., 161; Williams on Rights of Common, p. 18.

[2] Williams on Rights of Common, pp. 18, 21.

[3] *Ibid.*

[4] *Ibid*, p. 18.

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid*, p. 140.

[9] "Shack" is provincial English. As an intransitive verb it means "to shed or fall out as ripe grain from the ear."

As a noun it means (*a*) pasture in stubble, (*b*) fallen acorns, or nuts or mast, (*c*) grain shed from the husk at harvest, (*d*) liberty of winter pasture.

[10] Williams on Rights of Common, p. 68.

Common of shack comprises the right to pasture in stubble, to gather fallen acorns, or nuts, or fallen mast, or grain shed from the husk at harvest, and the liberty of winter pasture.

All these kindred rights may be prescribed for.[1]

Other miscellaneous easements.

(5) Other miscellaneous easements.

As other easements of a miscellaneous character not already dealt with may be mentioned the following :—

(*a*) Right to bury dead in a particular place.[2]

(*b*) Right to hold a *haut* or market on another's land.[3]

(*c*) Right to carry on a private ferry and levy tolls.[4]

This right is an easement so far as the embarking and disembarking of passengers are concerned.

(*d*) Right to sit in a particular pew in church.[5]

(*e*) Right to hang clothes on lines passing over a neighbour's land.[6]

(*f*) Right to keep a sign-post opposite a house of entertainment.[7]

(*g*) Right to affix a sign-board to the wall of a neighbour's house.[8]

(*h*) Right to nail fruit trees or beams to a neighbour's wall.[9]

(*i*) Right to retain in its position a fender or hatch for keeping a stream in a particular course.[10]

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[1] Williams on Rights of Common, p. 18.

[2] *Bryan* v. *Whistler* (1828) 8 B. & C., 288 : 2 Man. & Ry., 318 : *Mohun Lal* v. *Sheikh Noor Ahmed* (1868), 1 All. H. C., 116.

[3] *Rajah Bijoy Keshub Roy* v. *Obhoy Churn Ghose* (1871), 16 W. R., 198.

[4] *Parmeshuri Prasad Narain Singh* v. *Mahomed Syud* (1881), I. L. R., 6 Cal., 608. An exclusive right of ferry cannot arise by prescription, nor is it necessarily appurtenant to land though it can be claimed as such. It must have its origin in grant from the Crown, and neither mere non-user without waiver nor the running of an opposition ferry will destroy the right. *Nilgadhari Roy* v. *Deane* (1891), I. L. R., 18 Cal., 652.

[5] *Rogers* v. *Brooks* (1783), 1 T. R., 431*a* ; *Hinde* v. *Charlton* (1866), L. R., 2 C. P., 104.

[6] *Drewell* v. *Towler* (1832), 3 B. & Ad., 735.

[7] *Hoare* v. *Metropolitan Board of Works* (1874), L. R., 9 Q. B., 296.

[8] *Moody* v. *Steggles* (1879), L. R., 12 Ch. D., 261.

[9] *Hawkins* v. *Wallis* (1763), 2 Wils., 173 ; *Gordhan* v. *Chota Lal* (1888), I. L. R., 13 Bom., 82.

[10] *Wood* v. *Hewett* (1846), 8 Q. B. (917).

(*j*) Right to keep fixed in a river a pile of wood for the more convenient use and enjoyment of a wharf.[1]

(*k*) The right of one man to grow rice plants in his neighbour's land to be afterwards transplanted to his own.[2]

This right is strictly speaking a profit *à prendre*, but must be considered an easement under the Indian Limitation Act,[3] and Indian Easements Act.[4]

(*l*) Although the dominant owner is usually liable to repair the servient tenement for the use and preservation of his easement,[5] yet he can by prescription or express stipulation acquire a right against the servient owner that he shall repair it.[6]

Part II.—Miscellaneous Rights not amounting to Easements.

Under this heading it is proposed to deal successively with (*a*) Rights in Gross ; (*b*) Profits *à prendre* in Gross ; (*c*) other Miscellaneous Rights.

A.—Rights in Gross.

Rights in Gross.

These rights have already been referred to in my first chapter, and it will be remembered that they are rights which, though analogous to easements in some respects, differ from them materially in others, and chiefly in the respect of their enjoyment being altogether irrespective of the possession or ownership of land. They are not, as easements are, rights appurtenant to a dominant tenement.[7]

Another point of dissimilarity is that rights in gross are in reality nothing more than licenses, and as such are incapable of assignment.[8]

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[1] *Lancaster* v. *Eve* (1859), 5 C. B. N. S., 717.

[2] *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397.

[3] S. 3.

[4] S. 4; and see *Sundrabai* v. *Jayawant*.

[5] *See* Chap. VIII, Part III.

[6] *See* note to *Pomfret* v. *Rycroft*, 1 Wms. Saund., 322*c*.

[7] *Ackroyd* v. *Smith* (1850), 10 C. B. 187 ; *Rangeley* v. *The Midland Ry. Co.* (1868), L. R., 3 Ch. App., 306 ; *Thorpe* v. *Brumfitt* (1873), L. R., 8 Ch. App., 650 ; *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 915 ; 6 C. L. R., 269.

[8] *Ackroyd* v. *Smith* ; *Thorpe* v. *Brumfitt*, ibid (655).

Further, being altogether unconnected with the enjoyment or occupation of land, they cannot be annexed as incident to it.[1]

Nor do the principles governing the acquisition of easements by long enjoyment apply to these rights, for there must be something more than mere user to establish them ; there must be something to shew their nature and origin as by production of a grant.[2]

Had it ever been attempted to apply the prescriptive method to rights in gross difficulties would have at once arisen as to the evidence necessary to establish the nature and quality of rights in gross, which do not occur in the case of rights proved and determined by user and enjoyment on the part of the occupiers of a dominant tenement ; as for instance whether enjoyment by one man in the course of his own life, and no more, would establish any right either in that man for life or a descendible right in gross.[3]

Excepting profits *à prendre* in gross, rights in gross not within Act XV of 1877. All rights in gross excluded from Indian Easements Act.

Rights in gross apart from profits *à prendre* in gross do not appear to be within the scope of the Indian Limitation Act XV of 1877, and they have been expressly excluded from the Indian Easements Act V of 1882.[4]

The two important classes of rights in gross which it is necessary to consider here are Private Rights of way, and Public Rights of way.

Preceding observations on Rights in gross refer to private rights.

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[1] *Ackroyd* v. *Smith.*

[2] See *Bailey* v. *Stephens* (1862), 12 C. B.N.S., 91, and the learned argument of Mr. Mellish, afterwards Lord Justice Mellish, in *Shuttleworth* v. *LeFleming* (1865), 24 L. J. C. P. at p. 310, in which case it was held that the English Prescription Act does not apply to rights in gross. But *see* the remarks of White, J., in *Chundee Churn Mundul* v. *Shib Chunder Mundul* (1880), I. L. R., 9 Cal., 945; 6 C. L. R., 269, on the subject of profits *à prendre* in gross.

[3] See *Shuttleworth* v. *LeFleming* (1865), 19 C. B. N. S. (712) ; 34 L. J. C. P. (312).

[4] These Acts in India like the Prescription Act in England establish the acquisition of easements by mere user, *see* Chap. VII, Part II.

Public rights of way, as will presently be seen, are on a different footing.

(1) *Private Rights of way*—

Private rights of way are rights in gross when they are not appurtenant to a dominant tenement.[1]

Private rights of way.

Their method of acquisition has already been referred to.[2]

(2) *Public Rights of way*—

A public right of way is exercised over what is called a *Highway*.

Public rights of way.

And a highway may be either a public road or a public river.[3]

Highway either road or river.

A public right of way is not an easement but a right in gross.[4]

As a public road a highway may be either a *foot way* set apart solely for the purpose of foot passengers or it may be a *pack* and *prime way* which is a horse and a foot way; or it may be a *cart* or *carriage way;* or it may include all three.[5]

What a highway may be as a public road.

The right of way consists solely in the liberty of passing and repassing, and the use of a highway for any other purpose is a trespass.[6]

Public right of way, what it consists of.

But the modern tendency is not to enforce this rule too strictly, for in a recent case it was said that although highways were *primâ facie* dedicated for the purpose of passage, other things were done upon them by everybody which were permitted by the law as constituting a reasonable and usual mode of using a highway as such, and that so long as a person did

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[1] See *supra* cases collected in first note under "Rights in Gross."

[2] See *supra* under "Rights in Gross."

[3] *Hunooman Dass* v. *Shamachurn Bhutta* (1862), 1 Hay., 426; Notes to *Dovaston* v. *Payne*, 2 Sm. L. C. (10th Ed.), pp. 161, 181.

[4] *Rangeley* v. *The Midland Ry. Co.* (1868), L. R., 3 Ch. App. (310); *Hawkins* v. *Rutter* (1892), 1 Q. B., 668. It cannot be claimed as a dominant tenement to which to attach a right of easement. *Att.-Genl.* v. *Copeland* (1901), 2 K. B., 101.

[5] Co. Lit., 56*a;* Notes to *Dovaston* v. *Payne*, 2 Sm. L. C. (10th Ed.), p. 161.

[6] *Lade* v. *Shepherd* (1735), 2 Str., 1004; *Stevens* v. *Whistler* (1809), 11 East., 51; *R.* v. *Pratt* (1855), 4 E. & B., 860; *Harrison* v. *Rutland* (1893), 1 Q. B., 142; and *see* notes to *Dovaston* v. *Payne*, 2 Sm. L. C. (10th Ed.), p. 162.

not go beyond such reasonable mode of using it he was not a trespasser.[1]

"If a person is passing along a part of a highway which belongs to a particular owner, in order to do something beyond, on land which does not belong to that owner, then, so far as that owner is concerned, he is merely passing along that part of the highway, and, whatever it may be the intention to do further on, that would be no trespass as against such owner. Again, if a man is passing along a highway, only intending, so far as the highway is concerned, to pass along it, though he intends to go from it and goes into other land of the same owner, and does something contrary to his rights, I do not think there will be any trespass on the highway."[2]

But any use of the highway which is an interference with the enjoyment of his property by the owner of the soil is a clear trespass.[3]

Arise by dedication.

Public rights of way arise out of the dedication to public use by a landowner of that portion of his property over which the rights are exercised.[4]

Dedication how made.

Such dedication may be made by express grant, but it is usually founded on a presumption derived from user on the part of the public.[5]

In every case there must be an *animus dedicandi*, an intention to dedicate, of which the user by the public is *evidence* and no more.[6] Upon this question of intention a single act of interruption by the owner is of more value than many acts of enjoyment.[7]

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[1] *Harrison* v. *Rutland* (1893), 1 Q. B., 142.

[2] *Ibid* at p. 147 ; *per* Lord Esher, M. R.

[3] *Lade* v. *Shepherd* (1735), 2 Str., 1004 ; *Stevens* v. *Whistler* (1809), 11 East., 51 ; *R.* v. *Pratt* (1855), 4 E. & B., 860 ; *Harrison* v. *Rutland*.

[4] *Rex* v. *Lloyd* (1808), 1 Camp., 260 ; *Trustees of the British Museum* v. *Finnis* (1833), 5 C. & P., 460 ; *Grand Surrey Canal Co.* v. *Hall* (1840), 1 M. & G., 392 ; *Vestry of Bermondsey* v. *Brown* (1865), 35 Beav., 226 ; *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209.

[5] *Ibid.*

[6] *Grand Surrey Canal Co.* v. *Hall*, *Poole* v. *Huskisson* (1843), 11 M. & W., 827 ; *Vestry of Bermondsey* v. *Brown* : *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* ; and see *Ranchordass* v. *Manaklal* (1890), I. L. R., 17 Bom., 648.

[7] *Poole* v. *Huskisson*, *per* Parke, B., at p. 830.

The user from which the presumption is derived must be open, as of right and uninterrupted.[1]

An interruption will rebut the presumption.[2]

No special period of user is required to establish the presumption.[3]

Each case must depend upon its actual circumstances.[4]

A dedication can be presumed only in favour of the public generally; there can be no dedication in favour of a portion of the public, such as the inhabitants of a parish.[5]

In the latter case there would have to be a grant of the way,[6] or it might be acquired by custom.[7]

Ownership of soil is not dedicated, only right of passage.

In the case of a dedication nothing more is dedicated by the owner than a right of passage over a portion of his land.

The ownership of the soil remains vested in him, and he can use his property in any way he pleases not inconsistent with such dedication.[8]

As was said by Cairns, L. J., in *Rangeley* v. *The Midland Railway Company*, "a public road or highway is a dedication of that extent of ownership or of occupancy to the public consistent with the freehold or the *solum* of the land remaining in the original owner.[9]

Presumption as to ownership of soil.

This state of the law has given rise to the presumption that the ownership of the soil remains in the person or persons dedicating the road, either to the whole width of it in the case

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[1] *Rex* v. *Barr* (1814), 4 Camp., 16; *The Queen* v. *Petrie* (1855), 4 E. & B., 737; *Poole* v. *Huskisson*; *Vestry of Bermondsey* v. *Brown*.

[2] *Poole* v. *Huskisson*; *Vestry of Bermondsey* v. *Brown*; and *see* notes to *Dovaston* v. *Payne*, 2 Sm. L. C. (10th Ed.), p. 168.

[3] See *Woodyer* v. *Hadden* (1813), 5 Taunt., 125; and notes to *Dovaston* v. *Payne*, 2 Smith's L. C. (10th Ed.) at p. 167; and *Trustees of British Museum* v. *Finnis* (1833), 5 C. & P., p. 466, note (*c*).

[4] *Ibid*; and see *Ranchordas* v *Manaklal* (1890), I. L. R., 17 Bom., 648.

[5] *Poole* v. *Huskisson*; *Vestry of Bermondsey* v. *Brown*; *Shamsoonder Bhattacharjee* v. *Monee Ram Dass* (1876), 25 W. R., 233.

[6] *Vestry of Bermondsey* v. *Brown*.

[7] *See* notes to *Dovaston* v. *Payne*, 2 Sm. L. C. (10th Ed.), p. 169.

[8] *Dovaston* v. *Payne* (1795), 2 H. B. C., 527; 2 Smith's L. C. (10th Ed.), 157; *Lade* v. *Shepherd* (1735), 2 Str., 1004; *St. Mary Newington* v. *Jacob* (1871), L. R., 7 Q. B., 47; *Rangeley* v. *Midland Ry. Co.* (1868), L. R., 3 Ch. App., 306; 37 L. J. Ch., 313.

[9] 37 L. J. Ch., p. 316.

of one owner whose property lies on each side of it, or to the middle of it where the land on either side of it belongs to different owners.[1]

And this presumption exists as much with regard to private ways as public ways.[2]

The presumption may be rebutted by proof of circumstances incompatible therewith.[3]

Dedication on whom not binding.

A dedication made by a lessee or owner is not binding on the lessor or reversioner who on coming into possession of the land may interrupt the use of the public way. In such a case the dedication will continue only for the period of the limited ownership.[4]

Dedication may be limited.

A dedication may be limited to the use of the way at particular times, or for particular purposes, so long as the limitation is synchronous with the dedication.[5]

Corporation or Company may dedicate.

A corporation and a public company may dedicate, provided that the dedication is not incompatible with the objects of the corporation or company.[6]

Presumption of dedication against Crown.

A dedication of lands belonging to the Crown can as well be presumed as a dedication of land belonging to a private owner, and such dedication may and ought to be presumed from long continued user in the absence of anything to rebut the presumption.[7]

May be created by statute.

A highway may also be created by statute. It is essential to its valid creation that the provisions of the Act should be strictly followed.[8]

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[1] *Cooke* v. *Green* (1823), 11 Price, 736; *Haigh* v. *West* (1893), 2 Q. B., 19 (29). The presumption *usque ad medium filum viæ* is based upon the supposition that when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose, *Holmes* v. *Bellingham* (1859), 7 C. B. N. S., 329 (336).

[2] *Holmes* v. *Bellingham*; *Mobaruck Shah* v. *Toofany* (1878), I. L. R., 4 Cal., 206.

[3] *Beckett* v. *The Corporation of Leeds* (1871), 26 L. J., 375; 20 W. R., 454; and *see* notes to *Dovaston* v. *Payne*, 2 Sm. L. C. (10th Ed.), p. 164.

[4] *Wood* v. *Veil* (1822), 5 B. & Ald., 454.

[5] See Notes to *Dovaston* v. *Payne*, p. 169.

[6] *R.* v. *Leake* (1833), 5 B. & Ad., 469; *Grand Junction Canal Co.* v. *Petty* (1888), L. R., 21 Q. B. D., 273.

[7] *Turner* v. *Walsh* (1881), L. R., 6 App. Cas., 636; and *see* the same principle in *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 9 Bom., 209.

[8] *Cubitt* v. *Lady Caroline Maxse* (1873), L. R., 8 C. P. at p. 915.

The extent and mode of enjoyment of a highway must be measured by the user as proved, or by the terms of the deed when the right is so granted, but in the absence of evidence to the contrary the public are entitled to the whole width of the way without such qualification as exists in the case of a private way.[1] In *The Queen* v. *United Kingdom Electric Telegraph Co.*,[2] Martin, B., laid down the proposition which was accepted by the Court on a motion for a new trial :—"In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences ; and the public are entitled to the use of the entire of it as the highway and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers."

Extent and mode of enjoyment of public right of way.

The Queen v. *The United Kingdom Electric Tel. Co.*

It is a necessary element in the legal definition of a highway that it must lead from one definite place to some other definite place. No dedication will be presumed where the public have wandered at pleasure over a vacant space of land without any defined tracks in any given direction from point to point.[3]

Direction of highway.

If a public way from whatever cause becomes impassable or even incapable of commodious use by the public, the right is given of going on the adjacent land.[4] This is not a right which is extended to the case of a private way except where it becomes impassable owing to some obstruction placed in it by the servient owner.[5]

Public right of deviation.

In the case of a public way the right of deviation appears to exist, not only when the way has become impassable by reason of something not having been done as, for example, repairs, but when it has been rendered impassable by an obstruction placed in it.[6]

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[1] *See* Chap. VIII, Part I, C.

[2] (1862) 31 L. J. M. C., 166 (167) ; and see *Pullin* v. *Deffel* (1891), 64 L. J., 134.

[3] *Eyre* v. *New Forest Highway Board* (1892), 8 Times L. R., 648 ; *Robinson* v. *The Cowper Local Board* (1893), 62 L. J., Q. B., 619.

[4] Notes to *Dovaston* v. *Payne*, 2 Sm. L. C. at p. 166.

[5] *See* Chap. VIII, Part I, C.

[6] Notes to *Dovaston* v. *Payne*, 2 Sm. L. C. at p. 166.

Extent of right of access to highway from adjoining land.

An owner of land which is contiguous to a public highway has the right of access to the highway from his land at any point along the line of contact, whether he be the presumptive owner of the soil or not.[1]

This constitutes another point of difference between a public and a private way.[2]

Liability to repair.

England.

In England it is a general rule of law that the inhabitants of a parish are *primâ facie* bound to repair all highways lying within it, unless by prescription they can throw the burden on other persons by reason of their tenure.[3]

The liability does not arise by particular custom, but is a common law *onus* for the public benefit.[4]

India.

The same liability does not arise in India: in the mofussil questions of repairs of highways are usually provided for by acts regulating the maintenance of roads, as, for example, the Road-Cess Act, IX of 1880, in Bengal.

In the Presidency Towns such repairs are usually provided for by Municipal Acts, such as, for example, in Calcutta, the Calcutta Municipal Act, III of 1899, sections 336 and 337.

Public rights of way extinguishable only by act of God or statute.

It appears that, except by act of God,[5] and legislative enactment,[6] public rights of way cannot be extinguished.

It is a settled maxim that once a highway always a highway, for the public cannot release their rights, and there is no extinctive presumption or prescription.[7]

Effect of diversion of the way.

Diversion of the way will not extinguish the right; it will merely alter its mode of enjoyment,[8] as where through

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[1] *Lyon* v. *Fishmongers Co.* (1876), L. R., 1 App. Cas., 662; 46 L. J. Ch., 68; *Fitz* v. *Hopson* (1880), L. R., 14 Ch. D., 553, 554; 49 L. J. Ch., 325; *Ramuz* v. *Southend Local Board* (1892), 67 L. J., 169.

[2] *See* Chap. VIII, Part I, C.

[3] The *King* v. *Sheffield* (1787), 2 Jenn. R., 106; The *King* v. *Inhabitants of Netherthong* (1818), 2 B. & Ald., 179; *Cubitt* v. *Lady Caroline Maxse* (1873), L. R., 8 C. P., 704.

[4] The *King* v. *Sheffield*.

[5] As for example in India an earthquake which destroys a road, and see notes to *Dovaston* v. *Payne*, 2 Sm. L. C., p. 172. But an act of God causing the diversion, and not the destruction of the way, does not extinguish the right. See *infra*.

[6] Such as an act acquiring a public road for any particular purpose or allowing a public road to be stopped up.

[7] *Dawes* v. *Hawkins* (1860), 8 C. B. N. S., 858.

[8] See notes to *Dovaston* v. *Payne*, 2 Sm. L. C., 172.

natural causes a river changes its course ;[1] a matter of frequent occurrence in India.

Tidal and navigable rivers.

Tidal and navigable rivers are highways as well as public roads.[2]

Ownership of bed of such rivers.

The bed of a tidal and navigable river is vested in the crown,[3] but the public have a right of navigation on the river from which such ownership cannot derogate.[4]

Public rights of navigation.

There may be public rights of passage over the banks of a river for the purposes of navigation, and these rights are exercised over the property of the persons who own the land on the banks.[5]

B.—Profits a prendre in gross.

Profits à prendre in gross.

Profits à prendre in gross may be described as rights unappurtenant, or unconnected with the use and enjoyment of land whereby a person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another.

Their position with reference to the Indian Limitation Act and Indian Easement Act.

Although *rights in gross* of all kinds are altogether excluded from the Indian Easements Act,[6] *profits à prendre in gross* have been held to fall within the definition given to easements in section 3 of the Indian Limitation Act, XV of 1877.[7]

And although *profits à prendre in gross* are within the Limitation Act, *easements in gross*, as distinct from the last-mentioned rights, do not appear to find a place there.

Thus it comes about that though on the one hand all *rights in gross* are excluded from the Indian Eaesments Act and

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[1] *See* notes to *Dovaston* v. *Payne*, 2 Sm. L. C., 172.

[2] *Hunooman Dass* v. *Shama Churn Bhutta* (1862), 1 Hay, 426; notes to *Dovaston* v. *Payne*, 2 Sm. L. C. (10th Ed.), pp. 161, 181.

[3] *Fishers of Whitstaple* v. *Gann* (1865), 20 C. B. N. S., 1; and see *Hori Dass Mal* v. *Mahomed Jaki* (1885), I. L. R., 11 Cal., 434.

[4] *Fishers of Whitstaple* v. *Gann*.

[5] *Roop Lall Dass* v. *The Chairman of Municipal Committee of Dacca* (1874), 22 W. R., 279.

[6] See *Gazette of India*, 1880, Part V, p. 476.

[7] See *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; 6 C. L. R., 269, and *supra* under "Rights of Fishery in India," "Private Rights."

can only be acquired under the conditions prescribed by the English Common Law, on the other hand, under the Indian Limitation Act, *profits à prendre in gross* can be acquired by the same process as easements proper, notwithstanding that *easements in gross*, as distinct therefrom, not being within that Act are under the same disability as rights in gross in those parts of India to which the Indian Easements Act applies.

The principles of the English Common Law just referred to enjoin that no *rights in gross* can be proved by simple user; there must be something to shew their nature and origin as by production of a grant.[1]

Under the Indian Limitation Act, however, user of itself, without the additional proof of grant, is sufficient to establish a *profit à prendre in gross*.[2]

In English law it has always been found undesirable and wrong in principle to apply to rights in gross which are merely personal rights, unassignable and unappurtenant, and which in these respects are closely analogous to licenses, the same principles of acquisition by long enjoyment which obtain in the case of rights appurtenant.[3] Any attempt to apply the prescriptive method to *profits à prendre in gross* would have been met by the same difficulties as would have arisen in the case of other rights in gross.[4]

Thus, whatever the reason may have been for including one branch of rights in gross in the Indian Limitation Act, and excluding *all* rights in gross from the other Act, the curious result is obtained that whilst *profits à prendre in gross* can be established by mere user, all other rights in gross must in addition to user be supported by actual grant.

Thus, where a man claims a right, not appurtenant to any land of his own to take fish out of another's tank, he can under the Indian Limitation Act establish such right by user, but if he claims a mere right of way in gross over another's

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[1] See *supra* under "Rights in gross."

[2] Act XV of 1877, s. 26; and *see* Chap. VII, Part II.

[3] See *supra* under "Rights in gross"

[4] *Ibid.*

land, he cannot avail himself of the Act, but must go further than user and shew a grant.

But in the provinces to which the Indian Easements Act applies, it would not be sufficient to rely on mere user for establishment of *either* of the two rights abovementioned. The Common law principle would apply, and further proof, as by production of a grant, would be required.

It has been seen that a public right of way, although a right in gross, is an exception to the above rule as being created by dedication.[1]

C.—Other miscellaneous rights.

(1) *Right of Prospect.*

Right of prospect from a house.

A right of prospect, or a right to an uninterrupted view from the windows of a house, may be the subject of actual agreement, but it is not an easement and cannot be acquired by prescription.[2]

It is merely a matter of delight,[3] an amenity of prospect, a subject-matter which is incapable of definition.[4]

Attorney-General v. *Doughty.*

In *Attorney-General at the relation of Gray's Inn* v. *Doughty*,[5] Lord Hardwicke said :—

"I know no general rule of common law, which warrants that, or 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 therefore on a particular right."

In *Wells* v. *Ody*,[6] Baron Parke said, "A man can bring no action for the loss of a look out or a prospect."

Dalton v. *Angus.*

The decision that a right of prospect is not acquired by prescription was thought by Lord Blackburn in *Dalton* v. *Angus*,[7] to shew that, whilst, on a balance of convenience and

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[1] See *supra* under "Public Rights of Way."

[2] Aldred's case (1611), 9 Coke's Rep., 58*b* : *Attorney-General* v. *Doughty* (1752), 2 Ves. Sen., 253 ; *Bagram* v. *Khettranath Kerfarmah* (1869), 3 B. L. R., O. C. J., 46, 47 : *Dalton* v. *Angus* (1881), L. R. 6 App. Cas. (824).

[3] Aldred's case.

[4] *Harris* v. *DePinna* (1886), L. R. 33 Ch. D. at p. 262, *per* Bowen, L. J.

[5] (1752) 2 Ves. Sen., 453.

[6] (1836) 7 C. & P., 410 (411).

[7] (1881) L. R., 6 App. Cas., p. 824.

inconvenience, it was held expedient that the right to light, which could only impose a burthen on land very near the house, should be protected after long enjoyment, on the same ground it was held expedient that the right of prospect which would impose a burthen on a very large and indefinite area should not be allowed to be created, except by actual agreement.

To a shop window.

The same rule applies to the right to have unobstructed the view of a shop window where goods are displayed for sale,[1] or the view of a sign outside a place of refreshment or entertainment,[2] or the view of a place of business.[3]

An earlier decision,[4] however, is in conflict with the foregoing causes in permitting on a division of two tenements, the grantor to retain a right of unobstructed view of his shop window. But the case could hardly stand now, as it also offends against the general rule that rights of easement or rights in the nature of easements, not being easements of necessity, do not arise by implication of law in favour of the grantor on a severance of the tenements, but must be expressly reserved.[5]

(2) *Right to a south breeze or free and uninterrupted current of wind.*

Right to south breeze.

A right of this nature is governed by the same principles as those applying to rights of prospect.[6]

It has been fully considered in the first part of my third chapter, and further reference need not be made to it here.

(3) *Right to have trees overhanging a neighbour's land.*

Right to have trees overhanging a neighbour's land.

It is clearly established that this right is not an easement, and cannot be acquired by prescription though it may exist by express stipulation. The law, as laid down in England in the recent case of *Lemmon* v. *Webb*,[7] has settled any doubts

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[1] *Smith* v. *Owen* (1866), 35 L. J. Ch., 317.

[2] *Ibid.*

[3] *Butt* v. *Imperial Gas Co.* (1866), L. R., 2 Ch. App., 158.

[4] *Riviere* v. *Bower* (1824), Ry. & Moo., 24.

[5] *See* Chap. VI, Part IV, B.

[6] See *supra*; and see *Barrow* v. *Archer* (1864), 2 Hyde, 125; *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839.

[7] (1894), 3 Ch., 1, affirmed in the House of Lords (1895) App. Cas., 1.

there may have been with regard to the right to cut the offending branches and the duty of giving notice before doing so.

Lemmon v. Webb.

Lindley, L. J., states the law as follows [1] :—

"The owner of a tree has no right to prevent a person lawfully in possession of land into or over which roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots and branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice so long as he confines himself and his operations to his own land, including the space vertically above and below its surface."

The Court, however, did not make any order as to the costs of the action by reason of the obscurity of the law as to notice and the unneighbourly conduct of the defendant in cutting the particular branches without giving notice to the plaintiff, there being no question of urgency to prevent his doing so.

Hari Krishna Joshi v. Shankhar Vithal.

These principles have been followed in India in the case of *Hari Krishna Joshi* v. *Shankhar Vithal*,[2] which decided that the obstruction of overhanging branches is a private nuisance which does not create a "right" within section 4 of the Indian Easements Act and cannot be enjoyed as "of right" under section 15 of the same Act.[3]

The law, therefore, must now be taken to be that a lawful owner or occupier of land may cut the roots or branches of his neighbour's trees to the extent of removing the vertical obstruction, and he is under no legal obligation to give notice before doing so; but the Court will consider the nature of this conduct, and if it finds it unneighbourly may deprive him of his costs while dismissing the action brought against him.

An earlier decision of the Bombay High Court which declares in favour of a prescriptive right to have the branches

[1] (1894) 3 Ch. at p. 14.

[2] (1894) I. L. R., 19 Bom., 420.

[3] Corresponding with s. 26 of the Indian Limitation Act, XV of 1877.

of trees overhanging a neighbour's land cannot in view of these later authorities be accepted as good law.[1]

No analogy between projecting buildings and overhanging branches.

It is a matter of interest to note that the judges in *Lemmon* v. *Webb* considered that as regards the acquisition of the rights there was no analogy between an encroachment by projecting buildings and an encroachment by the intruding roots or overhanging branches, since the owner of a tree which gradually grows over the neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow, by reason of the secret and unavoidable growth of the new wood and the flexibility and constant motion of the branches.[2]

(4) *Rights to have roots of trees penetrating neighbour's soil.*

Right to have roots penetrating neighbour's soil.

A similar rule prevails in a case of this kind as in the case of overhanging branches.[3]

(5) *Kumki right of landholders in South Canara.*

Kumki right in S. Canara.

This right is not an easement but is merely a right exercised over Government waste by permission of Government.[4]

[1] *Naik Parsotam Ghela* v. *Gandrap Fatehlal Gokuldas* (1892), I. L. R., 17 Bom., 745.

[2] At p. 12.

[3] *Norris* v. *Baker* (1613), 1 Rol. Rep., 394; *Lemmon* v. *Webb* (1894), 3 Ch., 1.

[4] *Nagappa* v. *Subba* (1892), I. L. R., 16 Mad., 304.

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Part I.—Natural Rights Generally.

The chief object of this chapter is to deal particularly with the different classes of natural rights which conveniently divide themselves under the heads of (*a*) Natural rights to light and air; (*b*) Natural rights in water; and (*c*) Natural rights of support, and with the principles applying to their disturbance.

The general character of natural rights has already been discussed in my first chapter,[1] so that it is not intended to do more in the first part of this chapter than make a few supplementary observations on this subject, and on that of the leading principles which apply generally to the disturbance of natural rights.

Definition of natural rights.

It will be remembered that natural rights are regarded by law as incident to the ownership of land and as inherent in land *ex jure naturæ*, of natural right, that they are rights *in rem* enforceable against all the world, and that whereas easements are *acquired restrictions* of the complete rights of property, natural rights are themselves part of the complete rights of property and exist wherever land the subject of ownership exists, subject only to curtailment by easement.[2]

As easements cannot possess a separate existence from the dominant tenement, neither can natural rights from the land in which they are inherent.[3]

Natural right not extinguished but suspended.

It will be remembered also that on the creation of an easement adverse to the natural right the latter is not extinguished but suspended merely during the continuance of the easement, and revives upon the extinction of the easement.[4]

Application of the maxim *sic utere tuo ut alienum non laedas.*

It is a fundamental maxim that every landowner should so use and enjoy the natural rights of ownership as not to cause damage to his neighbour,[5] and this is a duty incidental to the possession of land.[6]

Natural use of land.

The authorities shew that in certain cases the natural use of a man's land does not impose upon him liability for damage done to his neighbour, unless the act causing the damage was done in a negligent manner.[7]

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[1] *See* Part I under "Natural Rights."

[2] *Ibid.*

[3] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C., 300.

[4] *Ibid.*

[5] *Tenant* v. *Goldwin* (1705), 2 Ld. Raym. (1092) ; *Rylands* v. *Fletcher* (1863), L. R., 3 H. L., 330 ; *Hodgkinson* v. *Ennor* (1863), 4 B. & S , 229 ; *Humphries* v. *Cousins* (1877), L. R., 2 C. P D., 239 ; *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1874), 1 I. App., 364.

[6] *Humphries* v. *Cousins.*

[7] *Smith* v. *Kenrick* (1849), 7 C.B., 515 ; *Rylands* v. *Fletcher.*

The question has already been discussed under the heading of "Negligence" in connection with the law of support,[1] and need not be further noticed here.

Non-natural use of land.

But the consideration of the maxim *sic utere tuo ut alienum non laedas* gives rise to another proposition, which is, that damage arising from a non-natural use of land is actionable unless it can be assigned to *vis major* or the default of the person damaged.[2]

Fletcher v. *Rylands*.

The rule is well stated by Mr. Justice Blackburn in his judgment in *Fletcher* v. *Rylands* in the Court of Exchequer Chamber.[3] He says :—

"We think that the true rule of law is, that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at the peril, and, if he does not do so, is *primâ facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by shewing that the escape was owing to the plaintiff's default ; or, perhaps, that the escape was the consequence of *vis major*, or the act of God........................... The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own, and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that

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[1] *See* Chap. III, Part IV, c.

[2] *Baird* v. *Williamson* (1863), 15 C. B. N. S., 376 ; *Rylands* v. *Fletcher*.

[3] L. R., 1 Exch. at p. 279.

no mischief may accrue, or answer for the anticipated consequence. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

Vis major.

As to *vis major*, reference to the case of *Nichols* v. *Marsland*[1] shews that a person is not liable for the injury caused to his neighbour by the escape of water stored on his land, if the escape was caused by some means beyond his control, such as a storm, which amounts to *vis major*, or the act of God, in the sense that it is *practically*, though not *physically*, impossible to resist it.[2]

But it is doubtful whether this rule could be uniformly applied to any source of danger or mischief kept on the land; as, for example, to the case mentioned by Baron Bramwell in *Nichols* v. *Marsland*[3] of a tiger being kept on a man's land and escaping by lightning breaking his chain.

No liability for acts done without negligence and in exercise of rights conferred by statute.

But the principle that a man, in exercising a right which belongs to him may be liable, without negligence, for injury done to another person,[4] has been held inapplicable to rights conferred by statute.[5] Thus it has been held that a Railway Company is not responsible for damage from fire caused by sparks from their locomotive engine in the absence of negligence, because they were authorised to use locomotive engines by statute.[6] It would be otherwise if they were not so authorised.[7]

Rylands v. *Fletcher* distinguishable from cases sometimes arising in India.

In India circumstances and conditions of cultivation and irrigation, essential always to the welfare, and often to the existence of a large portion of the population, may render cases where liability is sought to be imposed for the escape of water

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[1] (1875) L. R., 10 Exch., 255.

[2] And *see* further *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1874), 1 I. A., 364; *Ram Lall Singh* v. *Lill Dhary Mahton* (1877) I. L. R., 3 Cal., 776.

[3] *Ibid.* at p. 260.

[4] *e.g.*, the use of water by a riparian proprietor so as to infringe the rights of another riparian proprietor (see *infra*, Part III), or the use of land so as to withdraw the natural support rendered to another's land (see *infra*, Part IV).

[5] *Vaughan* v. *Taff Vale Ry. Co.* (1860), 5 H. & N., 679; *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1874), L. R., 1 I. A. (384).

[6] *Vaughan* v. *Taff Vale Ry. Co.*

[7] *Jones* v. *Festiniog Ry. Co.* (1868), L. R., 3 Q. B., 733.

stored on land artificially or otherwise, altogether distinguishable from the case of *Rylands* v. *Fletcher*.[1]

In that case[2] the defendants, for their own purposes, brought and accumulated upon their land a large quantity of water which they were under no private or public obligation to keep there, in which no rights had been acquired by other persons, and which they could have removed if they had thought fit.

This was considered by the Lord Chancellor to be a "non-natural" use of their land.

But when in India cases arise where the storing of water on land, for the purposes of cultivation and irrigation amounts to a necessity or positive duty, the person storing it will not, in the absence of negligence, be liable for its escape.[3]

Nichols v. *Marsland*.

And this view was taken in England in the case of *Nichols* v. *Marsland*.[4]

Principles applying to the disturbance of natural rights.

The principles applying to the disturbance of natural rights have already been considered in connection with the subject of "nuisances."[5] The following propositions may, however, be usefully added to complete the subject.

First—Two things must combine before a person complaining of the invasion of his natural rights is entitled to a remedy.

There must be damage to himself and a wrong committed by another.[6]

Damnum absque injuria, or damage sustained without wrong committed, is not sufficient.[7]

Secondly—*Injuria sine damno* is actionable.[8]

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[1] See *Madras Ry. Co.* v. *Zemindar of Carvatenagaram*; *Ram Lall Singh* v. *Lill Dhary Mahton* (1877), I. L. R., 3 Cal., 776.

[2] L. R., 1 Exch., 265; L. R., 3 H. L., 330.

[3] *Madras Ry. Co.* v. *Zemindar of Carvatenagaram* (1874), 1 I. A., 364; *Ram Lall Singh* v. *Lill Dhary Mahton* (1877), I. L. R., 3 Cal., 776.

[4] (1875) L. R., 10 Exch., 255.

[5] *See* Chap. IV, Part I A.

[6] *The King* v. *Commissioners of Pagram* (1828), 8 B. & C., 355; *Acton* v. *Blundell* (1843), 12 M. & W. (354).

[7] *Ibid*.

[8] *Wood* v. *Waud* (1849), 3 Exch. at p. 772; *Embrey* v. *Owen* (1851), 8 Exch. at p. 368; *Sampson* v. *Hoddenath* (1857), 1 C. B. N. S. at p. 611; *Swindon Water Work Co.* v. *Wilts and Berks Canal Navigation Co.* (1875), L. R., 7 H. L.

It being the invasion of the legal *right* which gives ground for relief, actual perceptible damage is not indispensable to found the action. If the violation of the right is shewn, the law will presume damage.

Wood v. Waud.

The case of *Wood* v. *Waud* provides a good illustration of these principles. In that case the fact found was that the defendants had fouled the water of a natural stream, but that the pollution had done no actual damage to the plaintiffs because the stream was already so polluted by similar acts of millowners above the defendant's mills and by dyers still further up the stream and by sewers from the town of Bradford, that the wrongful act of the defendants made no practical difference, that is, that the pollution did not make the water less applicable to useful purposes than before.

As to this, Pollock, C. B., in delivering the judgment of the Court said:[2] "We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the water-course flowed, as will be hereafter more fully stated; and that right continues, except so far as it may have been derogated from by user or by grant to the neighbouring land-owners.

"This is a case, therefore, of an injury to a *right*. The defendants by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye-works and other manufactories and other sources of pollution above the plaintiffs should be afterwards discontinued, the plantiffs, who would otherwise have had, in that case, pure water, would be compellable to submit to this nuisance, which then would do serious damage to them."

Swindon Water-works Co. v. Wilts and Berks Canal Nav. Co.

In *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*,[3] Lord Cairns, L. C., said: "It is

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at p. 705; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas. at p. 698; *Subramaniya* v. *Ramchandra* (1877), I. L. R., 1 Mad., 335.

[1] (1849) 3 Exch., 748.

[2] At p. 772.

[3] (1875) L. R., 7 H. L. at p. 705.

a matter quite immaterial whether, as riparian owners of *Wayte's* tenement, any injury has now been sustained, or has not been sustained by the respondents. If the appellants are right, they would, at the end of twenty years, by the exercise of this claim of diversion, entirely defeat the incident of the property, the riparian rights of *Wayte's* tenement. That is a consequence which the owner of *Wayte's* tenement has the right to come into the Court of Chancery to get restrained at once, by injunction, or declaration, as the case may be."

Thirdly—Where there is neither *damnum* nor *injuria* no action can be maintained.[1]

Fourthly—Each recurring act of disturbance constitutes a fresh cause of action.[2] In such cases it is the practice of the Court to grant an injunction to avoid a multiplicity of suits.[3]

Fifthly—Every occupier of land is *primâ facie* entitled to enjoy all the rights incident to the possession or ownership thereof without let or hindrance.

Burden of proof.

Hence upon any person claiming to invade those rights lies the burthen of showing that he is entitled to do so.[4]

A word as to the extinction of natural rights before concluding this part of the chapter. It will be remembered that natural rights are not capable of extinction so long as the subject of them continues to exist.

Natural rights unextinguishable so long as the subject of them exists.

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[1] *Kali Kissen Tagore* v. *Jodoo Lal Mullick* (1879), 5 C. L. R. (P. C.), 79.

[2] *The Court of Wards* v. *Raja Leelanund Singh* (1870), 13 W. R., 48; *Subramaniya* v. *Ramchandra* (1877), I. L. R., 1 Mad., 335. And see *Grand Junction Canal Co.* v. *Shugar* (1871), L. R., 6 Ch. App., 483; *Clowes* v. *Staffordshire Potteries Waterworks Co.* (1872), L. R., 8 Ch. App., 125; *Maharani Rajroop Koer* v. *Syed Abul Hossein* (1880), I. L. R., 6 Cal., 394; 7 C. L. R., 529; 7 I. A., 245.

[3] *Att.-Genl.* v. *Council and Borough of Birmingham* (1858), 4 K. & J., 528; *Grand Junction Canal Co.* v. *Shugar*; *Clowes* v. *Staffordshire Potteries Water Works Co.*; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; Specific Relief Act, s. 54, cl. (e.)

[4] *Bickett* v. *Morris* (1866), L. R., 1 H. L., Sc., 47 (56); *Humphries* v. *Cousins* (1877), L. R., 2 C. P. D., 239: *Ourmet* v. *Kishen Soonduree Dasee* (1871), 15 W. R., 83; *Obhoy Churn Dey* v. *Lukhee Mone Bewa* (1878), 2 C. L. R., 555; *Hari Mohan Thakoor* v. *Kissen Sundari* (1884), I. L. R., 11 Cal., 52.

They may be suspended by virtue of an easement, reviving on the extinction of the latter, but neither by non-user nor by any other means can they be extinguished.[1]

Part II.—Natural Rights to Light and Air.

A.—Natural Rights to the flow of Light and Air.

Light and air publici juris.

Every owner or occupier of land has a natural right to so much light and air as come vertically thereto.[2]

The right to the lateral passage of light and air over a neighbour's land unobstructed by any act of his can only be the subject of an easement, as already seen.[3]

Light and air are *publici juris*;[4] each man is free to take and use in the lawful enjoyment of his own property so much light and air as come thereto.

Neighbours' rights to light and air mutually qualified.

His neighbour's right is the same as his own, but these rights of enjoyment are mutually qualified, for neither owner can prevent the other from making such lawful use of his land as he pleases.

Distinguishable from natural rights in water and the natural right of support.

Herein lies the distinction between the right to light and air and the right to the flow of water in a defined channel, and to the support of soil by soil.[5] In the two latter cases the right, as will be seen, is unqualified.

The man who deprives his neighbour of the accustomed flow of water in a defined channel, or of the support to his land, infringes a well recognised right of property unless he can prove an easement in justification.[6]

But the man who is deprived of light and air by the acts of his neighbour, such as the erection of buildings, has still the right to so much light and air as come to him, but he cannot complain that they are less than before unless he on his side can prove this right by easement to the undiminished light and air.

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[1] *See* Chapter I, Part I, and *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S. at p. 611; *Roberts* v. *Richards* (1881), 50 L. J. Ch., 297.

[2] Gale, 7th Ed., p. 286.

[3] Chap. III, Part I.

[4] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 43.

[5] *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 753.

[6] See *infra*, Parts III and IV, and Chap. III, Parts III and IV.

Bryant v. *Lefever.*

The nature and extent of these natural rights are succinctly elucidated in the judgment of Branwell, L. J., in the case of *Bryant* v. *Lefever.*[1] His treatment of the subject is so clear that it will be useful to give his own words.[2] "What then is the right of land and its owner or occupier? It is to have all natural incidents and advantages, as nature would produce them; there is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow; a right that the rain which would pass over the land, should not be stopped and made to fall on it; a right that the heat from the sun should not be stopped and reflected on it; a right that the wind should not be checked, but should be able to escape freely; and if it were possible that these rights were interfered with by one having no right, no doubt an action would lie. But these natural rights are subject to the rights of adjoining owners, who, for the benefit of the community, have and must have rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbours' rights to use their property in various ways in which property is lawfully and commonly used.

A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other. But nobody could doubt that in such case no action would lie; nor will it in the case of a house being built and having such consequences. That is an ordinary and lawful use of property, so much so as the building of a wall, or planting of a fence or an orchard."

B.—Natural Right to the Purity of Air.

Every man has a natural right to the purity of air coming to his land.[3]

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[1] (1879) L. R., 4 C. P. D., 172.

[2] At p. 175.

[3] I. E. Act, s. 7, (b), ill. (b.)

It is essential to the health of the community that this should be so.

Consequently private health is considered of greater importance than the public benefit.[1]

Pollution not always actionable.

But it is not every pollution that will give a cause of action. In some cases discomfort of itself is not a sufficient ground for relief.[2]

Mere discomfort.

The question whether or not the Court will grant relief for mere discomfort largely depends on the nature of the locality where the pollution complained of occurs.[3]

In a town a man must accept the discomfort which may arise from the necessary operations of trade in his vicinity, whereas in other localities he may not be liable to submit to it.[4]

In any case, the discomfort must be such as to materially interfere with the ordinary comfort of human existence.[5]

The question whether such discomfort is or is not material must depend *inter alia* on the habits and circumstances of the person complaining of the pollution, the conditions of the climate in which he lives, and the relative positions of the two properties.[6]

What would not be material discomfort in England might very well be material discomfort in India, and *vice versâ*.

Walter v. *Selfe.*

Walter v. *Selfe*[7] is an instructive case on this point. There the plaintiff, the owner of a dwelling house in a rural district, complained of the burning of bricks by the defendant on his adjoining land which, though not dangerous to health, was so offensive as to cause serious discomfort to himself and the inmates of his house.

In the circumstances of the case the plaintiff was held entitled to an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family.

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[1] *See* Chap. IV, Part I A.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Walter* v. *Selfe* (1851), 4 DeG. & S., 315; 20 L. J. Ch., 433; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 409; *Fleming* v. *Hislop* (1886), L. R., 11 App. Cas., 686.

[6] *Walter* v. *Selfe.*

[7] (1851) 4 DeG. & S., 315; 20 L. J. Ch., 433.

"Untainted" and "unpolluted" air was considered to mean not necessarily air as fresh, free, and pure as at the time of building the plantiff's house, the atmosphere there was, but air not rendered, to an important degree, less compatible, or, at least, not rendered incompatible, with the physical comfort of human existence, a phrase to be understood with reference to the climate and habits of England.

The Court was further of opinion that the pollution of the plaintiff's air, though not injurious to health, was none the less a nuisance to be relieved against in causing serious and material discomfort according to plain, simple, and sober notions amongst the English people.

"Material discomfort."

"'Material discomfort' means such discomfort as excludes any sentimental, speculative, trivial discomfort or personal annoyance, a thing which the law may be said to take no notice of and to have no care for."[1]

Terms of injunction granted.

The terms of the injunction granted in cases of pollution of air usually are that the defendant, his servants, workmen and agents be restrained from using the subject of the nuisance in such manner as to occasion damage or annoyance to the plaintiff.[2]

Part III.—Natural Rights in Water.

It will be convenient to enumerate the headings under which it is proposed to divide this branch of the subject.

A.—Natural Rights in Private Streams—

(1) *Generally.*

(2) *Right of riparian proprietors to the use and consumption of water.*

(3) *Right of riparian proprietors to the purity of water.*

(4) *Rights of riparian proprietors to protect their lands from the operation of floods.*

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[1] *Per* Lord Selborne in *Fleming* v. *Hislop* (1886), L. R., 11 App. Cas. at p. 690.

[2] *Walter* v. *Selfe* (1851), 3 DeG. & S., 315; 20 L. J. Ch., 433; *Crump* v. *Lambert* (1867), L. R., 3 Eq., 409; *Rosken* v. *Whitworth* (1871), 19 W. R., 804; *Goose* v. *Bedford* (1873), 21 W. R., 449; and see *Fleming* v. *Hislop* (1886), L. R., 11 App. Cas., 686, and Chapter IV, Part IA.

B.—Natural Rights in Public Streams.
C.—Natural Rights in Natural Lakes or Ponds.
D.—Miscellaneous Natural Rights in Water.
E.—Alienation of Natural Rights in Water.
F.—Disturbance of Natural Rights in Water and Remedies therefor.

A.—Natural Rights in Private Streams.

(1) *Generally.*

Definition of natural rights in water.

In natural streams flowing past his land each riparian proprietor has certain natural rights. These rights were not rights of ownership in the water, but rights to the usufruct of the water.[1]

They do not depend upon a grant, but are *jure naturae.*[2] Thus it has been said that natural watercourses are like ways of necessity.[3]

Natural rights only in natural streams.

Natural rights in "private streams" are limited to such private streams as can be described as "Natural."[4]

Upon the question as to what is a "Natural" stream the correct view appears to be that a stream in order to be natural must flow at its source by the operation of nature, and in a defined channel.[5]

Natural streams must be known and defined.

All natural streams in order to be the subject of natural rights must flow in known and defined channels whether on the surface of the land or under ground.[6]

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[1] *Wood* v. *Waud* (1849), 3 Exch. at p. 775; and see *Mason* v. *Still* (1833), 5 B. and Ad. at p. 24; *Embrey* v. *Owen* (1851), 6 Exch., 353.

[2] *Rawstron* v. *Taylor* (1855), 11 Exch. at p. 382; *Chasemore* v. *Richards* (1859), 7 H. L. C. at pp. 379, 382; *Court of Wards* v. *Raja Leelaland Singh* (1870), B. W. R., 48.

[3] *Rawstron* v. *Taylor*, at p. 382.

[4] *Wood* v. *Waud* (1849), 3 Exch., 748; *Rawstron* v. *Taylor* (1855), 11 Exch., 369; *Sampson* v. *Hoddinott* (1857) 1 C. B. N. S., 611; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46. This is the general rule. There is, however, an exception to this rule in the case of the pollution of water. See *infra* (3) under "Rights of riparian proprietors to the purity of water."

[5] See *Gared* v. *Martyn* (1865), 19 C. B. N. S., 732; and I. E. Act, s. 7, explanation.

[6] *Acton* v. *Blundell* (1843), 12 M. & W., 324; *Embrey* v. *Owen* (1851), 6 Exch., 353; *Rawstron* v. *Taylor* (1855), 4 Exch., 369; *Broadbent* v. *Ramsbotham* (1855), 11 Exch., 602; *Dudden* v. *Guardians of the Clutton Union* (1857), 1 H. and N., 627; *Chasemore* v. *Richards* (1859), 7 H. L. C., 349.

Natural streams may be intermittent or permanent.

And it seems that natural rights can exist in intermittent, as well as permanent natural streams.[1]

Definition of artificial stream.

It has already been seen that there are no natural rights in artificial streams, but in laying down this broad distinction between natural and artificial streams it becomes important to ascertain what an artificial stream really is.

Gared v. *Martyn.*

The case of *Gared* v. *Martyn*[2] indicates that an artificial stream is a stream which flows at its source by the operation of man, whereas a natural stream is a stream which flows at its source by the operation of nature.

Stream, partly natural, partly artificial, how described.

As to this proposition there appears to be no doubt, but what is the description to be given to a stream which, natural in its inception and in its flow for a certain distance, is afterwards conducted in a particular direction by artificial means? In these circumstances can it be said to remain a natural stream or does it become an artificial stream?

The authorities appear to shew that in such a case the stream, if flowing in a permanent channel under ground or on the surface, whether it be called a natural stream as being one originally, or an artificial stream in regard to the particular means employed, must be regarded as possessing the incidents of a natural stream, conferring similar rights, and imposing similar obligations.[3]

Holker v. *Porritt.*

The case of *Holker* v. *Porritt*[4] is in point. There a natural stream divided itself into two branches; one branch running down to the river *Irwell,* the other running to a place where it formerly emptied itself into a watering trough, and the overflow, without forming itself into any visible stream, diffused itself over the surface of the ground and discharged itself by percolation through the surface or in small rills into the *Irwell.*

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[1] *Drewett* v. *Sheard* (1836), 7 C. and P., 465; *Trafford* v. *Rex* (1832), 8 Bing., 204; *Narayan* v. *Keshav* (1898), I. L. R. 23 Bom., 506; I. E. Act, s. 7, explanation.

[2] *Gared* v. *Martyn* (1865), 19 C. B. N. S., 732.

[3] *Sutcliffe* v. *Booth* (1863), 9 Jur. N. S., 1037; 32 L. J. Q. B., 136; *Nuttall* v. *Bracewell*, (1866), L. R., 2 Exch. 1; *Holker* v. *Porritt*, (1873), L. R., 8 Exch. 107; *Roberts* v. *Richards* (1881), 50 L. J. Ch., 297.

[4] (1873) L. R., 8 Exch., 107.

The owner of the land on which the trough stood collected the overflow into a reservoir and thence conducted it by a culvert to his mills which stood on the banks of the Irwell. Thereafter he sold the mill with all water rights to the plaintiff, and the plaintiff sued the defendant for obstructing the flow of water to his mill.

It was held that the plaintiff could maintain the action and would at any time have been entitled to do so after the artificial construction whereby the stream had been conducted to the mill on the ground that the proprietor of the mill then became possessed of the same rights as the proprietors on the banks of a natural stream.

The conclusion arrived at by the Court appears to be that the artificial operations resulted merely in the continuance of a natural stream and could not be held to divest it of its former incidents.

Martin, B., said:—"I am of opinion that if a proprietor in such a case expends his labour in cutting a course for the water, he acquires a right analogous to that which he would have if that course had been a natural stream, and no distinction can be made between a natural stream and a water course made to drain land and to carry down the water to its natural destination."[1]

In this case apart from any question of ownership of the *natural* right, the enjoyment of the culvert for over twenty years would have been sufficient to confer a right to the continuance of the stream if it had been necessary to rely upon that.

Nuttall v. Bracewell.

In *Nuttall* v. *Bracewell*,[2] Channell, B., said that he saw no reason why the law applicable to ordinary running streams should not be applicable to a natural stream or flow of water though flowing in an artificial channel, placing the artificial stream on the same footing as a natural stream, as regards the rights of riparian proprietors, as was held in *Sutcliffe* v. *Booth*,[3]

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[1] At p. 116.

[2] (1866) L. R., 2 Exch. at p. 14.

[3] (1863) 9 Jur. N. S., 1037; 32 L. J. Q. B., 136.

though it might be that the case of an entirely artificial stream, as one flowing from a river, might be different.

The principle established in these cases has been thought to be open to objection for the reasons pointed out by Mr. Goddard in his work on Easements.[1] The question is of importance not only to the person claiming the right, but to other landowners, as involving various considerations affecting the rights and obligations attaching to the enjoyment of the stream.

It is impossible, however, to say that these considerations were not present to the minds of the learned Judges who decided the abovementioned cases, and the foundation of their opinion seems to be that if a man expends his labour in conducting a natural stream through an artificial channel without thereby affecting the rights of other land owners, it is only reasonable that he should be taken to possess the same rights in that stream as in a stream flowing in a natural channel.

Artificial stream flowing into natural stream becomes natural.

The effect of an artificial stream flowing into a natural stream is to cause the former to become part of the latter as soon as it reaches it.[2]

Rights of riparian proprietors in natural streams.

With regard to the rights of riparian proprietors in natural streams it may be stated as a general proposition established both in England and in India that every riparian proprietor has, subject to similar natural rights of upper and lower proprietors, the right to have water come to him in its ordinary and accustomed course, undiminished in flow, quantity, and quality, and unaffected in temperature, and to go from him without obstruction.[3]

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[1] 5th ed., p. 77.

[2] *Wood* v. *Ward* (1849), 3 Exch. at p. 779.

[3] *Wright* v. *Howard* (1823), 1 Sim. and Stu., 190; *Mason* v. *Hill* (1833), 5 B. and Ad., 1; 2 Nev. and M., 747; *Embrey* v. *Owen* (1851), 6 Exch., 353; *Miner* v. *Gilmour* (1858), 12 Moo. P. C., 156; *Chasemore* v. *Richards* (1859), 7 H. L. C. at p. 382; *Kensit* v. *Gt. E. Ry. Co.* (1884), L. R., 27 Ch. D. at p. 130; *John Young & Co.* v. *Bankier Distillery Co.* (1893). App. Cas., 691; *Sheikh Monowar Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218; *Court of Wards* v. *Raja Leelaland Singh* (1870), 13 W. R., 48; *Baboo Cheemroo Singh* v. *Mullick Khyrub Ahmed* (1873), 18 W. R., 525; *Debi Pershad Singh* v. *Joynath Singh* (1897), I. L. R., 24 Cal., 865 (P. C); *Sangili* v. *Sundaram* (1897),

Embrey v. *Owen.*

Thus, as was said by Baron Parke in *Embrey* v. *Owen*,[1] while referring to the right of a riparian owner in the water flowing past his land, "The right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of *all* the water in its natural state . . . . . but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence."

Rights as to the enjoyment of water will be considered hereafter in connection with its reasonable use and consumption by a riparian proprietor as it flows past his land.[2]

Relative positions of riparian proprietors.

Every riparian proprietor has the same rights and is under the same obligations as his co-proprietors, whether he be a proprietor at the source or at the end of the particular stream, or an intermediate proprietor.[3]

If this be the law as between upper and lower riparian proprietors, what is the law as between opposite riparian proprietors ?

Where the two sides of a stream belong to different proprietors the presumption is that the ownership of each extends *usque ad medium filum aquae*.[4]

The soil of the bed of the river is not the common property of the respective owners, but is considered to belong to each in severalty up to the middle line.[5]

This being the rule of ownership as regards the soil of the stream or river it remains to be seen what are the principles

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I. L. R., 20 Mad., 279 ; *Narayan* v. *Keshar* (1898), I. L. R., 23 Bom., 506 ; and *see* I. E. Act., s. 7, ill. (*h*). As to the right of riparian proprietors to have the water coming to them unaffected in temperature see specially *Mason* v. *Hill; John Young & Co.* v. *Bankier Distillery Co ; Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), L. R., 11 Q. B. D., 155.

[1] (1851) 6 Exch. at p. 369.

[2] See *infra* under "Rights of riparian proprietors to the use and consumption of water."

[3] *Wright* v. *Howard* (1823), 1 Sim. and Stu., 190 ; *Dudden* v. *Guardians of the Clutton Union* (1857), 1 H. and N., 627.

[4] *Bickett* v. *Morris* (1866), L. R., 1 Sc. App., 47.

[5] *Ibid.*

which regulate the use or enjoyment of the water by the respective owners.

The respective rights and obligations of opposite proprietors in the use and enjoyment of the water of a stream or non-tidal and non-navigable river flowing between their respective proprietors were considered and defined by the House of Lords in the important case of *Bickett* v. *Morris*.[1]

Bickett v. *Morris*.

In that case the appellant and respondents were owners of property directly opposite each other on the banks of a river. It was agreed that the appellant should build into the *alveus* up to a certain fixed point and the appellant in pursuance of such agreement proceeded so to build, but as the direction of the building operations extended beyond the point agreed upon, the respondents applied to the Court of Session in Scotland for a suspension and interdict against him and brought an action to have it declared that he had no rights to erect buildings on the *solum* of the river beyond a particular red line.

The case eventually came up to the House of Lords, and the decision of that tribunal established the following important principles :—

(*a*) Neither of two opposite riparian proprietors is entitled to use the stream or river in such a way as to interfere with its natural flow.[2]

(*b*) He cannot even protect his land from inundation if the means employed for such protection causes actual injury to the property of the opposite proprietor.[3]

(*c*) An obstruction to the current of a stream is an injury of which the Courts will take notice even though immediate damage cannot be described or actual loss predicated.

But where the encroachment is on soil the ownership of which is vested in Government, and where the party

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[1] (1866) L. R., 1 Sc. App., 47.

[2] The same principle has been applied in India, *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218. See also *Att.-Genl.* v. *Earl of Lonsdale* (1868), L. R., 7 Eq. at p. 387.

[3] *Att.-Genl.* v. *Earl of Lonsdale*.

complaining proves no right or easement to have the water flow in its accustomed manner or any sensible alteration of the flow of the water, a suit for the removal of the encroachment will not lie.[1]

(2) *Right of Riparian Proprietors to the use and consumption of water.*

Extent of the right.

The rule that every riparian proprietor has a natural right that the water coming to his land shall be undiminished in quantity is subject to the qualification that other riparian proprietors may, for certain purposes, and under certain conditions, make a reasonable use of the water.

According to the civil law and the old English authorities flowing water was said to be *publici juris*.[2]

This gave rise to a misconception of the extent of the right to use and consume flowing water, and it was asserted that if flowing water was *publici juris*, the first appropriation of it to any *useful purpose* gave the person appropriating it a title against other riparian owners so as to deprive them of the benefit of the natural flow of water unless they had already made a beneficial use of the stream.

Mason v. *Hill; Embrey* v. *Owen.*

This misconception was corrected by two very important cases, *Mason* v. *Hill*[3] and *Embrey* v. *Owen*,[4] in which it was successively laid down by judges of great eminence that flowing water is *publici juris*, not in the sense that it is *bonum vacans* to which the first occupant may acquire an exclusive right, but in the sense only that all may reasonably use it who have a right of access to it, and that none can have property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that, during the time of the possession only.

Orr Ewing v. *Colquhoun.*

And in *Orr Ewing* v. *Colquhoun*[5] Lord Blackburn pointed out that the case of *Mason* v. *Hill* has settled the law that a

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[1] *Kali Kissen Tagore* v. *Jodoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97.

[2] See *Mason* v. *Hill* (1833), 5 B. & Ad., 1; *Embrey* v. *Owen* (1851), 6 Exch., 353.

[3] (1833) 5 B. & Ad., 1.

[4] (1851) 6 Exch., 353.

[5] (1877) L. R., 2 App. Cas. at p. 854.

riparian proprietor has, as incident to his property in the land, a proprietary right to have the stream flowing past his land flow in its natural state, neither increased nor diminished, and this quite independently of whether he has yet made use of it, or to use a former phrase, appropriated the water. And the statement of the law by Lord Kingsdown in *Miner* v. *Gilmour*[1] points to the same conclusion. Since these decisions the dictum of Tindal, C.J., in *Liggins* v. *Inge* that flowing water is *publici juris* giving the first person who appropriates any part of it flowing past his own land to his own use, the right to the use of so much as he thus appropriates against any other, can no longer be regarded as law.[2]

Miner v. *Gilmour*.

Reasonable user.

What is the test of reasonable user must depend upon the circumstances of each case,[3] but in no case must the user be such as to infringe the rights of other riparian proprietors.[4]

What amounts to an infringement is a question which will be discussed hereafter.[5]

The law relating to the use and consumption of water is perspicuously stated in Kent's Commentaries[6] and as this statement of the law was adopted by the Court in *Embrey* v. *Owen*,[7] it will be useful to reproduce it here.

Statement of law as to the use and consumption of water.

"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 usufruct as it passes

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[1] (1858) 12 Moo. P. C., 158.

[2] See *per* Cave, J., in *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), L. R., 11 Q. B. D. at p. 161.

[3] *Embrey* v. *Owen*, and see *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), L. R., 11 Q. B. D. at page 168.

[4] *Mason* v. *Hill*; *Embrey* v. *Owen*; *Miner* v. *Gilmour* (1858), 12 Moo. P. C., 158; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 H. L. 697.

[5] See *infra* under "Disturbance of Natural Rights in water and remedies therefor."

[6] 3 Kent's Comm. Lect., 52, p. 439, *et seq.*

[7] (1851) 6 Exch. at p. 369

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.[1] 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 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 neighbour below him who has an equal right to the subsequent use of the same water ; nor can he by dams or any obstruction cause the water injuriously to overflow the grounds and springs of his neighbour above him. 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 or the manner of using the water. All that the law requires of the party, by or 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 above or below on the

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[1] This explains the natural right of a riparian proprietor to have water come to him in its ordinary and accustomed course. *Kensit* v. *Great E. Ry. Co.* (1884), L. R., 27 Ch. D. at p. 131.

stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities to the annoyance of his neighbour. 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 naturally do and injure the proprietors below. But this rule 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 utterly useless, either for manufactories or agricultural purposes. The just and equitable principle is given in the Roman Law : *sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat.*"

Ordinary and extraordinary use of water.

From this statement of the law it will be convenient to consider the use of water by riparian proprietors from two points of view.

First.—From the point of view of what may be called the ordinary use of water.

Secondly.—From the point of view of what may be called the extraordinary use of water.

Miner v. *Gilmour.*

This division of the subject was made in the well-known case of *Miner* v. *Gilmour*,[1] where Lord Kingsdown in delivering the judgment of the Privy Council used the following language :—

" By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land, for instance, to the reasonable use of the water for his domestic purposes and his cattle, and this without regard to the effect which such use may have, in a case of deficiency, upon proprietors lower down the stream.[2]

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[1] (1858) 12 Moo. P. C., p. 156.

[2] The correctness of this doctrine was questioned in the case of *Lord Norbury* v. *Kitchin* (1863), 3 F. & F., 292 ; 9 Jur. N. S., 132, by a majority of the judges, but it was unnecessary to decide the point, as the Court found the defendant had not taken an unreasonable quantity of water. Lord Kingsdown's view of the law was however distinctly

"But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him.

"Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation.

"But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

(*a*) *The Ordinary Use of Water.*

Ordinary use of water.

It may be taken as settled law that every riparian proprietor has an unqualified right to the use of the water flowing past his land for washing, drinking, and domestic purposes, and for his cattle, and for such purposes he has a right not only to the use, but also to the consumption of the water.[1]

(*b*) *The Extraordinary Use of Water.*

Extraordinary use of water.

It is in this branch of the subject that difficulties arise, for though the doctrine is undoubted that a riparian proprietor may use the water flowing past his land for extraordinary purposes, such as those of agriculture, irrigation, and manufacture, provided the user be reasonable,[2] it is the impossibility of defining precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application that creates difficulties in cases connected with the extraordinary use of water.

Question of reasonableness.

The question of reasonableness must in all such cases be a question of degree to be determined by the particular circum-

approved in *Lord Norbury* v. *Kitchin* by Martin, B., and in *Nuttall* v. *Bracewell* (1866), L. R., 2 Exch., pp. 9, 13, by Martin, B., and Channell, B., and Pollock, C. B., and it may now be taken as correct.

[1] *Mason* v. *Hill* (1833), 5 B. & Ad., 1; *Embrey* v. *Owen* (1851), 6 Exch. 353; *Miner* v. *Gilmour* (1858), 12 Moo. P. C., 131; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 H. L., 697.

[2] *Embrey* v. *Owen*; *Miner* v. *Gilmour*; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.*

stances of each case, the extent of the estate and the nature and purpose of the user.[1]

Law in America.

In America, a very liberal use of the water, for the purposes of irrigation and for carrying on manufactures, has been allowed. In France, also, the right of the riparian proprietor to the use of water is not strictly construed. He may use it "*en bon père de famille, à son plus grand avantage.*" He may make trenches to conduct the water to irrigate his land, if he return it with no more loss than that which the irrigation caused.[2]

In France.

In England.

In England it is not clear that a user to that extent would be permitted; nor would it *in every case* be deemed a lawful enjoyment of the water, if it was again returned into the stream or river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor.[3] As Baron Parke said in *Embrey* v. *Owen.*[4] "This must depend upon the circumstances of each case. On the one hand it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the actual stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering pot into the stream in order to water his garden, or allow his family or cattle to drink it."

Embrey v. *Owen.*

Swindon Waterworks Co. v. *Wilts and Berks Canal Nav. Co.*

In *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*[5] it was said that in order to make the extraordinary use of water a reasonable use, the exhaustion of water which thereby takes places must be so

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[1] *Embrey* v. *Owen* (1851), 6 Exch., p. 372, and see *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), I. L. R., 11 Q. B. D. at p. 168; 52 L. J. Q. B. at p. 450.

[2] See *Wood* v. *Waud* (1849), 3 Exch. at p. 781; *Embrey* v. *Owen* (1853), 6 Exch., p. 371.

[3] See *Wood* v. *Waud; Embrey* v. *Owen.*

[4] (1851) 6 Exch. at p. 372.

[5] (1875) L. R., 7 H. L., 697.

inconsiderable as not to form a subject of complaint by the lower riparian proprietor, and the water must be restored after the object of irrigation or other work is answered, in a volume substantially equal to that in which it passed before.

Special circumstances such as the development of trade in the neighbourhood, and the use to which the water is put by adjoining owners, may convert an extraordinary use into an ordinary use, and make reasonable what might otherwise be unreasonable.[1]

Special circumstances may convert extraordinary into ordinary use.

Thus in *Earl of Sandwich* v. *Great Northern Railway Company* a railway company whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines and for the general purposes of the station. It was held that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that the quantity taken was reasonable.[2]

Earl of Sandwich v. *Great N. Ry. Co.*

Further it is essential to a reasonable use of the water that the purposes of agriculture, irrigation, or manufacture to which the water may be applied, must be connected with the tenement of the upper proprietor using the water.[3]

Purposes for which water used must be connected with tenement of riparian proprietor using the water.

Thus it has been held that a complete diversion of a stream for manufacturing purposes unconnected with the upper tenement, is not a reasonable use of water, and cannot be permitted.[4] Any use of the water which involves a confiscation of the rights of the other riparian proprietors or an annihilation of that portion of the stream which they require for their own purposes, is unreasonable and will not be permitted.[5]

Law of India similar to law of England.

Lord Norbury v. *Kitchin.*

In every case the user must be directed to purposes of utility to the riparian estate.

User must be of utility to riparian estate.

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[1] *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), I. L. R., 11 Q. B. D. at p. 168 ; 52 L. J. Q. B. at p. 450.

[2] (1878) L. R., 10 Ch. D., 707.

[3] *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 H. L., 697.

[4] *Ibid.*

[5] *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* 875), L. R., 7 H. L., 697. And see *Medway Navigation Co.* v. *Earl of Romney* (1861), 9 C. B. N. S., 575 ; 30 L. J. Ch., 236.

Thus in *Lord Norbury* v. *Kitchin*[1] it was ruled that the defendant had no right to abstract water from the stream flowing past his land for the purpose of forming an ornamental pond.

The law of India does not differ from the law of England in relation to the rights of riparian proprietors to the use of water in natural streams.[2]

In India as in England the natural right in the water is not a right of ownership or a right to the exclusive use of the water, but a right of usufruct for all reasonable and legitimate purposes, not materially interfering with an equally beneficent enjoyment of the water by other riparian proprietors.[3]

What is a reasonable or unreasonable use of the water is a question of fact to be determined by the particular circumstances of the case.[4]

Perumal v. *Ramasami Chetti.*

In *Perumal* v. *Ramasami Chetti*[5] it was decided following the English law that riparian proprietors are entitled to use and consume the water of the stream which their land adjoins for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (*a*) that the use is reasonable, (*b*) that it is required for their purposes as owners of the land, and (*c*) that it does not destroy or render useless or materially diminish or affect the application of the water by lower riparian proprietors in the exercise of their rights.

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[1] (1863) 3 F. & F., 292; 9 Jur. N. S., 132.

[2] *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16; *Debi Pershad Singh* v. *Joynath Singh* (1897), I. L. R., 24 Cal., 865 (P. C.); *Narayan* v. *Keshav* (1898), I. L. R., 23 Bom., 506. And *see* I. E. Act, s. 7, Ill. (*h*).

[3] *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218; *Court of Wards* v. *Rajah Leelaland Singh* (1870), 13 W. R., 48; *Baboo Chumroo Singh* v. *Mullick Khyred Ahmed* (1872), 18 W. R., 525; *First Assistant Collector of Nasik* v. *Shamji Dasrath* (1878), 7 Bom. H. C., 209 (212); *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16; *Debi Pershad Singh* v. *Joynath Singh*; *Sangili* v. *Sundaram* (1897), I. L. R., 20 Mad., 279; *Narayan* v. *Keshav*.

[4] *Court of Wards* v. *Rajah Leelalund Singh*; *Perumal* v. *Ramasami*; *Debi Pershad Singh* v. *Joynath Singh*; *Narayan* v. *Keshav*. This is a question which a Mamlatdar has jurisdiction to decide in Bombay under Bombay Act III of 1876 s. 6, *Narayan* v. *Keshav*.

[5] (1887) I. L. R., 11 Mad., 16.

In connection with the important subject of irrigation, the limits within which a riparian proprietor may use the water of a natural stream flowing through or past his land have been recently clearly defined by the Privy Council in the case of *Debi Pershad Singh* v. *Joynath Singh*[1] on appeal from the Calcutta High Court.

Debi Pershad Singh v. *Joynath Singh.*

In that case the appellants who were the plaintiffs in the first Court and proprietors of a *mehal* including three *mouzahs* through which a hill stream or *nullah* ran, claimed the right to divert the water of the stream for the purpose of irrigation, and store so much on their land as they required for such purpose, leaving the surplus, if any, for the use of the proprietors below. It was held by the Privy Council that the law gave no such right. Lord Watson in delivering judgment said:[2] "The right of a riparian proprietor to divert and use water for the purpose of irrigation is certainly not understated in the plaint. The right claimed by the appellants in the first conclusion is not less broadly asserted in the body of the plaint, and is neither more nor less than a right on the part of an upper proprietor to dam back a river running through his land, and to impound as much of its water as he may find convenient for the purposes of irrigation, leaving only the surplus, if any, for the use of the proprietors below.

In the absence of a right acquired by contract with the lower heritors, or by prescriptive use, the law concedes no such right. The common law right of a proprietor, in the position of the appellants, is to take and use, for the purpose of irrigation, so much only of the water of the stream as can be abstracted without materially diminishing the quantity which is allowed to descend for the use of riparian proprietors below, and without impairing its quality. What quantity of water can be abstracted and consumed, without infringing that essential condition, must in all cases be a question of circumstances, depending mainly upon the size of the river or stream, and the proportion which the water abstracted bears to its entire volume."

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[1] (1897) I. L. R., 24 Cal., 865.

[2] At p. 874.

(3) *Rights of Riparian Proprietors to the purity of water.*

The pollution of a stream, whether natural[1] or artificial,[2] is an infringement of the natural right to the purity of water, upon the principle that no one is entitled to cause polluted water to flow to his neighbour's premises without having a special right to do so.

Hodgkinson v. *Ennor.*

In *Hodgkinson* v. *Ennor*,[3] Blackburn, J., said, "I take the law to be as stated in *Tenant* v. *Goldwin*,[4] that you must not injure the property of your neighbour, and consequently if filth is created on any man's land, then, in the quaint language of the report in Salk., 361, 'he whose dirt it is, must keep it that it may not trespass.'"

Natural right to purity of water in artificial as in natural streams.

It will be noticed that the right to the purity of water in artificial streams furnishes an exception to the general rules that rights in artificial streams must be founded on the ownership of easements,[5] and that natural rights are confined to natural streams.[6]

Whaley v. *Laing.*

In *Whaley* v. *Laing* the plaintiff, who was a licensee of a Canal Company for the purpose of using the water of the canal in order to supply his steam engines and boilers, sued the defendant for polluting the water and thereby causing injury to the said steam engines and boilers. In giving judgment for the plaintiff the Court of Exchequer appears to have accepted the proposition that whatever the nature of a stream, a riparian proprietor entitled to the use of its water has also the natural right that his neighbour shall not pollute it.[7]

This view was not dissented from in the Court of Exchequer Chamber.[8]

It is not necessary to consider here the question of disturbance of natural rights to the purity of water, as that subject

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[1] *Wood* v. *Waud* (1849), 3 Exch., 748; *Hodgkinson* v. *Ennor* (1863), 4 B. & S., 229.

[2] *Whaley* v. *Laing* (1857), 2 H. & N., 476; (1858) 3 H. & N., 675.

[3] (1863) 4 B. & S. at p. 241.

[4] 2 Ld. Raymond, 1089; Salk. 21, 360; 6 Mod., 311; Holt, 500.

[5] See *supra*, Chap. III, Part III, B.

[6] See *supra*, Part III, A (i).

[7] (1857) 2 H. & N., 476.

[8] (1858) 3 H. & N., 675.

has already been discussed in connection with "Nuisances"[1] and at the beginning of this chapter.[2]

(4) *Right of Riparian Proprietors to protect their lands from the operation of floods.*

Extent of the right.

Riparian proprietors are entitled to protect themselves against the water of a stream or river rising in flood and overflowing their lands, provided they do not thereby cause any injury to the lands and property of other riparian proprietors.[3]

This is a qualification of the rule that where there is a natural outlet for natural water no one has a right for his own purposes to diminish it.[4]

B.—Natural Rights in Public Streams.

Subject to public right of navigation riparian proprietors have similar rights in public as in private streams.

Subject to the public right of navigation riparian proprietors have the same rights and liabilities and the same remedies for the infringement of those rights, in public, navigable, and tidal rivers as in private rivers.[5]

An important authority for this proposition is the case of *Lyon* v. *Fishmongers Company*[6] in the House of Lords.

Lyon v. *Fishmongers Co.*

When the case was before the Court of Appeal the Lords Justices appear to have thought that the natural rights possessed by a riparian proprietor, as such, on a non-navigable river, are not possessed by a riparian proprietor on a navigable river, and that the latter's right of complaint in case of interference with the river was only as one of the public, for a nuisance or an interruption to the navigation.

But this view did not commend itself to the House of Lords. In the latter tribunal Lord Chancellor Cairns in the course of his judgment demonstrates that the difference as regards the enjoyment of natural rights must be between rivers

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[1] See *supra*, Chap. IV, Part I, A.

[2] See *supra*, Part I, under "Principles applying to disturbance of Natural Rights."

[3] *Trafford* v. *The King* (1832), 8 Bing., 204 (211) ; *Nield* v. *London and North-Western Ry. Co.* (1874), L. R., 10 Exch., 4 ; *Imam Ali* v. *Poresh Mundul* (1882), I. L. R., 8 Cal., 468.

[4] *Nield* v. *London and N.-W. Ry. Co.; Imam Ali* v. *Poresh Mundul.*

[5] *Att.-Gen.* v. *Lord Lonsdale* (1868), L. R., 7 Eq., 377 ; *Lyon* v. *Fishmongers Co.* (1876), L. R., 1 App. Cas., 662.

[6] (1876) L. R., 1 App. Cas., 662.

which are navigable and those which are not, and not between tidal and non-tidal rivers, since on a navigable river a riparian owner has, superadded to his riparian rights, a right of navigation over every part of the river, whilst on the other hand, his riparian rights must be controlled in this respect, that whereas in a non-navigable river, all riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public right of navigation would intervene and prevent this being done.

And says the Lord Chancellor "the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land ; but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation."

C.—Natural Rights in Natural Lakes or Ponds.

Under the Indian Easements Act,[1] riparian proprietors have the same rights in natural lakes or ponds into or out of which a natural stream flows, as in natural streams.

D.—Miscellaneous Natural Rights in Water.

It will be remembered that natural rights in water do not come into existence so long as the water does not flow in known and defined channels whether on the surface or underground.[2]

Water confined in well or tank.

Hence water confined in a well or tank, though the subject of ownership,[3] gives no natural right as against adjoining owners that it shall not by anything lawfully done on their land be drawn off or that the percolation of water to such well or tank by which it is supplied shall not be interfered with.[4]

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[1] S. 7, ill. (*h*).

[2] See *supra*, Part III, A (1).

[3] *Race* v. *Ward* (1855), 4 E. & B., 702; 24 L. J. Q. B., 153.

[4] *Acton* v. *Blundell* (1843), 12 M. & W., 324; *see* this case fully set out in Chap. III, Part III, C.

Percolation.

Similarly a landowner who for the purpose of working his mill, or for other purposes, uses water derived from percolations has no right of action against his neighbour if the latter in the lawful enjoyment of his own property does or causes anything to be done which diminishes or stops such percolations.[1] The corollary of these propositions is that the owner of land containing underground water, which percolates by undefined channels and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it.[2]

Motive in drawing water away or stopping percolations, immaterial.

The motive of the act of drawing the water away or stopping the percolation is immaterial, for no use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious.[3]

It is the act, not the motive for the act, which must be regarded.[4]

Natural righ to collect and retain surface water.

Further every landowner has a natural right to collect and retain within the limits of his own land surface water not flowing in a defined channel.[5]

Exception to rule allowing diversion or appropriation of percolating water.

The general rule allowing a landowner to divert or appropriate within his own land, without regard to his neighbour, water percolating or flowing in undefined channels is subject to one exception, which arises where the water diverted or appropriated gives to a stream flowing in a defined channel above the surface of the ground a support which, if withdrawn, would cause the stream to disappear or become considerably diminished.

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[1] *Acton* v. *Blundel* ; *Chasemore* v. *Richards* (1859), 7 H. L. C., 349 ; and *see* Chap. III, Part III, C ; *Mayor of Bradford* v. *Pickles* (1895), A. C., 587 ; 64 L. J. Ch., 759.

[2] *Chasemore* v. *Richards ; Mayor of Bradford* v. *Pickles.*

[3] *Mayor of Bradford* v. *Pickles.*

[4] *Ibid.*

[5] *Rawstron* v. *Taylor* (1855), 11 Exch., 369 ; 25 L. J. Exch., 33 ; *Broadb* v. *Ramsbotham* (1855), 11 Exch., 602 ; 25 L. J. Exch , 115 ; *Mayor of Bradford* v. *Pickles* (1895), App. Cas. 587 ; 64 L. J. Ch., 759 ; *Bunsee Sahoo* v. *Kali Pershad* (1870), 13 W. R., 414 ; *Robinson* v. *Ayya Krishnama Chariyar* (1872), 7 Mad. H. C. at p. 46 ; *Hari Mohun Thakur* v. *Kissen Sundari* (1884), I. L. R., 11 Cal., 52 ; *Perumal* v. *Ramasami* (1887), I. L. R., 11 Mad., 16, and *see* I. E. Act, s. 7 Ill. (*g*).

Grand Junction Canal Co. v. Shugar.

This was decided in the case of *Grand Junction Canal Company* v. *Shugar*[1] where Lord Hatherley, L. C., in giving judgment said : " As far as regards the support of the water, all one can say is this : I do not think *Chasemore* v. *Richards*, or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground ; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it, and have it come to them unimpaired in quality, and undiminished in quantity.

This case, while providing an exception to the general rule above stated, supports the proposition that every riparian proprietor has a natural right that water flowing past or through his land in a defined channel shall not be diminished by the removal of underground water.[2]

Natural right of drainage.

Not only has every landowner a natural right to collect and retain within the limits of his own land surface water not flowing in a defined channel,[3] but he has also the right to draw it off on to his neighbour's lower lands [4] or put it to whatever use he pleases, agricultural or otherwise.[5]

Right of artificial discharge only acquired by easement.

But though there is a natural right of drainage from higher lands to lower lands of water flowing in the usual course of nature and in undefined channels, there is no obliga-

[1] (1871) L. R. ; 9 Ch. App., 483.

[2] At p. 487.

[3] See *Supra*.

[4] *Smith* v. *Kenrick* (1849), 7 C. B. at p. 566 ; *Rawstron* v. *Taylor* (1855), 11 Exch., 369 ; 25 L. J. Exch., 33 ; *Broadbent* v. *Ramsbotham* (1856), 11 Exch., 602; 25 L.J. Exch., 115 ; *Chasemore* v. *Richards* (1859), 7 H. L. C. at pp. 371, 375, 376 ; *Robinson* v. *Ayya Kristnama* (1872), 7 Mad. H. C. at p. 46 ; *Kopil Pooree* v. *Manick Sahoo* (1873), 20 W. R., 287 ; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335 ; *Imam Ali* v. *Poresh Mundul* (1882), I. L. R., 8 Cal., 468 ; and *see* the I. E. Act, s. 7, ill. (*i*).

[5] *Rawstron* v. *Taylor ; Broadbent* v. *Ramsbotham ; Chasemore* v. *Richards ; Robinson* v. *Ayya Kristnama.*

tion upon an adjoining landowner to submit to an artificial discharge of water from his neighbour's lands, unless, as has been seen, he is bound by an easement to do so.[1]

Natural right to defend land from injury by sea.

It is the natural right of every landowner to defend his land from injury by the sea whatever result the exercise of such right may have on his neighbours.[2]

The King v. *Commissioners of Sewers for Pagham.*

This rule was established in the case of *The King* v. *Commissioners of Sewers for Pagham.*[3] In that case the Commissioners acting *bonâ fide* for the benefit of the objects for which they were appointed caused certain defences to be erected against the inroads of the sea with the result that it flowed with greater violence against and injured the lands of the adjoining proprietor. It was held that they could not be compelled to compensate the adjoining proprietor or erect new works for his protection, for all owners of land exposed to the inroads of the sea, or Commissioners acting on their behalf, have a right to erect such works as are necessary for their own protection, even although they may be prejudicial to others.

It is apparent that in this respect there is a difference between the rights of landowners on the sea-coast and riparian owners, the latter, as will be remembered, being restricted in their right of self-protection to such operations as will not cause injury to other riparian owners.[4]

That this unqualified right has been given to sea-coast proprietors is due to the reason that the sea is considered a common enemy, against which all proprietors of lands on the seashore have a common right of defence. Thus if one proprietor is injured or likely to be injured by the means of protection adopted by another proprietor, his remedy is in his own hands, and he can, if he choses, adopt similar means of protection against the inroads of the sea.[5]

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[1] See *Arkwright* v. *Gell* (1839), 5 M. & W., 203, and Chap III, Part III, D.

[2] *The King* v. *The Pagham Commissioners* (1828), 8 B. and C., 355; *The King* v. *The Bognor Commissioners* (1828), 6 L. J. K. B., 338.

[3] (1828) 8 B. & C., 335.

[4] *Supra*, Part III, A (1) and (4), and *Att.-Gen.* v. *Earl of Lonsdale* (1868), L. R., 7 Eq., 377.

[5] *The King* v. *The Pagham Commissioners; The King* v. *The Bognor Commissioners; Att.-Gen.* v. *Earl of Lonsdale.*

Natural rights to purity of water in undefined streams.

The natural right to the purity of water exists not only in case of streams flowing in a defined channel, but also in case of water trickling over the surface of land or percolating through the soil.

Ballard v. *Tomlinson.*

The case of *Ballard* v. *Tomlinson*,[1] which is an authority for this proposition, has already been considered in connection with the easement to pollute water, and need not be further referred to here.[2]

E.—Alienation of Natural Rights in Water.

It appears at one time to have been a matter of doubt as to what was the position of a grantee or licensee of a riparian proprietor, who, retaining his riparian property, assigns to the former his natural rights in the water flowing past his land.

Whaley v. *Laing.*

In *Whaley* v. *Laing*[3] the point for decision turned principally upon the construction of the pleadings, but reference to the opinions of the Judges of the Exchequer Chamber[4] shows that they considered it very doubtful whether the licensee of a riparian proprietor could maintain an action for the pollution or diversion of the water founded on a right to the water.

Alienation of natural rights apart from riparian property invalid as against other riparian proprietors.

Since the judgments in *Whaley* v. *Laing* it has been clearly established that an alienation by a riparian proprietor of his natural rights in water as apart from his riparian property is valid only as between the grantor and the grantee, and gives the latter no right of action as against other persons for an infringement of them.[5]

If such an alienation gives rise to no liability on the part of third persons, it clearly confers no rights as against other riparian owners so that any user by the grantee which sensibly affects the flow of water by the lands of such other owners is wrongful and will be restrained.[6]

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[1] (1885) L.R., 29 Ch. D., 115.

[2] *See* Chap. III, Part III, F. (1).

[3] (1857) 2 H. & N., 476; 3 H. & N., 675, 901.

[4] (1858) 3 H. & N., 675.

[5] *Stockport Water Works Co.* v. *Potter* (1864), 3 H. & L., 300; *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), L. R., 11 Q. B. D., 155.

[6] *Ormerod* v. *Todmorden Joint Stock Mill Co.*

The law is clearly stated by Pollock, C. B., in *The Stockport Waterworks Company* v. *Potter* as follows :—[1]

The Stockport Waterworks Co. v. *Potter.*

"There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river the possession of which gives him his water rights, and at the same time transfer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant.

It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of the land abutting on the river.

If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant ? It seems to us that the true answer to this is that he can have them against the grantor, but not as to sue other persons in his own name for an infringement of them. The case of *Hill* v. *Tupper*,[2] recently decided in this Court, is an authority for the proposition that a person cannot create by grant new rights of property so as to give the grantee a right of suing in his own name for an interruption of the right by a third party."

Ormerod v. *Todmorden Joint Stock Mill Co.*

In *Ormerod* v. *Todmorden Joint Stock Mill Co.*, Bowen, L. J., said :[3] "Whether the original right of a riparian proprietor to the flow of water is in virtue of his ownership of land upon the bank or his presumed title to the bed of the river *usque ad medium filum*, the only legitimate user by him of the water, other than such rights as he may have acquired by prescription, is for purposes connected with his ordinary occupation of the land upon the banks. The right of a riparian owner to the flow of water may, in this respect, possibly be compared to a right of common appurtenant for cattle levant and couchant upon land ; this right cannot be aliened from the land ; whereas a right of

[1] At p. 326.

[2] (1863) 2 H. & C., 121.

[3] (1883) L. R., 11 Q. B. D. at p. 172.

common appurtenant for a number of beasts certain may be assigned."

No rule that licensee of riparian proprietor cannot take any water.

There is no rule of law that a licensee or a grantee of a riparian proprietor of his natural rights apart from his riparian property cannot take any water from the stream.

He may take as much as he pleases provided he return it undiminished in quantity and undamaged in quality, and if this be so, other riparian proprietors have no ground of complaint.[1]

Definition of "riparian proprietor."

The question arises as to what is a riparian owner.

It may be said that a riparian owner is one who has the possession or ownership of the soil abutting on the stream or river.[2]

Nuttall v. *Bracewell.*

In *Nuttall* v. *Bracewell*[3] it was decided that where a natural stream is divided into two branches, the owner of the land, through which the new course passes, is a riparian owner.

The ground of the decision was that the new stream was a branch of the old one.

Holker v. *Porritt.*

In *Holker* v. *Porritt*[4] the Judges of the Court of Exchequer appear to have acted upon somewhat similar reasoning, although in the Exchequer Chamber the judgment was affirmed on a different ground.

F.—Disturbance of Natural Rights in Water and Remedies therefor.

Though much has already been said concerning the disturbance of natural rights, both from the point of view of nuisances and generally, the subject of natural rights in water is so important that this part of the chapter would scarcely be complete without some reference to the principles which govern the disturbance of these rights and the remedies which the law provides therefor.

What is a disturbance.

The first question to be considered is what is a disturbance in contemplation of law.

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[1] *Kensit* v. *Great Eastern Railway Co.* (1884), L. R., 27 Ch. D., 122.

[2] *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), L. R., 11 Q. B. D. at pp. 169, 170, 172.

[3] (1866) L. R., 2 Exch., 1.

[4] (1873) L. R., 8 Exch., 107; L. R., 10 Exch., 59.

In answer to this question, a disturbance of natural rights in water may be stated to be any act, or series of acts, which materially or sensibly diverts the water from its ordinary and accustomed course, or materially or sensibly diminishes it in quality, or materially or sensibly affects it in quality or temperature.

This last has already been sufficiently considered in my chapter on nuisances ; it will be sufficient here to deal with the disturbance of natural rights arising out of the diversion and abstraction of water, and with the remedies for such disturbance.

Diversion or diminution of water must be material.

The first principle, therefore, to be remembered is that the act or acts causing the diversion or abstraction of water must be such as to *sensibly* and *materially* affect the flow of water or diminish it in quantity.[1]

Cases of disturbance of these natural rights in water usually arise out of the particular use made of the water by one or more riparian proprietors, who, it will be remembered, are entitled in common with the other riparian proprietors to the reasonable enjoyment of the water.

The unreasonable and unauthorised use of water gives right of action.

It is only, therefore, for an unreasonable and unauthorised use of this common benefit that an action will lie.[2]

Acts of disturbance.

Stopping the flow of water by putting an embankment across it,[3] diverting the water and impounding it in such a way as to lead to its entire or almost entire abstraction,[4] are acts of disturbance against which the Courts will relieve by injunction.

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[1] *Embrey* v. *Owen* (1851), 6 Exch., 353 ; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 H. L., 697 ; *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218 ; *Baboo Chumroo Singh* v. *Mullick Khyrut Ahmed* (1873), 18 W. R., 525 ; *Debi Persad Singh* v. *Joynath Singh* (1897), I. L. R , 24 Cal., 865 (P. C.) ; *Narayan* v. *Keshav* (1898), I. L. R., 23 Bom., 506.

[2] *Embrey* v. *Owen*, and *see* the other cases above cited.

[3] *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218 ; *Baboo Chumroo Singh* v. *Mullick Khyrut Ahmed* (1873), 18 W. R., 525.

[4] *Swindon Water Works Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 H. L., 697 ; *Debi Pershad Singh* v. *Joynath Singh* (1897), I. L. R., 24 Cal., 865 (P. C.) ; *Narayan* v. *Keshav* (1898) I. L. R., 23 Bom. 506.

Two grounds upon which party injured entitled to relief.

In the disturbance of these natural rights there are two grounds upon either of which the party injured is entitled to the intervention of the Court. These grounds are :—

(1) Any invasion of the right causing actual damage.[1]

(2) Any invasion of the right calculated to found a claim which may ripen into an adverse right.[2]

The first ground is undoubted and needs no comment.

The second ground has been repeatedly insisted on by the Courts in cases where it was urged by the defendant that because there was no proof of special damage to the plaintiff, the latter was not entitled to relief.

The Courts have answered that contention by saying that any invasion of a legal right calculated to found a claim which may ripen into an adverse right, such as, in these cases, an easement, gives ground of relief without proof of special damage, for such invasion imports damage, and that such right to relief is irrespective of any use of the water or desire for such use on the part of the riparian proprietor wronged.[3]

Where neither *Damnum* nor *injuria* no action lies.

Where there is neither *damnum* nor *injuria* no action will lie.

Thus where a riparian proprietor sued for the removal of an encroachment on the soil of a stream which was vested in Government, and proved neither a natural right nor an easement to have the water flow in its accustomed manner, nor any sensible alteration of the flow of the water, it was held the suit would not lie.[4]

Removal of obstruction.

The riparian proprietor who is injured by an obstruction of his natural rights in water is entitled to the removal of

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[1] *Embrey* v. *Owen* (1851), 6 Exch.,353 ; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 590 ; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.*; *Kensit* v. *Great Eastern Railway Co.* (1884), L. R., 27 Ch. D. at p. 130 ; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas. at p. 698 ; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335.

[2] *See* the cases cited in the last note and also *Wood* v. *Waud* (1849), 3 Exch. at p. 772 ; *Bickett* v. *Morris* (1866), L. R., 1 H. L. Sc., 47 ; *Harrop* v. *Hirst* (1868), L. R., 4 Exch., 43 ; *Kali Kissen Tagore* v. *Jodoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97, and *supra*, Part I, under "Principles applying to the disturbance of Natural Rights."

[3] *See* the cases cited in the last two notes.

[4] *Kali Kissen Tagore* v. *Jadoo Lall Mullick* (1879), 5 C. L. R. (P. C.), 97.

only so much of it as actually interferes with his natural rights.[1]

Thus where, as sometimes occurs in India, a bund is erected on another man's land which has the effect of causing an unreasonable diversion or abstraction of water, the riparian proprietor who complains of such infringement of his natural right is entitled to the removal of only so much of the bund as actually causes the interference.[2]

Continuing obstructions constitute a perpetually recurring cause of action.

Obstructions which interfere with the flow of water are continuing nuisances as to which the cause of action is renewed from day to day so long as the obstructions causing such interference continue.[3]

Pleadings.

In a plaint for disturbance of natural rights in water it is sufficient to state that the plaintiff was (and is) possessed of land and was (and is) entitled as (owner and) occupier of the said land to [here state the particular right claimed]. If the right claimed is a riparian right it should be stated that the plaintiff is entitled by his riparian rights as (owner and) occupier of the said land to the particular right to be stated.[4]

Part IV.—Natural Right of Support.

Nature and origin of right.

The natural right of support exists in the case of support of land in its natural state by adjacent or subjacent land in its natural state.

It is a right of property, an attribute of nature given for the common benefit of mankind, and must necessarily have existed from the beginning.[5] Unless each owner is entitled, as of natural right, to enjoy unmolested his land with this and other attributes given to it by nature, he has not the free and absolute use of it.[6] Such a right "stands on natural

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[1] *Court of Wards* v. *Raja Leelalund Singh* (1870), 13 W. R., 48.

[2] *Ibid.*

[3] *Court of Wards* v. *Raja Leelalund Singh*; *Subramaniya* v. *Ramachandra*, (1877), I. L. R., 1 Mad., 335; *Maharani Rajroop Koer* v. *Syed Abdul Hossein* (1880), I. L. R., 6 Cal., 394; 7 C. L. R., 529; 7 I. A., 240. This last case relates to an easement, but the principle is the same.

[4] Bullen and Leake, Precedents of Pleading, 6th ed., 537.

[5] *Angus* v. *Dalton* (1878), L. R., 4 Q. B. D. at pp 191 192

[6] *Ibid.*

Dalton v. *Angus.*

justice, and is essential to the protection and enjoyment of property."[1]

The nature and origin of the right is well and clearly stated by Field, J., in *Dalton* v. *Angus*,[2] where he says :—

"So soon as the surface of the land becomes divided, either vertically or horizontally, into separate and exclusive tenements, one of the first and clearest principles applicable to each holding is, that the owner has the right given to him by implication of law to use his property as best he likes, provided that he does not by such user injure the rights of his neighbour. If neither he nor his neighbour have built on or dealt with their respective portions, and the latter are in their natural state and condition, it is clear that each owner has as against the other a right to have his soil supported by the soil of his neighbour, whether adjacent so below, and any act done by one which destroys that support so that the land of the other falls is an actionable wrong, and that is so, although the act complained of is not done by him maliciously, but simply in the exercise of his own right to use his own property. Although, therefore, either of them may dig in his own soil as deep and as near to his own boundary or to the surface as he chooses, this right is subject to one limitation from the very first, *viz.*, that he cannot dig so deep and so near as to cause the neighbour's land to sink unless he substitute some other efficient support.[3]

This limitation, however, upon his right is accompanied by a like limitation of his neighbour's right, so that the advantage and burthen are mutual in quality, although they may vary in degree.

It is clear that these rights and burthens come into existence by implication of law at the very moment of severance.

They are unquestionably known as natural rights and require no age to ripen them."

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[1] *Humphries* v. *Brogden* (1850), 12 Q. B. at p. 744.

[2] (1881) L. R., 6 App. Cas. at p. 752.

[3] *See* also *Wilde* v. *Ministerley*, 2 Roll. Abr., 564, Trespass I, pl. I ; *Humphries* v. *Brogden* (1850), 12 Q. B., 739 : *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348.

The doctrine laid down in *Angus* v. *Dalton*, and numerous other authorities,[1] establishes beyond all doubt that the right of support for land by land is a natural right, a right of property passing with the land, and a right which gives rise to a corresponding obligation on every landowner that he shall not work on his own land in such a manner as to cause his neighbour's land to slip, fall in, or subside, and thereby cause him damage.

Building and mining operations.

Cases of withdrawal of support occur ordinarily in two kinds of operations, namely, in building and mining operations.

In the former where excavations are always made for the purpose of laying the foundations of the new building, a wall is usually substituted in place of the support given to the neighbour's land by the natural soil. If owing to the inefficiency of the new support damage ensues, or if when the natural support is removed no new support is substituted, and the neighbour's land subsides, it is clear that a right of action would accrue.[2]

So in the case of mining operations if the person entitled to take the minerals withdraws the natural support from his neighbour's land in the course of his excavations and substitutes either no support at all, or a support which is inefficient, he is liable to his neighbour for the damage he causes him.[3]

Cause of action how constituted.

These observations lead to the consideration of the principle that it is not the excavation which is the unlawful act, but it is the damage caused by such excavation which gives the right of action,[4] and the foundation of this principle

[1] *Humphries* v. *Brogden* (1850), 12 Q. B., 939; 20 L. J. Q. B., 10; *Harris* v. *Ryding* (1839), 5 M. & W., 60; *Rogers* v. *Taylor* (1858), 2 H. & N., 828; 27 L. J. Ex., 173; *Hunt* v. *Peake* (1860), 1 Johns, 705; *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348; 30 L. J. Q. B., 49; *Bonomi* v. *Backhouse* (1859), E. B. & E., 355; 9 H. L. C., 303; *Corporation of Birmingham* v. *Allen* (1877), L. R., 6 Ch. D., 284.

[2] See *Bonomi* v. *Backhouse* (1859), E. B. & E. at p. 655; and see *supra* the observations of Field, J., in *Dalton* v. *Angus*.

[3] *Ibid.* But the owner of minerals is not liable for damage to his neighbour, which, though occurring during the time of the former's possession, is caused by the act of his predecessor in title. *Greenwell* v. *Low Beechburn Coal Co.* (1897), 2 Q. B., 165; *Hall* v. *Duke of Norfolk* (1900), 2 Ch., 493.

[4] *Humphries* v. *Brogden* (1850), 12 Q. B., 739; *Bonomi* v. *Backhouse*; *Wakefield* v. *Duke of Buccleugh* (1866), L. R., 4 Eq.,

is, that the law favours the exercise of dominion by every one on his own land and his use of it for the most beneficial purpose to himself, and accordingly declares that before a man can be made liable for an act done in his own land, there must be actual damage caused to his neighbour.[1]

If it were otherwise, and a man were entitled to sue for prospective damage, the question in each case would be the merely speculative one as to whether any damage was likely to arise, depending for its answer upon the evidence of experts whose predictions might subsequently be contradicted by the actual event.[2]

Further, vexatious and oppressive actions might be brought on the one hand; and, on the other, an unjust immunity obtained for secret workings of the most mischievous character, but the result of which would not appear within the period of limitation, a state of things which might well arise if limitation were to run from the time the damage was likely to occur instead of from the time it actually occurred.[3]

When an injunction will be granted.

But though a suit for damages will not lie where a subsidence of the plaintiff's land is merely apprehended and has not actually occurred, there seems no reason why, if a sufficiently strong and clear case be made out, the Court will not interfere by injunction to prevent irreparable damage.[4]

The damage must be appreciable.

There must be appreciable damage proved in order to maintain an action for infringement of the natural right of support.[5]

The land to which the right of support applies must be land in a natural condition, and the support must be naturally rendered.[6]

613; 36 L. J. Ch., 763; *Hext* v. *Gill* (1872), L. R., 7 Ch., App., 699; *Davis* v. *Trehearne* (1881), 6 App. Cas., 460; *Dixon* v. *White* (1883), 8 App. Cas., 833.

[1] See *Bonomi* v. *Backhouse*.

[2] See *Bonomi* v. *Backhouse*.

[3] See *Bonomi* v. *Backhouse*.

[4] *Corporation of Birmingham* v. *Allen* (1877), L. R., 6 Ch. D., 284.

[5] *Smith* v. *Thackerah* (1866), L. R., 1 C. P., 564.

[6] *Humphries* v. *Brogden* (1848), 12 Q. B., 739; L. J. Q. B., 10; *Bonomi* v. *Backhouse* (1859), E. B. and E., 655; 9 H. & L., 502; *Corporation of Birmingham* v. *Allen* (1871), L. R., 6 Ch. D., 284; 46 L. J. Ch., 673.

The Indian Easements Act in section 7, illustration (*e*), and the explanation thereto reproduces the English law, when in referring to the natural right of support it defines it as follows :—

Indian Easements Act, s. 7, ill. (*e*).

The right of every owner of land that such land in its natural condition, shall have the support naturally rendered by the subjacent and adjacent soil of another person.

The explanation to the illustration is :—

Land is in its natural condition when it is not excavated,[1] and is not subjected to artificial pressure,[2] and "the subjacent an adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.[3]

Extent of land from which support can be claimed.

The extent of land from which the support can be claimed is so much land the existence of which in its natural state is necessary for the support of the land.[4]

Though there is no natural right to support for buildings by land, appreciable damage done to land on which they rest is actionable if the damage to the land would have occurred even if the buildings had not been there.[5]

But supposing if the buildings had not been there no appreciable damage would have accrued, then there would be no right of action for the mere withdrawal of the support.[6]

Covenant having effect of release of the natural right.

Though a natural right of support cannot be extinguished by a release, a covenant binding the owner of the surface land may operate so as to destroy the right, as where on a separation of surface land from the mines beneath, the person taking the surface land enters into a covenant in which he states that he is ready to accept the surface land subject to any inconvenience or incumbrance which may arise from working the mines.[7]

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[1] See *Partridge* v. *Scott* (1838), 3 M. & W., 229.

[2] *e.g.*, by buildings. For such cases *see* Chap. III, Part IV, *A* (1), (*b*).

[3] *Corporation of Birmingham* v. *Allen*.

[4] *Ibid.*

[5] *Browne* v. *Robins* (1859), 28 L. J. Exch., 250 ; *Stroyan* v. *Knowles* (1861), 6 H. & N., 454 ; 30 L. J. Exch., 102.

[6] *Smith* v. *Thackerah* (1866), L. R., 1 C. P., 564.

[7] *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348.

Pleadings.

Since the right of support for land by land is not an easement, but a right of property, *ex jure naturae*, a plaint for the disturbance of the natural right need contain no express allegation of the right. It is enough to state the facts from which a right or a duty arises.[1]

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[1] *Humphries* v. *Brogden* (1850), 12 Q. B., 739; *Hext* v. *Gill* (1872), L. R., 7 Ch. App., 699; *Davis* v. *Trehearne* (1881), 6 App. Cas., 460; *Dixon* v. *White* (1883), 8 App. Cas., 833.

CHAPTER VI.

Acquisition of Easements.

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Part I.—Generally.

In previous chapters the various modes whereby easements are usually created have been incidentally referred to during an examination of the rights themselves.

After some general observations on the acquisition of easements, the principal object of this chapter will be to deal with the acquisition of easements from three specific standpoints :

(*a*) That of Express Grant ;

(*b*) That of Implied Grant ;

(*c*) That of Presumed Grant or grant by operation of law.

The acquisition of easements through the operation of the doctrine of acquiescence and by virtue of legislative enactment will also be considered.

Acquisition of easements by creation or transfer.

Acquisition of easements may arise either by creation of the rights themselves, as where *A* and *B* being owners of adjoining lands, *A* grants *B* a right of way over his land, or by transfer of the dominant tenement in which case in the absence of a contrary intention expressed or implied, the easement or easements attaching thereto pass with it.

Under Indian Easements Act.

Any one having an interest in land may create an easement over it in the circumstances and to the extent in which, and to which, he may convey such interest.[1]

Under Transfer of Property Act.

Section 8 of the Transfer of Property Act, IV of 1882, provides that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee, all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof, and that such incidents include, where the property is land, the easements annexed thereto.

This provision is limited to transfers *inter vivos*.

Comments in *Wutzler* v. *Sharpe*.

Section 8 of Act IV of 1882 and sec. 5 of Act V of 1882 have been commented upon as follows by the Allahabad High Court in the case of *Wutzler* v. *Sharpe*.[2] Under sec. 8

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[1] *See* I. E. Act, s. 8.

[2] (1893) I. L. R., 15 All., 270

of Act IV of 1882 the easements which may pass on a transfer of a land or a house are " the easements annexed thereto."

What meaning the Indian Legislature intended to express by the use of the word "annexed" in sec. 8 of the Act, it is impossible to ascertain.

It is not in this connection at least an ordinary term of law, and Act IV of 1882 does not define it.

It may be assumed from Dr. Whitley Stokes' introduction to Act IV of 1882, in his edition of the Anglo-Indian Codes, that the statute 44 and 45 Vict., Chap. 4, was before the Legislature in India, or its advisers, when Act IV of 1882 was passed ; yet the Indian Legislature for some reason did not think it advisable to use in sec. 8 of Act IV of 1882, the plain language of sec. 6 of 44 and 45 Vict., Chap. 41. Possibly it was not intended to extend to India the broad principles of what appear to be the justice, equity, and good conscience to be found in sec. 6 of 44 and 45 Vict., Chap. 41. The latter section, so far as is material for purposes of comparison, is as follows :—

"(2). A conveyance of land, having houses or other buildings thereon, shall be deemed to include, and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of, or appurtenant to, the lands, houses, or other buildings conveyed, or any of them, or any part thereof."

" (4). This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance, and the provisions therein contained."

Whether it was intended by sec. 8 of Act IV of 1882 to apply the broad principles of justice, equity, and common

sense to be found in sub-sections (2) and (4) of sec. 6 of 44 and 45 Vict., Chap. 41, is a matter uncertain, and impossible of ascertainment from an examination of sec. 8 of Act IV of 1882.

The same word "annexed" is used in the illustrations to sec. 5 of Act V of 1882. As Act IV of 1882 and Act V of 1882 were passed in the same session of the Indian Legislature and received the assent of the Governor-General on the same day, *viz.*, on the 17th February 1882, it might be expected that some light as to the meaning of a word common to the two Acts might be obtained by a comparison of the two Acts.

Section 19 of the Indian Easements Act makes the same rule applicable not only to a transfer *inter vivos*, but also to a devise.

And the same rules are recognised by the English law.[1]

Further comments in *Wutzler* v. *Sharpe.*

In the last mentioned case of *Wutzler* v. *Sharpe* the separate and combined effects of sec. 8 of Act IV of 1882, and secs. 5, 13, and 19 of Act V of 1882, are discussed as follows :—

"If the words "annexed" and "easements" are used with the same common meaning in sec. 8 of Act IV of 1882, and in sec. 5 of Act V of 1882, we have, in cases not falling within sec. 19 of Act V of 1882, this extraordinary result that on a transfer of a house an easement, whether it was continuous or discontinuous, apparent or non-apparent, so long as it was one of the "easements annexed" to the house, would, by virtue of sec. 8 of Act IV of 1882, pass to the transferee "unless a different intention is expressed or necessarily implied," and yet when we turn to Act No. V of 1882, which more exclusively and exhaustively deals with easements, we find that the same easement, if it was not continuous and apparent, although it was necessary for enjoying the subject as it was enjoyed when the transfer took effect, and although it was an easement annexed to the house, would not under sec. 13 of Act V

[1] Gale on Easements, 7th Ed., p. 75. And *see* the Conveyancing and Law of Property Act, 1881, 44 and 45 Vict., C. 41, s. 6, and *infra*, Part III.

of 1882 pass to the transferee. Yet we presume that the Legislature could not have intended that in cases not falling within section 19 of Act V of 1882, an easement which would not on a transfer of property pass by virtue of section 13 of Act V of 1882, might pass by virtue of Act IV of 1882. In section 19 of Act V of 1882, which applies to the transfer or devolution of a heritage which at, and prior to, the time of transfer or devolution was a dominant heritage, the same generic word "easement" is used, and is, by the illustration to that section, applied to a case in which "*A*" has certain land to which a right of way is "*annexed*..............."

In order to guard against its being suggested that we have carelessly read sections 5 and 13 of Act V of 1882, it is necessary to point out that, although the only apparent object of section 5 was to provide definitions, by inclusion and exclusion, of the words "continuous" and "apparent" used in section 13, none of the illustrations to section 5 seem to be strictly applicable to any easement provided for by section 13. For instance, illustrations (*a*) and (*c*) to section 5, which are respectively illustrations of a continuous easement and of an apparent easement, assume the existence of a dominant and servient tenement and a several ownership, but clauses (*b*), (*d*) and (*f*) of section 13 apply to easements necessary for enjoying the subject or the share, which were apparent and continuous at or before the time where a several ownership and a dominant and servient tenement were created by the transfer, bequest or partition as the case might be. However, although the illustrations to section 5 are not apposite to the cases provided for by section 13, the meaning of section 5 is obvious.

It is obvious from what we have pointed out that from a comparison of Act IV of 1882 and Act V of 1882, confusion and not light is obtained as to the meaning to be attached to the word "annexed" as used by the Legislature. It is also obvious that if Act V of 1882 applied in this case and were to be considered as the governing Act and as limiting, so far as easements are concerned, section 8 of Act IV of 1882, no right of way over the path in question passed to the plaintiffs as an

incident of the transfer, unless the way was an easement of necessity as distinguished from an easement apparent and continuous and necessary for the enjoyment of the Charleville Hotel property, as that property was enjoyed when the transfer took effect in 1886."

Perhaps a possible explanation of the apparent confusion is to be found in the view that section 19 of the Easements Act is intended to supplement section 8 of the Transfer of Property Act, and that both sections are intended to refer to those easements only which are actually in existence at the time of the transfer or devolution and not to easements which are not in existence but which are created by implied or presumed grant on the severance of tenements, as easements of absolute necessity or *quasi* easements to which section 13 of Act V of 1882 is intended to refer.

In cases where the Indian Easements Act does not apply, it seems impossible to take the view that section 8 of the Transfer of Property Act is intended to refer to any other easements than those which are actually in existence at the time of the transfer and are appurtenant to the dominant tenement as a separate property.

Powers of lessor and mortgagor to create easements.

A lessor may by grant or covenant create over the property leased by him any easement that does not derogate from the rights of the lessee as such, and similarly a mortgagor may by grant or covenant create over the property mortgaged to him any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, create any other easement over such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.[1]

Power of tenant to create easements.

A tenant may create an easement over the land leased to him for the term of his lease or a less term,[2] but no lessee or other person having a derivative interest may create over the

[1] *See* I. E. Act, s. 10.

[2] *See* I. E. Act, s. 8, ill. (*a*). This and other sections of the second chapter of the Act speak of an easement being "imposed." This is hardly an accurate expression, as the term "easement" in English law is ordinarily used to denote a right and not an obligation. *See* Chap. I, Part IIA.

property held by him, as such, an easement to take effect after the expiration of his own interest or in derogation of the right of the lessor or superior proprietor.[1]

By whom easements may be acquired.

An easement may be acquired in respect of a tenement for the advantage or benefit whereof the right is created, either by the owner of such tenement or on his behalf by any person in possession thereof.[2]

Tenant cannot acquire prescriptive right against his landlord.

On the principle that the dominant and servient tenements must be distinct subjects of ownership, a tenant cannot by user or prescription acquire in respect of the land leased to him an easement as against his landlord over other land belonging to the landlord.[3]

The explanation of this rule is that the possession of the tenant is the possession of the landlord, that it would be a violation of the first principles of the relation of landlord and tenant to permit a tenant whose occupation of the land leased to him is the occupation of the landlord to acquire by virtue of such occupation an easement over other land belonging to his landlord, and that if the tenant is allowed to pass over his landlord's land, it is his duty to do no more than his lease authorises him to do.[4]

Acquisition of easement by a tenant as against another tenant.

But there seems no objection to the acquisition of an easement by the tenant of one property over the property in possession of another tenant of the same landlord limited to the period of the tenancy.[5]

Tenant may acquire easement against landlord by express or implied contract.

Further a tenant can acquire an easement against his landlord limited to the duration of his tenancy either by the express contract of lease or by implication from that contract.[6]

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[1] *See* I. E. Act, s. 11.

[2] *Ackroyd* v. *Smith* (1850), 10 C. B., 164; 19 L. J. C. P., 315; *Kristna Ayyan* v. *Vencatachella Mudali* (1872), 7 Mad., H. C. at p. 64; I. E. Act, ss. 4 and 12.

[3] *Gayford* v. *Moffatt* (1868), L. R., 4 Ch. App., 133; *Outram* v. *Maude* (1881), L. R., 17 Ch. D., 391; *Kristna* v. *Vencatachella* (1872), 7 Mad. H. C. at p. 64; *Udit Singh* v. *Kashi Ram* (1892), I. L. R., 14 All., 185.

[4] See *Gayford* v. *Moffatt*.

[5] *Daniel* v. *Anderson* (1862), 31 L. J. Ch., 610; *Mitchell* v. *Cantrill* (1887), L. R., 37 Ch. D., 56; *Robson* v. *Edwards* (1893), 2 Ch., 146.

[6] *Krishna* v. *Vencatachella* (1872), 7 Mad. H. C., 60.

Affirmative and negative easement how created.

Affirmative easements are usually created by grant and negative easements by covenant.[1]

Construction of grant. Covenant may operate as grant.

Any form of words, when properly construed with the aid of all that is legitimately admissible to aid in the construction of a written document, may indicate an agreement and, when under seal, constitute a covenant, and a covenant may, if it is necessary in order to carry out the intention, operate as a grant.[2]

Distinction between express grant of easement in general terms during grantor's interest and grant for a particular term.

It should be noted that there is a material distinction between a grant of an easement in general terms during the existence of the grantor's then interest, and the express grant of an easement to continue for a particular term. In the former case the grant would be restricted to what the grantor had the power to grant, and would not extend to anything which he might subsequently acquire. whereas in the latter case the grant would extend to any interest subsequently acquired.[3]

Booth v. *Alcock.*

Thus in *Booth* v. *Alcock*,[4] a lessor granted a lease for twenty-one years of a house "together with all edifices, buildings, ways, lights, sewers, water-courses, rights, easements, advantages, and appurtenances thereto belonging, or therewith used or enjoyed. At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the adjoining house; and after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which might interfere with the lights of the demised house, such lights not being ancient lights. In a suit to restrain him from so building, it was held by the Appeal Court (reversing the decision of Malins, V. C.) that the lessor was not by his grant prevented from so building.

This case shews that the rule that a man cannot derogate from his own grant binds only the interest which the grantor has in the quasi-servient tenement at the time of the grant.

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[1] *Dalton* v. *Angus* (1881), L. R., 9 App. Cas. at p. 782.

[2] *Russell* v. *Watts* (1883), L. R., 10 App. Cas. at p. 611.

[3] *Booth* v. *Alcock* (1873), L. R., 8 Ch. App., 663.

[4] (1873), L. R., 8 Ch. App., 663.

If a person grants an easement upon the representation that he has the title to do so and he has not the title at the time of the grant, but subsequently acquires it, the easement so granted attaches to the newly-acquired property and the conveyance operates by way of estoppel against the denial of the right.[1]

Estoppel in case of interest subsequently acquired by grantor of easement.

The grant of an easement is void, if it is at variance with the provisions or objects of an act of the legislature.

Grant of easement void if at variance with an act of the legislature.

In *Mulliner* v. *The Midland Railway Company*,[2] it was decided that a Railway Company which had acquired land for the general purposes of a railway held such land subject to the rights of the public and the company's private rights of working and using it and had no power to devote the land to another purpose either by conveying it away generally under the ordinary powers of ownership or by granting any rights of easement over it.

Mulliner v. *Midland Ry. Co.*

But this principle cannot be so applied as to prevent a company from using the land acquired by it in any way which is not incompatible with the purposes for which the company was constituted.

Limits of the principle.

Thus in *Foster* v. *The London, Chatham and Dover Railway Company*,[3] it was held that a company which had constructed a bridge over arches on a strip of land acquired for a railway was at liberty to let out the interiors of such arches on short terms of lease to different persons for the purposes of trade reserving to itself the right to re-enter whenever it should deem it necessary for the purposes of the company to do so.

Foster v. *London, Chatham and Dover Ry. Co.*

Though the grant of an easement is of no effect if in contravention of the powers of the company and of the purposes for which it is constituted, yet if the subject of the easement be capable of division in such a way as after the public requirements have been fully satisfied to be applicable to private use, then the grant will be valid to such extent.

Grant may be valid where subject of easement divisible.

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[1] *Rowbotham* v. *Wilson* (1857), 8 E. & B. at p. 145. And cf. Transfer of Property Act, IV of 1882, s. 43.

[2] (1879), L. R., 11 Ch. D., 611.

[3] (1895), 1 Q. B., 711.

Att.-Genl. v. *Corporation of Plymouth.*

The *Attorney-General* v. *The Corporation of Plymouth*,[1] is an authority for this proposition.

In that case the Corporation having been empowered by Act of Parliament to construct a water-course for the purpose of supplying the ships in the harbour of *Plymouth*, and the town of *Plymouth* with water, leased a portion of their interest in the water-course for the benefit of certain mills which had been erected thereon.

It was held by the Master of the Rolls that as the Corporation had undertaken the performance of a public trust and duty and could not lawfully divest themselves of the means or any part of the means of fully performing that duty and executing that trust, all that was conveyed or was meant to be conveyed by the deed was so much water as remained after the public purposes of the Act had been satisfied.

Such an easement acquirable by prescription.

It seems that a right of easement the enjoyment of which is limited to the extent of its compatibility with the provisions of the Act can be acquired by prescription.[2]

As the grant of an easement which affects the same servient tenement as that over which a previously existing easement has been created holds good provided the enjoyment of the later easement does not interfere with that of the earlier, so it is stating the same proposition in another way to say that a later grant cannot derogate from an earlier grant, and if at variance with it is void as against the first grantee.[3]

Effect of covenant for quiet enjoyment.

It is clear law that a covenant for quiet enjoyment in its plain ordinary terms, does not increase or enlarge an easement granted by the previous part of the conveyance.

Thus in the grant of an easement of light and air a covenant for quiet enjoyment would not enlarge the easement beyond the ordinary right known to the law.

It would, of course, be possible to insert in any covenant words of enlargement, as if in a grant of an easement of light

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[1] (1845), 9 Beav., 67.

[2] *Grand Junction Canal Co.* v. *Petty* (1888), L. R., 21 Q. B. D., 273. This was a case of a public right of way acquired by dedication, but the principle is the same.

[3] *Mundy* v. *Duke of Rutland* (1883), 23 Ch. D., 81.

and air a covenant were inserted that the grantee should fully enjoy the house with an uninterrupted view from his drawing-room windows over the existing land of the grantor. In such case there would be a larger light than had previously been granted, and damages might be recovered at law if the grantor broke the covenant, and an injunction would be granted in equity against him if he intended to break it, or against the person claiming under the grantor if he took with notice of the covenant.[1]

Part II.—By Express Grant.

This and the following two parts of this chapter will be devoted to an examination of the different modes of acquisition by grant which may be classified as follows :—

(*a*) Express grant where the language is clear.

(*b*) Implied grant where the language of the grant does not expressly state the creation of the easement and the right is said to arise by implication under the test of construction.

(*c*) Presumed grant or grant by operation of law whereby easements are held to arise in certain cases irrespective of intention, express or implied, on the part of the grantor.

What is an express grant.

An express grant is that which clearly expresses the nature of the right to be created or conveyed, and the intention of the grantor to create or convey it.

Rights acquirable by express grant.

As already seen, many rights which not being strictly easements partake of the nature of easements, can be acquired by express grant though not by presumed grant or prescription.[2]

These rights have already been dealt with and need not be further discussed here.

Question whether writing essential to valid acquisition of easement by express grant.

The question has to be considered whether writing is essential to the valid acquisition of an easement by express grant.

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[1] *Leech* v. *Schweder* (1874), L. R., 9 Ch. App., 463.

[2] *See* Chap. III, Part III, B.; Chap. IV, Part II, C.

In England.

In England the old common law rule was invariable that the express grant of an easement should be by instrument under seal,[1] and the necessity for this rule was due to reasons derived from the feudal and statute law.[2]

The strictness of the rule was, however, subsequently relaxed by the introduction of the equitable principle that where an agreement had been made and acted upon, but no grant executed, the Court would not decline to give effect to the right claimed for want of the full legal title.[3]

In India.

In India there does not appear to be any law requiring the express grant of an easement, as referring to the actual creation of the right, to be in writing.

In cases falling outside the Indian Easements Act it has been said not to be necessary,[4] and it is certainly not required by the Act itself.[5]

There are, no doubt, certain provisions in the Transfer of Property Act requiring the transfer of immoveable property by gift or sale to be made by a registered instrument, but these do not apply to easements.[6]

The definition of "Immoveable property" in section 3 of the Indian Registration Act, III of 1877, includes easements, and section 17 provides for the compulsory registration of instruments relating to the gift of immoveable property or the creation of interests in immoveable property of the value of Rs. 100 and upwards, but registration only becomes necessary if there is writing, and there appears to be nothing in the Act making *writing* compulsory.

No doubt as a matter of prudence the creation of an easement would usually be accompanied by a written and

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[1] Gale, 7th Ed., p. 25.

[2] *Hewlins* v. *Shippam* (1826), 5 B. & Cr., 221; *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98.

[3] *Duke of Devonshire* v. *Eglin* (1851), 14 Beav., 530.

[4] *Krishna* v. *Rayappa*; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 22; *Gazette of India* (1880), July to Dec., Part V, p. 477. A verbal promise or representation or an agreement to be inferred from conduct is sufficient to create an easement. *Collector of 24-Pergunnahs* v. *Nobin Chunder Ghose* (1865), 3 W. R., 27.

[5] *Gazette of India* (1880), July to Dec., Part V, p. 477.

[6] Act IV of 1882, ss. 54, 123.

registered document, but there appears to be no legal necessity for such a course.

Where the grant is not in writing it is a question of fact whether the effect of the oral communication is such as to create an easement or a mere license.

When grant oral, question of fact whether easement or license created.

Part III.—By Implied Grant.

It has already been explained that the sense in which it is here intended to use the term "implied grant" is that of a grant arising by implication from the language of the grantor under the ordinary rules of construction.

"Implied grant" in the sense here used.

A man may grant an easement in express terms making his intention clear and undoubted, but he may also employ words which, without expressly granting the right, may be construed into indicating that such was the grantor's intention.

It is with such grants that it is now proposed to deal.

As to the principles governing the creation of an easement by implied grant, it is clearly established there is no necessity to use any particular form of words to grant an easement. So long as words are used from which the intention of grantor can be gathered, that is sufficient for the purpose of a valid grant.

No special words necessary to create an easement.

In *Rowbotham* v. *Wilson*,[1] Lord Wensleydale said—"It is undoubted law, that no particular words are necessary to a grant; and any words which clearly shew the intention to give an easement which is by law grantable, are sufficient to effect that purpose."

Rowbotham v. *Wilson.*

And in *Buchanan* v. *Andrew*,[2] Lord Chelmsford said—"It is the safest and best mode of construction upon all occasions to give words free from ambiguity their plain and ordinary meaning."

Construction of implied grants.

Buchanan v. *Andrew.*

In *Taylor* v. *Corporation of St. Helens*[3] the true rule of construction is stated by Jessel, M. R., to be that the language

Taylor v. *Corporation of St. Helens.*

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[1] (1860), 8 H. L. C. at p. 362.

[2] (1873), L. R., 2 H. L., Sc. 286 (298).

[3] (1877), L. R., 6 Ch. D., 264.

of the particular instrument is to be construed according to its ordinary meaning giving to technical terms their technical meaning, unless a context is found such as to lead to the conviction that the ordinary rules of construction which would be applied to the original expressions standing alone ought not to be applied.

The meaning of the instrument must be ascertained according to the ordinary and proper rules of construction, and if the meaning cannot be ascertained, the instrument is void for uncertainty.[1]

In the case just referred to there was a grant of "all and singular the water-courses, dams, and reservoirs, &c.," and the question arose as to what was the meaning of the term "water-course" and what it conveyed.

As to this part of the case it will be convenient to quote from the judgment of the Master of the Rolls who said : "This is a grant of a water-course . . . . a grant of a water-course in law, especially when coupled with other words, may mean any one of three things. It may mean the easement or the right to the running of water, it may mean the channel pipe or drain which contains the water, and it may mean the land over which the water flows. Which it does mean must be shown by the context, and if there is no context, I apprehend that it would not mean anything, but the easement, a right to the flow of water."

In the opinion of the Master of the Rolls the word "water-course" as used in the case meant a corporeal hereditament, and not merely an easement or right to the running of water, and bore the second meaning, that is, the channel through which the water ran, namely, the pipe or drain containing the water.

He thought that the word "water-course" conveyed not merely the pipe or drain, but also the water in it, and that if nothing else was found in the deed, the grantee ought to be held entitled to the property of the channel, and the right to take water which got into that channel by lawful means.

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[1] (1877), L. R., 6 Ch. D., 264.

In the same case there was the further grant "of the several springs and streams of water flowing into or feeding the said water-courses, &c."

By this second grant the intention imputed by the Court to the grantor was to grant the springs or streams of water which flowed into or fed the water-course in addition to the water-course, used in the sense of a channel, and in addition to the water which may have found its way from sources beyond his estate, or even by percolation from his estate into the water-course.

It was explained that springs and streams are definite things, and that they should, therefore, be considered in this case as something quite apart from the water-course, and that the grantor must be taken so to have considered also.

The question then arose as to whether the whole of the water arising in or falling on the plaintiff's landhad been granted separately and independently and not merely as an incident to the water-course, so as to give the defendants the right to enlarge the water-course, on the principle that if a thing is granted, the reasonable means of getting it is granted also. But it was held that the grant in the case was restricted to a grant of the water-course in its actual state, and of such water not being water in the defined streams or springs, as could be conveyed by the water-course, and that therefore the defendants had no right to alter or enlarge the existing water-course.

Wutzler v. *Sharpe.* Principle of equity, justice and good conscience.

Parties who claim easement under an implied grant or as incidental to the property granted have only themselves to blame if being able to produce their title-deeds, they fail to do so, and the Court refuses to recognise the easement.

This was the case in *Wutzler* v. *Sharpe*[1] where the plaintiffs claimed a right of way over the defendant's land for the purpose of obtaining water from a spring for the use of their hotel. The Allahabad High Court in dismissing the suit observed, "We are not prepared to hold in this case, in which the plaintiffs

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[1] (1893), I. L. R., 15 All., 270.

who had to make out their title to a way over the defendant's property, and who could have produced, but refused to produce their title-deed, any right of way whatever over the property which now belongs to the defendant passed to them by implication or as incidental on the transfer to them of the Charleville property in 1886.

In conclusion, we may say that in these provinces in which strict rules of conveyancing based on cases decided in England are little understood, and are consequently seldom followed, the principle of justice, equity, and good conscience embodied in sub-sections (2), (4), and (5) read together with section 6 of 44 and 45 Vict., Chap. 41, should be applied by us in this case, and that we should hold, as we do, that the plaintiffs have failed to make out a right to use any way whatever over the defendant's land. If the plaintiffs' title-deeds would shew that we might in justice, equity, and good conscience hold that a way over the defendant's land passed by implication or as incidental on the transfer to them in 1886 of the Charleville property, they have only themselves and their legal advisers to blame for the result of this litigation."

Same rules of construction and evidence in case of will and deed.

The words of either a will or deed may create an easement by implication, and the Court will in each case follow the same rules of construction and evidence in ascertaining the intention of the grantor or testator.[1]

Questions of implied grant usually arise on a severance of tenements by grantor.

Questions of the implied creation of easements usually arise in cases where the tenements having been united in the same person are severed by him either by a conveyance *inter vivos* or by a testamentary disposition of his property.

Such questions how to be determined.

The proper determination of these questions depends not only upon the words used by the grantor or testator, but also upon the kind of easement which is claimed under the particular instrument, and the manner in which the property was previously enjoyed.

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[1] *Pheysey* v. *Vicary* (1847), 16 M. & W., 484; *Pearson* v. *Spencer* (1863), 1 B. & S., 671; in error 3 B. & S., 761. *Polden* v. *Bastard* (1863), 4 B. & S., 258; L. R., 1 Q. B.. 156.

Distinction between apparent and continuous easements and discontinuous easements.

In the consideration of these matters it is important to note the distinction that is made in the law between, on the one hand, apparent and continuous easements, necessary for the enjoyment of the property as it was formerly enjoyed, such as easements of light and air, easements relating to water, and easements of support, and on the other hand, those easements, such as rights of way which are called discontinuous easements.

The former class of easements, as will hereafter be seen,[1] arise by presumption of law independently of any intention on the part of the grantor or testator to create them and pass without general words, whereas the latter class, excluding easements of necessity,[2] do not pass under a deed or will unless in express terms or words sufficient, upon a proper construction of the instrument, to shew the intention to create.

Polden v. *Bastard.*

The distinction was clearly stated by Erle, C. J., in *Polden* v. *Bastard*,[3] where he says: "there is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity, or continuous easements. The cases recognise this distinction, and it is clear law that upon a severance of the tenements, easements held as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass unless the owner by appropriate language shows an intention that they should pass."[4]

Acquisition of Discontinuous Easements by Implied Grant.

The acquisition of discontinuous easements by implied grant must now be considered, and for this purpose it is necessary to examine the principal authorities.

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[1] *See* Part IV and Part IV, B. These easements are usually called "Quasi-Easements."

[2] Easements of Absolute Necessity, which are subject to the same rule as "Quasi-Easements" as passing by presumed grant, *see* Part IV A.

[3] (1863), L. R., 1 Q. B., 156.

[4] Approved in *Watts* v. *Kelson* (1870), L. R., 6 Ch. App., 166. *See* also *Allen* v. *Taylor* (1880), L. R., 16 Ch. D. at p. 357; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 52; *Purshotum* v. *Durgoji* (1890), I. L. R., 14 Bom., 452; and *infra* generally.

Effect of words "appurtenant" or "belonging."

The first principle to be elucidated is that the words "appurtenant" or "belonging" do not raise an implication of grant of a discontinuous easement not appurtenant, that is, not in existence at the time of the grant.

Whalley v. *Thompson.*

In *Whalley* v. *Thompson*[1] the use of the word "appurtenances" in a devise of one of adjoining properties held in unity of seisin was declared insufficient to carry a right of way over one property to the other as no new right of way was thereby created, the old right of way which previously existed having been extinguished by the unity of seisin in the devisor.

Clements v. *Lambert.*

In *Clements* v. *Lambert*[2] it was held that after an easement has been extinguished by unity of possession, a new easement is not created by a grant of a messuage and land with common appurtenant, though those who have occupied the tenement since the extinguishment have always used the common therewith, but it would have been otherwise if there had been a grant of all commons "used therewith."

Effect of words "used therewith." *Barlow* v. *Rhodes.*

Barlow v. *Rhodes*[3] was an action for trespass for breaking and entering the plaintiff's close and pulling down his wall.

The defendants pleaded several special pleas, of which only the third and seventh were relied upon at the trial.

The third plea justified the trespasses, under a claim of a right of way under a grant in which certain premises had been conveyed "together with all ways, roads, rights of road, paths and passages to the hereby devised premises, or any part thereof, belonging or in any wise appertaining."

The seventh plea claimed a right of way of necessity.

The right of way by necessity being unarguable the sole question remained as to whether the way claimed could pass under the general words in the deed "belonging or in any wise appertaining."

The way was not in existence at the time of the grant having been extinguished by unity of ownership, and was therefore not appurtenant, and there was nothing in the convey-

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[1] (1799), 1 B. & P., 371.
[2] (1808), 1 Taunt., 205.
[3] (1833), 1 C. & M., 448.

ance to shew that the parties intended to use the word "appurtenant" in any but its strict legal sense.

In these circumstances the Court felt itself bound to give the words used their ordinary legal meaning, and to hold that they were not sufficient of themselves to show an intention on the part of the grantor to create the right claimed, but at the same time it was said that if the words "therewith used and enjoyed had been inserted" the right claimed would have passed.

"Therewith used and enjoyed."

An attempt was made on behalf of the defendants to distinguish between the word "belonging" and the word "appertaining," but without success, previous authorities shewing that the Courts had uniformly considered these words to be synonymous.

No distinction between "belonging" and "appertaining."

The defendants strongly relied upon the case of *Morris* v. *Edgington*,[1] in which similar words had been used and a right of way allowed, but that case was explained by Lord Lyndhurst, C. B., as a case where the deed itself shewed the obvious intention of the parties that the word "appurtenant" should receive a more extensive construction than its usual legal meaning admitted of, and by Bayley, B., as case merely of a way of necessity, and not as a case properly requiring the construction of the words "belonging" and "appertaining," because if there had been no such words, the law would have presumed the way in question, on the principle that where property is granted, a right of access to the property is also granted.[2]

Morris v. *Edgington* explained.

In that case a way was necessary to the use of the dominant tenement, and there being two ways whereby such access could be had, all the Courts had to decide was to which of the two the plaintiff was entitled as being the more natural and convenient way.

In *Pheysey* v. *Vicary*[3] a testator being seised in fee of two houses devised them and the "appurtenances thereunto belonging" to two separate persons, and it was held that these

Pheysey v. *Vicary*.

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[1] (1810), 3 Taunt., 24.

[2] The same view appears to have been taken by Parke, B., in *Pheysey* v. *Vicary* (1847), 16 M. & W., 484. But *see* the observations of Edge, C. J., and Aikman, J., in *Wutzler* v. *Sharpe* (1893), I. L. R., 15 All., 270.

[3] (1847), 16 M. & W., 484.

words were not sufficient to give the devisee claiming it a right of way over the other devisee's property, such right of way not being a way of necessity.

Worthington v. *Gimson.*

In *Worthington* v. *Gimson*[1] it was held that the right of way claimed in that case passed neither by implied grant nor by presumption of law, for the use merely of the words "rights, members, easements, and appurtenances" was insufficient to carry it by implied grant, and the way, not being an apparent and continuous easement necessarily passing upon the severance of the property, as being incident to the separate enjoyment of the part severed, could not pass by presumption of law.

Polden v. *Bastard.*

In *Polden* v. *Bastard*[2] there was a devise of two houses, one in the occupation of the devisor and another in the occupation of a tenant of the devisor.

Under the devise of the latter house whereby merely the house, out-house, and garden had been given and nothing more, the right was claimed to go and draw water from a pump which belonged to the house occupied by the devisor, and which the tenant of the devisor, as the occupier of the other house, had been accustomed to go and draw water from, to the knowledge of the devisor. It was decided that no such right passed under the devise, but the Court expressed the opinion that if the will had contained words showing that the house was intended to be devised "as usually enjoyed before" it might have been successfully contended that the right to use that pump, which had been enjoyed by the tenant of the house for two years, would pass, though not properly an easement.

"As sually enjoyed before."

Identity of rules in England and India.

The rule of English law that the use of the words "appurtenant" or "belonging" will not carry a discontinuous easement, such as a right of way, not in existence at the time of the grant, has been followed in India.[3]

Chunder Coomar Mookerjee v. *Koylash Chunder Sett.*

In *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett*[4] the words "appurtenant" or "belonging" were considered

[1] (1860), 2 E. & E., 618.

[2] (1863), 4 B. & S., 258; L. R., 1 Q. B., 156.

[3] *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46; *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665.

[4] (1881), I. L. R., 7 Cal., 665.

as ordinarily carrying only *existing* discontinuous easements, though it was thought they might, under certain circumstances, have a wider construction, as in *Morris* v. *Edgington*.[1]

This case has already been referred to in connection with the case of *Barlow* v. *Rhodes*,[2] where it was explained that from the circumstances of the case and the obvious intention of the parties expressed in the deed, the Court of Common Pleas in *Morris* v. *Edgington* thought a more extensive meaning should be given to the words used than that which they ordinarily bore. But as pointed out by Bayley, B., the right of way established in that case appears more appropriately to rest upon the ground of necessity than upon any construction of the deed.

Result of authorities.

The principle established by the foregoing authorities may accordingly be stated to be the following :—

That discontinuous easements not appurtenant, that is to say not in existence at the time of the grant, do not pass under the words "appurtenant" or "belonging" used in their ordinary legal sense, but that such easements actually in existence at the time of the grant do pass by the use of such words.

Effect of words "therewith used and enjoyed" or like words.

This being the state of the law as regards the use of the words "appurtenant" or "belonging" it now remains to be considered what is the effect of adding the words "therewith used and enjoyed" or like words.[3]

It will be seen that the usual effect of the addition of these words is to carry a way which, though not actually existing as an easement at the time of the grant, was used during the unity of possession or ownership for the convenience of a portion of the property afterwards severed.

Koostrya v. *Lucas.*

In *Koostrya* v. *Lucas*,[4] a portion of certain premises which belonged in their entirety to the grantor was leased to the plaintiff "together with all ways thereto belonging or appertaining, or therewith or *with any part thereof used or enjoyed*."

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[1] (1810) 3 Taunt., 24.

[2] (1833) 1 C. & M., 448.

[3] See *supra* in connection with words "appurtenant" or "belonging," and *infra*.

[4] (1822) 5 B. & Ald., 830.

Before and at the time of granting the lease, the grantor used a right of way through a gateway to a piece of ground on which the plaintiff had built stables, and which easement he claimed under the lease. It was held that as the way was used and enjoyed with a part of the devised premises it passed to the plaintiff by the words of the lease.

This was a case, therefore, where during unity of seisin a way was used for the convenience of the portion of the property devised, and it was accordingly held to pass under the words "used or enjoyed."

Similar principle in England and India.

The same principle was recognised in England in *Barlow* v. *Rhodes*, *Polden* v. *Bastard*, already referred to, and in other cases,[1] and in India in *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett*,[2] and *Wutzler* v. *Sharpe*.[3]

James v. *Plant*. Application of principle in case of partition of joint property.

The case of *James* v. *Plant*[4] is important as shewing that the same principle applies in the case of an implied grant on the partition of joint property.

In that case the properties, formerly separate, vested in coparceners as one joint property. Thereafter, a way which before the unity of seisin had been enjoyed from one property over the other continued to be used.

The coparceners for the purpose of making partition conveyed the property in two separate estates as had formerly existed to a grantee to uses to hold the same to the use in fee of two distinct persons. In conveying the messuages, tenements, lands, &c., the coparceners also conveyed all houses, out-houses, ways, easements, &c., to the said several messuages or tenements, lands, &c., belonging or appertaining, or *therewith usually held*, *used*, *occupied*, *or enjoyed*, to have and to hold the messuages, &c., with the buildings, lands, &c., thereunto belonging, *and their appurtenances* to the grantor to the use of the said two persons.

It was held reversing the judgment of the Queen's Bench that from the deed itself it was obviously the intention of the

[1] See *Watts* v. *Kelson* (1870), L. R., 6 Ch. App., 166; *Kay* v. *Oxley* (1875), L. R., 10 Q. B., 360.

[2] (1881) I. L. R., 7 Cal., 665.

[3] (1893) I. L. R., 15 All., 270.

[4] (1863) 4 A. & E., 749.

grantors that the right of way should pass and that the words above cited were sufficient to carry such intention into effect.

As to the use of the word "*appurtenances*" standing alone in the habendum, it was not considered that it affected in any way the implied grant arising from the use of the former words, as it was not to be taken by itself but with reference to the rest of the deed, and as thereby receiving a more enlarged meaning sufficient to let in and comprehend a right of way which had been "usually held, used, occupied, or enjoyed."

Guiding principle for determination of effect of particular words used.

The guiding principle in all these cases of implied grant where questions arise whether on the severance of tenements formerly held in joint or sole ownership, discontinuous easements have passed under the particular words used in the instrument, is so clearly stated by Tindal, C. J., in the last-mentioned case that his language may be usefully quoted here :—He said, "We all agree that, where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended according to the duration of the respective estates in the land and the way ; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word.

"We agree also in the principle laid down by the Court of King's Bench that, in the case of a unity of seisin in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one 'used and enjoyed with the land' which forms the subject-matter of the conveyance."

But though the Court of Exchequer Chamber to whom the case came in error, agreed with the Court of King's Bench in its statement of principles, it did not, as has been seen, agree with it in its application of them to the case.

How easement to divert water passes.

The principle laid down in this and similar cases with reference to the use of the words "therewith used and enjoyed" or the like has been applied by analogy to the case of an easement to divert water claimed under a conveyance which

purported to be of "all waters, water-courses, privileges, easements, advantages and appurtenances to the premises belonging or in anywise appertaining, or to or with the same or any part thereof held, used, occupied or enjoyed."[1]

But since the case of *Watts* v. *Kelson*[2] to be hereafter referred to in connection with quasi-easements,[3] an easement of the kind just mentioned would appear on a severance of the tenements to pass more properly by presumption of law than under an implied grant depending on the particular words used.

When words "therewith held or used" or like words will not carry a discontinuous easement.

But the words "therewith held or used" or like words will not carry a way not used prior to unity of possession or ownership but made by the owner of both properties during unity of possession or ownership for his own greater convenience in the use of the two properties jointly.[4]

Thomson v. *Waterlow.*

In the case of *Thomson* v. *Waterlow*[5] Lord Romilly, M. R., recognised this principle and pointed out the distinction between the case of a right of way which previously to the unity of possession existed from one property to another and had become merged by the fact of the same person having become the owner of both properties, and the case of a right of way where the user had sprung solely from the convenience of the person who held the tenements, which convenience ceased to exist when the severance of the tenements took place.

Watts v. *Kelson.*

Upon the authority of *Thomson* v. *Waterlaw* and *Langley* v. *Hammond*, the Master of the Rolls in *Watts* v. *Kelson*[6] held that because the artificial water-course was first made and begun by a person who was owner of both properties, and had no prior existence at a time when the properties were separately owned, the general words in the conveyance were not sufficient to pass the right.

But the Court of Appeal in expressing the opinion that the general words were sufficient to pass the right even if the

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[1] *Wardle* v. *Brocklehurst* (1859), 1 E. & E., 1058.

[2] (1870) L. R., 6 Ch. App., 166.

[3] See Part IV, B.

[4] *Thomson* v. *Waterlow* (1868), L. R., 6 Eq., 36; *Langley* v. *Hammond* (1868), L. R., 3 Exch, 161; *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665.

[5] (1868) L. R., 6 Eq., 36.

[6] (1870) L. R., 6 Ch. App., 166.

easement had not passed as a quasi-easement by a presumption of law, which it had, pointed out that *Thomson* v. *Waterlow* and *Langley* v. *Hammond* were both cases of rights of way, and that the Master of the Rolls had overlooked the well-established distinction between easements, like rights of way, which are only used from time to time, and what are called continuous easements.[1]

General rule of construction.

Lastly, it is a general rule of construction that the question, whether or not the particular easement must be taken to have passed under the particular instrument, is to be determined by the intention of the parties to be gathered from the language of the instrument considered with reference to the state of circumstances existing at the time of the grant, and to the previous manner of enjoyment.[2]

Kay v. *Oxley.*

In *Kay* v. *Oxley*,[3] Blackburn, J., said, "I think in considering the words we should see what they really mean, and apply them to the state of circumstances existing at the time of the conveyance."

Questions of construction as to whether the entire interest in the land conveyed or an easement only.

Questions of construction have occasionally arisen as to whether the grant is to be construed as conveying the land itself, and thereby excluding the grantor from all further interest in, and enjoyment of, the land or its produce, or as confining the grantee's rights within the limits of a mere easement or *profit à prendre.*

In this connection it has been held that the grant of a house together with the exclusive use of a gateway described by particular dimensions and being a covered passage, carried with it not only the right to use the gateway as a means of access to the dominant tenement, but a right of property in the passage itself so as to permit of a bookstall being put up in it.[4]

It was pointed out that the exclusive use of the gateway had an entirely different meaning from the words " the exclusive

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[1] See further Part IV, B.

[2] *Wardle* v. *Brocklehurst* (1859), 1 E. & E., 1058; *Thompson* v. *Waterlow* (1868), L. R., 6 Eq., 36; *Langley* v. *Hammond* (1868), L. R., 3 Exch., 161; *Kay* v. *Oxley* (1875), L. R., 10 Q. B., 360; *Municipality of City of Poona* v. *Vaman Rayaram Gholap* (1891), I. L. R., 19 Bom., 797.

[3] (1875) L. R., 10 Q. B., 360 (368).

[4] *Reilly* v. *Booth* (1890), 44 Ch. D., 12; and see *Bastard* v. *Capel* (1828), 8 B. & C., 141.

right of gateway" as used in the case of *London Taverns Company* v. *Worley*.[1]

Minerals.

As regards the case of minerals it has been held in determination of the question whether the land itself was conveyed or merely the right to get the minerals, which is a *profit à prendre*, that the grant of a right to get all the coal lying in a particular close, is a grant of the land itself, a corporeal right, conveying the entire interest of the grantor.[2]

In the absence of clear and explicit language showing an intention to convey the greater right, the Court will decide in favour of the lesser right.[3]

Lord Mountjoy's case.

"*Lord Mountjoy's case*[4] is a leading authority for the proposition that a grant in fee of liberty to dig ores does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor. This was the view taken of the case in *Chetham* v. *Williamson*,[5] and in *Doe* v. *Wood*,[6] and has never been judicially questioned."

Such is the language of Lindley, L. J., in the recent case of *Duke of Sutherland* v. *Heathcote*.[7]

Rule as to uncertain grant being construed most strongly against grantor.

It appears at one time to have been considered that when the terms of a grant were uncertain, the grant was to be construed most strongly against the grantor.

The rule as to doubtful grants being construed most strongly against the grantor which involves the application of the maxim, *Verba chartarum fortius accipiuntur contra proferentem* has been questioned in *Taylor* v. *Corporation of St. Helens*[8] by Jessel, M. R., who made the following observations :—

Taylor v. Corporation of St. Helens.

"Before doing so, I will take the liberty of making an observation as regards a maxim quoted by Mr. Christie, and which is to be found, I believe, in a great many text-books, and. I am afraid, also in a great many judgments of ancient date, and that is, that a grant, if there is any difficulty or obscurity as to its meaning, is to be read most strongly against the grantor.

[1] See *Reilly* v. *Booth* (1890), 44 Ch. D. at p. 24, per Lindley, L. J.

[2] *Sanders* v. *Norwood* (1600), 2 Cro. Eliz., 683 ; *Wilkinson* v. *Proud* (1843), 11 M. & W., 33.

[3] *Duke of Sutherland* v. *Heathcote*, (1892), 1 Ch., 475.

[4] (1583), 1 And., 307 ; 4 Leon., 147.

[5] (1804), 4 East, 469.

[6] (1819), 2 B. and Ald., 724.

[7] (1892), 1 Ch. at p. 485.

[8] (1877), L. R., 6 Ch. D., 264.

"I do not see how, according to the now established rules of construction as settled by the House of Lords in the well-known case of *Grey* v. *Pearson*,[1] followed by *Roddy* v. *Fitzgerald*[2] and *Abbott* v. *Middleton*,[3] that maxim can be considered as having any force at the present day. The rule is to find out the meaning of the instrument according to the ordinary and proper rules of construction. If we can thus find out its meaning, we do not want the maxim. If, on the other hand, we cannot find out its meaning, then the instrument is void for uncertainty, and in that case it may be said that the instrument is construed in favour of the grantor, for the grant is annulled."

But the Master of the Rolls while referring to the two extreme cases of an instrument intelligible by the ordinary rules of construction, and of an instrument so obscure as to be void for uncertainty, appears to have left unnoticed the middle case of an instrument, which is capable of two meanings, but raises a doubt as to which meaning it ought to bear. In such a case authority appears to show that the doubtful words should be given the meaning which is the most unfavourable to the grantor provided no wrong is thereby done.[4]

Part IV.—By Presumed Grant or Operation of Law.

Distinction between "Implied grant" and "Presumed grant."

The distinction between the operation of an implied grant and presumed grant has already been observed.

In the former case the grant is an implied grant arising out of the intention of the grantor and the words used by him considered with reference to the state of circumstances existing at the time of the grant, whereas in the latter case the grant operates not by virtue of any words used by the grantor, but by virtue of a legal presumption arising on the ground of necessity, whether absolute, or of the qualified character to be found in what are called *quasi*-easements.[5]

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[1] (1857), 6 H. L. C., 61.

[2] (1857), 6 H. L. C., 823.

[3] (1858), 7 H. L. C., 68

[4] See Elphinstone, Norton and Clark on Interpretation of Deeds, pp. 93 *et seq.*; Brooms Legal Maxims, 6th Ed., p. 548.

[5] In *Pheysey* v. *Vicary* (1847), 16 M. & W. (1847), at p. 495, Parke, B., conveniently distinguishes these two classes of easements by construing one as of absolute necessity for access to property

In the cases of presumed grant the easement is said to arise as incident to the grant of the dominant tenement.[1]

It is between the consideration of what for the purposes of distinction may be called "easements of absolute necessity" and *quasi*-easements that this part of the chapter will be divided.

A.—Acquisition of Easements of Absolute Necessity.

Easements of necessity.

These are the easements which are usually known as "Easements of Necessity."

The most ordinary instance of them is what is called a "way of necessity," though their application is not strictly limited to ways.[2]

How they arise.

These easements arise on a severance of the tenements, and the principle by which their acquisition is governed may be stated to be that the law will presume an additional grant in favour of the grantee or a reservation in favour of the grantor of everything absolutely necessary for the enjoyment of the dominant tenement.

This principle has been consistently recognised from the earliest times.[3]

In the case of a reservation the right operates by way of a re-grant from the owner of the surrounding land.[4]

Notes to *Pomfret* v. *Ricroft*.

In the notes to *Pomfret* v. *Ricroft*,[5] the following statement of the law occurs :—

"So where a man, having a close surrounded with his own land, grants the close to another in fee, for life or years,

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in its strict sense, and the other, by a more modern doctrine as necessary to the convenient enjoyment of the dwelling-house as it was enjoyed at the time of grant or devise.

[1] Oldfield's case, Noy's Rep. 123.

[2] *See* Introductory, Part 1 under "Easements of Necessity," and *infra*.

[3] *Clark* v. *Cogge* (1607). Cro. Jac., 170 ; *Packer* v. *Welstead* (1657), 2 Siderfin, 111; *Pomfret* v. *Ricroft* (1681), 1 Sand., 321 ; *Dutton* v. *Taylor* (1701), 2 Lut., 1487 ; *Hinchcliffe* v. *Earl of Kinnoul* (1838), 5 Bing. N. C., 1. ; *Dand* v. *Kingscote* (1840), 6 M. & W., 174 ; *Pinnington* v. *Gallard* (1853), 9 Exch., 1 ; *Suffield* v. *Brown* (1864), 4 DeG. J. & S. at p. 197 ; *Crossley* v. *Lightowler* (1866), L. R., 2 Ch. App., p. 486 ; *Gayford* v. *Moffatt* (1868), L. R. 4 Ch. app. 133 ; *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D., 31 ; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839 ; I. E. Act, s. 13, cls. (*a*), (*c*), and (*e*), and see *Chuni Lal* v. *Mani Shankar* (1893), I. L. R., 18 Bom. at p. 625.

[4] *Corporation of London* v. *Rigges* (1880), I. L. R., 13 Ch. D., 798.

[5] 1 Saund. Rep., 321.

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."

"This principle seems to be the foundation of that species of way which is usually called a way of necessity."

Gayford v. *Moffatt.*

Upon this very principle, a way of necessity was allowed in *Gayford* v. *Moffatt*[1] where it was held that immediately after the lease was granted, the plaintiff who was a tenant occupying the inner close, became entitled to a way of necessity through the outer close, suitable to the business to be carried on on the premises demised, namely, the business of a wine and spirit merchant.

Hinchcliffe v. *Earl of Kinnoul.*

So in *Hinchcliffe* v. *Earl of Kinnoul*[2] there were two adjoining houses belonging to the same lessor, and the coal cellar under one house was supplied through a shoot, the mouth of which opened in the yard of the adjoining house; and it was held that a demise by the owner of both houses of the first house with its appurtenances carried with it the right to use the coal shoot, and also a right of way to the coal shoot through the premises of the adjoining house, such way being necessary for the enjoyment of the coal shoot. This decision rests on the ordinary principle of law applicable to these cases, that if a tenement is granted for valuable consideration a right of way to it through other land belonging to the grantor is also granted, if such way be absolutely necessary for the enjoyment of the thing granted.[3]

Davies v. *Sear.*

On a similar principle rests the decision in *Davies* v. *Sear*,[4] which was also a case of a right of way.

Easements of necessity may arise on a grant of minerals.

By a similar legal presumption when minerals are granted and the surface is land reserved or the surface land is granted and the minerals are reserved, such powers as are necessary for working the mines are granted or reserved, as the case may be, as incident to the grant or reservation.[5]

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[1] (1868) L. R., 4 Ch., App. 133.

[2] (1838) 5 Bing N. C. 1.

[3] See *Suffield* v. *Brown* (1864), 4 DeG. J. and S. at p. 197.

[4] (1869) L. R., 7 Eq. 427, explained in *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D. at p 58.

[5] *Dand* v. *Kingscote* (1840), 6 M. & W., 174; *The Durham and Sunderland Railway Co.* v. *Walker* (1842), 2 Gale and

Dand v. Kingscote.

Thus in *Dand* v. *Kingscote*,[1] where land was granted with a reservation of mines and the liberty of sinking pits, it was held that the right of erecting a steam engine, and other machinery necessary for draining them with all proper accessories passed as incident to the reservation.

Rowbotham v. Wilson.

In *Rowbotham* v. *Wilson* [2] Lord Wenslydale observed as follows:—

"The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed.

"*Primâ facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved, as a necessary incident. It is one of the cases put by Sheppard (Touchstone, 5 chap., 89) in illustration of the maxim, 'Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit,' that, by grant of mines, is granted the power to dig them."

Ruabon Brick and Terra-Cotta Co. v. G. W. Ry. Co.

The same principle was followed in the recent case of *Ruabon Brick and Terra-Cotta Company* v. *Great Western Railway Company*,[3] where the plaintiffs having granted land to the defendants reserving mines, and the defendant company having laid a railway over a bed of valuable clay lying in the subject of the grant, it was held that the plaintiffs were entitled to work the clay from the surface, and to remove the ballast and surface soil lying above such clay.

Easements of necessity relating to water. *Nicholas v. Chamberlain.*

With regard to easements relating to water, the case of *Nicholas* v. *Chamberlain* [4] has been explained as referring to a case of necessity where it was said that if a man erects a house and builds a conduit thereto from 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 reserves

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Dav., 326 ; *Rowbotham* v. *Wilson* (1860), 8 H. L. C., 348 (360), *Gould* v. *The Great Western Deep Coal Co.* (1865), 13 L. J., 109.

[1] (1840) 6 M. & W., 174.

[2] (1860) 8 H. L. C. at p. 360.

[3] (1893) L. R., 1 Ch., 427.

[4] (1607) Cro. Jac., 121. See *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D. at p. 50, *per* Thesiger, L. J.

the house and sells the land, the conduit and pipes pass with the house, because they are necessary and *quasi*-appendant thereto.

Ewart v. *Cochrane.*

In *Ewart* v. *Cochrane*,[1] Lord Chelmsford appears to have thought that the easement there claimed, of draining surplus water from a tanyard into a tank or cesspool, situated in the adjoining property, passed as an easement of absolute necessity on a severance of the two properties. But the tendency of the later authorities has been to recognise the acquisition of such an easement as a *quasi*-easement, apparent, continuous and necessary for the enjoyment of the property as it was enjoyed at the time of the severance, rather than as an easement of absolute necessity.

Morgan v. *Kirby.*

So in India in *Morgan* v. *Kirby*,[2] where the easement claimed was the right to the flow of water along an artificial watercourse, it was said that such an easement might be an easement of necessity arising on a severance of tenements when the convenience claimed is one without which the grantee could not have the use of the tenement then severed off from the main heritage.

" During unity of possession no easement strictly so called exists, but a man may, by the general right of property, make one part of his property dependent on another and grant it with this dependence to another person. Where property is conveyed which is so situated relatively to that from which it has been severed so that it cannot be enjoyed without a particular privilege in or over the land of the grantor, the privilege is what is called an easement of necessity, and the grant of it is implied and passes without any express words. It is as it were brought into existence by the severance of the tenements on the principle that together with the property sold, the vendor grants everything, without which it could not be beneficially used."[3]

Similarly the right to the flow of water along a drain may be acquired as an easement of necessity.[4]

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[1] (1861) 7 Jur. N. S., 925 ; 4 Macq., S. A., 117.

[2] (1878) I. L. R., 2 Mad., 46.

[3] *Per* Innes, J., at p. 52.

[4] *Purshotam* v. *Tukaram* (1890), I. L. R., 14 Bom., 152

Tenant may acquire easement of necessity against landlord. *Gayford* v. *Moffatt*.

The rule preventing a tenant from acquiring an easement by prescription as against his landlord does not extend to the case of an easement of necessity, as the case of *Gayford* v. *Moffatt*,[1] above referred to, shews.

Distinction between easements of absolute necessity and quasi-easements where dominant tenement retained by grantor.

Though easements of absolute necessity and *quasi*-easements may alike be created by implication of law on a severance of the tenements, a point of distinction arises between these two classes of easements in cases where the dominant tenement is retained by the grantor instead of being conveyed, and it is the servient tenement which is conveyed to the grantee.

In such circumstances the legal presumption operates for the acquisition of an easement of absolute necessity as much in favour of the grantor retaining the dominant tenement as of the grantee obtaining it, the necessity which is the foundation of the easement, being considered equally unanswerable in either case.

But with regard to *quasi*-easements, the law as it has to be applied in Bengal and those parts of India where the Indian Easements Act is not in force, is different, for, as will be seen, these rights arise in favour of a grantor retaining the dominant tenement and conveying the servient tenement, not by virtue of a similar presumption, but only by express reservation in the conveyance.[2]

B.—Acquisition of Quasi-Easements.

What are *quasi*-easements.

The term "*quasi*-easements" has been applied to those easements, which, not being easements of absolute necessity, come into existence for the first time by presumed grant or operation of law on a severance of two or more tenements formerly united in the sole or joint possession or ownership of one or more persons.[3]

They are to be distinguished from those easements which, existing before the unity of possession, are suspended merely

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[1] (1868) L. R., 4 Ch. App., 133.

[2] See *infra* B, Acquisition of *Quasi*-Easements.

[3] They will not, of course, come into existence where the terms of the conveyance exclude them. *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 809.

during its continuance, and revive upon its determination by the mere separation of the tenements.[1]

Meaning of the term.

Though possessing no legal existence during the unity of possession or ownership, their use during that time by the owner of the united tenements as necessary to the enjoyment of the property, causes them to be regarded in law as *quasi*-appendant rights expanding into easements proper on a disposition of the tenements.

How distinguishable from easements of absolute necessity.

Though in one sense they may be called easements of necessity as originating partly in reasons of practical utility, they offer important features of dissimilarity to easements of absolute necessity, both in the matter of their acquisition by a grantor retaining the *quasi*-dominant tenement, and in their character of being apparent and continuous.[2]

Their acquisition to be considered from three different aspects.

It will be convenient to consider the law relating to the acquisition of *quasi*-easements on a severance of tenements from three different aspects : *first*, where the tenements were formerly united in *sole* possession or ownership ; *secondly*, where they were formerly united in *joint* possession or ownership and are severed on partition ; and *thirdly*, where being formerly united in either sole or joint possession or ownership, they are simultaneously conveyed to different persons.

Most of the cases fall under the first branch of the subject, where a man, having been in sole possession or ownership of a united property, disposes of it in different tenements, but the second branch of the subject is also important as involving a consideration of the law as it applies to cases arising out of the partition of joint properties. The third branch of the subject appears to be nearly allied to the second.

I.—Acquisition of quasi-easements on a severance of tenements formerly held in sole possession or ownership.

In cases falling under this heading the question whether *quasi*-easements arise on a severance of the tenements depends

[1] See *Suffield* v. *Brown* (1864), 4 De G. J. & S., 185 ; and Chap. X, Part II.

[2] See *supra*, this matter is referred to under "Acquisition of Easements of Absolute Necessity" and *infra* where it is fully discussed.

upon whether the *quasi*-dominant tenement is conveyed to the grantee or retained by the grantor, for though in the former state of circumstances, *quasi*-easements arise in favour of the grantee under a presumed additional grant, they are not in the latter state of circumstances retained by the grantor, except by express words of reservation. This distinction makes it necessary to consider the law, first, when the *quasi*-dominant tenement is conveyed, and secondly, when it is retained.

(a)—The law as to the acquisition of quasi-easements when the quasi-dominant tenement is conveyed to the grantee, and the quasi-servient tenement is retained by the grantor.

(1). *Generally.*

General principles.

It will be convenient in the first instance to state general principles, and then to refer in detail to the different kinds of easements to which such principles have been applied.

From an examination of the authorities these general principles will be found to be the following :—

First.—On the grant by the owner of an entire property of part of that property as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements, meaning *quasi*-easements, which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted.[1]

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[1] *Suffield* v. *Brown* (1864), 4 De G. J. & S., 185 ; *Watts* v. *Kelson* (1870), L. R., 6 Ch. App., 166 ; *Amutool Russool* v. *Jhoomuck Singh* (1875), 24 W. R., 345 CivilRulings), *Wheeldon* v. *Burrows* (1878), L. R., 12 Ch. D., 31 ; *Allen* v. *Taylor* (1880), L. R. 16 Ch. D., 355; *Russell* v. *Watts* (1885), L. R., 10 App. Cas., 611 ; *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., 46 ; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., at p. 853 ; *Purshotum* v. *Durgoji* (1890), I. L. R., 14 Bom., 452 ; *Chunilal* v. *Manishankar* (1893), I. L. R., 18 Bom., 616. The same rule applies in favour of a lessee of the *quasi*-dominant tenement either as against the lessor retaining the *quasi*-servient tenement or his assigns. *Cox* v. *Matthews* (1685), 1 Ventris, 237, 239 ; *Rosewell* v. *Pryor* (1704), 6 Mod., 116 ; *Coutts* v. *Gorham* (1829), M. & M., 396 ; *Jacomb* v. *Knight* (1863), 32 L. J., Ch. 601. It applies also in the case of a sale by a mortgagee rightly exercising his power of sale. *Born* v. *Turner* (1900), 2 Ch., 211.

Secondly—Such easements arise in favour of the grantee either on the principle that the grantor is presumed by law to grant everything which is essential to the use and enjoyment of the *quasi*-dominant tenement, or on the principle that a man cannot derogate from his own grant.[1]

The former principle applies in the case of an affirmative easement under a presumed additional grant.[2]

The latter principle applies in the case of a negative easement under a presumed negative covenant.[3]

The justice of these principles is unquestionable, for it is obvious that where one portion of a united property has been dependent on another portion for certain necessary advantages, and the former portion is alienated, the denial to the grantee of the enjoyment of similar advantages would be to deprive his newly acquired property of utility, and him of the benefit of his bargain. Not only would such denial work injustice to the grantee, but would shew undue favour to the grantor by allowing him to retain his consideration without making an adequate return.

Uniformly recognised in England and India.

These principles are well-established in English law, and have obtained uniform recognition in India, both from the Legislature in the Indian Easements Act,[4] and from the Courts in cases falling outside the Act.[5]

Such being the definition of *quasi*-easements and the general principles upon which they are acquired, it remains to be ascertained what classes of easements fall within their scope.

In order to arrive at a satisfactory conclusion in this respect, it becomes necessary to examine separately and from its own standpoint, each of the different classes of easements.

First in the importance and number of cases to which they have given rise come easements of light.

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[1] *Suffield* v. *Brown*; *Wheeldon* v. *Burrows*; *Allen* v. *Taylor*; *Chunilal* v. *Atmaram*.

[2] *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. 782.

[3] *Dalton* v. *Angus*.

[4] S. 13, cl. (*b*).

[5] *Morgan* v. *Kirby*; *Delhi and London Bank* v. *Hem Lall Dutt*; *Purshotam* v. *Durgaji*; *Chunilal* v. *Manishankar*.

(2). *In particular.*

(*a*) Easements of Light.

Easements of light pass as *quasi*-easements and not as easements of necessity.

In the first place it should be observed that the general principles above stated are applicable to the acquisition of easements of light by presumed grant, and that when such easements pass to a grantee on a severance of the tenements they pass as *quasi*-easements, and not as easements of necessity.[1]

With this preliminary observation it is proposed to examine the authorities in detail.

Palmer v. *Fletcher.*

One of the earliest reported cases is that of *Palmer* v. *Fletcher*[2] where it was resolved that if a man erects a house on his own land and thereafter sells the house to one purchaser and the land to another, the purchaser buying the land cannot block up the other's lights any more than the original owner, who cannot derogate from his own grant, and this though the house is a new one.

To the same effect are the decisions in *Cox* v. *Matthews*,[3] and *Rosewell* v. *Pryor*.[4]

Compton v. *Richards.*

Palmer v. *Fletcher* was followed in *Compton* v. *Richards*,[5] where it was held that the occupier of one of two houses built nearly at the same time and purchased by the same proprietor, might maintain a special action on the case against the tenant of the other for obstructing his window lights, however short the previous enjoyment by the plaintiff.

Though the houses were unfinished at the time of sale, the openings intended for the windows were sufficiently indicated to support an implied condition that nothing should be afterwards done whereby the windows might be obstructed.

Coutts v. *Gorham.*

In *Coutts* v. *Gorham*,[6] the owner of two adjoining houses having certain ancient windows leased one of them for twenty-one years determinable on lives, which lease the lessee afterwards assigned to the defendant.

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[1] *Wheeldon* v. *Burrows* (1878), L. R., 12 Ch. D., 31 ; *Chunilal* v. *Manishankar*, (1893), I. L. R., 18 Bom., 616, and see Indian Easements Act, s. 13, cl. (*b*), and Il. (*c*).

[2] (1679), 1 Levinz, 122.

[3] (1685), 1 Ventr., 237.

[4] (1704), 6 Mod., 116.

[5] (1814), 1 Price, 27.

[6] (1829), 1 Moody and Malkin, 396.

Thereafter the defendant took a new lease of the same premises from the owner for twenty-one years.

The windows of the other house had been altered and placed in a different position from the ancient ones at a period within twenty years of the obstruction of lights complained of by the plaintiff, and the owner thereafter leased the house to the plaintiff.

It was held that as the owner could not have obstructed the plaintiff's lights in these circumstances, the defendant had not the right to do so.

Swansborough v. Coventry.

The same principle was applied in *Swansborough* v. *Coventry*,[1] where Tindal, C. J., said : "It is well established by the decided cases, that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, 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 principle is laid down by Twisden and Wyndham, JJ., in the case of *Palmer* v. *Fletcher*, 'that no man shall derogate from his own grant.' The same law was adhered to in the case of *Cox* v. *Matthews*, by Holt, C. J., in *Rosewell* v. *Pryor;* and, lastly, in the later case of *Compton* v. *Richards*."

Wheeldon v. Burrows.

In *Wheeldon* v. *Burrows*,[2] the general rule governing the acquisition of *quasi*-easements by the grantee of the *quasi*-dominant tenement was stated to be applicable to easements of light and to be founded on the maxim well established by authority and consonant to reason and common sense, that a grantor shall not derogate from his own grant and was expressed as follows :—

"On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (meaning *quasi*-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property

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[1] (1832) 9 Bing., 305.

[2] (1879) L. R., 12 Ch. D., 31.

granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted."[1]

Allen v. *Taylor.*

In *Allen* v. *Taylor*[2] Jessel, M. R., said : "There can be no doubt that the law as laid down by *Palmer* v. *Fletcher* is the law of the present day ; that is, where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights. That is based on the principle that a man shall not derogate from his own grant : and it makes no difference whether he grants the house simply as a house, or whether he grants the house with the windows or the lights thereto belonging. In both cases he grants with the apparent easements or *quasi*-easements. All that is now, I take it, settled law."

Broomfield v. *Williams ; Pollard* v. *Gare.*

Finally, the recent cases of *Broomfield* v. *Williams*[3] and *Pollard* v. *Gare*[4] have affirmed the same doctrine by deciding that the purchaser or lessee of the first of a series of building plots is entitled to the free access of light to his house, unless the vendor or lessor has expressly reserved to himself and his assigns a right to obstruct by building on the adjoining land or there is sufficient evidence of a definite building scheme binding on the purchaser or lessee.[5] This is a *primâ facie* right and the burden of setting limits to it lies on the vendor or lessor.[6]

The successive decisions above cited establish beyond question the principles of English law which govern the acquisition of *quasi*-easements of light by the grantee of the *quasi*-dominant tenement.

English principles applied in India.

In India the same rule has, in its application to easements of light, received legislative and judicial approval.[7]

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[1] *Per* Thesiger, L. J., at p. 49.

[2] (1880) L. R., 16 Ch. D. at p. 357.

[3] (1897) 1 Ch., 602.

[4] (1901) 1 Ch., 834.

[5] Reference in the conveyance and the plan thereon to "building land" and the existence of a building line in the plan, by reference to which the agreement of sale or lease is entered into, without anything further are insufficient to restrict the application of the doctrine, *Broomfield* v. *Williams; Pollard* v. *Gare.*

[6] *Broomfield* v. *Williams.*

[7] I. E. Act, s. 13, cl. (*b*) and ill. (*c*) ; *Delhi and London Bank* v. *Hem Lal Dutt* (1887), I. L. R., 14 Cal. at p. 853.

(*b*) Easements relating to Water.

The same general principles apply equally in England and India.

The same general principles governing the acquisition of *quasi*-easements by the grantee of the *quasi*-dominant tenement and applying to easements of light, apply also in England and in India[1] to easements relating to water, whether as regards the flow of water to or from the dominant tenement, or as regards the pollution of water.

Easement in flow of water to dominant tenement. *Nicholas* v. *Chamberlain.*

Thus in *Nicholas* v. *Chamberlain*,[2] it was held by all the judges upon demurrer that if one erects a house and builds a conduit thereto from another part of his land and conveys water by pipes to the house and afterwards sells the house with the appurtenances excepting the land, the conduit and pipes pass with the house, because they are necessary and *quasi*-appendant thereto.

Sury v. *Piggott.*

In *Sury* v. *Piggott*[3] 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 land over which the stream flowed and the plaintiff's close had both belonged in unity of ownership to the Crown until King Henry VIII granted the land over which the stream flowed to the grantee under whom the defendant claimed.

It was held that the defendant took the land subject to the previously existing right of the plaintiff's predecessors to have the flow of water to the pool unobstructed.

In the same case it was laid down that if a man has a mill on one part of his land, and the stream which works the mill flows through another part of his land, and he grants the mill with the land on which it stands, he cannot afterwards stop the stream from flowing to the mill through the part of the land which he has not granted.

Canham v. *Fisk.*

In *Canham* v. *Fisk*[4] the owner of two closes, in one of which a stream arose that flowed through the other, first sold the latter to the plaintiff and afterwards sold the former to the defendant. In an action by the plaintiff for the diversion of

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[1] I. E. Act, s. 13, ill. (*h*).

[2] (1607) Cro. Jac., 121.

[3] (1625) Palmer, 444.

[4] (1831) 2 C. & J., 126.

the water by the defendant it was held that a presumed right to the water passed with the conveyance to the plaintiff, and that the action could be maintained.

Watts v. Kelson.

Watts v. *Kelson*[1] is an important case both as an authority for bringing easements in the flow of water within the scope of the general principles governing the acquisition of *quasi*-easements by the grantee of the *quasi*-dominant tenement, and as explaining the meaning of the words "continuous" and "necessary" as applying to *quasi*-easements.

In that case the plaintiff sued to maintain an alleged right to the uninterrupted flow of water along an artificial water-course through the defendant's premises to the plaintiff's.

The facts were that the owner of two properties held in unity of ownership made a drain from a tank on one property to a lower tank on the same property, and laid pipes from the lower tank to cattle-sheds on the other property for the purpose of supplying them with water, and they were so supplied up to the time the owner sold the latter property to the plaintiff who then had the use of the water until the defendant, who subsequently became the purchaser of the former property, stopped it.

In granting a perpetual injunction restraining the defendant from obstructing and diverting the stream and water-course, the Court of Appeal in a judgment delivered by Mellish, L. J., made the following observations :—

"We are clearly of opinion that the easement in the present case was in its nature continuous. There was an actual construction on the servient tenement extending to the dominant tenement by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement. According to the rule, as laid down by Chief Justice Erle, the right to such an easement as the one in question would pass by implication of law without any words of grant, and we think that this is the correct rule."[2]

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[1] (1870) L. R., 6 Ch. App., 166.

[2] P. 173.

"It was objected before us, on the part of the defendant, that on the severance of two tenements no easement will pass by an implied grant, except one which is necessary for the use of the tenement conveyed. It was, at the time of the conveyance, the existing mode by which the premises conveyed were supplied with water; and we think it is no answer that if this supply was cut off, possibly some other supply might have been obtained. We think it is proved on the evidence that no other supply of water equally convenient or equally pure could have been obtained."[1]

Ramessur Prasad Narain Singh v. *Koonj Behari Pattuk.*

In *Ramessur Prasad Narain Singh* v. *Koonj Behari Pattuk*,[2] where the plaintiff claimed for the purposes of irrigation to have the flow of water in an artificial channel from the defendant's estate to his own without diversion by the defendant, the Privy Council, referring to *Watts* v. *Kelson*, observed, "It may be that at the time when this system of irrigation was adopted the *mouzahs* now belonging to the plaintiff and the defendant formed one estate, and, if so, on severance the right to the continued flow of water in the accustomed channels would arise and subsist."

Morgan v. *Kirby.*

In *Morgan* v. *Kirby*,[3] where the easement claimed was the flow of water along an artificial water-course, it was said that such an easement might be acquired as a *quasi*-easement in the character of being a continuous and apparent easement which has been used by the owner during the unity of possession for the purpose of that part of the united tenement which corresponded with the tenement conveyed.

Same law with regard to *jus aquæ educendæ.*

As regards the easement to discharge water from the dominant tenement on to another's land, the *jus aquæ educendæ* of the Civil Law, there are cases deserving attention.

Coppy v. *J. de B.*

The first of these is the old case of *Coppy* v. *J. de B.* decided in the 11 H. 7 and reported in Gale on Easements as follows[4]:—

"One William Coppy brought an action in the case against J. de B., and counted that according to the custom of London,

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[1] P. 175.

[2] (1878) L. R., 4 App. Cas. at p. 128; I. L. R., 4 Cal. at p. 639

[3] (1878) I. L. R., 2 Mad., 46. *See* also *Amtool Russool* v. *Jhoomuck Singh* (1875), 24 W. R., 345 (Civ. Rul.).

[4] 7th Ed., pp. 101 *et seq.*

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 seized 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 to another man's land is a custom solemnly binding the land, and this is not extinct by unity of possession ; as if the lord of a seigniory purchased 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 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."

Though the plaintiff rested his case on a custom of London, the decision appears to be equally founded on general principles.

Ewart v. *Cochrane.*

In *Ewart* v. *Cochrane*[1] there were two adjoining properties, one a tanyard and the other a house and garden, which formerly belonged to the same owner.

[1] (1861) 7 Jur. N. S., 925 ; 4 Macq. S. A., 117.

From the tanyard, a drain was formed to carry off the surplus water, which was sent into a cesspool or tank in the adjoining garden, where it disappeared by absorption. Thereafter the properties were severed, the tanyard eventually finding its way into the ownership of the respondents and the house and garden into that of the appellants.

Subsequently the appellants becoming annoyed by the cesspool, blocked up the drain, and the respondent thereupon brought an action for damages which the Court of Session decided in their favour, on the ground that there had been a presumed grant of an easement to discharge the water from the tanyard into the cesspool.

The correctness of this decision was affirmed by the House of Lords on the ground that where two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used, and was necessary for the comfortable enjoyment of that part of the property which was granted, must be considered to follow from the grant.

Lord Campbell's judgment, from which the abovementioned ground is taken, refers merely to "comfortable enjoyment" and discloses no distinction between apparent and continuous easements, and discontinuous easements, between which, as has been seen, a very real difference exists in the method of their acquisition by presumed and implied grant. "Comfortable enjoyment" appears too broad a ground upon which to base the qualified necessity which is one of the conditions to the acquisition of *quasi*-easements. Lord Chelmsford appears to have based his concurrence in the decision of the House on the ground of absolute necessity.

Purshotam Sakharam v. Durgaji Tukaram.

In *Purshotam Sakharam* v. *Durgaji Tukaram*,[1] the plaintiff and defendant were in joint possession of certain land. They partitioned the land and subsequently built at their joint expense a partition wall between their respective portions, leaving a drain in the wall for the passage of water from the plaintiff's to defendant's land.

[1] (1890) I. L. R., 14 Bom., 452.

Thereafter the defendant stopped the flow of water of this drain and the plaintiff sued for an injunction restraining the defendant from causing the obstruction. It was held that the plaintiff would be entitled to the easement claimed by him if he could shew either that it was necessary for his share of the property or that it was apparent and continuous and necessary for enjoying the share as it was enjoyed when the partition took effect.

Lastly, there is the easement to pollute water.

Easement to pollute water. *Hall* v. *Lund.*

An authority for the acquisition of this right, as a *quasi*-easement by presumed grant, is the case of *Hall* v. *Lund*.[1]

There the owner of two mills leased one to the defendant. In the lease he was described as a bleacher, and the mill leased as lately occupied by one Pullan. Pullan had formerly carried on the business of a bleacher in the same mill and drained the refuse of his works into a water-course which supplied the other mill. The lessor subsequently sold both mills to the plaintiff who sued the defendant for polluting the water-course with the drainage from his bleaching works to the injury of the other mills.

The plaintiff lost his action as there was found to be an implied grant to the defendant to use the water-course for the purposes of his business as a bleacher.

Chief Baron Pollock, Baron Channel and Baron Wilde rested their decision on the ground of a continuous and apparent easement, bringing the case within the abovementioned principles of acquisition.

They were also of opinion that to grant the plaintiff the relief claimed when he stood in the same position as the lessor, who with full knowledge of the mode in which the premises had been used by the former lessee, had granted the defendant a new lease of the premises for the same purpose, would be to allow the plaintiff to derogate from his own grant which he could not do.

The remaining Judge, Baron Martin, agreed that the plaintiff could not succeed, but based his judgment on the decision of

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[1] (1863) 1 H. & C., 676.

the House of Lords in *Ewart* v. *Cochrane*,[1] above referred to, that where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor has granted those rights.

(*c*).—Easements to pollute air.

The same principles of acquisition are applied by the Indian Easements Act to the case of an easement to pollute air.[2]

(*d*).—Easements of support.

Application of general principles.

Easements of support, that is, easements of the support of a house by land, or of a house by a house, provide no exception to the application of the general principles of acquisition of *quasi*-easements by the grantee of the *quasi*-dominant tenement.

In fact as regards easements of support for buildings by buildings this doctrine of presumed grant applies, not only in the case of the grantee acquiring the *quasi*-dominant tenement, but also, without express words of reservation, in the case of the grantor retaining the *quasi*-dominant tenement thereby, as will hereafter be seen,[3] excluding these easements from the operation of the general rule applying in the latter case.

But, at present, it is the acquisition of the *quasi*-easement of support by the grantee which is the subject of discussion, and as to this it seems clear that on a severance of tenements the grantee of a house, or of land sold for the purpose of being built upon, will acquire by presumption of law an easement of support for his house built or to be built, from the adjoining portions of the severed property.[4]

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[1] (1861) 7 Jur. N. S., 925 ; 4 Macq., S. A., 117.

[2] S. 13, ill. (*h*).

[3] See *infra* under "Law as to the acquisition of *quasi*-easements when the *quasi*-servient tenement is conveyed to the grantee and the *quasi*-dominant tenement is retained by the grantor," "exceptions to the general rule."

[4] *Richards* v. *Rose* (1853), 9 Exch. 218; *Gayford* v. *Nicholls* (1854), 9 Exch. at p. 708 ; *Suffield* v. *Brown* (1864), 4 DeG. J. and S. at p. 198 ; *Angus* v. *Dalton* (1877), L. R., 3 Q. B. D., at p. 116 ; *Siddons* v. *Short* (1877), L. R., 2 C. P. D., 572 ; *Angus* v. *Dalton* (1878), L. R., 4 Q. B. D. at p. 182 ; *Wheeldon* v. *Burrows*, (1879), L. R., 12 Ch. D. at p. 59 ; *Dalton* v. *Angus* (1880), L. R., 6 App. Cas. at pp. 792, 826 ; *Rigby* v. *Bennett* (1882), L. R., 21 Ch. D., 559 ; Indian Easements Act, s. 13, ills. (*i*) & (*j*).

Angus v. *Dalton.*

Thus in *Angus* v. *Dalton*, Cockburn, C. J., said,[1] "Where land has been sold by the owner for the express purpose of being built upon, or where, from other circumstances, a grant can reasonably be implied, I agree that every presumption should be made and every inference should be drawn in favour of such an easement, short of presuming a grant when it is undoubted that none has ever existed."

Dalton v. *Angus.*

And in the same case when it was before the House of Lords as *Dalton* v. *Angus*, Lord Chancellor Selborne said,[2] "If at the time of the severance of the land from that of the adjoining proprietor it was not in its original state, but had buildings standing on it up to the dividing line, or if it were conveyed expressly with a view to the erection of such buildings, or to any other use of it which might render increased support necessary, there would be an implied grant of such support as the actual state or the contemplated use of the land would require, and the artificial would be inseparable from, and (as between the parties to the contract) would be a mere enlargement of, the natural. If a building is divided into floors or 'flats' separately owned (an illustration which occurs in many of the authorities), the owner of each floor or 'flat' is entitled upon the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself: *Caledonian Railway Company* v. *Sprot*."[3]

On the same occasion Lord Blackburn said,[4] "But I think it is now established law that one who conveys a house does, by implication and without express words, grant to the vendee all that is necessary and essential for the enjoyment of the house, and that neither he nor any who claim under him, can derogate from the grant by using his land so as to injure what is necessary and essential to the house."

Siddons v. *Short.*

In *Siddons* v. *Short*,[5] the plaintiffs who were iron founders and had bought land from the defendant's assignor for the pur-

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[1] (1877) L. R., 3 Q. B. D., at p. 116.

[2] (1881) L. R., 6 App. Cas. at p. 792.

[3] 2 Macq., 449. *See* I. E. Act, s. 13, ill. (*m*).

[4] At p. 826.

[5] (1877) L. R., 2 C. P. D., 572.

pose of erecting an iron foundry upon it to the knowledge of the latter, sued the defendant, their vendor's lessee, to restrain him from working the minerals in the adjoining land leased to him in such a way as to cause any subsidence or alteration of their land. An injunction was granted on the principle that a vendor of land adjoining other land of his own, who knows at the time of sale that buildings are to be erected on the purchased lands enters into an implied covenant that he will not use or permit the adjoining land to be used in such a manner as to derogate from his grant.

C.—Easements of Way.

General principles do not apply to easements of way.

The general principles which obtain regarding the acquisition of *quasi*-easements by presumption of law do not apply to easements of way. The reason for this exception lies, as has been already observed, in the distinction which is made between discontinuous easements, that is, easements used from time to time merely, such as rights of way, other than ways of necessity, and continuous easements, such as easements of light and others, which fall within the category of *quasi*-easements.[1]

When easements of way do pass by presumption of law, it is only as ways of necessity arising in favour of grantor or grantee alike on a severance of the tenements.

In all other cases, rights of way, when passing by implication, do so only under an implied grant.[2]

In the third part of this chapter the acquisition of easements of way by implied grant on a disposition of the tenements was fully considered, and it was seen that such easements, not being easements of necessity, do not pass by presumption of law, but by virtue of an implied grant founded on appropriate language sufficiently indicating the intention of the grantor.

Charu Surnokar v. Dokouri Chunder Thakoor at variance with English principles.

This on the authorities appears to be such a clearly established distinction that it would not be necessary to refer to it again were it not for the decision in the case of *Charu Surnokar* v. *Dokouri Chunder Thakoor*,[3] which, if it is to be

[1] *Supra*, Part III.

[2] *Supra*, Part III.

[3] (1882) I. L. R., 8 Cal., 956.

considered as the law in Bengal, is undoubtedly at variance with English principles in more respects than one.

The easement in question in that case was a right of way claimed by the defendant in answer to the plaintiff's action for a perpetual injunction restraining the defendant from using a path which ran over the plaintiff's land.

The land held by the plaintiff and defendant originally belonged to the same owner, the plaintiff and defendant having obtained their respective tenements more than twenty years previously to suit. The path had been admittedly made by the original owner, but the plaintiff contended that when he purchased the land he had closed the path. This the Munsif disbelieved and refused the injunction.

The District Judge treating the case as if it fell within section 26 of the Indian Limitation Act, and being of opinion that the defendant had not proved twenty years' peaceable, open, and uninterrupted exercise of the right of way, gave the plaintiff an injunction.

The Calcutta High Court, Field and Bose, JJ., disapproved of this method of dealing with the case, and expressed the opinion that the acquisition of the easement need not be restricted to the operation of the Indian Limitation Act, but might be claimed by virtue of a presumed grant, and they accordingly remanded the case to the District Judge to determine whether, if the right had not been lost, the doctrine of presumed grant was applicable to the particular easement.

They thought that this presumed grant might arise in two ways, either (*a*) as an easement of necessity, or (*b*) if the use of the path though not absolutely necessary to the enjoyment of the defendant's tenement, might be necessary for its enjoyment in the state in which it was at the time of severance : in which case if the easement was apparent and continuous, there would be a presumption that it passed with the defendant's tenement.

From the language used by the learned Judges it was apparently assumed by them that the right of way might pass as a *quasi*-easement by presumption of law upon the principle of

the *disposition of the owner of two tenements* (*destination du père de famille*), and they were of opinion that such principle was just and fair and accorded with common sense, and that it was in consonance with the rule of justice, equity, and good conscience which must guide the Courts in the absence of positive direction by the Legislature.

Now with great respect to the learned Judges it would seem that, in arriving at this conclusion, they had lost sight of two very important considerations, first, that a right of way being a discontinuous and not a continuous easement cannot, upon well-recognised principles, pass by presumed grant or operation of law as a *quasi*-easement, and, secondly, that, as held by no less an authority than Lord Westbury himself in the case of *Suffield* v. *Brown*,[1] the comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived.

In the first respect the learned Judges appear to have fallen into a similar error as Lord Romilly, M. R., in *Watts* v. *Kelson*, under converse conditions.

In *Watts* v. *Kelson*,[2] the Master of the Rolls committed the oversight of applying to a continuous easement principles governing the acquisition of a discontinuous easement by implied grant. In *Charu Surnokar* v. *Dokouri Chunder Thakoor*, the learned Judges applied to a discontinuous easement the principles governing the acquisition of continuous easements by presumed grant.

Watts v. *Kelson.*

In *Watts* v. *Kelson*, the Court of Appeal, whose judgment was delivered by *Mellish*, L. J., in overruling the Master of the Rolls, observed as follows[3] :—

"The Master of the Rolls has held, on the authority of *Thomson* v. *Waterlow* and *Langley* v. *Hammond*, that, because the artificial watercourse was first made and begun by a person who was owner of both properties, and had no prior existence at a time when the properties were separately owned, the general

[1] (1864) 4 DeG. J. & S., 185.
[2] (1870) L. R., 6 Ch. App., 166.
[3] *Ibid*, at p. 173.

words in this conveyance were not sufficient to pass the rights. *Thomson* v. *Waterlow* and *Langley* v. *Hammond* were both cases of rights of way, and we cannot but think that, in the decision of the Master of the Rolls, the well-established distinction between easements, like rights of way which are only used from time to time, and what are called continuous easements has been overlooked. In *Polden* v. *Bastard*,[1] Chief Justice Erle, delivering the unanimous judgment of the Exchequer Chamber, says, "There is a distinction between easements such as a right of way, or easements used from time to time, and easements of necessity, or continuous easements.

"The cases recognise this distinction, and it is clear law that upon a severance of tenements easements used as of necessity or in their nature continuous will pass by implication of law, without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner by appropriate language shews an intention that they should pass." "We are clearly of opinion that the easement in the present case was in its nature continuous."

In the second respect Lord Westbury's emphatic repudiation in *Suffield* v. *Brown* of the analogy between the disposition of the owner of two tenements and the *destination du père de famille*, which was apparently not present to the minds of the learned judges in *Charu Surnokar* v. *Dokouri Chunder Thakoor*, shews that no assistance can or ought to derived from the latter principle.

Lord Westbury's remarks are interesting and deserve reproduction. He says[2]:—

"Many rules of law are derived from fictions, and the rules of the French Code which Mr. Gale has copied,[3] are derived from the fiction of the owner of the entire heritage, which is afterwards severed, standing in the relation of *père de famille*, and impressing upon the different portions of his estate mutual services and obligations which accompany such portions when divided among them, or even, as it used in French law.

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[1] (1863) L. R., 1 Q B., 156 (161).

[2] (1864) 4 DeG. J. & S. at p. 195.

[3] Gale on Easements, 3rd Ed., p. 81.

when aliened to strangers. But this comparison of the disposition of the owner of two tenements to the *destination du père de famille* is a mere fanciful analogy from which rules of law ought not to be derived."

Pyer v. *Carter.*

In further support of their decision the learned Judges in *Charu Surnokar* v. *Dokouri Chunder Thakoor* referred to the case of *Pyer* v. *Carter*,[1] which since the decision in *Wheeldon Burrows*,[2] is no longer good law,[3] but which at one time was considered as properly deciding that *quasi*-easements arise by presumption of law without express words of reservation as much in favour of the grantor reserving the *quasi*-dominant tenements as of the grantee obtaining it.

But at the time the judges of the Calcutta High Court relied on *Pyer* v. *Carter*, it had been more than once dissented from and had been finally rejected in *Wheeldon* v. *Burrows*, and even if it had been good law at that time, it is difficult to see how the learned Judges could have derived any assistance from it, as it was not a case of a right of way, but of a right to have water flowing through a drain from one tenement to another, the former tenement having been retained by the grantor at the time of the sale of the latter tenement, and subsequently sold to a third person who claimed the easement.

Such being the existing state of the law at the time of the decision in *Charu Surnokar* v. *Dokouri Chunder Thakoor*, it is not easy to understand why the Court should have ignored it and adopted principles which a series of recent English decisions had repudiated. If the Court had recognised its own departure from existing principles and justified it on the ground of justice, equity and good conscience as applying to special conditions in India, there would surely have been some explanation of the ground on which the Court had proceeded, but there is nothing in the judgment to shew that the existing law in England was being disregarded or that there was any necessity for the application of different principles in India on the ground of justice, equity and good conscience, or otherwise.

[1] (1857) 1 H. & N., 916.

[2] (1878) L. R., 12 Ch. D., 31.

[3] See *infra* (*b*).

Does not agree with provisions of I. E. Act and has not been followed by subsequent decisions.

From the point of view just considered of easements of way (not being ways of necessity) being capable of acquisition, as *quasi*-easements, by presumption of law, the case of *Charu Surnokar* v. *Dokouri Chunder Thakoor* stands alone.

Neither is it at one with the provisions of section 13 read with section 5 of the Indian Easements Act,[1] nor has it been approved by subsequent decisions in India.[2]

Wutzler v. *Sharpe.*

In the recent case of *Wutzler* v. *Sharpe*, decided by the Allahabad High Court, the plaintiffs who were the proprietors of the Charleville Hotel, Mussoorie, sued the defendant for the declaration of a right of way over a road running over his property which they claimed to use as a means of access to a spring for the purpose of obtaining water therefrom for the use of the hotel. The properties of the plaintiffs and defendant adjoined one another and had at one time been united in the same owner, who was accustomed to use the particular way claimed for the same purpose of obtaining water from the spring for the use of the hotel. There was another, but smaller and much less convenient path from the hotel to the spring. The plaintiffs became owners of their portion of the property in 1886, and the defendant of his portion in 1888. The plaintiffs continued to use the abovementioned road through the defendant's property for the purpose of getting water for the hotel until 1889, when the defendant refused to permit them any longer to use the road. The plaintiffs accordingly brought an action against the defendant; but refused to put in evidence the deed under which they became owners of the hotel property.

The plaintiffs claimed a right of way on the alternative ground of absolute necessity, or as a *quasi*-easement on the authority of *Charu Surnokar* v. *Dokouri Chunder Thakoor*.

As regards the first alternative, the Allahabad High Court, on special appeal, decided there was no absolute necessity for the use of the way claimed since owing to the existence of the smaller and less convenient path, the question became merely one of expense, affecting the profitable working of the hotel.

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[1] *See* particularly cls. (*b*), (*d*) & (*f*) of s. 13, and illustrations (*a*) and (*b*) to s. 5.

[2] *Wutzler* v. *Sharpe* (1893), I. L. R., 15 All., 270.

The second ground was disallowed by the Court after an exhaustive review of all the English decisions upon the conclusion that *Charu Surnokar* v. *Dokouri Chunder Thakoor* was contrary to English authority and wrongly decided, and that no right of way could pass by presumption of law on a severance of tenements as an apparent and continuous easement.

In conclusion it should be observed that the passing of quasi-easements is not defeated by the dominant tenements being in lease at the time of alienation.[1]

(*b.*) *Law as to the acquisition of quasi-easements when the quasi-servient tenement is conveyed to the grantee and the quasi-dominant tenement is retained by the grantor.*

The legal presumption under which quasi-easements have been seen to arise in favour of the grantee of the quasi-dominant tenement does not operate similarly in favour of the grantor who retains the quasi-dominant tenement.

English law.

The general rule in England, now well-established by a series of decisions culminating in the case of *Wheeldon* v. *Burrows*,[2] which has settled the law on the subject, is that quasi-easements cannot arise in favour of the grantor unless expressly reserved in his grant, inasmuch as the grantor by a grant for valuable consideration is, in the absence of such express reservation, taken to have relinquished all rights over the tenement granted, and to be thereby afterwards precluded from doing anything which derogates from his grant. This general rule has certain exceptions which will be noticed hereafter, but for the present it is important to consider separately the English cases supporting the general rule and then to ascertain whether the same rule prevails in India under and outside the Indian Easements Act.

Nicholas v. *Chamberlain.*

The earliest case is that of *Nicholas* v. *Chamberlain*,[3] in which it was held that if a man erects a house and builds a conduit therefrom to 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,

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[1] *Barnes* v. *Loach* (1879), L. R., 4 Q. B. D., 494.

[2] (1879) L. R., 12 Ch. D., 31.

[3] (1607) Cro. Jac., 121.

reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and quasi-appendant thereto.

Though this case appears at first sight from the use of the words "necessary and quasi-appendant thereto" to conflict with the general rule above stated by determining that quasi-easements arise as much in favour of a grantor by presumed reservation as of a grantee by presumed grant, it will be found on closer examination that the case is capable of explanation on two grounds, either as a case of necessity in which. as has been seen, easements can undoubtedly arise in favour of a grantor by presumed reservation,[1] or as not being the case of the grant of an incorporeal easement relating to the passage of water, but of the grant of the whole of the conduit through which the water ran, as being a corporeal part of the house and passing in that capacity.[2]

The next case is *Palmer* v. *Fletcher*,[3] in which the proposition that if a man wishes to derogate from his own grant or reserve any right to himself he should state so in the grant itself, was mooted, but there was a difference of opinion in the Court and the point was not decided.

Tenant v. *Goldwin.*

Then comes the case of *Tenant* v. *Goldwin*,[4] which throws light on what was intended to be decided in *Nicholas* v. *Chamberlain* and supports the explanation given of the case by Thesiger, L. J., in *Wheeldon* v. *Burrows*. Further in *Tenant* v. *Goldwin*, Lord Holt in delivering the judgment of the Court expressly dealt with the very point which had been raised in *Palmer* v. *Fletcher*, and in the following way, "as to the case of *Palmer* v. *Fletcher*, 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 against his house. But in the other case where he

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[1] *See* per Thesiger, L. J., in *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D. at p. 50.

[2] *Ibid*, per James, L. J. at p. 60.

[3] (1615) 1 Lev., 122.

[4] (1705) 2 Ld. Raym., 1093.

sells the house, the vacant piece of ground is by that grant charged with the lights."

This clear enunciation of the law has been repeatedly affirmed in later decisions, and the only case which breaks the otherwise unbroken current of authority is that of ***Pyer*** v. *Carter*, which is the next case that comes up for consideration.

Pyer v. *Carter*.

In *Pyer* v. *Carter*,[1] the owner of two houses granted one of them to a purchaser absolutely, and without reservation, and he subsequently granted the other house to another purchaser. Prior to, and at, the time of grant the second house was drained by a drain that ran under the foundation of the first house, and this being obstructed by the defendant, who was the first purchaser, the plaintiff, who was the second purchaser, brought an action against him for the obstruction.

It was held that the plaintiff was entitled to maintain the action, and that upon the original conveyance to the defendant there was a reservation to the grantor of the right to drain water from the defendant's premises on to the plaintiff's land, as had formerly been done during unity of ownership.

In this case the Court of Exchequer went beyond the recognised doctrine and laid down that there was no distinction between implied reservation and implied grants.

White v. ***Bass***.

Though the actual decision in ***Pyer*** v. *Carter* may not be said to have been exactly overruled, the principles there laid down were clearly and distinctly overruled by the same Court in *White* v. *Bass*.[2]

In that case there were held in unity of ownership certain land, and a certain house through the windows of which light, not as an easement, but as a matter of enjoyment, had come for some time. The owner, reserving the house, let the land to trustees, subject to certain covenants whereby they were to build in a particular manner upon the land, and if such covenants had been complied with, there would have been no obstruction of the lights of the house reserved. This was followed by a conveyance of the reversion in the land to the trustees, and in that conveyance there was no covenant not to

[1] (1857) 1 H. & N., 916.

[2] (1862) 7 H. & N., 722.

obstruct the lights nor any limitation of the right to use the land. Subsequently to that conveyance the house was conveyed to a purchaser, and buildings having been erected upon the land conveyed to the trustees, contrary to the terms of this original covenant, and of such a kind as obstructed the lights of the house, an action was brought by the purchaser for the obstruction.

It was decided that the lease having merged in the fee by the conveyance of the reversion to the lessees, and there being no covenant in such conveyance not to obstruct the plaintiff's lights, the defendant held his land unfettered by the original covenant and by any implied reservation, and that he was entitled to build on his land in such a way as he thought proper, even though by doing so he were to obstruct the plaintiff's lights.

Suffield v. Brown.

This case was followed in point of time by *Suffield v. Brown.*[1] There the plaintiffs were respectively the owners in fee and lessee of a dock situate on the Thames at Bermondsey, and used for repairing ships, principally sailing vessels.

The defendant was the owner in fee of a strip of land and coal wharf adjoining the dock, on which he had begun to build a warehouse.

The plaintiffs filed the bill in this suit for an injunction to restrain such building on the ground that when their dock was occupied by a vessel of large size her bowsprit must project over the boundary fence of the dock, across the defendant's premises, which it could not do if the defendant's building should be erected, and that they had a right to restrain such building, because it would deprive them of an easement or privilege which they were entitled to use or exercise over the land of the defendant.

The dock and the adjoining strip of land and coal wharf had formerly belonged to the same owner, until he sold the strip of land and coal wharf to a purchaser under whom the defendant claimed, and subsequently sold and conveyed the dock to other persons under whom the plaintiffs claimed.

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[1] (1864) 4 DeG. J. & S., 185.

At the time of severance nothing was stated to show that the dock or its owner either then had, or were intended to have, any right or privilege over the adjoining premises.

The Master of the Rolls, Lord Romilly, following the decision in *Pyer* v. *Carter*, granted the plaintiffs an injunction on the ground that the projection of the bowsprit from the vessel in the dock across the defendant's premises was essential to the full and complete enjoyment of the dock as it stood at the time that the wharf was sold to the purchaser under whom the defendant claimed, and that the purchaser and the defendant had distinct notice of this fact, not merely from the description contained in the particulars of sale under which he bought, but also because the fact was patent and obvious to any one, for the reason that if the dock admitted the largest vessel capable of being contained in it, the bowsprit must project over that portion of the defendant's premises indicated.

On appeal the decree of the Master of Rolls was reversed, and the injunction granted by him dissolved, by the Lord Chancellor, Lord Westbury, in a judgment which is important for the principles it clearly expounds and establishes and for its emphatic dissent from the doctrine of *Pyer* v. *Carter*. It will be of advantage to recite the principal passages in the judgment.

The Lord Chancellor, after observing that it was difficult to understand how any interest, right, or claim, in, over, or upon, the coal wharf could remain in the grantor, or be granted by him to a third person, consistently with the prior absolute and unqualified grant that was made of the coal wharf premises to the purchaser, or how, even if the vendor during his joint occupation of both properties had been in the habit of making the coal wharf subservient in any way to the purposes of the dock, the necessary operation of the absolute and unqualified grant would be other than to cut off and release the right to make such use of the coal wharf, proceeds as follows :[1]—

"It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to

[1] At p. 190.

limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances. But this view of the case is not taken by his Honour the Master of the Rolls." Lord Westbury then refers to the ground, already referred to, upon which the Master of the Rolls states that he grants the injunction, and proceeds to deal specifically with the ground of notice on which the Master of the Rolls relies. He says: "The effect of this is, that if I purchase from the owner of two adjoining freehold tenements the fee-simple of one of those tenements and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed as may be requisite for the enjoyment of the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and daring doctrine; I believe it to be of very recent introduction: and it is in my judgment unsupported by any reason or principle, when applied to grants for valuable consideration.

"That the purchaser had notice of the manner in which the tenement sold to him was used by his vendor for the convenience of the adjoining tenement is wholly immaterial, if he buys the fee-simple of his tenement, and has it conveyed to him without any reservation. To limit the vendor's contract and deed of conveyance by the vendor's previous mode of using the property sold and conveyed is inconsistent with the first principles of law, as to the effect of sales and conveyances. Suppose the owner of a manufactory to be also the owner of a strip of land adjoining it on which he has been for years in the habit of throwing out the cinders, dust and refuse of his workshops, which would be an easement necessary (in the sense in which that word is used by the Master of the Rolls) for

the full enjoyment of the manufactory; and suppose that I, being desirous of extending my gardens, purchase this piece of land and have it conveyed to me in fee-simple; and the owner of the manufactory afterwards sells the manufactory to another person; am I to hold my piece of land subject to the right of the grantee of the manufactory to throw out rubbish on it? According to the doctrine of the judgment before me I certainly am so subject; for the case falls strictly within the rules laid down by his Honour and reduces them to an absurd conclusion."

The Lord Chancellor then explains the apparent origin of the erroneous doctrine, and says that he cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor. He refers to the comparison of the disposition of the owner of the two tenements to the *destination du père de famille* upon which the rule in *Pyer* v. *Carter* was apparently based in the following language:[1]—"But this comparison of the disposition of the owner of the two tenements to the *destination du père de famille* is a mere fanciful analogy, from which rules of law ought not to be derived. And the analogy, if it be worth grave attention, fails in the case to be decided, for when the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end, by contract, to the relation which he had himself created between the tenement sold and the adjoining tenement; and discharges the tenement so sold from any burthen imposed upon it during his joint occupation; and the condition of such tenement is thenceforth determined by the contract of alienation and not by the previous user of the vendor during such joint ownership."

Lord Westbury then proceeds to discuss *Pyer* v. *Carter* in the following manner[2]:—

Pyer v. *Carter* discussed in *Suffield* v. *Brown* and rejected.

"And this observation leads me to notice the fallacy in the judgment of the Court of Exchequer in the case of *Pyer* v. *Carter*, one of the two cases on which the Master of the Rolls

[1] At p. 195. [2] *Ibid.*

relies. In *Pyer* v. *Carter* the owner of two houses sold and conveyed one of them to a purchaser absolutely, and without reservation, and he subsequently sold and conveyed the remaining house to another person. It appeared that the second house was drained by a drain that ran under the foundation of the house first sold; and it was held that the second purchaser was entitled to the ownership of the drain, that is to a right over a freehold of the first purchaser, because, said the learned judges, the first purchaser takes the house 'such as it is.' But, with great respect, the expression is erroneous, and shows the mistaken view of the matter, for in a question, as this was, between the purchaser and the subsequent grantee of his vendor, the purchaser takes the house not 'such as it is,' but such as it is described and sold and conveyed to him in and by his deed of conveyance; and the terms of the conveyance in *Pyer* v. *Carter* were quite inconsistent with the notion of any right or interest remaining in the vendor. It was said by the Court that the easement was 'apparent,' because the purchaser might have found it out by inquiry; but the previous question is whether he was under any obligation to make inquiry, or would be affected by the result of it; which, having regard to his contract and conveyance, he certainly was not. Under the circumstances of the case in *Pyer* v. *Carter* the true conclusion was, that as between the purchaser and the vendor the former had a right to stop and block up the drain where it entered his premises, and that he had the same right against the vendor's grantee. I cannot look upon the case as rightly decided, and must wholly refuse to accept it as any authority."

After reviewing the other cases, the Lord Chancellor concludes his judgment as follows[1] :—

"There is in my judgment no possible legal ground for holding that the owner of the dock retained or had in respect of that tenement any right or easement over the adjoining tenement after the sale and alienation of the latter in the year 1845. I must entirely dissent from the doctrine on which his Honour's decree is founded, that the purchaser and grantee of

[1] P. 199.

the coal wharf must have known, at the time of his purchase, that the use of the dock would require that the bowsprits of large vessels received in it should project over the land he bought, and that he must be considered, therefore, to have bought with notice of this necessary use of the dock, and that the absolute sale and conveyance to him must be cut down and reduced accordingly. I feel bound, with great respect, to say that in my judgment, such is not the law.

"But if any part of this theory were consistent with law, it would not support the decree appealed from, for the easement claimed by the plaintiff is not 'continuous' for that means something the use of which is constant and uninterrupted; neither is it 'an apparent easement,' for except when a ship is actually in the dock with her bowsprit projecting beyond its limits, there is no sign of its existence; neither is it a 'necessary easement,' for that means something without which (in the language of the treatise cited) the enjoyment of the dock could not be had at all.

"But this is irrelevant to my decision, which is founded on the plain and simple rule that the grantor, or any person claiming under him, shall not derogate from the absolute sale and grant he has made."

Effect of *Suffield* v. *Brown*.

The gist of this important case may, therefore, be said to be that if on a severance of tenements the grantor desires to reserve any right or easement to himself over the tenement granted, he must do so in express terms, and that in the absence of such express reservation the grantee will take the quasi-servient tenement free from all rights, privileges or easements notwithstanding any knowledge on his part, actual or constructive, of the use which was made of the tenement granted to him at the time of the severance.[1]

[1] In *Amutool Russool* v. *Jhoomuch Singh* (1875), 24 W. R. (C. R.), p. 346, the statement that the correctness of the principle laid down in *Suffield* v. *Brown* was questioned in the subsequent case of *Watts* v. *Kelson* (1870), L. R., 6 Ch. App., 166, appears to have proceeded upon a misapprehension of what was decided in those two cases. For, as explained in the later case of *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D., 31, *Suffield* v. *Brown* repudiates the doctrine of an implied reservation arising in favour of a grantor retaining

Curriers Company v. Corbett.

The same principle was recognised by the Vice-Chancellor Page Wood in *Curriers Company* v. *Corbett*,[1] though he expressed the opinion that the law in this respect "if carried to an extreme, would in some cases produce great and startling injustice."

Crossley & Sons v. Lightowler.

Suffield v. *Brown* was confirmed in *Crossley & Sons* v. *Lightowler*[2] by the equally high authority of Lord Chelmsford who, as Lord Chancellor, had to deal with a similar question, and expressed himself as follows :—

"Lord Westbury, however, in the case of *Suffield* v. *Brown* refused to accept the case of *Pyer* v. *Carter* as an authority, and said : 'It seems to be more reasonable and just to hold that if the grantor intends to reserve any right in the property granted it is his duty to reserve it expressly in the grant rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation.' I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shews the contrary by expressly reserving it. The argument of the defendants would make, in every case of this kind, an implied reservation by law ; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity."

Watts v. Kelson.

The next case in order of time which deserves notice is *Watts* v. *Kelson*,[3] and in this respect, that, in the subsequent case of *Wheeldon* v. *Burrows*,[4] it was endeavoured to be used in the argument for the defendant-appellant as an authority for setting up *Pyer* v. *Carter*, and shaking the decision in *Suffield* v. *Brown*. But the Court of Appeal in *Wheeldon* v. *Burrows* refused to recognise *Watts* v. *Kelson* as an authority which would justify the overruling of *Suffield* v. *Brown* supported as it was

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the *quasi*-dominant tenement, whilst *Watts* v. *Kelson* merely decides the opposite case that a *quasi*-easement will pass by presumed grant to a grantee of the *quasi*-dominant tenement. *See* further *infra*.

[1] (1865) 2 Dr. and Sm., 355.

[2] (1867) L. R., 2 Ch. App., 478.

[3] (1870) L. R., 6 Ch. App., 166.

[4] (1879) L. R., 12 Ch. D., 31.

by the case of *Crossley & Sons* v. *Lightowler*. The Lord Justices explained that what had to be decided in *Watts* v. *Kelson* was that a *quasi*-easement will pass by presumed grant where the dominant tenement is conveyed first, and that in the considered judgment of the Court in that case there was nothing to shew that *Suffield* v. *Brown* was not law.

Wheeldon v. *Burrows.*

The next case is that of *Wheeldon* v. *Burrows*,[1] which has decisively settled the law on this subject.

The material facts of this case are short and simple and may be taken from the judgment of the Appeal Court delivered by Thesiger, L.J.

Prior to the month of November 1875, a person named *Samuel Tetley* was the owner of certain property in *Derby*, which included a piece of vacant land having a frontage to the street, and a silk manufactory and certain workshops at the rear of and abutting upon that vacant land. In one of the work-shops were certain windows which opened upon that land. Owning this property *Tetley* resolved to sell it, and appears to have put it up in several lots for sale by auction ; and in respect of some of the lots, including a lot which was afterwards sold to the defendant, the sale by auction was abortive.

However, an agreement was made at the auction to sell one of the lots to the plaintiff's husband, and the lot was conveyed to him upon the 6th day of January 1876, with these general words, " together with all walls, fences, sewers, gutters, drains, ways, passages, lights, watercourses," and the other general words, " easements and appurtenances whatsoever to the said piece of land and hereditaments belonging or in any wise appertaining."

The conveyance contained no reservation in express terms of any right to the grantor in respect of his other land. On the 18th of February a contract was made whereby *Tetley* contracted to sell to the defendant the silk manufactory and the workshop which had the windows opening upon the land previously sold and conveyed to the plaintiff's husband.

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[1] (1879) L. R., 12 Ch. D., 31.

The action arose from a claim on the part of the defendant to have as of right the light to enter into those windows, or, in other words, to prevent the plaintiff from obstructing those windows by building on her land.

At the trial before Vice-Chancellor Bacon, that Judge decided that no right in respect of the windows being reserved either impliedly or expressly under the conveyance of January 1876, and the defendant being privy in estate with the grantor of the land which was the subject of the conveyance, no right to light through the windows arose in favour of the defendant, and that the plaintiff was accordingly entitled to build upon her land, though the result of such building might be to obstruct the lights.

On appeal the judgment of the Vice-Chancellor was affirmed.

In the judgment of Thesiger, L.J., the following passage occurs [1] :—

" We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind." The first of these rules has already been stated in considering the acquisition of quasi-easements by the grantee of the *quasi*-dominant tenement.

The second of these rules is stated by Lord Justice Thesiger as follows [2] :—" The second proposition is that if a grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in his grant.

Those are the general rules covering cases of this kind, but the second of those rules is subject to certain exceptions.[3]

One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity ; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

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[1] At p. 49.

[2] *Ibid.*

[3] For these exceptions, see *supra*, Part IV A, and *infra*.

Both of the general rules which I have mentioned are founded upon a maxim which is as well-established by authority as it is consonant to reason and common sense, *viz.*, that a grantor cannot derogate from his own grant. It has been argued before us that there is no distinction between what has been called an implied grant and what is attempted to be established under the name of an implied reservation; and that such a distinction between the implied grant and the implied reservation is a mere modern invention, and one which runs contrary, not only to the general practice upon which land has been bought and sold for a considerable time, but also to authorities which are said to be clear and distinct upon the matter.

So far, however, from that distinction being one which was laid down for the first time by and which is attributed to Lord Westbury in *Suffield* v. *Brown*, it appears to me that it has existed almost as far back as we can trace the law upon the subject; and I think it right, as the case is one of considerable importance. not merely as regards the parties, but as regards vendors and purchasers of land generally, that I should go with some little particularity into what I may term the leading cases upon the subject."

The Lord Justice then goes into the cases and notices the exceptions to the second general rule.[1]

Allen v. *Taylor.*

In *Allen* v. *Taylor*,[2] Jessel, M.R., said: "I take it also that it is equally settled law that if a man who has a house and land grants the land first reserving the house, the purchaser of the land can block up the windows of the house."

Russell v. *Watts.*

In *Russell* v. *Watts*,[3] Lord Selborne said there was the "general rule (exemplified in the case of *Wheeldon* v. *Burrows*) that if a man entitled to a house with windows, however long enjoyed, sells and grants away the adjoining land without any condition, reservation, or other form of contract which can operate restrictively against the grantee, he is not at liberty to derogate from his own grant so as to prevent any use otherwise

[1] For these exceptions, *see* Part IV A, *supra*, and *infra*.

[2] (1880) L. R., 16 Ch. D., 355.

[3] (1885) L. R., 10 App. Cas., 590.

lawful, of the land granted, although the windows of his house may be darkened thereby."

The circumstances of this last case were peculiar. One Jeffery upon land consisting of seven plots marked respectively A, B, C, D, E, F, and G, and forming together one square block, and held by him under seven simultaneous leases from the same owner, commenced the erection of a large building for the purposes of his drapery business, of which building the several parts and the internal arrangements were to be connected together for a common use and occupation, but capable, if so desired, of separation into separate buildings or blocks.

While the building was in course of erection, Jeffery being in occupation of the whole, mortgaged by demise the blocks comprised in the leases C, F, and G, the mortgagee having notice of the general scheme of construction, and there being a stipulation that Jeffery should complete the part comprised in his mortgage in accordance with the plans. Subsequently Jeffery executed a similar mortgage of E and afterwards mortgaged B.

On the bankruptcy of Jeffery the several mortgagees obtained foreclosure decrees in respect of B, C, and E respectively.

The defendants claiming to be entitled to plots C and E blocked up windows in that part of the building of which the plaintiff was in possession and which he was using as a hotel, namely, block B, and the action was brought by the latter to restrain the obstruction and to determine the rights of the plaintiff as the owner and occupier of block B to the free access of light to those of his windows which faced the other portions of the building in the possession and occupation of the defendants.

The plaintiff claimed an easement of light as a *quasi*-easement, that is, on the ground that it was apparent, continuous and necessary for the convenient enjoyment of the plaintiff's hotel and the property of the Corporation of *Liverpool* who were the common landlords of the plaintiff and the defendants.

The defendants denied the right to the easement on the authority of *Wheeldon* v. *Burrows*, inasmuch as the instruments

under which the plaintiff claimed did not contain any express reservation of the light.

Bacon, V.C., in granting an injunction refused to apply the doctrine of *Wheeldon* v. *Burrows* to the circumstances of the case, as. in his opinion, that case was altogether distinguishable from the present, and on the ground that the defendants were estopped by their own conduct from obstructing the plaintiff's windows, for the reason that they had approved and accepted a general scheme of building of which they were owners of a part, and the plaintiff likewise, and that having full knowledge of the windows the plaintiff intended to open, and not objecting, they could not now erect any structure or do any act so as to obstruct the access of light to the plaintiff's windows.[1]

On appeal the majority of the Court, Lindley, L.J., dissenting, reversed the decision of Bacon, V.C., considering themselves bound by the authority of *Wheeldon* v. *Burrows*.[2]

Lindley, L.J., apparently in accord with the view of the Vice-Chancellor put the plaintiff's right to the easement on the ground of estoppel.[3]

The House of Lords agreeing by a majority[4] with the opinion of Bacon, V.C., and Lindley, L.J., reversed the order of the Appeal Court and restored that of the Vice-Chancellor.[5]

They considered that this was not the case of a vendor of a piece of land attempting to derogate from his own grant and did not fall within *Wheeldon* v. *Burrows*, but that it was the case of a mutual agreement, the effect of which was a reciprocal contract of each of the parties to it with the other, and that for either party to insist on the benefit of such an agreement, so far as it was in his favour was not to derogate from his own grant, but to require that the other party should not do so.

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[1] (1882) L. R., 25 Ch. D., 559.
[2] Pp. 572, *et seq.*
[3] P. 577.
[4] Lord Selborne and Lord Fitzgerald. Lord Blackburn in the minority dissented.
[5] (1885) L. R., 10 App. Cas., 590.

Independently of the principles established in cases of simultaneous conveyance to which particular reference will be made hereafter, Lord Selborne expressed the opinion that if on a sale and conveyance of land adjoining a house to be built by the vendor, it is mutually agreed that one of the outer walls may stand wholly or partly within the verge of the land sold, and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold so as to prevent or obstruct the access of light to those windows.

Russell v. *Watts*, clearly distinguishable from *Wheeldon* v. *Burrows*.

The circumstances in *Russell* v. *Watts* and the principles applied in that case clearly differentiate it from *Wheeldon* v. *Burrows* which remains unshaken upon the particular subject with which it deals.

Union Lighterage Co. v. *London Graving Dock Co.*

Finally in *Union Lighterage Company* v. *London Graving Dock Company*,[1] the facts, so far as they are material to the present subject, were that, in 1860, the owner in fee-simple of two adjoining pieces of land had leased out the western part as a wharf and shipbuilding yard, and was in occupation of the eastern part himself. In the same year he constructed a graving dock in his own premises with wooden sides which by arrangement with his tenants he caused to be supported by rods or ties carried through the boundary fence under the wharf to a particular distance and fastened by nuts to piles placed at that particular point.

In 1877 the owner died and thereafter, both the properties being in hand, the persons entitled under his will conveyed the wharf premises to the plaintiffs, without expressly reserving to themselves any right of support.

In 1886 the deceased owner's devisees sold the dock revenues to a company which subsequently conveyed them to the defendants. No mention of support was made in the conveyance.

The action was brought by the plaintiffs to have it declared that they were entitled to remove the means of support to the graving dock without interference from the defendants.

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[1] (1901) 2 Ch., 300.

Upon the question whether on the conveyance of 1877 to the plaintiffs there was an implied reservation in favour of the vendors of a right to the then existing support to the dock, Cozens Hardy, J., observes as follows[1] :—

"On the first point I am clearly of opinion that there was no implied reservation in favour of the vendors when the wharf was conveyed to the plaintiffs in 1877. The judgment of Lord Westbury in *Suffield* v. *Brown*, followed by the judgment of Lord Chelmsford in *Crossley & Sons* v. *Lightowler*, has been distinctly adopted by the Court of Appeal in the leading case of *Wheeldon* v. *Burrows*. It seems to me that, in a case like this, the vendors must expressly reserve any such right, and that the purchaser is, in the absence of express reservation entitled to rely upon the plain effect of the conveyance executed by the vendors."

Law in India as to the general rule.

Such being the English law, it remains to be considered whether the same law prevails in India either under the Indian Easements Act, or in those parts of India where the Act is not in force.

Charu Surnokar v. *Dokouri Chunder Thakoor*, departure from the English law.

As to the case-law on this subject the question of the doctrine of implied reservation appears to have been first raised in India in the case of *Charu Surnokar* v. *Dokouri Chunder Thakoor*.[2]

This case has already been referred to in connection with the passing of easements of way on a severance of tenements,[3] but it is another and equally important aspect of the case which here deserves consideration.

The facts of this case, so far as they are material to the present question, are the following: The owner of a single property made a path over a portion of it, which he continued to use until he granted such portion to the plaintiff. He subsequently granted the remaining portion of his property to the defendant's predecessor in title. The suit was brought by the plaintiff to restrain the defendant from using the path, and the

[1] At p. 304.

[2] (1882) I. L. R., 8 Cal., 956.

[3] See *supra*.

defence raised the alternative plea of title to an easement of way by prescription, or of implied reservation on a severance of the tenements.

The District Judge dealt with the case solely under the Indian Limitation Act, and finding the defendant had not acquired any right under that Act, gave the plaintiff an injunction.

On appeal to the High Court, Field, J., in delivering the judgment of the Court, expressed himself as follows :—

"The use of the path and ghat, though not absolutely necessary to the enjoyment of the defendant's tenements, might be necessary for its enjoyment in the state in which it was at the time of the severance ; and in this case, if the easements were apparent and continuous, there would be a presumption that it passed with the defendant's tenement.

"This latter case is discussed in the books under the principle of the *disposition of the owner of two tenements* (*Destination du père de famille*). See Gale on Easements, 5th Edition, pp. 96, 97, and following pages ; and as to right of way, p. 103 note, p. 124 note, and *Pyer* v. *Carter*.[1] This principle is just and fair and accords with common-sense.

"It is in consonance with the rule of justice, equity, and good conscience, which must guide the Courts in the absence of positive direction by the Legislature."

Now, with all due respect, this judgment intended, as it apparently is, to decide that an easement apparent and continuous is capable of acquisition on a severance of tenements by the grantor under an implied reservation, and based, admittedly, as it is, on *Pyer* v. *Carter* and the doctrine of *Destination du père de famille*, comes into direct conflict with the decisions in *Suffield* v. *Brown*[2] and *Wheeldon* v. *Burrows*[3] where not only was the doctrine just referred to repudiated in distinct terms, but the rule of implied reservation laid down in *Pyer* v. *Carter* was pronounced to be unsupported by previous decisions and a break in the chain of authority.

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[1] (1857) 1 H. & N., 916.
[2] (1864) 4 DeG J., & S., 185.
[3] (1879) L. R., 12 Ch. D., 31.

There is nothing in the report of the case to shew that *Suffield* v. *Brown* and *Wheeldon* v. *Burrows* were brought to the notice of the Court, and it may be that the learned Judges not having those decisions before them considered that the correct view of the law was that of Mr. W. Stokes, who, in referring to a similar deviation in the Indian Easements Act, expressed the opinion that the contrary rule in England rested on a doubtful dictum of Lord Holt's.[1] It is difficult on any other supposition to imagine that, without some reason shewn, they would knowingly have departed from the accepted law of England and rejected the strong and emphatic confirmation by the Lord Justices in *Wheeldon* v. *Burrows* of the principle laid down by Lord Holt in *Tenant* v. *Goldwin*[2] which Mr. Stokes describes as doubtful.

I. E. Act, s.13, cl. (*d*). Similar departure from English law.

The same departure from the English law is to be found in clause (*d*) of section 13 of the Indian Easements Act. That clause runs as follows :—

"If such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor or the legal representative of the testator shall, unless a different intention is expressed or necessarily implied, be entitled to such an easement."

No reason is assigned in Council for the introduction of this clause beyond the short statement in the Objects and Reasons of the Bill[3] that the Bill follows the decision in *Pyer* v. *Carter*, rather than that in *Suffield* v. *Brown*, but why the former case is to be preferred to the latter, supported as it is by the decision in *Wheeldon* v. *Burrows*, and whether such a state of law was better adopted to Indian requirements than the English rule, nowhere appears.

This fact and Mr. Whitley Stokes' statement that the law of England "being just, equitable, and almost free from local peculiarities, has in many cases been held to regulate the

[1] *See* The Anglo-Indian Codes, Vol. I, p. 882.

[2] (1758), 2 Lord Rayn., 1093.

[3] See *Gazette of India*, 1880, Part V, July to December, at p. 477.

subject in this country,"[1] makes it all the more curious and anomalous that the Indian Easements Act should have introduced a provision shewing such a marked variance from the English law. It is true that, when Mr. Stokes drafted and introduced the Indian Easements Bill in 1878, the judgment in *Wheeldon* v. *Burrows* had not been delivered, but it was delivered more than two years before the passing of the Act, and the clause might easily have been amended to fit in with that authoritative expression of opinion.

This clause was discussed and its origin suggested in a recent decision of the Bombay High Court in a case which was not governed by the Indian Easements Act.[2]

Decision in *Charu Surnokar* v. *Dokouri Chunder Thakoor*, not accepted by Bombay High Court.

Upon the facts found in that case, the Court preferred to follow the well-established principles of English law, rather than to apply the doctrine laid down in *Charu Surnokar* v. *Dokouri Chunder Thakoor* and clause (*d*), section 13 of the Indian Easements Act.

On the subject of this clause, Mr. Justice Candy's observations are :

"It is no doubt anomalous that the Easements Act should have introduced such a marked variance from the English law. This is apparently due to the fact that Mr. W. Stokes, who drafted and introduced the Easements Bill in 1878, was of opinion that the English law 'rests on a doubtful doctrine of Lord Holt's (see 2 Drew. and Smale, 260).' The judgment of the Court of Appeal in *Wheeldon* v. *Burrows* had not then been delivered, shewing that the doctrine of Lord Holt was not doubtful, but had been laid down in clear and distinct terms, and was as well established by authority as it is consonant to reason and common-sense.[3] The reference to 2 Drew. and Smale, 360, is to the case above quoted of *Curriers Co.* v. *Corbett*, in which Vice-Chancellor Kindersley, though stating the law, if carried to an extreme, would in some cases produce great and startling

[1] See *Gazette of India*, 1880, July to December, Part V, p. 476 ; Anglo-Indian Codes, Vol. I, p. 878.

[2] *Chunilal* v. *Manishankar* (1893), I. L. R., 18 Bom., 616.

[3] *See* the remarks *supra* with regard to this.

injustice, yet held the law to be in no way doubtful, but quite clear. Since the decision of *Wheeldon* v. *Burrows*, there is no room for doubt. In *Allen* v. *Taylor*, Jessel, M. R., said that it is 'settled law that if a man who has a house and land, grants the land first, reserving the house, the purchaser of the land can block up the windows of the house.'

It is not difficult to see how the Easements Act, section 13, clause (*d*), has become law. It is apparently based on the judgments of Mr. Justice Field in *Charu Surnokar* v. *Dokouri Chunder Thakoor*. Mr. Whitley Stokes acknowledged the assistance given to him by that learned Judge in drafting the Bill which became the Easements Act."[1]

Chunilal Mancharam v. *Manishankar Atmaram.*

In *Chunilal Mancharam* v. *Manishankar Atmaram*,[2] the Bombay case just quoted, the plaintiff became the owner by purchase of a certain house, behind which was a courtyard or *chok*, half of which belonged to the defendant's father and half to the plaintiff's vendor. Two of the rear rooms in the plaintiff's house abutted on the latter portion of the *chok*, and had two doors opening out into it. The plaintiff's vendor sold his half of the said *chok* to the defendant's father under a conveyance, which not only contained no reservation of any rights, but expressly recited that the vendor reserved no rights over the *chok*, and thereafter the plaintiff purchased the house. Shortly afterwards the defendant put up a boundary on the *chok*, which blocked up the abovementioned doors of the plaintiff's house, and obstructed the light and air passing through them into the said two rear rooms. The plaintiff sued for an injunction. The Court in applying to these facts the English principles established by *Suffield* v. *Brown*, *Wheeldon* v. *Burrows* and the other authorities, held that it would be contrary to equity and good conscience to decide that he had impliedly reserved a right of light and air over the *chok*, which would prevent the purchaser from building on the *chok* so purchased, and thus obstructing the windows or doors in the vendor's house overlooking the *chok*.

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[1] *See* abstract of proceedings of the Council of the Governor-General in India, Vols. XX—XXI, 1881—1882, Part II, pp. 102, 103.

[2] 1893) I. L. R., 18 Bom., 616.

Mr. Justice Candy, by the light of the English authorities, evidently considered that *Charu Surnokar* v. *Dokouri Chunder Thakoor* was wrongly decided and preferred to apply English principles. Mr. Justice Fulton, in contrasting the English and Indian law and admitting the Easements Act could not effect transfers which took place before its introduction, thought it unsafe to hold that all such transfers are, on the point in question, governed by English law albeit they were effected in a country, in which that law is not in force and in total ignorance of its provisions.

He said : "In England the law has been established by a series of decisions, subject to which sales take place, but this is not the case in India. Two Indian decisions, those of *Charu Surnokar* v. *Dokouri Chunder Thakoor* [1] and *Chunilal* v. *Husein*,[2] appear to go further than the English cases in this matter. The former of these has, it is true, been recently criticised by the Allahabad High Court in *Wutzler* v. *Sharpe*,[3] but whether it was rightly or wrongly decided it seems to be conceivable that even in regard to light and air a case might arise where to hold that the vendee of adjacent land was entitled to render useless the vendor's house by building up against his windows might be so obviously contrary to what was contemplated at the time of the sale and be productive, in the language of Kindersley, V. C. (2 Drew. and Sm., at p. 360), of such 'great and startling injustice' that a Court not bound by any positive rule of law on the subject might, in the exercise of equity and good conscience, think it necessary to hold that an easement had been meant to be reserved.

But while unwilling to decide that, prior to the introduction of the Easements Act, there were any positive rules in force on this subject, I think that a vendor or his successor in title claiming such a reservation as is claimed in the present case, must show either by reference to the urgent necessity of the easement or the conduct of the parties to the sale that it cannot reasonably have been intended by either of them to do otherwise than reserve to the vendor the right which he claims."

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[1] (1882) I. L. R., 8 Cal., 956.

[2] (1886) P. J., 128.

[3] (1892) I. L. R., 15 All., 270.

The case contemplated by the learned Judge of an implied reservation arising out of the conduct of the parties at the time of sale, or what was clearly within their contemplation does not in fact encroach upon the doctrine of *Suffield* v. *Brown* and *Wheeldon* v. *Burrows*, but falls more properly within the scope of the decision in *Russell* v. *Watts*.[1]

Result of the law in India.

The result of the abovementioned decisions of the Calcutta and Bombay High Courts and the provisions of clause (*d*), section 13 of the Indian Easements Act, has been to leave the law in India on the subject of a presumed reservation, as recognised in *Pyer* v. *Carter*, in a state of confusion and uncertainty.

The provision in the Indian Easements Act is anomalous and makes it questionable whether the draftsmen of the Act were aware of the decision in *Wheeldon* v. *Burrows* before the passing of the Act.

Charu Surnokar v. *Dokouri Chunder Thakoor*, agreeing as it does with the Indian Easements Act, is open to the same criticism, and makes it doubtful whether, as a decision which cannot be accepted as law according to English principles, it will be followed in future either in Bengal or in other parts of India outside the scope of the Indian Easements Act.

As already observed, the decision has not found favour with the Bombay High Court, who refused to accept it as a guide in a case not governed by the Act.

Exceptions to second general rule.

Wheeldon v. *Burrows.*

The exceptions to the second general rule mentioned by Lord Justice Thesiger in *Wheeldon* v. *Burrows* attach to those cases, in which a reservation may arise by presumption of law in favour of a grantor retaining the dominant tenement, just as under the first general rule a presumed grant may arise in favour of a grantee taking the dominant tenement.

The first exception is the case of an easement of absolute necessity which has already been considered.[2]

The second exception is the case of simultaneous conveyances which will be considered hereafter.[3]

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[1] See *supra* and *infra* in connection with the doctrine of "acquiescence."

[2] See *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D. at p. 49 and *supra*, Part IV, A.

[3] See *infra*, Part IV, B III.

The third exception arises in cases of mutual support of buildings by buildings, where the easement is said to be reciprocal arising out of the mutual subservience to, and dependence on, one another of two houses, in which case the alienation of one house by the owner of both would not estop him from claiming, in respect of the house he retains, that support from the house sold, which is at the same time afforded in return by the former to the latter tenement.

Richards v. *Rose.*

Before its recognition by Thesiger, L. J., in *Wheeldon* v. *Burrows*, this exception was the subject of decision in *Richards* v. *Rose*,[1] and was explained by Lord Westbury in *Suffield* v. *Brown.*

Suffield v. *Brown.*

In *Suffield* v. *Brown*,[2] the Lord Chancellor points out the distinction that arises between a case such as that of mutual support and the case to which the general rule of express reservation is applicable. In the former case the right claimed in respect of the tenement retained is inseparable from it, but in the latter case, where the right is separable, it is severed by the grant and either passes to the grantee where the dominant tenement is granted, or is extinguished where the dominant tenement is retained.

Wheeldon v. *Burrows.*

In *Wheeldon* v. *Burrows*,[3] Lord Justice Thesiger, in recognising the exception in favour of such reciprocal easements as easements of mutual support, suggested that the decision in *Pyer* v. *Carter* might possibly be justified on that ground, without departing from the general maxims upon which the judgment in *Wheeldon* v. *Burrows* is based.

II.—Acquisition of Quasi-Easements on a partition of Joint Property.

The principles governing the acquisition of quasi-easements on a grant of the dominant tenement in the case of a severance of properties belonging to a single owner, apply also to cases of partition of joint property.

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[1] (1853) 9 Exch., 218. *See* also *Gayford* v. *Nicholls* (1854), 9 Exch., 702.

[2] (1864) 4 Deg. J. and S., at p. 193.

[3] 1879) L. R., 12 Ch. D. at p. 59. *See* also the remarks of the same judge in *Angus* v. *Dalton* (1878), L. R., 4 Q. B. D. at p. 182.

In *Ratanji H. Bottlewalla* v. *Edalji H. Bottlewalla*,[1] it was held that the easement there claimed, one of light and air, being of a continuous nature, passed by implication of law upon a partition of joint property resulting in a conveyance of the dominant tenement to the plaintiff.

Ratanji H. Bottlewalla v. *Edalji H. Bottlewalla.*

To the same effect is the decision in *Purshotam Sakharam* v. *Durgoji Tukaram*,[2] where the easement claimed was the right to discharge water from the dominant tenement on to the servient tenement.

Purshotam Sakharam v. *Durgoji Tukaram.*

As between co-parceners, mutual conveyances of the shares allotted to them respectively upon a partition of joint property, whether under the direction of a Court of law or otherwise, will carry with them by presumption of law the right to such continuous easements as are necessary for the reasonable use and enjoyment of the premises respectively allotted.

Upon this principle easements of light and air were held in *Bolye Chunder Sen* v. *Lalmoni Dasi*[3] to pass to the different co-parceners upon partition.

Bolye Chunder Sen v. *Lalmoni Dasi.*

And in more recent cases it has been decided that the result is the same where the partition has not been affected by mutual conveyances but by decree of Court, whether in a contested suit,[4] or as recording the consent of parties to a partition,[5] and even though such decree makes no mention of easements.[6]

III.—Acquisition of Quasi-Easements on the simultaneous conveyance of severed tenements, or on conveyances made at different times, but as part of one transaction.

It is now settled law that when, on a disposition of property belonging to the same owner, the severed tenements are conveyed either simultaneously, or at different times, but as part of one transaction, quasi-easements apparent and continuous and necessary for the enjoyment of the severed tenements as they were

Effect of simultaneous conveyance of severed tenements or of conveyance at different times but as part of one transaction.

[1] (1871) 8 Bom. H. C. (O. C. J.), 181.
[2] (1890) I. L. R., 14 Bom., 452.
[3] (1887) I. L. R., 14 Cal., 797.
[4] *Dwarkanath Paul* v. *Sunder Lall Seal* (1898), 3 Cal. W. N., 407.
[5] *Kadombini Debi* v. *Kali Kumar Haldar* (1899), 3 Cal. W. N., 409.
[6] *See* the two last-mentioned cases.

enjoyed at the time of severance, will pass by presumption of law to the grantees thereof.[1]

In either case the conveyances are regarded in equity as one transaction, and each grantee, as taking his tenement with knowledge of the other conveyance or conveyances, is precluded from interfering with the quasi-easements attaching to the other tenements.

The law as to the acquisition of quasi-easements on a partition of joint and undivided property appears to be founded on the same principles.[2]

Barnes v. *Loach.*

With reference to the present subject, it was said in *Barnes* v. *Loach*[3] "if the owner of an estate has been in the habit of using quasi-easements of an apparent and continuous character over the one part for the benefit of the other part of his property, and aliens the quasi-dominant to one person and the quasi-servient to another, the respective alienees will, in the absence of express stipulation, take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to them."

Allen v. *Taylor.*

In *Allen* v. *Taylor*,[4] Jessel, M. R., enunciates the rule and the principles upon which it rests. He says, "supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights; can it be said that the purchaser of the land is entitled to block up the lights, the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyances? I should have said certainly not. In equity it is one transaction. The purchaser of the land knows that the vendor is at the same moment selling the house with the lights and as part of one transaction he takes the land; he cannot take away the lights from the house."

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[1] *Palmer* v. *Fletcher* (1615), 1 Lev., 122; *Compton* v. *Richards* (1814), 1 Price, 27; *Swansborough* v. *Coventry* (1832), 9 Bing., 305; *Barnes* v. *Loach* (1879), L. R., 4 Q. B. D., 494; *Allen* v. *Taylor* (1880), L. R., 16 Ch. D., 355; *Rigby* v. *Bennett* (1882), L. R., 21 Ch. D. at p. 567; *Phillips* v. *Low* (1892), 1 Ch., 47, and *see* the judgment of Lord Selbourne in *Russell* v. *Watts* (1885), L. R., 10 App. Cas., pp. 602, 603.

[2] See *supra*.

[3] (1879) L. R., 4 Q. B. D., 494.

[4] (1880) L. R., 16 Ch. D., 355 (358).

After referring to previous decisions, the Master of the Rolls proceeds [1] :

"The particular case before me is the strongest I ever saw, for both of the purchasers were also vendors, and were parties to both conveyances. It is not the mere case of a vendor by contemporaneous conveyances selling to two different purchasers, but the two purchasers were two of the three trustees of a will, and an option was given to the two purchasers, or either of them, to buy any part of the real estate that they thought fit, notwithstanding they were trustees ; and then, by contemporaneous conveyances, each with the assent of the other exercised his option as to some of the houses and lands, for they both bought houses and both bought lands. It is not like the case of a man buying land alone or a house alone. The three trustees conveyed to the purchaser, one trustee, land with a house built upon it, together with the lights thereto belonging, and all the estate. Can people who have been parties to two transactions in this way say that they were otherwise than one transaction, and that both parties who bought houses with lights were not to get the lights ? It appears to me, independently of authority, that in such a case as this there is a manifest intention shewn that the houses sold were to retain their lights, and that neither purchaser could on his land erect any obstruction which would block up or destroy the lights of his neighbour."

It is important to note that the rule applies not only in case of simultaneous conveyances as in *Allen* v. *Taylor*, but also in cases of conveyances executed at different times, but all part and parcel of the same transaction.[2] In such cases the conveyances are founded upon transactions which, in contemplation of equity, are equivalent to conveyances between the parties at the time the transactions were entered into, and which

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[1] *Ibid*, at p. 359.

[2] *See* per Thesiger, L. J., in *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D. at pp. 59, 60 ; *Russell* v. *Watts* (1885), L. R., 10 App. Cas., pp. 602, 603. Conveyances executed more than a year apart and not arising out of the same transaction cannot be called simultaneous conveyances, *Rigby* v. *Bennett* (1882), L. R., 21 Ch. D. at pp. 565, 567.

were entered into at the same moment of time and as part and parcel of one transaction.[1]

Same law in case of will as of deed.

The law as laid down in the above-cited cases applies to contemporaneous devises as well as to contemporaneous grants by deed.[2]

Part V.—Acquisition of Easements by the operation of the doctrine of acquiescence.

The doctrine of acquiescence is an interesting feature of the law relating to the acquisition of easements. The previous portions of this chapter have been devoted to an inquiry into the acquisition of easements arising out of the express or implied language or intention of the grantor, and, independently of either of these factors, the acquisition, by operation of law, of a certain class of easements essential to the reasonable enjoyment of the property conveyed, but what has here to be considered is the acquisition of easements arising out of the previous conduct of the servient owner. The doctrine may be said to apply in those cases where the servient owner by active encouragement, passive acquiescence, or other conduct, has induced or permitted a belief on the part of the dominant owner, upon which he has acted, that by expending some money or doing some act, he will acquire an easement over the servient tenement.

Imputed grant arises out of acquiescence.

In such cases equity forbids the servient owner to repudiate the obvious and plain consequences of his own conduct and imputes to him a grant of the easement.

Broad principle laid down in *Dann* v *Spurrier*.

The broad principle underlying all these cases of acquiescence has been stated in the leading case of *Dann* v. *Spurrier*[3] to be that if one man stands by and encourages, though but passively, another to lay out money under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the Court will not permit any subsequent interference with it by him.

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[1] *Wheeldon* v. *Burrows* (1879), L. R., 12 Ch. D. at p. 60.

[2] *Phillips* v. *Low* (1892), 1 Ch., 47.

[3] (1802) 7 Ves., 231; *see* also *Powell* v. *Thomas* (1848), 6 Hare, 300; *Rochdale Canal Co.* v. *King* (1851), 18 L. J. Q. B. (N. S.), 293; 2 Sim. N. S., 78; (1853) 22 L. J. Ch., 604, and see *Ramsden* v. *Dyson* (1866), L. R., 1 H. L., 129, where analogous principles are laid down.

It has been said that the acquiescence which will deprive a man of his legal rights must be in the nature of a fraud.

Acquiescence must be in the nature of a fraud.

The elements or requisites necessary to constitute such fraud have been stated by Fry, J., in *Wilmott* v. *Barber*[1] to be the following :—

Wilmott v. *Barber*.

First, the man claiming under the equity must have made a mistake as to his legal rights.

Secondly, he must have expended some money or must have done some act, not necessarily upon the other's land, on the faith of his mistaken belief.

Thirdly, the possessor of the legal right must know of the existence of his own right, which is inconsistent with the right claimed by the other. If he does not know it, he is in the same position as the other, and the doctrine of acquiescence is founded upon conduct with knowledge of legal rights.

Fourthly, the possessor of the legal right must know of the other's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights.

Finally, the possessor of the legal right must have encouraged the other in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.[2]

The explanation of this case appears to be that there cannot be acquiescence without knowledge, and that the knowledge which permits one man to suppress his own legal rights and another man to continue in a mistaken belief whereby he is led into incurring expense or doing some act, he would not otherwise have incurred or done, is in the nature of a fraud, and cannot afterwards be repudiated. With this preliminary statement of general principles it becomes necessary to examine the principal authorities specially relating to easements, in which the doctrine of acquiescence has been applied.

In *The East India Company* v. *Vincent*[3] the defendant, an adjoining landowner, agreed with the Company's agent that

E. I. Co. v. *Vincent*.

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[1] (1880) L. R., 15 Ch. D., 96.

[2] *Ibid* at p. 105. Repeated by the same Judge in the Appeal Court in *Russell* v. *Watts* (1884), L. R., 25 Ch. D. at pp. 585, 586, and followed in India in *Baswantapa* v. *Rana* (1884), I. L. R. 9 Bom., 86.

[3] (1740) 2 Atk., 82.

the Company should have liberty to build with windows overlooking his land on condition the Company retained him in their services as a packer. To such condition the agent made no answer or objection and the Company proceeded to build. Thereafter the defendant, being dismissed from the service of the Company, proceeded to block up their lights by building a wall. In a suit by the Company to have the wall pulled down Lord Chancellor Hardwicke decided accordingly, and said that though the silence of the agent was an acquiescence binding his principals, and notwithstanding that the dismissal of the defendant was a breach of the agreement between him and the agent of the Company, yet the defendant was not justified in building a wall merely to block up the Company's lights, but that his remedy was by bill in that Court to establish the agreement. The Lord Chancellor further observed that "there are several instances where a man has suffered another to go on building upon his ground, and not set up a right till afterwards, when he was all the time conversant of his right, and the person building had not notice of the other's right, in which the Court would oblige the owner of the ground to permit the person building to enjoy it quietly, and without disturbance. But these cases have never been extended so far as where parties have treated upon an agreement for building, and the owner has not come to an absolute agreement; there, if persons will build notwithstanding, they must take the consequence, and there is not such an acquiescence on the part of the owner, as will prevent him from insisting on his right."

George Clavering's case cited in *Jackson* v. *Cator*.

In *Jackson* v. *Cator*,[1] Lord Chancellor Loughborough referred during the argument for the plaintiff to the case of Mr. George Clavering in the following terms:—"There was a case, I do not know whether it came to a decree, against Mr. George Clavering; in which some person was carrying on a project of a colliery; and had to make a shaft at a considerable expense.

"Mr. Clavering saw the thing going on; and in the execution of that plan, it was very clear the colliery was not worth a farthing without a road over his ground; and when

[1] (1800) 5 Ves., 688.

the work was begun, he said, he would not give the road. The end of it was, that he was made sensible, I do not know whether by a decree or not, that he was to give the road at a fair value."

The Rochdale Canal Company v. *King*,[1] was a bill filed by the plaintiff Company against King and other defendants who were mill-owners for an injunction restraining them from using the water of the canal for any other purpose except for condensing steam in the engines used by them. Under the Act empowering the Company to make and maintain the canal, land-owners, within a distance of twenty yards of the canal, had been given liberty to communicate with the canal by pipes and to draw from the canal such quantity of cold water as would be sufficient for the sole purpose of condensing steam used for working their steam engines, and for no other purpose.

The Rochdale Canal Co. v. *King.*

The defendants who were the owners of two mills used the water for seventeen years for generating as well as condensing steam in their engines, and eventually this bill was filed to restrain them as aforesaid. It was held that as regards the first mill, the plaintiff Company could not restrain the defendants from using the water as they had done, as they had encouraged its construction, and that as regards the second mill, it being evident that the Company never intended to waive the protection of the Act, an injunction should be granted against the defendant restraining them amongst other things from taking any water from the canal other than for condensing steam, except by license of the plaintiffs.

The case of *Bankart* v. *Houghton*,[2] while shewing what is to be measure of an imputed grant, in which connection it will hereafter be considered, is also an authority for the proposition that where a man acquiesces in and encourages the construction by another of works which he knows, or ought to know, is likely to occasion him injury by way of nuisance, he has no grounds upon which to go to the Court for an injunction to stop the works.

Bankart v. *Houghton.*

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[1] (1853) 22 L. J. Ch., 604. *See* also same case reported (1851), 18 L. J. Q. B. (N. S.), (293); 2 Sim. N. S., 78.

[2] (1859) 27 Beav., 425.

Davis v. *Marshall.*

In *Davis* v. *Marshall*[1] the plaintiff sued for the obstruction of his lights, the removal of support to his house, and the obstruction of his chimney. The defendant pleaded equitably that she pulled down an ancient house and erected in its place a new one, that the plaintiff had notice thereof, and that the defendant had done this act with the knowledge, acquiescence, and consent of the plaintiff and on the faith that the plaintiff had consented to it.

The acquiescence and consent of the plaintiff were passive.

It was held that this was a good equitable plea, the facts stated amounting to a permission on the part of the plaintiff, and the obstructions and removal of support complained of being the natural consequences of the act so permitted.

Cotching v. *Bassett.*

In *Cotching* v. *Bassett*[2] there was a material alteration of ancient lights in the course of re-building the dominant tenement. The alteration was made upon notice to the servient owner and with the knowledge and under the inspection of his surveyor, but without any express agreement. Thereafter the defendant gave the plaintiff notice of his intention to build a party wall, which, if erected, would wholly have excluded the light from certain of the plaintiff's windows.

The plaintiff accordingly sued for a perpetual injunction to restrain the defendant from so building. It was held that the case came strictly within the principle of *Dann* v. *Spurrier*, and that plaintiffs were entitled to a perpetual injunction against the defendant.

Davies v. *Sear.*

The same principle was applied in *Davies* v. *Sear*[3] where Lord Romilly, M. R., said :[4] "A man cannot take the assignment of the lease of a house having an archway and road under it leading to a mews, and abstain from looking at the plan by which the adjoining ground is laid out, and intended to be built upon ; he cannot stand quiet, and see it gradually become covered with houses, so that every access or means of communication with the mews is shut out except this one, which he had

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[1] (1861) 7 Jur. N. S., 1247. S. C. sub-nom. *Davies* v. *Marshall* (1861), 10 C. B., N. S., 697.

[2] (1862) 32 Beav., 101.

[3] (1869) L. R., 7 Eq., 427.

[4] At p. 433.

always known was intended to be used as a means of access, and then say 'this easement was not reserved, although there was an archway and road under the house.' It does not lie in his mouth to say 'I did not understand that you intended to use this mode of access, and still less did I understand that you intended to close all other means of access, and leave this as the only existing one.' This is a case where the slightest inquiry or the most casual observation would have shewn the defendant if, indeed, he did not all along, as I believe he did, know, what was intended."

Russell v. *Watts*, mutual accommodation.

The last and not the least important of the English cases to be considered is that of *Russell* v. *Watts*.[1] The facts of this case have already been stated in connection with another aspect of the case,[2] but so far as they are material to the present inquiry, it appears that the Corporation of Liverpool were the owners in fee of a piece of land which they agreed to lease out for building purposes, the intention of the tenant being to construct one large building upon it, but in such a manner as to be capable of subdivision into a number of separate houses. In order to erect a building of the required size it became necessary for the tenant to raise money by mortgaging the land and building, and before such scheme of building could be carried out, it was necessary that the three parties concerned should concur, namely, the owners in fee, the tenants, and the mortgagees.

The scheme was in fact approved by them all, and the mortgagees and lessors either knew how the various blocks were to be constructed or left it to the builder to construct them as they were constructed, without troubling themselves about the matter. In either case there was no question that they authorised the builder to construct the building as he did, and a particular block in such a way as that it should be dependent for light to some of its windows on adjacent blocks.

The question for decision in the suit was whether the mortgagees of the latter blocks could obstruct the windows

[1] (1884) L. R., 25 Ch. D., 559. *See* the judgments of Bacon, V.C., and Lindley, L. J., as bearing on the present subject.

[2] *Supra*.

of the former blocks. Bacon, V. C., thought by reason of their previous conduct they could not, and on appeal Lindley, L. J., agreed with him, in opposition to the views of Cotton and Fry. L. JJ.

The conclusions arrived at by the Vice-Chancellor and Lindley, L. J., were confirmed by the House of Lords, but on somewhat different grounds already referred to.[1]

The judgments of Bacon, V. C., and Lindley, L. J., are instructive as bearing on the question of acquiescence.

Lindley, L. J., thought the case did not fall within the rule of *Wheeldon* v. *Burows*,[2] and said, "This is not the case of a vendor of a piece of land attempting to derogate from his own grant.

It is more like the case of several persons interested in several pieces of land, all agreeing to build upon them in a particular way, so as to accommodate one another, and one of them afterwards, when the buildings are up, insisting on rights which are quite inconsistent with the enjoyment of the buildings as erected. There is no authority to shew that in such a case any one of such persons could afterwards build on his own land so as to obstruct his neighbour's lights, and in the absence of such authority I am of opinion that he cannot do so.

In such a case, it appears to me that the cross easements which are created in the first instance are impliedly granted in equity, if not at law, and if such easements are apparent, no purchaser can protect himself against them by alleging he bought without notice of them.

The principles of *Dann* v. *Spurrier*[3] and *Cotching* v. *Bassett*[4] are in my opinion applicable to such a case."

Application of the doctrine in India.

In India there appears to be no reported case in which the English doctrine of acquiescence has been specially applied, but the inclination of the Indian Courts to follow English equitable principles, and the favourable, but extra-judicial, notice

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[1] (1885) L. R., 10 App. Cas., 590, see *supra*.

[2] (1879) L. R., 12 Ch. D., 31.

[3] *Supra*.

[4] *Supra*.

given to the doctrine in a recent case in the Bombay High Court leaves no doubt as to its adoption, should occasion arise.

Extent of imputed grant.

The extent of the imputed grant is to be measured by the necessary, obvious, and plain consequences of the permitted or encouraged act.

It is reasonable that when a man acquiesces in a particular act he should be taken to have acquiesced in the obvious and plain consequences of that act, but it is also reasonable that a man cannot be taken to assent to what he cannot foresee.

Bankart v. *Houghton.*

The rule is well illustrated in the case of *Bankart* v. *Houghton.*[2]

The plaintiff was a copper manufacturer and the defendant was an occupier of farms in the neighbourhood of the works.

For the reduction of copper-ore the plaintiff at first used three roasting furnaces, the exhalations and deposits from which caused no material injury to the defendant's farms.

The roasting furnaces were subsequently increased to seven. Neither the defendant nor his predecessor took any legal steps to prevent the nuisance arising from the noxious vapours produced from the smelting of the copper or to stop them. Their attitude appears to have been one of passive non-interference.

The nuisance having increased, the defendant brought an action at law against the plaintiff for the injury done to his farms and recovered damages.

The plaintiff thereupon filed his bill to restrain the defendant from taking out execution in the action, and from all further proceedings therein and from commencing any other action at law against the plaintiff.

A motion was made for an injunction which was refused with costs.

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[1] *Chunilal Mancharam* v. *Manishankar Atmaram* (1893), I. L. R., 18 Bom., 618. *See* the *dicta* of Fulton, J., at pp. 629, 630.

[2] (1859) 27 Beav., 425. *See* also *Davis* v. *Marshall* (1861), 7 Jur. N. S., 1247; and the judgment of Lindley, L. J., in *Russell* v. *Watts* (1883), L. R., 25 Ch. D. at p. 579.

The judgment of the Master of Rolls is important, and certain passages may be usefully cited. He said, "The way in which it is put for the plaintiff in equity is this :—It is said that in a district where the effects of copper smoke are widely felt and plainly understood, a tenant who takes land adjoining copper works or such works then in the course of erection and who makes no objection to them, must be held to have acquiesced, not only in the evil produced by the works then in the course of erection, but also in all that which may hereafter be produced by their extension : that the addition to the works is the natural consequence of their existence, and that the tenant cannot afterwards complain of the effects of the smoke, which, flowing from the works then existing or thereafter to be added, he must have foreseen and of which he did not complain. . . . . I think it impossible to be reasonably contended, that, because a man has acquiesced in the erection of certain works which have produced little or no injury, he is not afterwards to have any remedy, if, by the increase of the works, at a subsequent period, he sustains a serious injury. . . . . .

I am unable to accede to the argument that the defendant must be held to have foreseen and to have assented, as a probable consequence to the great and injurious additions which have been made to the works.

The highest that it can be put is, that he assented to what was done and to the consequences that were necessarily to be derived from that, but no further.

The consequences of going further would be most injurious, and would be unwarranted by any authority I am aware of.

It would follow that a partial obscuration of ancient lights, if assented to, involved a consent to their total observation, and that any easement assented to might be increased at the pleasure of the grantee, provided it could be shown that the increase was only a probable consequence of the use of the easement, if found beneficial.

But I do not assent even to the first limited statement of the proposition. It may well be that a person's assent is given under an erroneous opinion and view and in ignorance of

consequences. Is that mistake of fact to bind him from thenceforward and for ever? I think not. . . . . . It is necessary, in order to avoid misconception as to the view which I have taken of the case, and the observations I have made on the ignorance of the consequences of his assent being not binding on the assenting party, to distinguish between the case where the consequences of the act assented to are obvious and plain, and another where they are necessarily doubtful. This may be easily illustrated; for instance, if a neighbour permit me to open a window overlooking his close, he knows the exact consequences of that permission, namely, that he is liable for ever after to be overlooked, and that he cannot afterwards so build on his close as to obscure that window. This is the extent of the injury which can be produced, and he cannot say that he did not foresee it.

So also if he allow another a right of way across his meadow, he knows and can accurately estimate the extent of the injury that will result from such permission. But if a copyholder allows the lord of manor to work the coals under the close of the copyhold, by offset out of the adjoining land, does it therefore follow that if the lord in winning the coals, works so near the surface as to destroy the farm buildings of the copyholder, he is to have no remedy at law for the injury done to him? Could the lord be permitted to allege in this Court, that the copyholder must have known that the coal lay near the surface, and that such a result was probable from its having often occurred in the neighbourhood? Certainly not; but, in truth, all such illustrations present a weaker case than that before the Court, and the strongest illustration of the distinction to be taken in such cases appears to me to be the case of works erected which at first seem to be and are innocuous, and which afterwards, by addition, become seriously injurious to the proprietors of the neighbouring lands."

Question whether acquiescence effects the reversion.

In cases between a lessor and lessee the acquiescence of the former cannot affect or bind the reversion, or give the lessee any additional right because the latter knows what his title is and what his length of tenure in the land is, but where

the reversioner has knowingly permitted a state of things affecting his reversion with an easement he will be as much bound by it as if he had been in possession and acquiesced in it.[1]

Assignee for value without notice.

The grant of an easement founded upon the equitable doctrine of acquiescence will not bind an assignee of the grantor for value without notice.[2]

What notice is necessary to bind assignee. Actual. "Constructive."

The notice necessary to bind the assignee is not limited to actual notice of the grant contained in a conveyance or conditions of sale,[3] but may be "constructive" on the principle that when a person purchases property where a visible state of things exists which could not legally exist, or would be very unlikely to exist, without the property being subject to some burthen, he is taken to have notice of the nature and extent of that burthen.[4]

But this rule of constructive notice cannot be stretched to such a length as from the mere fact of existence of windows to put the purchaser upon inquiry as to the right to use them, for such a doctrine would be unreasonable and dangerous and tantamount to affecting a purchaser with notice of any agreement relating to any structure which he sees on the adjoining land.[5]

The case of windows merely is not a case where the visible state of things makes the existence of an easement extremely probable, for windows are often put in situations where they are liable to be obstructed, the owner being in hopes of coming to some arrangement about lights and taking his chance of acquiring a right to access of light by twenty years' enjoyment.[6]

Part V.—Acquisition of Easements by virtue of Legislative enactment.

Before closing this chapter it is necessary to mention the acquisition of easements by virtue of Legislative enactment.

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[1] *Duke of Beaufort* v. *Patrick* (1853), 17 Beav., 60. As to the case of a mortgagee see *Mold* v. *Wheatcroft* (1859), 27 Beav., 510.

[2] *See* Gale on Easements, 7th ed., p. 63.

[3] *Duke of Beaufort* v. *Patrick*.

[4] See *Mold* v. *Wheatcroft*; *Bankart* v. *Houghton* (1859), 27 Beav., 425; *Allen* v. *Seckham* (1879), L. R., 11 Ch. D., 790.

[5] *Allen* v. *Seckham* (1879), L. R., 11 Ch. D., 790.

[6] *Ibid.*

With reference to this mode of acquisition in India it is proposed to refer shortly to the provisions of certain Acts under which easements may be said to have been created in favour of individuals or Government in express terms or by implication according to the apparent intention of the Act.

It will be convenient to refer to these easements in two separate classes according as they are created in favour of individuals or of Government.

(a) Easements created in favour of individuals.

Land Acquisition Act (Mines), XVIII of 1885, s. 8.

As an instance of easements created by legislative enactment in favour of individuals may be mentioned the rights granted to owners, lessees and occupiers of mines by the Land Acquisition Act (Mines) XVIII of 1885, an Act of the Governor-General in Council.

By section 8 of this Act it is provided that when by reason of the acquisition of land the working of any mines is prevented or restricted, the respective owners, lessees and occupiers of the mines, if their mines extend so as to be on both sides of the mines the working of which is prevented or restricted, may, subject to certain limitations, cut and make such and so many airways, headways, gateways, or water levels through the mines, measures, or strata the working whereof is prevented or restricted as may be requisite to enable them to ventilate, drain, and work their said mines.

This, it will be observed is an instance of the creation of easements by legislative enactment in express terms.

(b) Easements created in favour of Government.

Various instances occur in local Acts of the creation of easements in favour of Government.

The following instances may be mentioned :—

Ajmere Land and Revenue Regulation, II of 1877, s. 3.

(1) Section 3 of the Ajmere Land and Revenue Regulation II of 1877 provides for the rights of the ownership of Government in limes and quarries.

The first proviso in the section by providing for the payment of compensation to any person whose rights are

infringed by the occupation or disturbance of the surface of the land occasioned by working the mines and quarries indicates the creation of easements essential to the proper enjoyment of such mining and quarrying rights. In this case the easements are not created in express terms, but may be said to arise by implication.

The Central Provinces Land Revenue Act, XVIII of 1881, s. 151.

(2) By section 151 of the Central Provinces Land Revenue Act XVIII of 1881, it is enacted that, subject to express provision elsewhere, the right to all mines, minerals, coals, and quarries, and to all fisheries in navigable rivers shall be deemed to belong to Government, and the Government shall have all powers necessary for the proper enjoyment of such rights.

Punjab Land Revenue Act, XVII of 1887, s. 41.

(3) Section 41 of the Punjab Land Revenue Act XVII of 1887 provides that all mines, metals and coals, and all earth . . . and gold workings, shall be deemed to be the property of Government, and the Government shall have all powers necessary for a proper enjoyment of its right thereto.

In England. Railway Clauses Act.

In England an illustration of the creation of easements by Act of Parliament is to be found in the Railway Clauses Act, 1845, which gives general powers for running engines and carriages over a railway [1] and in what may be called the Canal Acts which are private Acts, in some cases authorising the making of canals through private lands,[2] and in other cases authorising mine owners, or lessees of mines, to make a railroad to a canal through intervening lands,[3] compensation being made in each case.

Canal Acts.

Inclosure Acts.

And in the case of the Inclosure Acts awards made under the provisions of those Acts give rise to easements in favour of allottees of land over the allotments of other persons.[4]

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[1] *See* Goddard on Easements, 5th Ed., p. 187.

[2] See *Duke of Beaufort* v. *Patrick*, (1853). 17 Beav., 60.

[3] See *Mold* v. *Wheatcroft* (1859), 27 Beav. 510, and Goddard on Easements, 5th Ed., p 187.

[4] *See* Goddard, p. 188.

CHAPTER VII.

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Acquisition of Easements.—(*Continued.*)

It has been found necessary to devote two chapters to an inquiry into the acquisition of easements with a view to the more convenient treatment of a lengthy and important subject.

The purpose of the last chapter was to examine the acquisition of easements by express, implied, presumed, and imputed grant.

The purpose of the present chapter is to inquire into the acquisition of easements by long enjoyment, and in this connection to consider the history and doctrine of prescription and the

provisions of the Indian Limitation and Indian Easements Acts. The provisions of the English Prescription Act so far as they coincide with those of the Indian easements will be discussed with the aid of leading authorities in the hope that light may thereby be thrown on the meaning and intention of the Legislature.

Part I.—By Prescription.

A.—Prescription Generally.

Definition of Prescription.

Prescription has been defined to be "a title taking his substance of use and time allowed by the law.

Præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis."[1]

Dalton v. *Angus.*

"Prescription," says Lord Blackburn in *Dalton* v. *Angus*,[2] "is not one of those laws which are derived from natural justice. Lord Stair, in his Institutions, treating of the law of Scotland, in the old customs of which country he tells us prescription had no place (book 2, tit. 12, s. 9) says, I think truly, 'Prescription although it be by positive law founded upon utility more than upon equity, the introduction whereof the Romans ascribed to themselves, yet hath it been since received by most nations, but not so as to be counted amongst the laws of nations, because it is not the same, but different in diverse nations as to the matter, manner, and time of it.'"

History of Prescription.

To the Roman lawyers prescription was known by the name of *Usucapio*, which is defined to be "adjectio domini per continuationem possessionis temporis lege definiti."[3]

Roman Law.

By the old Roman law as enunciated in the Twelve Tables, and in Rome modified, and in the provinces practically superseded, by the equitable edicts of the Praetors, the true owner of the *dominium* or legal estate was deprived of it by a possession for two years provided such possession was peaceable, open, adverse, and not fraudulent.

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[1] Coke, 1 Inst., 113 *b*.

[2] (1881) L. R., 6 App. Cas. at p. 818.

[3] Dig. Lib. 41, tit. 3.

Any possession once obtained *nec vi, nec clam, nec precario* could not be disturbed by force.[1] On the basis of these principles was established principally, but not exclusively, the "*præscriptio longi temporis.*"

This was changed by Justinian, who published a constitution by which, throughout the Empire, twenty years in the case of absent parties, and ten years in the case of those present, were fixed as the period of possession that must elapse before the use or possession was clothed with the title.[2]

French Law.

In the numerous provinces into which *France* before the Revolution was divided, many of which were governed by their own customs, the law of prescription varied. *Domat* in his treatise on the Civil Law, says, "It is not necessary to consider the motives of these different dispositions of the Roman law, nor the reasons why they are not observed in many of the customs. Every usage hath its views, and considers in the opposite usages their inconveniences. And it sufficeth to remark here what is common to all these different dispositions of the Roman law, and of the customs as to what concerns the times of prescriptions. Which consists in two views ; one, to leave to the owners of things, and to those who pretend to any rights, a certain time to recover them, and the other to give peace and quiet to those whom others would disturb in their possessions or in their rights after the said time is expired."[3]

The Code Napoleon had to supply one law for all *France.*

Servitudes were divided into classes, continuous and discontinuous, apparent and non-apparent.

The first Projet of the Code allowed continuous servitudes, whether apparent or not, and discontinuous servitudes, if apparent, to be gained by title or by possession for thirty years. The *Code Civil* as it was finally adopted by Article 690, allows servitudes, if continuous and apparent, to be acquired by title or by possession for thirty years, and by Article 691 enacts that continuous servitudes, not apparent, and servitudes,

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[1] Dig. Lib. 43, tit. 24, art. 1 ; Dig. Lib. 43, tit. 26, art. 2 : Dig. Lib., 43 tit. 17.

[2] Inst., Just., Lib. 2, tit. 6.

[3] Book 3, tit. 7, s. 4. Translation by Doctor *Strahan.*

discontinuous, whether apparent or not, can only in future be established by titles, but saves vested rights already acquired.

B.—Prescription in England.

Origin of prescription in English law.

The English law as to prescription is, without doubt, chiefly derived from the Roman law, but as every system of law is founded on its own ideas of expediency, it becomes necessary to examine the English law and the principles upon which it rests.

By the law of England the ownership of real property has always been jealously guarded.

The maxim which has passed into a proverbial saying that "every man's house is his castle and fortress for defence or for repose" exemplifies the sanctity with which the law invests rights of ownership.

A man may do what he pleases with his own property, and he incurs no liability for any use he may make of it, so long as such use causes no injury to any one else.

No one has a right to set foot within the limits of his land without his express or implied consent.

He may build on his land in any way or to any height he pleases. He has a right to the continuous flow of streams passing through it. He may put it to wasteful or deteriorating uses, for he is his own master and no one can question what he does.

These and other rights of an absolute character the law annexes to the ownership of land, and *primâ facie* every owner is presumed to possess them.

But though the law regards the ownership of land with a watchful eye and gives protection to those rights and advantages which are bound up with the full and unrestricted enjoyment of it, yet under certain circumstances, and after the lapse of a particular period of time, another may claim to have deprived the owner of these rights, of some, or all of them.

The man who claims to prevent another from exercising the ordinary rights of ownership must found the claim upon

some title which the law will recognise, and in order to do this he must shew how such title originates.

Now it happens in many cases that a man finds himself in the position of being compelled to say that as a proof of the right claimed by him, he and his predecessors have exercised the right for generations, though how the right was first acquired he is unable to say.

User.

It was to help parties in such a position that the doctrine of prescription was first invoked, and the effect of such doctrine was to release such parties from the obligation of shewing the origin of the right claimed, provided that they could prove the exercise or enjoyment of it in a particular manner and for a particular time. If they succeeded in this, they were presumed to have acquired the right. Thus it has been said in Coke's First Institutes that "prescription is a title taking his substance of use and time allowed by the law. *Præscriptio est titulus ex usu et tempore substantiam capiens ab authoritate legis.*"

Prescription under the common law. Length of user.

It is evident that the *length* of the user as well as its character is a powerful element in the law of prescription, for as the saying goes "ambiguity of time fortifieth all titles and supposes the best beginning the law can give them."[1] In this respect it is interesting to trace the development of a doctrine which, introduced in early times, passed through successive stages of judicial treatment until it acquired its present form at the hands of the Legislature in the English Prescription Act.

Immemorial user.

At the common law, in the first stage of the doctrine, there appears to have been no fixed period of prescription, but rights were acquired by prescription when possession or enjoyment had existed beyond the memory of man, or where, as the legal phrase was, "the memory of man ran not to the contrary."

The fact of immemorial user being one of the requisites for the acquisition of a prescriptive right aptly illustrates the extreme dislike with which the English law has always regarded any interference with the ordinary rights of property.

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[1] *Per* Lord Hobart in *Slade* v. *Drake*, Hob., 295, cited in *Ellis* v. *Mayor of Bridgnorth* (1863), 15 C. B. N. S., 52.

Even after the introduction of this rule it was not admitted that such user gained the right, but that it supplied the place of the proof of origin which was wanting.[1]

It cannot be too clearly understood how entirely opposed to the theory and doctrine of prescription, is the view that it is the user which gains the right. User, no doubt, plays an important part in prescription, but it does so not as bestowing the right, but as affording the presumption of a lost grant, from which the right can be inferred. Prescription in reality has never been anything more than the presumption of a grant, and it is erroneous to suppose that the fiction of a lost grant is a modern device. It was merely the old rule of prescription in a new dress.

In 1789 Buller, J., in the course of his judgment in the case of *Read* v. *Brookman*,[2] said, "For these last two hundred years it has been considered as clear law that grants, letters patent, and records, may be presumed from length of time. It is so laid down in Lord Coke's time, 12 Rep., 5 as undoubted law at that time; and in modern times it has been adopted in its fullest extent. The *Mayor of Kingston-upon-Hull* v. *Horner*, Cowp., 102; *Powell* v. *Milbanke*, ante, 1 vol., 399 *n*, and *The King* v. *The Archbishop of Canterbury* (Tr. 11 & 12 Geo. 2, B. R.) where Lee, C. J., said, here is an uninterrupted usage since 1278, and there cannot be a stronger prescription of a grant. So in *Hasselden* v. *Bradney* (Tr. 4 Geo. 3, G. B.), a jury may find a recovery upon presumption. So that there never appears to have been any doubt on this point."

By various statutes,[3] fixed periods were limited for the bringing of actions for the recovery of real estate, and these continued in force until the statute of Westminster. 3 Edw. I., c. 39, 1275.

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[1] *See* rule as to prescription stated in Sir Francis North's argument in *Potter* v. *Norton*, 1 Ventr., 387, cited by Lord Selborne in *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 795.

[2] East's Term. Rep. at p. 158.

[3] Before the statute of Merton the limitation in a writ of right, according to Braction, was from the time of Henry I, that is, from the year 1100, or 135 years. By the statute of Merton, 20 Henry III, c. 8, limitation in a writ of right was from the time of Henry II, a period of seventy years.

By this statute, the period of bringing a writ of right was limited to the time of King Richard I, a period of eighty-eight years, or as commencing from the year 1189. Writs of mort d'ancestor, &c., were limited to the coronation of Henry III, about fifty-eight years. The writs of novel disseisin remained subject to the same limitation as before, namely, to the passage of Henry III into Gascony.[1] It is obvious that this statute had reference to actions for the recovery of real estate, but the judges by an assumption of legislative authority proceeded to apply the prescriptive rule established by the statute to incorporeal hereditaments, and, amongst others, to easements.

In course of time the limitation thus fixed became attended with the inconvenience and hardship caused by the impossibility of carrying back the proof of possession or enjoyment to a period, which after one or two generations, ceased to be within the reach of evidence.

Here again the judges came to the rescue and provided a remedy by holding that if the proof was carried back as far as *living* memory would go, it should be presumed that the right claimed had existed from the time of legal memory, that is to say, from the time of Richard I or the year 1189.

No further change took place in the law until the passing of the statute of Jac. 1, c. 21, notwithstanding the statute of 31 Hen. VIII, c. 2, by which the time for bringing a writ of right was limited to sixty years, and an opportunity was given to the Courts to apply by analogy its provisions to the case of easements. The statute of Jac. I, c. 2, limited the time for bringing a possessory action to twenty years, and judges by another bold assumption of the functions of the Legislature availed themselves of the opportunity afforded by this statute to adopt the abovementioned period as sufficient to found a presumption of the existence since legal memory of the right claimed.

But in no case was the presumption conclusive and none of these changes in the law, important as they were in reducing

[1] Writs of mort d'ancestor and of entry, were not to exceed the last return of King John from Ireland, a period of twenty-five years. Writs of novel disseisin were to be limited to the first voyage of the King into Gascony, a period of fifteen years.

the period of prescription to narrower and more certain limits, were of any avail in removing the obstacle to the acquisition of the right claimed, which appeared as soon as there was proof of an origin later than legal memory, inasmuch as, if in the course of a cause it was shewn that the disputed right had had such later origin, the presumption failed, and the claim of right was defeated.

Fiction of a lost grant.

It is evident that this latitude in rebutting the presumption allowed to the person contesting the right was in many cases productive of great hardship and injustice to the party claiming it and frustrated the very object of prescription which is the protection of titles after long possession.

In order to remedy this defect in the law, resort was had to the doctrine of a lost grant, a fiction which appears to have been created on the principle that, independently of prescription, every incorporeal hereditament must have had its origin in grant.

By this device user of the right, at first for living memory and, afterwards, for twenty years under the statute of James I, raised the presumption that it had been granted by a deed which in the lapse of time had been lost.

Effect of the device.

This device completely cut the ground away from under the feet of the party contesting the right, for no matter what evidence he might produce to shew that the right could not possibly have existed one hundred years previously, he would be met with the reply that it was found to have been granted since that time ; that the user had commenced under a deed of grant which had since been lost.

It should be observed that in the early use of this doctrine a grant had been really made and afterwards lost or destroyed by accident, and it was the business of the jury to decide whether the making and subsequent loss or destruction had been fairly proved by the evidence.[1]

As the doctrine was extended in later times the attention of the Courts seems to have been fixed on the length of the

[1] Leyfield's case (1611), 10 Rep., 92.

user or enjoyment of the right conferred by the deed rather than on the deed itself or the evidence which proved its destruction or loss. Thus gradually it came about that the loss of the deed was not so much proved as presumed from the assertion to that effect of the party claiming under it.

As applied to easements the doctrine was based wholly on fiction, and juries were directed to find in favour of a lost grant where it was clear that no grant had ever existed.

Of this doctrine, while its utility is admitted, it has been said that its introduction was "a perversion of legal principles and an unwarrantable assumption of authority."[1]

Its effect on the law of prescription was indirectly to convert the rebuttable presumption formerly raised by proof of actual user into a practically conclusive one, and it thus became a method of shortening the period of prescription.[2]

Angus v. *Dalton.*

In the case of *Angus* v. *Dalton*,[3] already considered at length in reference to the easement of support, the doctrine of a lost grant and the evidence necessary to rebut its presumption were the subjects of elaborate discussion in all the three Courts before whom the case was heard, and the opinion formed by a majority of the judges was that the presumption of a lost grant founded on long enjoyment is so far conclusive as not to be rebuttable by proof that no grant has in fact been made.

But legal incompetence as regards the servient owner to grant an easement, or a physical incapacity of being obstructed

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[1] 2 Ev. Poth., 139.

[2] The former presumption rebuttable by proof of origin of the easement within the period of legal memory gave place to a presumption which could be rebutted neither by proof of the origin of the easement within the period of legal memory, nor by proof of such circumstances as negatived an actual assent on the part of the servient owner to the enjoyment of the easement claimed, nor by evidence of dissent short of actual interruption of, or obstruction to, the enjoyment, nor by mere proof by the servient owner, that no grant was in fact made either at the commencement or during the continuance of the enjoyment. *See* the judgment of Thesiger, L. J., in *Angus* v. *Dalton* (1878), L. R., 4 Q. B. D., pp. 171 *et seq.*

Thus though the evidence of enjoyment was in theory merely presumptive evidence, in practice and effect it was a bar. See *Bright* v. *Walker* (1834), 1 C. M. & R. at p. 217.

[3] (1878—1881) L. R., 3 Q. B. D., 85; 4 Q. B. D., 162; *Dalton* v. *Angus*, L. R., 6 App. Cas., 740.

as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant.[1]

English Prescription Act.

In the early part of the nineteenth century when war was made on all legal fictions and that of a lost grant fell into disfavour, the legislature determined to remove the blot on the administration of justice which arose from thus forcing the consciences of juries, and to substitute a direct for an indirect method of lessening the period of prescription.

This was the chief aim and object of Lord Tenterden's Act, otherwise known as the English Prescription Act, 2 and 3 Wm. IV, C. 71.

Mounsey v. *Ismay.*

In *Mounsey* v. *Ismay*,[2] Martin, B., declares the occasion of the enactment of the Prescription Act to be well known. He says: "It had been long established that the enjoyment of an easement as of right for twenty years was practically conclusive of a right from the reign of Richard the First, or, in other words, of a right by prescription (except proof was given of an impossibility of the existence of the right) from that period. A very common mode of defeating such a right was proof of unity of possession since the time of legal memory.

"To meet this the grant by a lost deed was invented, but in progress of time a difficulty arose in requiring a jury to find upon their oaths that a deed had been executed which every one knew never existed, hence the Prescription Act."

Section 2.

By section 2 of the Prescription Act, claims to any way or other easement, or to any watercourse, or the use of any water after actual enjoyment by any person claiming right thereto without interruption for twenty years are not to be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but such claims are made defeasible as formerly after

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[1] See *Angus* v. *Dalton* (1878), L. R., 4 Q. B. D. at p. 175.

[2] (1865) 3 H. & C., 486; 34 L. J. Exch., 52.

twenty years' actual enjoyment and without interruption, and absolute and indefeasible after forty years.[1]

Section 3.

By section 3 of the same statute a right to light becomes absolute and indefeasible after twenty years' enjoyment without interruption.[2]

Prescription Act not exclusive.

It is a mistake to suppose that the Prescription Act has taken away any of the modes of claiming easements which existed before the statute. They may still be utilised, but instances of claims based on them are much fewer.

The common law method of prescription by immemorial user and the fiction of a lost grant are still open to any one claiming an easement when, owing to recent interruption, a prescription under the statute next before action brought cannot be made out.[3] But if the claimant chooses to base his title to any easement contemplated by the Act, upon the old common law method of immemorial user, he is of course liable to be defeated, as formerly, by proof of a modern origin.[4]

Effect of the Act.

What the Prescription Act has done is to refuse to take cognisance of anything that took place prior to periods of twenty or forty years as the case may be instead of prior to the year 1189. Thus under that statute instead of its now being antiquity of time which fortifies the title to easements and supposes the best beginning the law can give them, it is twenty years' or forty years' user or enjoyment.

In fact the statute by creating a fresh origin for easements provides a direct and simple method for the acquisition thereof in the place of the indirect and complicated method.[5]

Regarding the Prescription Act as an act of procedure, and the preamble supports this view, it is clear that one of the

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[1] *See* App. I.

[2] *See* App. I.

[3] *Bagram* v. *Khetranath Karformah* (1869), 3 B. L. R., O. C. J. at p. 25; *Ponnuswami Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C. at p. 21; *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad. at p. 338; *Warrick* v. *Queen's College, Oxford* (1871), L. R., 6 Ch. App., 728; *Aynsley* v. *Glover* (1875), L. R., 10 Ch. App., 283; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 814.

[4] See *Hollins* v. *Verney* (1884), L. R., 13 Q. B. D., 304.

[5] See *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839

results of the statute has been largely to supersede the old system of pleading.[1]

Under the statute, prescription has become a matter *juris positivi*, and does not require, and, therefore, ought not to be rested on, any prescription of grant or fiction of license having been obtained from the person contesting the right or his predecessors in title.[2]

Acquiescence at the root prescription.

But this after all is really a question of pleading and does not affect the theory that every easement must arise with the knowledge and consent of the servient owner, express or implied.

***Sturges* v. *Bridgman*.**

"Consent or acquiescence," said Thesiger, L. J., in delivering the judgment of the Court of Appeal in *Sturges* v. *Bridgman*,[3] "of the owner of the servient tenement lies at the root of prescription and of the fiction of a lost grant."

***Dalton* v. *Angus*.**

In *Dalton* v. *Angus*,[4] Fry, J., expressed the opinion that the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence.

He said: "It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man upon the land of another; secondly, the absence of right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; and lastly the abstinence by him from any such interference for such a length of time as renders it reasonable for the Courts to say that he shall not afterwards interfere to stop the act being done.

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(855), and see *Scott* v. *Pape* (1886), L. R., 31 Ch. D., 554.

[1] *See* the Act in App. I.

[2] See *Tapling* v. *Jones* (1865), 11 H. L. C., 290.

[3] (1879) L. R., 11 Ch. D., 852 (863). Cited by Fry, J., in *Dalton* v. *Angus*, 1881, L. R., 6 App. Cas. at p. 774.

[4] *Ibid* at pp. 773, 774.

"In some other cases as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner: 1, a knowledge of the acts done: 2, a power in him to stop the acts or sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that such is the ground upon which presumptions or inferences of grant may be made appears to me to be plain, both from reason, from maxim, and from the cases. As regards the reason of the case it is plain good sense to hold that a man who can stop an asserted right or a continued user, and does not do so for a long time may be told that he has lost his right by his delay and by negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the quiet consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb. '*Qui non prohibet quod prohibere potest, assentire videtur:*' '*contra non valentem agere, nulla currit prescriptio,*' are two maxims which shew that prescription and assent are only raised where there is a power of prohibition."

In the same case[1] Lord Blackburn preferred laches to acquiescence as a possible ground upon which to found prescription; but he declined to regard it as the only ground.

He thought a failure to interrupt, when there is a power to do so, might well be called laches, and it seemed far less hard to say that for the public good and for the quieting of titles, enjoyment for a prescribed time should bar the true owner when the true owner had been guilty of laches, than to say that for the public good the true owner should lose his rights if he had not exercised them during the prescribed period whether there had been laches or not. But in either case he thought there was not much hardship. Presumably such rights if not exercised were not of much value, and though sometimes they were "*Ad ea quae frequentius accidunt jura adaptantur.*"

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[1] (1881) L. R., 6 App. Cas. at p. 818.

But if, according to Lord Blackburn, prescription being a positive law differing in matter, manner, and time in different countries, is founded on a more extensive principle than that of acquiescence solely, it is at any rate the generally accepted view at the present time that acquiescence is an all-important element in prescription.

From the acquiescence of the servient owner is deduced the grant of the easement.[1] Thus it comes about that in legal conception all the different modes in which easements are acquired are in reality reducible to one, that of grant.

Rangeley v. *Midland Railway Co.*

In *Rangeley* v. *Midland Railway Co.*,[2] Lord Justice Cairns said, "every easement has its origin in a grant expressed or implied."

Character of user in prescription.

This leads to the consideration of that important factor in prescription, the character of the user. Nothing is more clearly established than that the acquisition of an easement by prescription depends upon an enjoyment which has been *nec vi, nec clam, nec precario,* or in other words, peaceable, open, and as of right.[3] And this rule applies both to affirmative and negative easements.[4]

Dalton v. *Angus.*

"The cantilena *nec clam, nec vi, nec precario,*" says Bowen, J., in *Dalton* v. *Angus*,[5] "is a doctrine not peculiar to affirmative easements, though we are chiefly familiar with it in that chapter of the law of England. It seems in truth a natural condition of any inchoate user which is to mature by length of time and apart from statute into the presumption of a right acquired at a neighbour's expense."

The theory which underlies the whole law is that the right has been granted for valuable consideration and a conveyance of it made before the commencement of the user.

Supposing that to have been actually done how would the purchaser have used or enjoyed the right? It might well be

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[1] See *per* Thesiger, L. J., in *Angus* v. *Dalton* (1878), L. R., 4 Q. B. D. at p. 173.

[2] (1868) L. R., 3 Ch. App., 306 (310).

[3] *Bright* v. *Walker* (1834), 1 C. M. & R., 219; *Tickle* v. *Brown* (1836), 4 A. & E., 369; *Sturges* v. *Bridgman* (1879), L. R., 11 Ch. D., 852; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 785. Prescription Act, s. 5, *see* App. 1.

[4] *Sturges* v. *Bridgman.*

[5] (1881), L. R., 6 App. Cas., at p. 785.

assumed that he would have done so openly, at all seasons and at all times, and whenever he chose. He would not have done so in a secret or stealthy manner as if he were doing something he ought not to do.

He would have enjoyed it peaceably because if any one had disturbed or injured him in the exercise of the right he would have had his legal remedy against him. It was user of this character which, prior to the Prescription Act, the law required in order to raise a conclusive prescription of grant, and it is a similar user that the law now requires under the statute to make the right absolute and indefeasible.

The real question in each case of alleged prescription is whether the user or enjoyment is in all respects the same as it would have been, if at the commencement of, or previous to, the period of such user of enjoyment, the right in dispute had been bought and paid for.

This is a question of fact which must depend for its determination on the particular circumstances of each case.

Enjoyment must be peaceable.

Returning to the abovementioned requisites of a valid enjoyment ; first, the *enjoyment should be peaceable.*

This means that the person claiming the easement must be able to shew that he has enjoyed it during the prescriptive period without any interruption or opposition on the part of the servient owner sufficient to defeat the enjoyment.

Briefly the user must not be a contentious one. Thus where an action was brought for the disturbance of a right to draw water from a watercourse, and it was proved that the plaintiff had been in the habit of drawing off the water for his own purpose and that the owners of the watercourse had resisted and had his servants fined for doing so, and that they having been defended by the plaintiff had not appealed : it was held that this conviction unappealed against was evidence of an acknowledgment by the plaintiff that the enjoyment had not been as of right.[1]

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[1] *Eaton* v. *Swansea Waterworks Co.* (1851), 17 Q. B., 267.

As will be seen when the question of interruption comes to be considered, such obstruction or opposition must find expression in something done on the servient tenement or in legal proceedings.

Enjoyment must be open.

Secondly, *the enjoyment must be open.* As it is essential that the enjoyment of an easement during the prescriptive period should be uninterrupted, so is it equally essential that the enjoyment should be capable of interruption.

And in order that the enjoyment should be capable of interruption, it is essential that the enjoyment should be open.

A man cannot resist or interrupt that of which he has no knowledge, either actual or constructive.

And if he cannot resist or interrupt it he cannot be said to consent to, or acquiesce in it, and it has been seen that consent or acquiescence lies at the root of prescription.

Knowledge, power to interrupt, and abstention from so doing on the part of the servient owner are three necessary elements in the acquisition of easements by prescription.

On this subject it will be useful to quote passages from some of the leading authorities to shew how the openness of the user or the capability of interruption has always been insisted on as a necessary ingredient in prescription.

Humphries v. Brogden.

"Although," says Lord Campbell in *Humphries* v. *Brogden*,[1] "there may be some difficulty in discovering whence the grant of the easement in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man, *and acquiesced* in by another who has the power to interrupt them."

Angus v. Dalton.

In *Angus* v. *Dalton*,[2] Thesiger, L. J., referring to *Webb* v. *Bird*[3] and *Chasemore* v. *Richards*[4] as instances of the secrecy of

[1] (1848) 12 Q. B. at p. 749.

[2] (1878) L. R., 4 Q. B. D. at p. 175. *See* also *per* Cotton, L. J., at p. 187, "Enjoyment does not confer a right unless the enjoyment has been open."

[3] (1863) 13 C. P. N. S., 841.

[4] (1859) 7 H. L. C., 349.

user and incapability of interruption operating against the acquisition of an easement by prescription, said that they were direct authorities to shew that "a physical incapacity of being obstructed as regards the easement itself, or an uncertainty and secrecy of enjoyment putting it out of the category of all ordinary known easements, will prevent the presumption of an easement by lost grant; and on the other hand indirectly, they tend to support the view, that as a general rule where no such physical incapacity, or peculiarity of enjoyment, as was shewn in those cases, exists, uninterrupted and unexplained user will raise the presumption of a grant upon the principle expressed by the maxim, '*Qui non prohibet quod prohibere potest, assentire videtur.*'" And again in a later part of his judgment he says, "a user which is secret raises no presumption of acquiescence on the part of the servient owner, and, as a consequence, no presumption of right in the dominant."[1]

Sturges v. *Bridgman.*

In *Sturges* v. *Bridgman*[2] the same learned Lord Justice clearly enunciates the law.

After stating that consent or acquiescence on the part of the servient owner lies at the root of prescription, and of the fiction of a lost grant, and that the acts or user which go to the proof of either one or the other must be *nec vi*, *nec clam*, *nec precario*, he proceeds, "a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis, it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence. Upon this principle it was decided in *Webb* v. *Bird* that currents of air flowing from a particular quarter of the compass, and in *Chasemore* v. *Richards* that subterranean water percolating through the strata in no known channels, could not be acquired as an

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[1] (1878) L. R., 4 Q. B. D. at p. 181.

[2] (1879) L. R., 11 Ch. D. at p. 863.

easement by user ; and in *Angus* v. *Dalton*,[1] a case of lateral support of buildings by adjacent soil, which came on appeal to this court, the principle was in no way impugned, although it was held by the majority of the Court not to be applicable so as to prevent the acquisition of that particular easement.

It is a principle which must be equally appropriate to the case of affirmative as of negative easements ; in other words, it is equally unreasonable to imply your consent to your neighbour enjoying something which passes from your tenement to his, or to his subjecting your tenement to something which comes from his, when in both cases you have no power of prevention.

But the affirmative easement differs from the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement, but the former, constituting, as it does, a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. To put concrete causes—the passage of light and air to your neighbour's windows may be physically interrupted by you, but gives you no legal grounds of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both."

Dalton v. *Angus.*

Again in *Dalton* v. *Angus*[2] the necessity for the enjoyment which raises the presumption of a grant being open or capable of interruption was declared by all the judges who had occasion to notice the subject. In the same case Fry., J., said :[3]

"There is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb.

"'*Qui non prohibet quod prohibere potest, assentire videtur:*' '*contra non valentem agere, nulla currit prescriptio*' are two

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[1] (1878) L. R., 4 Q. B. D., 162.

[2] (1381) L. R., 6 App. Cas. at pp. 757, 766, 774, 785, 786, 801.

[3] At p. 774.

maxims which shew that prescription and assent are only raised where there is a power of prohibition."

By *clam* is not meant fraudulently or surreptitiously. It is sufficient that the easement has not come to the knowledge of the party disputing it, and is not of such a nature that his attention ought reasonably to have been drawn to it.[1]

As regards the question of capability of interruption both Lindley, J., and Fry, J., in *Dalton* v. *Angus*[2] felt themselves compelled by authority to hold that an easement of support being physically capable of obstruction could be acquired by prescription, but they both doubted the expediency and common sense of a law which obliges an adjoining owner to remove the soil used for support, which he would otherwise have left where it was, in order to preserve his unrestricted right to do so at some future time, and thereby imposes upon him the necessity of an excavation which might be at once expensive, difficult, and churlish.

Knowledge may be either actual or constructive.

The knowledge which is necessary to affect the servient owner with notice of the right that is being acquired against him so as to make the enjoyment of it capable of interruption by him, may be either actual or constructive.[3]

Angus v. *Dalton.*

As regards constructive knowledge *Angus* v. *Dalton*[4] is a case in point.

There it was said by Lord Chancellor Selborne that if a house which formerly enjoyed a right of support is pulled down and a building of an entirely different character is erected in its place, the adjoining owner must have imputed to him knowledge that a new and enlarged easement of support, whatever may be its extent, is going to be acquired against him, unless he interrupts or prevents it. It is not essential to the acquisition of the easement that he should have particular information as to the details of the new structure.

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[1] *Union Lighterage Co.* v. *London Graving Dock Co.* (1901), 2 Ch., 300.

[2] (1881) L. R., 6 App. Cas. at pp. 764, 775.

[3] *Sturges* v. *Bridgman* (1879), L. R., 11 Ch. D., 852; *Angus* v. *Dalton* (1878—1881), L. R., 3 Q B. D., 85; L. R., 4 Q.B. D., 162; L. R., 6 App. Cas., 740.

[4] *Dalton* v. *Angus* (1881), L.R., 6 App. Cas. at p. 801.

There are some things of which all men ought to be presumed to have knowledge and amongst them is the fact that, according to the laws of nature, a building cannot stand without vertical, or, ordinarily, without lateral support.

Interruption necessary to prevent acquisition of easement.

Supposing the servient owner to have knowledge of the right which is being acquired against him and the power to interrupt it, the next question is what sort of interruption is necessary in order to prevent the acquisition of the easement.

Angus v. *Dalton.* *Sturges* v. *Bridgman.*

From the observations of the learned judges in *Angus* v. *Dalton*[1] and *Sturges* v. *Bridgman*[2] it appears that effective interruption, in the case of affirmative easements, must consist either in doing some act on the servient tenement or in taking legal proceedings for the direct interference with the servient owner's rights of ownership, and in the case of negative easements, in doing some act on the servient tenement.

Cross v. *Lewis.*

Thus in *Cross* v. *Lewis*[3] Bayley, J., speaking of the case of a man opening windows, says: "If his neighbour objects to these, he may put up an obstruction, but that is his only remedy, and if he allows them to remain unobstructed for twenty years, that is a sufficient presumption of an agreement not to obstruct them."

Proof of circumstances negativing actual assent on the part of the servient owner to the enjoyment of the easement claimed; evidence of dissent, such as a protest on the part of servient owner unaccompanied by actual interruption of, or obstruction to, the enjoyment are neither of them effectual to support a plea of interruption.[4]

Enjoyment must be as of right.

Thirdly, *the enjoyment must be as of right.*

The person claiming the easement must shew that he has exercised it as if he had been the true owner, without permission or license from any one.

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[1] *See* the judgment of Thesiger, L. J., in L. R., 4 Q. B. D. at p. 172; that of Lindley, J., in *Dalton* v. *Angus*, L. R., 6 App. Cas. at p. 766; and that of Fry, J., at p. 774.

[2] *See* the judgment of Thesiger, L. J., in L. R., 11 Ch. D. at p. 864.

[3] (1824) 2 B. & C., 686 at p. 689. *See* also judgment of Littledale, J., in *Moore* v. *Rawson* (1824), 3 B. & C., 339.

[4] *Angus* v. *Dalton* (1878), L. R., 4 Q. B. D. at p. 172; *Dalton* v. *Angus* (1881), L. R., 6 App. Cas. at p. 766.

Thus it has been held that enjoyment for part of the twenty years had under license or permission from the servient owner is not enjoyment for that period so as to be evidence of a perfect right.

Winship v. Studspeth.

This was the case of *Winship* v. *Studspeth*,[1] where the defendant who claimed a right of way was found to have exercised the way for six out of the twenty years under permission from the plaintiff's predecessor in title and the remaining fourteen years as an easement. Alderson, B., said that the way must be exercised for the period prescribed *as of right against all persons* so as to be evidence of a perfect right, and that on the evidence the defendant had no way "*as of right*" since the exercise for the first seven years was during a period when the owner could not stop him.

Sturges v. Bridgman.

As a general rule; says Thesiger. L. J., in *Sturges* v. *Bridgman*,[2] a man cannot be said to consent to, or acquiesce in, the acquisition of an easement through an enjoyment which he temporarily licenses.

Arkwright v. Gell.

Another instance of precarious enjoyment is that furnished by the case of *Arkwright* v. *Gell*,[3] which decides that the enjoyment of a temporary artificial stream is of too precarious a nature to establish a prescriptive right to the flow of water in such a stream as against the originator.[4]

Under the heading of precarious enjoyment, that is, enjoyment not as of right, may be noticed the rule that the right claimed should be enjoyed as an *easement* during the prescriptive period. If the nature of the user is such as to preclude the possibility of the right claimed having been enjoyed as an easement for any part of the necessary period of enjoyment, no easement is acquired. Thus unity of possession or ownership during any part of the prescribed period operates as a

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[1] (1854) 10 Exch., 5.

[2] (1879) L. R., 11 Ch. D., p. 863. *See* also *Monmouth Canal Co.* v. *Harford* (1834), 1 C. M. & R., 614; *Onley* v. *Gardiner* (1838), 4 M. and W. at p. 500; *Tone* v. *Preston* (1883), L. R., 24 Ch. D., 739; *Chamber Colliery Co.* v. *Hopwood* (1886), L. R., 32 Ch. D., 549.

[3] (1839) 5 M. & W., 203.

[4] *See* also *Burrows* v. *Lang* (1901), 2 Ch., 502.

disqualification and excludes the period during which it has continued.[1]

Effect of unity of possession on acquisition of the right.

At one time, it appears to have been considered that the effect of the unity was not only to suspend during its continuation the accruing right to the easement, but also to nullify any valid enjoyment which had preceded it,[2] but later decisions appear to justify the conclusion that the interruption caused by the unity is not an adverse interruption under the statute, but a mere suspension of the growing right, so that if it could be shewn that the enjoyment had lasted say for fifteen years, and then there had been an interruption by unity of possession, and then, the unity of possession having terminated, the enjoyment had lasted for five years more, in such a case an enjoyment for twenty years could have been pleaded.[3]

In addition to the requisites contained in the phrase *nec vi, nec clam, nec precario*, it is further essential to the acquisition of an easement that the enjoyment should be definite in character, and that the right should be physically capable of interruption.

Enjoyment should be definite in character.

That the enjoyment should be definite in character follows from the rule that the enjoyment should be capable of interruption. An enjoyment which is casual and uncertain in character puts the right claimed through it out of the category of all ordinary known easements.

Easement should be physically capable of interruption.

Further, physical incapacity of obstruction as regards the easement itself will defeat the acquisition of the prescriptive right.

Webb v. *Bird*. *Chasemore* v. *Richards*.

For both these propositions the cases of *Webb* v. *Bird*[4] and *Chasemore* v. *Richards*,[5] are recognised authorities, and are

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[1] *Onley* v. *Gardiner* (1838), 4 M. & W., 496; *Clayton* v. *Corby* (1842), 2 Q. B., 813; *Harbidge* v. *Warwick* (1849), 3 Exch., 552; *Battishill* v. *Reed* (1856), 18 C. B., 696; *Ladyman* v. *Grace* (1871), L. R., 6 Ch. App., 763; *Ecclesiastical Commissioners* v. *Kino* (1880), L. R., 14 Ch. D., 213; *Damper* v. *Bassett* (1901), 2 Ch., 350.

[2] *Onley* v. *Gardiner* (1838), 4 M. & W., 496; *Battishill* v. *Reed* (1856), 18 C. B., 696.

[3] *Ladyman* v. *Grace* (1871), L. R., 6 Ch App., 763; *Hollins* v. *Verney* (1884), L. R., 13 Q. B. D., 304.

[4] (1863) 13 C. B. N. S., 841.

[5] (1859) 7 H. L. C., 349.

referred to in that connection by Thesiger, L. J., in *Angus* v. *Dalton*,[1] and *Sturges* v. *Bridgman*.[2] The Lord Justice's observations in these cases have already been quoted at length in regard to the openness of enjoyment and need not be recapitulated here.

Question whether continuous, actual enjoyment necessary to acquisition of easement.

Connected with the law of prescription under the statute an important question for consideration is whether actual enjoyment throughout the whole period of twenty years is necessary to establish an easement.

Interruption through act of servient owner.

For the proper consideration of this question it is necessary to differentiate the cessation of enjoyment which arises from actual interruption or obstruction by some act done by the servient owner or some person other than the person claiming the right and the cessation of enjoyment which arises from mere non-user on the part of the person claiming the right.

Flight v. *Thomas*.

As regards the first branch of this inquiry, the case of *Flight* v. *Thomas*,[3] and the language of section 4 of the Prescription Act[4] shew that an interruption submitted to, or acquiesced in, for a year, is fatal to the acquisition of the easement at whatever part of the prescribed period such interruption may occur, but that an interruption for less than a year, though acquiesced in, is not fatal whether it occurs at the commencement, or end, or at any part of the statutory period.

In *Flight* v. *Thomas*, the easement in contest was a continuous easement, a right to light, and the plaintiff had enjoyed the light for nineteen years and three hundred and thirty days when the defendant raised a wall which obstructed the light. The obstruction was submitted to for thirty-five days only when the plaintiff brought an action for it. It was decided that the enjoyment for nineteen years and three-quarters was sufficient to establish a right to light under the

[1] (1878) L. R., 4 Q. B. D., pp. 174, 175.

[2] (1879) L. R., 11 Ch. D. at p. 863.

[3] (1840) 8 Cl. & Fin., 231. And see *Eaton* v. *Swansea Waterworks Co.* (1851), 17 Q. B. 267.

[4] *See* App. I. "Interruption" has the same meaning in sections 3 and 4 of the Act, namely, that of an adverse obstruction, not of a mere discontinuance of user. *Smith* v. *Baxter* (1900), 2 Ch., 138.

statute and could be accepted as "actual enjoyment" for the period required by the statute.

Court will not protect inchoate right by injunction.

But though an inchoate right is not defeated by an interruption not acquiesced in for less than a year, the Court will not interfere to protect it by injunction before it is complete.[1]

Stranger may interrupt.

The interruption or obstruction may be caused by the act of a stranger as well as by the owner of the servient tenement.[2]

Tenant for life may interrupt.

By section 7 of the Prescription Act life estates held by persons otherwise capable of resisting the claim are excluded in the computation of the prescribed periods of enjoyment.

In other words the tenant for life cannot by acquiescence burthen the estate.

But though the tenant for life cannot acquiesce he may by interruption free the estate, so as to defeat an inchoate right. Thus under the English law, if there is an enjoyment for an incomplete period before the life estate and there is an interruption acquiesced in for more than a year during the life estate, such interruption will be sufficient to defeat the right.[3]

An interruption which is fatal to the acquisition of an easement will not prevent a subordinate or qualified easement being acquired where the subject-matter admits of it.

Thus where an interruption, acquiesced in, of the flow of water in a weir by a fender put down for the better working of a mill was considered to be fatal to the acquisition of a right to the weir as an easement, it was held that, as such interruption had not the effect of withdrawing all the water from the weir, there was nothing to prevent a qualified easement being acquired by an uninterrupted user of the weir for the purpose of taking fish at such time as the fender was down, and the whole body of the water was not required for the use of the mill.[4]

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[1] *Bridewell Hospital Governors* v. *Ward, Lock, Bowden & Co.* (1893), 62 L. J. Ch., 270; *Lord Battersea* v. *Commissioners of Sewers for City of London* (1895), 2 Ch. D., 708. There is no such thing known to the law as an inchoate easement, *Greenhalgh* v. *Brindley* (1901), 2 Ch., 324.

[2] *Davies* v. *Williams* (1851), 16 Q. B., 546; 20 L. J., Q. B., 330.

[3] *Clayton* v. *Corby* (1842), 2 Q. B., 813.

[4] *Rolle* v. *White* (1868), L. R., 3 Q. B. at p. 302. And see *Goodman* v. *Mayor of Saltash* (1882), L. R., 7 App. Cas., 633.

The question whether or not there has been submission to, or acquiescence in, the interruption necessary to defeat the acquisition of the easement is a question of fact and depends upon the circumstances of the case and the conduct of the parties.[1]

But in order to negative submission to, or acquiescence in, the interruption, it is not necessary that the party interrupted shall have brought an action or suit, or taken any active steps to remove the obstruction ; it is enough to show that he has in a reasonable manner made it known to the party causing the interruption that he does not really submit to, or acquiesce in, in it.[2]

The fact that certain members of a particular body of persons have acquiesced in an interruption will not bar the rights of the others who, as a body, have never submitted to, or acquiesced in, the interruption.[3]

So much as regards the question of cessation of enjoyment through interruption.

Non-user.

It now remains to examine the question of non-user in relation to the acquisition of the easement.

This subject has been chiefly considered in connection with rights of way which, being discontinuous easements, are more apt to furnish instances of non-user than easements which are continuous, since in the latter case cessation of enjoyment is found usually to proceed from the obstruction or interference of the servient owner or a third party, though, as will hereafter be seen, it may arise from some act on the part of the person claiming the right which renders the enjoyment thereof temporarily impossible, in which case the rule applied to rights of way has been held to be equally applicable to easements of light.[4]

Question as to the effect of non-user on the acquisition of the easement.

Taking then the case of a right of way, the question arises as to what is sufficient user during the period of twenty years to establish the easement.

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[1] *Bennison* v. *Cartwright* (1864), 5 B. & S., 1 ; *Glover* v. *Coleman* (1874), L. R., 10 C. P., 108.

[2] *Ibid.*

[3] *Warrick* v. *Queen's College, Oxford* (1870), L. R., 10 Eq., 105.

[4] See *infra.*

The answer is that whatever fairly amounts to an actual enjoyment, *nec vi*, *nec clam*, *nec precario*, as an easement, as of right and without interruption for the required period of twenty years is sufficient, that the words "without interruption" do not mean "without cessation" including non-user, and that it would be contrary to common sense to require actual continuous user by day and by night for twenty years without any cessation whatever.[1]

Further, user as of right is sufficient, whether proved in each year or not, provided it be of such a character as to indicate to the person who is in possession of the servient tenement that an easement is being acquired against him.[2]

It is obviously extremely difficult in the case of a discontinuous easement, such as a right of way, to say exactly what cessations of actual user are, and what are not, consistent with the actual enjoyment for twenty years required by the Legislature.

The Legislature has apparently intended that the question whether in any particular case a right of way has, or has not, been actually enjoyed for the necessary period, should be a question of fact unless the Court sees that, having regard to the provisions of the Act, there is no evidence upon which such enjoyment can properly be found.

Hollin v. Verney.

This question of what is sufficient user to establish a discontinuous easement was exhaustively discussed in the case of *Hollins* v. *Verney*[3] and all the authorities bearing on the subject were reviewed. That was an action for trespass on the plaintiff's land. The defendants pleaded a right of way for carting timber and underwood from a wood of his own, and sought to bring the easement within the Prescription Act. The only reliable evidence showed that at intervals of one, thirteen, one, and twelve years during a period of thirty-one years prior to the action, timber had been cut in the defendant's wood and carted along the road by the defendant whenever he desired to

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[1] *Hollins* v. *Verney* (1884), L. R., 13 Q. B. D., 304.

[2] *Ibid.*

[3] (1884) L. R., 13 Q. B. D., 304.

do so, but that between the years of actual user the road had been occasionally stopped up.

The Appeal Court before whom the case eventually came decided that, as there was some evidence of a more frequent user than at the time abovementioned, the defendant could, if he chose, avail himself of a new trial, but it also expressed the opinion that it would be useless for him to go to a new trial unless he was prepared with evidence of a much more continuous user as of right than he had relied upon before.

This was tantamount to deciding that, on the evidence before the Court, the user was of too discontinuous a kind to establish an easement of way under the Statute.

The judgment in *Hollins* v. *Verney* affords an interesting and instructive insight into the proper method whereby questions regarding the cessation of enjoyment by interruption and the cessation of enjoyment by non-user should respectively be determined.

As already observed, the result of the decision in *Flight* v. *Thomas* is to render an interruption or obstruction for one year necessarily fatal to the acquisition of an easement.

But the same consequence does not necessarily follow from mere non-user.

The current of the authorities ending in *Hollins* v. *Verney* shews that the mere fact of non-user for any particular period at any particular time during the prescribed period of acquisition is not necessarily fatal, if the non-user is capable of explanation consistently with continued actual enjoyment of the right.[1]

Lawson v. *Langley. Hall* v. *Swift.*

The cases of *Lawson* v. *Langley*[2] and *Hall* v. *Swift*[3] appear to establish that if user before the statutory period is proved and user for eighteen or nineteen years next before action is proved, the mere fact of non-user for some time immediately before the commencement of the statutory period is not necessarily fatal to the acquisition of the easement,

[1] And see *infra* the same principle applied to cases of right.

[2] 1836) 4 A. & E., 890.

[3] (1838) 4 Bing. N. C., 381; 7 L. J., C. P., 209.

provided such non-user is capable of explanation consistently with continued actual enjoyment of the right.

This was thought to be good law in *Hollins* v. *Verney*.

Parker v. *Mitchell.*

In *Parker* v. *Mitchell*[1] a right of way was claimed under section 2 of the statute, and both a forty and a twenty years' user were pleaded. The evidence shewed an user from a period of fifty years before action, but not for the last four or five years.

The explanation of this non-user did not appear. The Judge at the trial thought the claim was unsupported and the Court refused a rule for a new trial evidently on the ground that on the undisputed facts, the jury could not find an actual enjoyment for the period required by the statute.

In the absence of all explanation accounting for the non-user, this decision was thought in *Hollins* v. *Verney* to be correct.

Lowe v. *Carpenter.*

In *Lowe* v. *Carpenter*[2] the defendant claimed a right of way under section 2 of the statute.

He proved user for forty-eight years before action, with the exception of the last fourteen months, when the way did not appear to be used at all. It also appeared that the way was not used every year, but only as occasion required, for carting lime, timber, etc. It is not stated whether this was the reason why the way was not used for the last fourteen months. Under the direction of the Judge before whom the case was tried, the jury found in favour of the defendant. The plaintiff having obtained a rule the Court upon argument decided in his favour.

It considered *Parker* v. *Mitchell* rightly decided, and that the jury could not upon the evidence find an actual enjoyment for the full period required by the statute. Parke, B., thought that proof of some user every year was essential to bring the case within the statute, and he referred to section 4 in support of his opinion. But the Judges in *Hollins* v. *Verney* thought there was no decision which went to that length ;

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[1] (1840) 11 A. & E., 788.

[2] (1851) 6 Exch., 825.

and they were not prepared to say that an actual enjoyment for the full period required by the statute might not be inferred, although there was no proof of actual user in every year.

As, in their opinion, section 6 of the statute was addressed to presumptions rather than legitimate inferences from facts, they thought that if user for more than twenty or thirty years, as the case might be, had been proved, a non-user for more than a year within twenty or thirty years from the commencement of the action, might be so explained as to warrant the finding of actual enjoyment for the statutory period, as it was found in *Carr* v. *Foster*.[1]

Carr v. *Foster*.

But they agreed that the total absence of user for any year of the statutory period would be fatal, unless explained in such a way as to warrant the inference of continued actual enjoyment.

They were unable to appreciate the supposed distinction between temporary cessations of user for a year occurring at the beginning, or the end, or in the middle of the statutory period.

They considered that a cessation of user which excluded an inference of actual enjoyment as of right for the full statutory period would be fatal at whatsoever portion of the period the cessation occurred, and that, on the other hand, a cessation of user not excluding such inference would not be fatal whether it occurred at the beginning,[2] middle,[3] or end[4] of the period.

They were further of opinion that, as the enjoyment which was required by statute was an enjoyment open and as of right, it seemed to follow that no actual user could be sufficient to satisfy the statute, unless during the whole of the prescribed period, whether acts of user were proved in each year or not, the user was enough at any rate to carry to the mind of a reasonable person in possession of the servient tenement, the fact that a continuous right to enjoyment was being asserted, and ought to be resisted if he was not willing to recognise it.

This test as applied to the facts in ***Hollins*** v. *Verney* was held to be unsatisfied by the user as proved.

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[1] (1842) 3 Q. B., 581.

[2] *Hall* v *Swift*; *Lawson* v. *Langley*.

[3] *Carr* v. *Foster*.

[4] *Parker* v. *Mitchell*; *Lowe* v. *Carpenter*. In these cases the non-user was apparently unexplained, and was therefore fatal.

The rule laid down in *Hollins* v. *Verney* has, in a recent case, been held applicable to an easement of light where there has been a temporary absence, or suspension of, actual user caused by the use of shutters in shops or other buildings, or by the pulling down of a building and the construction on the same site of another building which becomes the dominant tenement.[1]

Rule as to non-user in case of right of way applied also to easements of light.

In every case the question as regards the actual enjoyment of the right is one of fact to be decided on the particular circumstances.[2]

The question one of fact.

But though cessation of actual user may be so explained as not to defeat the acquisition of the growing right, the law is different where the continuity of rightful enjoyment is broken by periods of permissive user. This was the case of the *Monmouth Canal Co.* v. *Harford*,[3] where Parke, B., said: "The issue is, whether the occupiers of the closes, of *right* and *without interruption*, have had the use and enjoyment for twenty years, as they insist, under this issue, therefore they must shew an uninterrupted rightful enjoyment for twenty years. If they had enjoyed it for one week, and not for the next, and so on alternately, their plea would not have been proved. In the case of *Bright* v. *Walker*,[4] lately decided by this Court, it was held that the claimant must shew that he has enjoyed the full period of twenty years, and that he has done so as *of right*, and *without interruption*, and that such claim might be answered by proof of a license, written or parol, for a limited period, comprising the whole or part of the twenty years.

No easement acquired where continuity of rightful enjoyment broken by periods of permissive user.

Monmouth Canal Co. v. *Harford.*

In the present case, the permission asked for and given shews that the occupiers of the closes did not enjoy the way 'as of right,' and also that they do not enjoy it uninterruptedly."

With reference to the provision in section 4 of the Prescription Act,[5] that each of the periods prescribed by the statute for the acquisition of easements is to be reckoned as next before the commencement of some suit or action in which

To be within statute, enjoyment must be up to commencement of suit or action, not up to time of act complained of.

[1] *Smith* v. *Baxter* (1900), 2 Ch., 138.

[2] *Hollins* v. *Verney*; *Smith* v. *Baxter* (1900), 2 Ch., 138 (145).

[3] (1834) 1 C. M. & R., 614.

[4] (1834) 1 C. M. & R., 211.

[5] See App. 1.

the claim shall have been brought into question, it was at one time contended that such enactment must be construed to mean that the periods should be reckoned as next before the act complained of, but it was determined that the statute must be construed literally and that the enjoyment in order to give a right under the statute must be up to the commencement of the suit or action, and not up to the time of the act complained of.[1]

This conclusion, in supporting the view that the Prescription Act is merely an act of procedure and does not affect the theory that prescription is founded on grant presumed from user, over-rides the opinion, which appears at one time to have been entertained, that in fact and in theory an easement was acquired by the prescribed user, and that a servient owner could sue for any alleged trespass committed before the end of the twenty years user. But it was decided in *Wright* v. *Williams*[2] that this was not so, and that an action by the servient owner for an alleged trespass committed before the twenty years which had expired before the action was brought, would not lie, because the statute was intended to confer after the periods of enjoyment therein mentioned a right from their first commencement, and to legalise every act done in the exercise of the right during their continuance.

Wright v. *Williams.*

The commencement of the suit or action is the terminus of the periods of enjoyment appointed by the statute for the acquisition of the right, and the effect is that, immediately upon the bringing of such suit or action, the enjoyment if of the required character and length shall ripen into a right. If the statute did not then come into operation, there would be a right without a remedy.

Right created upon bringing of the *first* suit or action.

The right is created upon the bringing of the first action in which by reason of the claim having been brought into question it becomes necessary for the person claiming such right to possess it for the purpose of his action or defence.

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[1] *Wright* v. *Williams* (1836), 1 M. & W., 77; *Richards* v. *Fry* (1838), 7 A. & E., 698; *Ward* v. *Robins* (1846), 15 M. & W., 237.

[2] (1836) 1 M. & W., 77.

By reason of such enjoyment before any suit being sufficient to establish a right, the claimant, upon the bringing of any such suit or action, may rely upon an enjoyment satisfying the statute, ending with either the existing suit or any of the previous suits or actions.

Cooper v. *Hubbuck.*

This was decided in *Cooper* v. *Hubbuck*,[1] where the question was raised as to the meaning of the words in "some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question."

The construction put by the Court on these words was that the proof of user required to be shewn under the statute is only necessary in the first suit or action in which the right is contested, and that it is not correct to suppose that in any succeeding action the period must be proved to have been next before that particular action.

The right asserted and established in the first action is not exhausted by those proceedings because it is given as a right inherent in the land, as if it arose by grant, not as by some machinery applicable to the one suit or action, and which cannot go beyond the period of the existence of that suit or action.

In every succeeding action, therefore, the right is proved by the judgment in the first action where the claimant gets recorded evidence of his title which by virtue of the statute is conclusive evidence of the right.

It makes no difference if the first suit or action never goes to trial so long as there was enough in the actual proceedings to apprise the parties that the claim was advanced, so that there might be an opportunity of litigating upon it.[2]

If this is done the claim is "brought into question" under the statute.

By whom and against whom prescriptive rights of easement may be acquired.

Before concluding the first part of this chapter it will be useful to ascertain by whom and against whom prescriptive rights of easement may be acquired.

Remembering that the existence of two tenements is essential to the acquisition of an easement and that an easement is

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[1] (1862) 12 C. B. N. S., 456. [2] *Ibid.*

By whom.

a privilege acquired in respect of the dominant tenement in or over the servient tenement for the advantage or benefit of the former tenement, it is obvious that a prescriptive right of easement must be acquired by some one in possession of the dominant tenement by whom the rights have been exercised during the prescribed period.

Against whom.

Remembering also that all easements are deemed to originate in grant it follows that an easement can only be acquired against such persons as are capable of making a permanent grant and thereby imposing a permanent burthen or obligation upon the servient tenement. Such persons must be the owners in fee of the servient tenement.

When owner in fee is in possession.

But it is only when the owner in fee is in possession of the servient tenement that, in England, easements of way and easements relating to water-courses, and the use of water, and in India, all easements, can be acquired against him, for the Prescription Act [1] and the Indian enactments[2] both exclude, in the computation of the necessary period of enjoyment, any interest for life or any tenancy for more than three years during the continuance of which enjoyment has been had, provided the claim to the easement is within three years next after the determination of the said interest or tenancy for years resisted by the owner in fee.

No easement as against a tenant for life or for years.

The question then presents itself whether, under these circumstances, no easement being capable of acquisition against the owner in fee, enjoyment is of any avail for such purpose as against the tenant for life or for years.

Bright v. *Walker*.

This question was raised and determined in the negative in the case of *Bright* v. *Walker*.[3]

The facts were that the assignee of a leasehold interest for lives held under the Bishop of Worcester began to make bricks in the demised close and to carry them into a public highway through another close the subject of another leasehold interest held by another lessee for lives under the Bishop.

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[1] S. 8, *see* App. I.

[2] Indian Limitation Act, XV of 1877, s. 27; Indian Easements Act, s. 16.

[3] (1834) 1 C. M. & R., 211.

This continued for two years when the assignee of the last mentioned leasehold interest put up a gate to obstruct the carrying of the bricks.

This gate the first mentioned assignee and the plaintiff claiming under him broke down, and, thereafter, continued to carry the bricks as formerly without interruption for more than twenty years, when the defendant claiming as assignee of the leasehold interest in the other close obstructed the way, and for that obstruction the action was brought.

It being undoubted that under section 8 of the Prescription Act no easement of way had been acquired as against the Bishop, the important question arose whether the enjoyment, as it could not give a title against all persons having estates in the *locus in quo*, gave a title as against the lessee and the defendant claiming under him, or not at all.

It was held that it did not, on the ground that as titles by immemorial prescription were absolute and valid against all, and absolutely bound the fee in the land, an enjoyment which could not give a good title as against the see, could not give a good title against the tenant for life.

It was considered that neither under the Act, nor otherwise, were there different classes of prescriptive rights either qualified and absolute, or valid as to some persons and invalid as to others.

An enjoyment which could not affect the reversion in the Bishop, and which was, therefore, not good as against everyone, was not good as against anyone, and therefore not good as against the defendant.

Effect of the statutory provision.

The effect of the statutory provision is apparently not to unite two disconnected periods of user, namely, the user prior to the excluded period and the user subsequent thereto, but to extend the period of the continuous enjoyment which is necessary to give the right, by so long a time as the land is out on lease, subject to the condition contained in the section.[1]

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[1] See *per* Parke, B., in *Onley* v. *Gardiner* (1838), 4 M. & W., 500.

C.—Prescription in India prior to the passing of Indian Limitation Act IX of 1871.

Law in India prior to Act XI of 1871.

Before the Indian Limitation Act, IX of 1871, came into force the law of prescription in India generally was the English law prior to the passing of the English Prescription Act,[1] with this difference, that the rule of immemorial user raising a presumption rebuttable by proof that no grant had in fact been made or by proof of grant made within legal memory, was not recognised.[2]

Proof of uninterrupted enjoyment acquiesced in by the servient owner for a period not exceeding twenty years was considered to raise a presumption of grant sufficiently decisive for the Court to act upon unless contradicted, or explained, by proof of facts legally inconsistent with the presumption.[3]

Actual belief of prescription, that is, enjoyment during legal memory, or of a grant actually made, was not thought necessary to support the presumption, so that as a jury in England was directed to act upon a presumption arising from user of the necessary character and for the necessary period, so a Judge in India under similar circumstances was thought bound to find the existence of the right, unless the presumption was rebutted.[4]

Bagram v. *Khettranath Karformah.*

As was said by Peacock, C. J., in *Bagram* v. *Khettranath Karformah:* "The legal unrebutted presumption of a grant, no more depends upon the actual belief of its existence, than the legal unrebutted presumption of prescription, depends upon the actual belief that the right has been enjoyed from the time of Richard I."[5]

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[1] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Bhuban Mohun Banerjee* v. *Elliot* (1870), 6 B. L. R., 85; on appeal to Privy Council (1873), 12 B. L. R., 406; *Narotam Bapu* v. *G. Pandurang* (1871), 8 Bom. H. C., 6; *Ponnusawmi Tevar* v. *Collector of Madura* (1868), 5 Mad. H. C., 6.

[2] *Bagram* v. *Khettranath Karformah.*

[3] See cases cited in note 1 and *Madhoosoodun Dey* v. *Bissonath Dey* (1875), 15 B. L. R., 361; *Rajrup Koer* v. *Abdul Hossein* (1880), I. L. R., 6 Cal., 394; 7 C. L. R., 529; 7 I. A., 240.

[4] *Bagram* v. *Khettranath Karformah.*

[5] 3 B. L. R., O. C. J. at p. 49.

And in India the presumption of a grant could only be rebutted in the same way as the presumption of a lost grant could be in England.[1]

Thus, it is apparent that, although the fiction of a lost grant may have been considered inappropriate in India where there are no juries to be directed,[2] yet exactly the same result was attained in India as in England by the Judge assuming the function of a jury and finding the existence of the right claimed upon the presumption of a grant derived from the necessary enjoyment.[3]

Length of requisite enjoyment.

In Presidency towns.

As regards the period of prescription in India, the Courts, so far as they administered the law of easements in the Presidency towns, appear to have followed the English rule of twenty years.[4]

In mofussil.

In the mofussil, however, the law was in an unsettled condition and no fixed period of prescription appears to have been recognised except by Bombay Regulation V of 1827, applying to the Bombay mofussil, which required thirty years for the acquisition of easements.[5]

Bombay.

Bengal.

In the Bengal mofussil, the decisions shew that no particular period of prescription was adopted, the Court in some cases inclining to the opinion that by analogy to the Indian Limitation Act XIV of 1859 a user for twelve years would be sufficient,[6] in others considering that the circumstances of a case might be such as to warrant the Court in inferring the existence of a right from a user of four or five, or six years,[7] in others refusing to

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[1] See *supra*, Prescription in England.

[2] *Bagram* v. *Khettranath Karformah*, *ubi supra* at p. 42.

[3] See the judgment of Peacock, C. J., pp. 46—56.

[4] *Bagram* v. *Khettranath Karformah*; *Bhoobun Mohun Bonerjee* v. *Elliot*; *Narotam Bapu* v. *G. Pandurang*.

[5] See *Anaji Dattshet* v. *Morushet Bapushet* (1865), 2 Bom. H. C., 354; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C. at p. 20; *Parmeshari Prasad Narain Singh* v. *Mahomed Syud* (1881), I. L. R., 6 Cal. at p. 615. This regulation did not apply to the island and town of Bombay which was subject to the twenty years' rule. *Narotum Bapu* v. *G. Pandurang* (1871), 8 Bom. H. C., 69.

[6] *Joy Prokash Singh* v. *Ameer Ally* (1868), 9 W. R., 91; *Mohim Chunder Chuckerbutty* v. *Chundee Churn Gooroo* (1868), 10 W. R., 452.

[7] *Krishna Mohan Mookerjee* v. *Jagannath Roy Jogi* (1869), 2 B. L. R., A. C. J., 323.

accept a user for four or five years as sufficient to establish the right,[1] in others thinking that no prescriptive right could be acquired in less than twelve years,[2] in others declaring that a user for less than twelve years was not necessarily fatal and a user for twelve years only not necessarily conclusive,[3] and in others that proof of twenty years' user was not indispensable to the acquisition of an easement, proof of well-established and fixed user being sufficient.[4]

Madras.

In the Madras Presidency there was the same uncertainty regarding the period of prescription.

The Courts appear to have followed no fixed rule, but to have reserved to themselves in each case the liberty of determining whether user of the necessary character had been exercised for a sufficient period to justify the finding of the right claimed.[5]

Character of enjoyment.

Though the *length* of the enjoyment necessary to the acquisition of an easement has been involved in confusion and uncertainty, the *character* of the enjoyment accepted by the Indian Courts has been uniformly consistent with the requirements of English law.

Thus the English rule of uninterrupted enjoyment, and of enjoyment *nec clam, nec vi, nec precario* has received constant recognition in India.[6]

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[1] *Huro Soondaree Debia* v. *Ram Dhun Bhattacharjee* (1867), 7 W. R., 276.

[2] *Kartick Chunder Sircar* v. *Kartick Chunder Dey* (1869), 11 W. R., 522 ; *Rajah Bijoy Keshab Ray* v. *Obhoy Churn Ghose* (1871), 16 W. R., 198 ; *Krishna Chandra Chuckerbutty* v. *Krishna Chandra Banik* (1869), 3 B. L. R., A. C. J., 211 ; 12 W. R., 76.

[3] *Rupchandra Ghose* v. *Rupmanjari Dasi* (1869), 3 B. L. R., A. C. J., 325.

[4] *Bhugwan Chunder Chowdhry* v. *Shaikh Khosal* (1867), 7 W. R., 271. But a finding that the exercise of an easement "formerly" is sufficient to establish the right is not one that can be supported, as indicating no length of time ; *Krishna Chandra Chuckerbutty* v. *Krishna Chundra Banik* (1869), 3 B. L. R., A. C. J., 211 12 W. R., 76.

[5] See *Ponnasawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6 ; *Subramaniya* v. *Ramchandra* (1872), I. L. R., 1 Mad. at p. 338.

[6] *Bagram Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18 ; *Elliot* v. *Bhuban Mohun Banerjee* (1873), 12 B. L. R., 406 ; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6 ; *Narotam Bapu* v. *G. Pandurang* (1871), 8 Bom. H. C., 69. See also *Moonshee Zumeer Ali* v. *Mussamut Doorgabux* (1864), 1 W. R., 230 ; *Asker* v. *Ram Manick Ray* (1870), 13 W. R., 344 ; *Chunder Jaleah* v. *Ram Churn Mookerjee* (1871), 15 W. R., 212 ; *Joy Doorga Dos-*

Similarly, the rule that unity of possession or ownership is fatal to enjoyment "as of right" during its continuance,[1] and that enjoyment by license or permission is equally ineffectual has been followed in India.[2]

Similarly, it has been held in India in accordance with English principles that user for any number of years will not be sufficient to confer a right of way if the user is periodically interrupted by the owner resuming, as occasion requires, the exclusive use of his land, and that the only inference to be drawn from such user is that it is permissive.[3]

So, too, the English rule that mere non-user for any particular period at any particular time during the prescribed period of acquisition is not necessarily fatal if the non-user be capable of explanation consistently with actual enjoyment of the right appears to have been adopted in India in favour of the easement claimed in cases where user of a way has either been continued,[4] or discontinued,[5] according to the nature of the way, during the rainy season only.

In India also, as in England, it is essential to the acquisition of an easement that it should be capable of interruption during the prescriptive period.

Acquiescence of servient owner necessary.

In India, as in England, the acquiescence of the servient owner is an important element in prescription.[6] Since acquiescence implies knowledge, there can be no acquiescence without

sia v. *Juggernath Roy* (1871), 15 W. R., 295; *Heera Lall Kooer* v. *Rumesser Kooer* (1871), 15 W. R., 401.

[1] *Obhoy Churn Dutt* v. *Nobin Chunder Dutt* (1868), 10 W. R., 298.

[2] *Moonshee Zumeer Ali* v. *Mussamut Doorgabux* (1864), 1 W. R., 230; *Ashootosh Chuckerbutty* v. *Teetoo Holdar* (1864), Jan.—July, W. R., 293; *Asker* v. *Ram Manick Roy* (1870), 13 W. R., 344; *Aukhoy Coomar Chuckerbutty* v. *Mollah Nobee Nowaz* (1870), 13 W. R., 449; *Heera Lall Kooer* v. *Purmesur Kooer* (1871), 15 W. R., 401.

[3] *Aukhoy Coomar Chuckerbutty* v. *Mollah Nobee Nowaz.*

[4] *Ramsoonder Burral* v. *Woomakant Chuckerbutty* (1864), 1 W.R., 217; *Oomar Shah* v. *Rumzan Ali* (1868), 10 W. R., 363.

[5] *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302; *Sheikh Mahomed Ansur* v. *Sheik Sefatullah* (1874), 22 W. R., 340; *Koylash Chunder Ghose* v. *Sonatun Chung Baroie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 281.

[6] *Bagram* v. *Khettranath Karformah* (1869), 3 B. L. R., O. C. J., 18; *Elliot* v. *Bhuban Mohun Banerjee* (1873), 12 B. L. R., 406; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *Narotam Bapu* v. *G. Pandurang* (1871), 8 Bom. H. C., 69.

knowledge, and if there is no knowledge, it follows there can be no capability of interruption. So much is certain.

But here the question arises as to what evidence is necessary to show knowledge on the part of the servient owner from which, by his failure to interrupt, acquiescence can be presumed.

Bhuban Mohun Banerjee v. Elliot.

In *Bhuban Mohun Banerjee* v. *Elliot*,[1] a distinction, as bearing on this question, was drawn by Chief Justice Couch between the two cases of the servient owner being in possession, and out of possession, of the servient tenement during the period of acquisition.

That was a case in which the plaintiffs sued to enforce the removal of an obstruction to their alleged rights to light and air, and one of the matters for determination was whether the owner of the servient tenement could be said to have had knowledge of the plaintiff's enjoyment so as to have acquiesced in the acquisition of the easements.

It was proved in evidence that the servient tenement had for some years during the alleged prescriptive period belonged to one Rajah Ramchand from whom the defendants subsequently purchased, that whilst the Rajah was owner he had never been in possession and that the property had been let out to tenants from whom rent was collected periodically by the Rajah's gomasta.

In reviewing the authorities, the Chief Justice, while agreeing that if the servient owner is in possession of the servient tenement during the prescriptive period he must be taken to have knowledge of the growing right, and that his knowledge is proof of acquiescence if he fails to interrupt, considered the law to be otherwise if the servient owner was out of possession.

In that case he thought that if there was no direct evidence of his knowledge of the enjoyment, it became a question for determination whether from the circumstances of the case and the nature of the easement enjoyed, knowledge might fairly be presumed.

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[1] (1871) 6 B. L. R., 85.

Applying this view of the law to the proved facts the Chief Justice, Markby, J., concurring, came to the conclusion that the evidence was insufficient to raise an implication of knowledge on the part of the owner, and deciding the question of acquiescence in favour of the defendants on this ground, dismissed the plaintiffs' suit.

On appeal to the Privy Council this judgment was affirmed, but on a different ground.[1]

Question as to what may be constructive knowledge on part of servient owner.

Their Lordships of the Privy Council, however, said that if it had been necessary to decide the case on the question of acquiescence, they would have desired to hear further argument as they were by no means satisfied that knowledge on the part of the agent, who acted for the Rajah, collected his rents, and was entrusted with the authority of fixing their amount, would not be constructive knowledge on the part of the Rajah, sufficient to satisfy the exigence of proof on the part of the plaintiffs.[2]

Question whether knowledge of servient owner for the whole prescriptive period is necessary.

Before leaving the subject of acquiescence there remains to be considered the further question whether when there has been an enjoyment for twenty years, and knowledge by the owner of the servient tenement for only a part of that time, a grant ought to be presumed.

Bhoobun Mohun Banerjee v. *Elliott.*

This does not appear to have been ever expressly decided. In *Bhoobun Mohun Banerjee* v. *Elliott*,[3] Couch, C. J., took the view that, as twenty years' enjoyment with acquiescence is necessary, there must be knowledge for the whole of that period, and, at any rate, if the knowledge were for a lesser period, it would be a question for the jury whether there was a grant, and not a presumption which they ought to make.

Bright v. *Walker.*

There is a *dictum* in the judgment of *Bright* v. *Walker*[4] which appears opposed to this view, where Parke, B., said that one of the ways in which the claim to a right of way might be defeated was by proof of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised.

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[1] *Elliott* v. *Bhoobun Mohun Banerjee* (1873), 12 B. L. R., 406.

[2] *Ibid* at p. 409.

[3] (1870) 6 B. L. R. at p. 98.

[4] (1834) 1 C. M. & R. at p. 219.

Chief Justice Couch in referring to this *dictum* thought, and it would seem correctly, that some words had been omitted in the report of the particular passage, and that the words should have been "during the whole or part of the time it was exercised."

If the acquiescence of the servient owner for twenty years is necessary, it would certainly appear to follow that proof of want of knowledge on his part for any portion of that period would be fatal to the prescriptive right.

Effect of actual obstruction not being completed until after the expiration of twenty years.

It was decided prior to the Indian Limitation Acts that though the actual obstruction is not completed until after the expiration of twenty years, notice, actual or constructive, that the servient owner intends to commence such obstruction followed by the actual commencement of such obstruction before the expiration of the abovementioned period, will constitute an interruption sufficient to defeat the acquisition of the right.[1]

The facts in this case which showed notice given only about a month before the expiration of the twenty years would not support a similar decision under the Indian Limitation Acts,[2] and for the purposes of the present law as contained in Act XV of 1877,[3] the decision must be taken with the qualification that the interruption to be fatal must have been acquiesced in for one year after the claimant has had notice thereof and of the person making or authorising the same to be made.

Part II—Under the Indian Limitation Acts.

Bombay Regulation V of 1827, only legislation in India prior to Act IX of 1871.

Prior to the year 1871 the only attempt at legislation in India on the subject of the acquisition of easements by long enjoyment is to be found in Bombay Regulation V of 1827 which, as already observed, applied to the Bombay mofussil only, and prescribed thirty years as the necessary period of enjoyment.

It was not until 1871 that any Act of general application was passed.

[1] *Elliott* v. *Bhoobun Mohun Bannerjee* (1873), 12 B. L. R. at p. 406.

[2] Acts IX of 1871, s. 27, and XV of 1877, s. 26, and see *supra* the English law under the Prescription Ac and *Flight* v. *Thomas* (1840), 8 Cl. & Fin., 231.

[3] S. 26.

Indian Limitation Act, IX of 1871.

This was the Indian Limitation Act IX of 1871. It extended to the whole of British India and received the assent of the Governor-General on the 24th of March 1871.

It repealed Bombay Regulation V of 1827. Its provisions have been sufficiently referred to in the second part of my first chapter and do not require further notice here.[1]

Repealed by Indian Limitation Act XV of 1877.

Act IX of 1871 continued in force until the 19th of July 1877 when it was repealed by the Indian Limitation Act XV of 1877.

In relation to easements this Act now applies to such parts of British India as do not fall within the scope of the Indian Easements Act V of 1882, namely, to Bengal, the Punjab, and Upper and Lower Burma.[2]

Provisions of the Act relating to easements.

The provisions of the Act relating to easements are to be found in section 3, sections 26 and 27 and articles 36, 37 and 38 of the second schedule.

Section 3.

Section 3 has already been considered in connection with the fusion of *profits à prendre* in easements,[3] and in this respect, it is here sufficient to observe that by the definition of easement therein contained, the legislature has given a wider meaning to the term easements than that which is to be found in English law.[4]

Arts. 36, 37 and 38.

Articles 36, 37 and 38 will be referred to in dealing with the question of limitation as part of the chapter on the disturbance of easements and the legal remedies therefor.[5]

The provisions of the Act which remain to be discussed here are those contained in sections 26 and 27.

Section 26.

Section 26 provides as follows :—

" Where the access and use of light and air to or for any building have been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, and where any way or water-course, or the use of any water or any other easement (whether affirmative) or negative has been peaceably and openly enjoyed by any person claiming title

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[1] See Chap. I, Part II, E.

[2] Chap. I, Part III.

[3] See Chap. I, Part I.

[4] *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945 : *Dukhi Mallah* v. *Holway* (1895), I. L. R., 23 Cal., 55.

[5] Chap. XI, Part III (5).

thereto as an easement, and as of right, without interruption, and for twenty years, the right to such access and use of light and air, way, water-course, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made."

Corresponds with section 27 of Act IX of 1871.

Section 26 corresponds with section 27 of Act IX of 1871, and is in the same terms.

Relation of Indian Limitation Acts to the English Prescription Act.

The draughtsmen of Act IX of 1871 appear to have had the English Prescription Act before their eyes,[1] but they have only partially reproduced its provisions in a section which in some important respects is a materially altered version of the Act.

Act XV of 1877 unlike Prescription Act, places light and air on same footing.

From the first paragraph of section 26 of Act XV of 1877 and of the corresponding section of Act IX of 1871 it will be observed that, unlike the English Act, the Indian Limitation Acts place light and air on the same footing.[2] This result is no doubt attributable to the evident desire of the Indian Legislature to favour the acquisition of the right to air at least as much as the acquisition of the right to light. The same intention discloses itself in the corresponding and other section of the Indian Easements Act.[3]

Delhi and London Bank v. Hem Lall Dutt.

In the case of the *Delhi and London Bank* v. *Hem Lall Dutt*,[4] it was contended in argument for the plaintiff that the effect of the words "absolute and indefeasible" taken with the

[1] See *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., p. 337.

[2] *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839.

[3] See ss. 15 and 28, and Chap. III, Part I.

[4] (1887) I. L. R., 14 Cal., 839.

preceding language of the section was to enlarge the extent and operation of easements of light and air so as to entitle the owner to relief on proof of any interference with the exact amount of light and air enjoyed by him during the prescriptive period, but it was held, in accordance with a similar decision under the English Prescription Act,[1] that such was not the effect of the section, the object of the Indian Limitation Act, like that of the English Act, being not to alter the pre-existing law, but merely to provide another and more convenient mode of acquiring such easements.[2]

Character and length of enjoyment required by the Act.

It will be seen that section 26 embodies the English rule of twenty years' uninterrupted enjoyment *nec vi nec clam, nec precario*.[3]

In accordance also with English law the particular right claimed must have been enjoyed "as an easement."

It is as much opposed to the law of easements in India, as to that in England, that there can be any enjoyment of the light claimed, "as of right," and "as an easement," during unity of possession, for in order that the enjoyment may comply with the requirements of the law there must be an adverse exercise of it as against the servient owner.[4]

It has been held in Bombay that the enjoyment of the right of free pasturage belonging to certain villages according to the recognised custom of that part of India is not, in the absence of special circumstances pointing to the land in question having been used for grazing by the villagers in exercise of a right other than, and independent of, the general right, enjoyment "as of right" either under the Limitation Act or the previous law.[5]

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[1] *Kelk* v. *Pearson* (1871), L. R., 6 Ch. App., 809.

[2] As to the extent and operation in this respect of easements of light and air, see Chap. III, Part I.

[3] See *Subrumaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335; *Chundee Churn Roy* v. *Shib Chunder Mundul* (1880), I. L. R., 5 Cal., 945; *Lutchmeeput Singh* v. *Sadaulla Nashya* (1882), I. L. R., 9 Cal., 698; *The Secretary of State for India* v. *Matharabhai* (1889), I. L. R., 14 Bom., 213; *Chunilal* v. *Mangaldas* (1891), I. L. R., 16 Bom., 592.

[4] *Madhoosoodun Dey* v. *Bissonath Dey* (1875), 15 B. L. R., 361.

[5] *The Secretary of State for India* v. *Mathurabhai* (1889), I. L. R., 14 Bom., 213.

If a particular right is claimed, not as an easement, but by virtue of ownership of the land itself supported by evidence of immemorial user, and the claim fails, such evidence will not be sufficient to prove an enjoyment "as of right" and "as an easement" as distinguished from a right of ownership. Evidence adduced to prove enjoyment as owner cannot be relied on to prove enjoyment "as of an easement."[1]

Meaning of the words "as of right."

The true meaning of the words "as of right" in section 27 of Act IX of 1871 and in section 26 of Act XV of 1877 has, in the case of an affirmative easement such as a right of way, been held to be, not "user without trespass," but "user as the assertion of a right."[2] If they were intended to mean "user without trespass," it is difficult to see how affirmative easements could be acquired because the enjoyment of an affirmative easement, such as a right of way, depends in reality upon repeated acts of trespass acquiesced in for the necessary period by the servient owner.

It has been decided that under section 26 of Act XV of 1877, enjoyment of light and air in order to be "as of right" and to result in the acquisition of an easement must be open and manifest, not furtive or invisible.[3]

The enjoyment must, as has already been observed, be the enjoyment as it were of an owner, who is content to enjoy his rights openly because he has no object in concealing his enjoyment of them.

Since, under the Limitation, Acts it is essential that the enjoyment should be "as of right," it is clear that permissive user is as fatal to the acquisition of easements under the present law as under the former law.[4]

With reference to the requirement of the law of prescription and of the section that the enjoyment conferring the right should be "without interruption," it has repeatedly been held that the unavoidable interruption caused in the user of such

[1] *Chunilal* v. *Mangaldas* (1891), I. L. R., 16 Bom., 592.

[2] *Alimooddeen* v. *Wuzeer Ali* (1874), 23 W. R., 52.

[3] *Mathuradas* v. *Bai Amthi* (1883), I. L. R., 7 Bom., 522.

[4] See *supra* C. "Prescription in India prior to the passing of Indian Limitation Act IX of 1871."

rights as are limited in their exercise to a particular period or season of the year, such as a right of passage by boats in the rainy season, is not an interruption which is fatal to the acquisition of the easement.[1]

Un er the Limitation Acts knowledge of servient owner not essential to acquisition of easements.

It has been seen that in England, and under the law in India, prior to the Indian Limitation Acts, the knowledge of the servient owner is an essential condition to the acquisition of an easement against him. But under the Indian Limitation Acts the law appears to be different.

It has been decided by the Calcutta High Court that the Indian Limitation Act XV of 1877 under which easements are now usually acquired has nothing to do with prescription or the presumption of a grant, and that though the conditions as prescribed by the Act governing the acquisition of easements are in the main the same as those which govern the acquisition of easements by prescription, yet there is nothing in the Act which renders the knowledge of the servient owner necessary to the acquisition of the right, or refers the twenty years' enjoyment to any grant, express or implied, from the servient owner.

Arzan v. *Rakhal Chunder Roy Chowdhry.*

In the case in question *Arzan* v. *Rakhal Chunder Roy Chowdhry*,[2] the easement claimed was a right of way, and it was found in the first Court that the enjoyment had continued peaceably and fairly, and without interruption for more than twenty years, but both the first Court and the Court of original appeal dismissed the suit on the ground, amongst others not material to the present question, that the owners of the servient tenement had not been aware of the plaintiff's user of the way.

On second appeal Garth, C. J., in delivering the judgment of the Calcutta High Court explained the distinction existing between the acquisition of an easement by prescription and the acquisition of an easement under the Indian Limitation Act, and that the principles governing the former were not

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[1] *Ramsoonder Bural* v. *Woomakant Chuckerbutty* (1864), 1 W. R., 217; *Oomer Shah* v. *Ramzan Ali* (1868), 10 W. R., 363; *Mokoondonath Bhadoory* v. *Shib Chunder Bhadoory* (1874), 22 W. R., 302; *Shaikh Muhomed Ansar* v. *Shaikh Sefatoollah* (1874), 22 W. R., 340; *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132; S. C., 8 C. L. R., 281.

[2] (1883) I. L. R., 10 Cal., 214.

necessarily the same as the principles governing the latter. In proof that this was the view taken by the Indian Legislature, the Chief Justice pointed out that there was no provision in the Indian Limitation Act corresponding with section 7 of the English Prescription Act, though there was a provision in section 27, which answered to section 8 of the Prescription Act, and which protected, under certain conditions, the rights of reversioners.

Use of words "peaceably and openly."

He thought it probable that the words "*peaceably and openly*," which were not in the English Act, had been introduced into the Indian Act for the very purpose of preventing the acquisition of easements by stealth or by a wrongfully contested user, although actual knowledge of the user on the part of the servient owner might not be necessary.

This is an important decision and goes a long way towards elucidating the real meaning and intention of the Legislature in the use of the words "*peaceably and openly*," and in the omission of any condition as to the knowledge of the servient owner.

"Open."

It may also be said in this connection that the use of the word "*open*" was apparently, in the opinion of the Legislature, sufficient to meet the situation, for if the servient owner was in possession, an open user was clearly capable of interruption by him, whereas if he was out of possession section 27 provided for such an emergency. By the light of this decision the requirements of the general law in India as contained in the Indian Limitation Act, are satisfied by proof in the case of easements of light and air, of a peaceable enjoyment, and in the case of other easements, of a peaceable and open enjoyment, for twenty years without interruption, as an easement, and as of right. And the result of such enjoyment is to make the right absolute and indefeasible.[1]

"Peaceable."

The word "peaceable" appears to have been introduced in conformity with the rule in England that a contentious user throughout the prescriptive period is fatal to the acquisition of an easement.[2]

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[1] *Arzan* v. *Rakhal Chunder Roy Chowdhry.*

[2] *Eaton* v. *Swansea Waterworks Co.* (1851), 17 Q. B., 267.

Thus constant interruptions though not acquiesced in for a year may shew that the enjoyment never was of right, but contentious throughout.[1] But if the enjoyment as of right has begun, no interruption for less than a year can affect it.[2] This statement of the English rule may be found a useful guide to the meaning of the word "peaceable" in the Indian Act.

Difference between section 26, para. 4, and corresponding provision in English Act.

It is important to observe that there is a material difference between the fourth paragraph of section 26 of Act XV of 1877, and the corresponding provision in section IV of the English Prescription Act.

In the Indian Enactment each of the periods of twenty years is to be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested, whereas the language of the English section is 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."

In England there are cases to show that in dealing with this portion of section IV of the English Act, the Courts have held that the claimant of an easement in order to satisfy the length of enjoyment required by the statute was bound to show some act of user within one year of action.[3]

But these were cases of a right of way, an affirmative easement, in which the plaintiff was not suing for a declaration of an easement or for prevention or removal of its interruption or obstruction, but in trespass, and it was the defendant who set up the easement as a plea in bar.

It is obvious that this class of case could only arise with reference to affirmative easements as involving something done by the defendant on the land of the plaintiff, and could have no application to negative easements which involve no act of the dominant owner on the servient tenement.

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[1] *Eaton* v. *Swansea Waterworks Co.* (1851), 17 Q. B., 267

[2] *Ibid.*

[3] *Parker* v. *Mitchell* (1840), 11 A. & E., 788; *Lowe* v. *Carpenter* (1851), 6 Exch., 825.

Thus these were not cases where the plaintiff alleging an easement had to bring his suit within a particular time and the question of limitation became material,[1] but cases where the defendant in pleading an affirmative easement was told by the Court that his plea would be rejected on the ground of insufficient enjoyment unless he could shew some act of user within one year of action.

The question was clearly one of user as required by the statute and not one of limitation with which the statute had nothing to do.

To construe the question as one of limitation would be to attribute to the judges a usurpation of legislative powers whereby they had not only provided for affirmative easements a period of limitation inapplicable to negative easements, but had also practically repealed the provisions of the Statute of limitations.

For these reasons it is impossible to suppose that it was their intention to do anything more than to supply a reasonable and practical interpretation of section IV of the English Prescription Act.

Effect and result of s. 26, para. 4.

But the framers of the Indian Limitation Acts, whether or not they had the English decisions before their eyes, have converted what is a question of *user* into a question of *limitation*, and by the fourth paragraph of sections 27 and 26 of the two Acts respectively, have in effect prescribed a period of limitation of two years for the bringing of all suits relating to easements excepting those for which the second schedule has expressly provided.

The result is that in India plaintiffs have been placed in the same position as defendants were under the English decisions, and are obliged to submit to the operation of a rule the effect of which is to prescribe an enjoyment which is often impossible, and thus to create a limitation of suits by a process which was unknown to the English statute and was never contemplated by the English Courts.

Thus all persons suing under the Act to have a right of easement acquired by long enjoyment declared or for an injunc-

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[1] As it was in *Bonomi* v. *Backhouse* (1889), 1 E. B. & E., 655; 9 H. of L., 503, and in *Darley Main Colliery Co.* v. *Mitchell* (1886), L. R., 11 App. Cas., 127.

tion to prevent or remove an interruption of, or obstruction to, an easement, must do so by reason of this section within two years of the interruption complained of.[1]

The above remarks apply equally to the fifth paragraph of section 15 of the Indian Easements Act which contains the same provision.

Maharani Rajroop Koer v. Syed Abul Hossein.

The severity of the rule if exclusively applied to the case of rights acquired by long enjoyment, was apparently recognised by the Privy Council in the case of *Maharani Rajroop Koer* v. *Syed Abul Hossein.*[2] In that case the plaintiff sued to establish his right to an artificial water-course constructed and enjoyed by him for more than twenty years prior to the obstruction complained of, but as he had not brought his suit within two years of the said obstruction, the High Court of Calcutta considered section 27 of Act IX of 1871 (the corresponding section to section 26 of Act XV of 1877) to be a bar to his claim.

The Privy Council appreciating the difficulty of the plaintiff's position, supposing section 27 of the Limitation Act to be exclusively applicable to his case, took a different view, and adopted the expedient of withdrawing the case from the operation of the Act, and deciding it on the basis of prescription by presuming from the facts as found by the Lower Courts the existence of a grant at some distant period of time.

In excluding the operation of the Act they removed the necessity for proof of enjoyment within two years of suit and saved the plaintiff's right. In order to reach this conclusion they decided that the Act was remedial and neither prohibitory nor exhaustive, and that it did not exclude other titles or modes of acquiring easements.[3]

Punja Kuvarji v. *Bai Kuvar*[4] was a case on all fours with the Privy Council case just cited.

The plaintiff had from time immemorial or at any rate for more than twenty years prior to the date of disturbance by the defendant, enjoyed the right of having the rainwater from his house carried off over the defendant's land.

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[1] See *Luchmi Persad* v. *Tiluckdharee Singh* (1875), 24 W. R., 295.

[2] (1880) I. L. R., 6 Cal., 394; 7 C. L. R., 529; 7 I. A., 240.

[3] See further as to this, *infra*.

[4] (1881) I. L. R., 6 Bom., 20.

The defendant obstructed the passage of the water through his land, and the plaintiff did not institute his suit for more than two years after the date of the disturbance.

It was held that the plaintiff having a title evidenced by immemorial user did not require the aid of the Limitation Act, and that, as the obstruction complained of was a continuing nuisance in respect of which the cause of action occurred *de die in diem*, the plaintiff's claim was not barred by any provision in the Limitation Act, but, on the contrary, was saved by the express provisions of section 23 of the Act.

Construction of s. 26 read with illustration (*b*). *Koylash Chunder Ghose* v. *Sonatun Chung Barooie.*

Before leaving the subject of the fourth paragraph of section 26 of Act XV of 1877, it will be useful to refer to the case of *Koylash Chunder Ghose* v. *Sonatun Chung Barooie*,[1] which, as regards affirmative easements, places an intelligible construction on the section read with illustration (*b*) in relation to the question whether it is enjoyment of the right claimed as required by the section, or actual user or exercise thereof as required by the illustration, which is to be shewn within two years of suit.

The plaintiffs in this case sued for the obstruction of a right of passage for boats over the defendant's land when it was covered with water during the rainy season.

The suit was instituted on the 6th of April 1878. The plaintiffs proved a peaceable, open and interrupted enjoyment of the right as an easement, and as of right, for more than twenty years, but they proved no actual user since November 1875. Upon these facts the Subordinate Judge before whom the case came on first appeal dismissed the suit on the strength of illustration (*b*). On second appeal the High Court differed from the Subordinate Judge, and in remanding the case, rejected illustration (*b*) on the ground that the language of the section pointing to one view of the law, and that of the illustration to another, the section should clearly be preferred, as the illustrations ought never to be allowed to control the plain meaning of the section itself, especially when the effect would be to curtail a right which the section in the ordinary sense would confer. The case is an important one, and it will be

[1] (1881) I. L. R. 7 Cal., 132.

useful to quote from the judgment of the Court delivered by Garth, C. J. He says :—" The 26th section of the Limitation Act only ren ders it necessary, so far as we can see, that the *enjoyment of the right* claimed should have continued till within two years before suit. The section says not a word as to any *actual user* or *exercise* of the right within the two years. It is obvious to us that the enjoyment intended by the section means something very different from actual user. In order to establish the right, the *enjoyment* of it must continue for twenty years ; but in the case of discontinuous easements, this does not mean that actual *user* is to continue for the whole period of twenty years.

On the contrary, there may be days and weeks and months, during which the right may not be exercised at all, and yet during all those days and weeks and months, the person claiming the right may have been in full enjoyment of it.

The easement with which we have to deal in the present case affords a remarkable illustration of this. The right which the plaintiffs' claim can only be used by them during the two or three months of the year when the defendant's land is flooded ; and if there were a lack of rain, it is probable, that even for twenty or twenty-one months, the right might not be exercised at all ; and yet, so long as the plaintiffs' right was not interfered with, whenever they had occasion to use it, their enjoyment must, we conceive, be considered as continuing during all the year round. Unless this were so, a person in the plaintiffs' position, who could only use his right during a short period of the year, could never gain a prescriptive right at all. Illustration (*b*), therefore, which would seem to make 'enjoyment' equivalent to 'actual user' must, we think, be rejected, especially as the latter clause, which follows the words. 'The suit shall be dismissed,' is obviously quite unnecessary for the purposes of the illustration."

This view of the section places it in accord with the spirit of previous Indian and English decisions which do not make it essential to the acquisition of the right that there should be a continuous user throughout the whole of the prescriptive period,

provided the cessations of actual user are consistent with the enjoyment required by law.[1]

Explanation to s. 26.

The *explanation* to section 26 provides that "nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant. and unless such obstruction is submitted to. or acquiesced in, for one year after the claimant has notice thereof and of the person making or authorising the same to be made."

There is a similar provision in section IV of the English Act, except that there is nothing in the latter enactment which makes it essential to an effectual interruption that the interruption should be "an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant," though the term has been so construed by the Court.[2]

Meaning of term "interruption."

The term "interruption" as used in the corresponding section of the Limitation Acts does not mean any voluntary discontinuance of user by the claimant himself, but an obstruction or prevention of the user by some person acting adversely to the person who claims it. This is obvious from the explanation given to the Act itself.[3]

It is clear that the person contesting the easement cannot deny knowledge of the user and yet allege that there has been an interruption within the meaning of the section.[4]

What is necessary to negative "acquiescence" in the interruption.

With reference to the condition that the obstruction in order to amount to an interruption within the meaning of the section must be submitted to or acquiesced in for one year after the claimant has notice thereof, it has been held in India, following the English rule, that in order to negative submission it is not necessary that the party interrupted should have brought an action or suit, or taken any active steps to remove the

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[1] See *supra*, and Part I, B. & C. : and also *Sham Churn Auddy* v. *Tariney Churn Banerjee* (1876), I.L.R., 1 Cal., 422 (430).

[2] *The Plasterers' Co.* v. *The Parish Clerks' Co.* (1851), 6 Exch., 630.

[3] *Sham Churn Auddy* v. *Tariney Churn Banerjee* (1876), I. L. R., 1 Cal., 422.

[4] *Arzan* v. *Rakhal Chunder* (1883 I. L. R., 10 Cal., 214.

obstruction ; it is enough if he has communicated to the party causing the obstruction that he does not submit to or acquiesce in it.[1]

Claims against Government prior to the Limitation Acts.

Prior to the Indian Limitation Acts there is no reason to doubt that, as against the East India Company, and subsequently as against the Crown,[2] claims in the nature of easements and *profits à prendre* might be acquired by prescription.[3]

Question whether the Limitation Acts apply to such a case.

But since the passing of the Indian Limitation Acts it appears to be questionable whether the provisions of these acts can be used as against the Crown for the acquisition of easements.

Secretary of State for India v. *Mathurabhai.*

The question was raised before the Bombay High Court in the case of *The Secretary of State for India* v. *Mathurabhai*,[4] where it was contended on behalf of the Government that section 26 of Act XV of 1877 is not applicable to a claim against the Secretary of State, on the ground of the well-established rule in England, that the Crown, whose interests he represents, is not included in an Act unless there be words to that effect.

Without expressing a decided opinion on the subject, which was not necessary in the view they took of the case, the Court (Sargent, C. J., and Candy, J.), thought that, in accordance with English principles, the mere mention of the Crown in an Act could not be held to have the effect of making all its provisions applicable to the Crown, and that section 26, being clearly in prejudice of the Crown's rights, the provisions of the Act could not, on principle, be said to afford sufficiently clear evidence of an intention to include the Crown in section 26. They considered that it might be fairly inferred from the provision in section 15 of the Indian Easements Act, V of 1882, fixing a period of sixty years in lieu of twenty years for acquiring an easement against the Crown that the Crown's rights were not actively present to the minds of the Legislature when enacting section 26.

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[1] *Subramaniya* v. *Ramachandra* (1877), I. L. R., 1 Mad., 335 (339).

[2] Against the Crown "all such remedies were given as might been had against the East India Company" by Act 21 and 22 Vic., c. 106, s. 65.

[3] *Ponnusawmi Tevar* v. *The Collector of Madura* (1869), 5 Mad. H. C., 6 : *The Collector of Thana* v. *Dadabhai Bomanji* (1876), I. L. R., 1 Bom., 352 (361).

[4] (1889) I. L. R., 14 Bom., 213.

Arzan v. Rakhal Chunder Roy Chowdhry.

But in the case of *Arzan* v. *Rakhal Chunder Roy Chowdhry*[1] this view did not suggest itself to the Judges of the Calcutta High Court who by their decision evidently considered that Government is in no other or better position than an ordinary landowner as regards the period and nature of enjoyment required for the acquisition of an easement against it.

Under the English Prescription Act.

Under the English Prescription Act all rights of easements are capable of acquisition against the Crown except easements of light, whatever may have been the reason of the exception.

The Indian Limitation Acts are remedial. Neither prohibitory nor exhaustive.

It has already been incidentally remarked, and it must here be repeated, that the Indian Limitation Act, like the English Prescription Act, does not exclude or interfere with other titles and modes of acquiring easements.

The Privy Council has laid it down that the object of the Act was to make more easy the establishment of easements by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more a title to easements.[3] "But," say their Lordships, "the Statute is remedial and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements."[4]

Modoosoodun Dey v. Bissonath Dey.

The same view was expressed by Markby, J., in *Modoosoodun Dey* v. *Bissonath Dey*,[5] when he said, "It has indeed been contended that the Statute" (meaning Act IX of 1871) "excludes other modes of acquiring an easement by enjoyment. But this is clearly not so. There are no words in the Statute to which such a construction can be given, and with the history

[1] (1883) I. L. R., 10 Cal., 214.

[2] Sections II & III. See App. I, and Goddard on Easements, 5th Ed., p. 277.

[3] *Maharani Rajroop Koer* v. *Syed Abul Hossein* (1880), I. L. R., 6 Cal., 394; 7 C. L. R., 529; 7 I. A., 240.

[4] These observations were made with reference to Act IX of 1871. The same also apply to Act XV of 1877. See *Srinivasa Rau Saheb* v. *Secretary of State* (1880), I. L. R., 5 Mad., 226; *Sri Raja Vericharla* v. *Sri Raja Satracharla* (1881), I. L. R., 5 Mad., 253; *Punja Kuvarji* v. *Bai Kuvar* (1881), I. L. R., 6 Bom., 20; *Achul Mehta* v. *Rajun Mehta* (1881), I. L. R., 6 Cal., 812; *Koylash Chunder Ghose* v. *Sonatun Chung Barooie* (1881), I. L. R., 7 Cal., 132; 8 C. L. R., 231; *Charu Surnokar* v. *Dokouri Chunder Thakoor* (1882), I. L. R., 8 Cal., 952; 10 C. L. R., 577; *Arzan* v. *Rakhal Chunder* (1883), I. L.R., 10 Cal., 214; *The Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839; *Secretary of State* v. *Mathurabhai* (1889), I. L. R., 14 Bom., 223.

[5] (1875) 15 B. L. R., 361.

of the English Prescription Act before them, it can scarcely be supposed that the legislature here, had they intended any such exclusion, would have omitted to express their intentions."

They are Acts of prescription.

Arzan v. *Rakhal Chunder Roy Chowdhry.*

In *Arzan* v. *Rakhal Chunder Roy Chowdhry*,[1] Garth, C. J., after stating that the Indian Limitation Act had nothing to do with prescription, said, "Of course rights of way as well as other easements, may still be claimed in this country by prescription; see *Rajrup Koer* v. *Abul Hossein*, and when they are so claimed the principles which apply to their acquisition in England will be equally applicable in this country."

The Delhi and London Bank v. *Hem Lall Dutt.*

In *The Delhi and London Bank* v. *Hem Lall Dutt*,[2] it is observed by Trevelyan, J., that "the object of the Prescription Act and of the provisions in the Limitation Act was, not to enlarge the extent and operation of the easements [of light and air], but to provide another and more convenient mode of acquiring such easements, a mode independent of any legal fiction and capable of easy proof in a Court of Law."[3]

Section 27.

Section 27 of Act XV of 1877 is as follows :—"Provided that when any land or water upon, over, or from which any easement has been enjoyed or derived, has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water."

A corresponding provision is to be found in section VIII of the English Prescription Act, except that the operation of the section is limited to ways, water-courses or use of water.[4]

The corresponding section in the Indian Limitation Act IX of 1871, section 28, excluded easements of light and

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[1] (1883), I. L. R., 10 Cal., 214.

[2] (1887), I. L. R., 14 Cal., 839.

[3] In *Kelk* v. *Pearson* (1871), L. R., 6 Ch. App., 809, the same view was expressed in England with reference to the English Prescription Act, *see* also *Scott* v. *Pape* (1886), L. R., 31 Ch. D., p. 571.

[4] *See* App. I.

air, whereas section 27 of the present Act applies to all easements.

Effect of the section.

It is to be observed that the section protects the rights of reversioners against the acquisition of any easement upon or over any land or water, which has been the subject of an outstanding estate for more than three years, provided the claim is resisted by them within three years after coming into possession.

It has been seen that as against the servient owner in possession section 26 prescribes a particular mode of enjoyment, whilst section 27 provides for all cases where the servient owner is out of possession for more than three years.

Section 27 follows the English law which has already been noticed.[1]

Part III.—Under the Indian Easements Act.

Section 3, repealing portion of Act XV of 1877.

By section 3 of the Indian Easements Act, the definition of "easement" contained in section 3 of the Indian Limitation Act, and sections 26 and 27 of that Act are repealed in the territories to which the former Act extends.[2]

Secs. 15 & 16.

Sections 15 and 16 of the Indian Easements Act correspond to sections 26 and 27 of the Indian Limitation Act with the addition of the explanation as to "enjoyment," suspension of enjoyment, and when an easement of pollution begins, and with an exception in respect of claims against Government.[3]

Length and character of enjoyment same as under the Indian Limitation Act.

As under the Limitation Acts the enjoyment must be *nec vi, nec clam, nec precario* without interruption, and for twenty years, except as against the Government, when an enjoyment for sixty years is required.[4]

A similar proviso to that contained in Explanation I to section 15 is to be found in sections I, II, and III of the English Prescription Act.[5]

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[1] *Supra*, Part I, B., p. 378.

[2] Bombay, North-Western Provinces and Oudh, Madras, Central Provinces, and Coorg. As to the terms of the section, *see* App. VII.

[3] *See* Apps. IV and VII.

[4] S. 15, last para. See *infra*.

[5] App. I and App. VII, and see *Sultan Nowaz Jung* v. *Rustomji N. Byramji Jijibhoy* (1899), I. L. R., 24 Bom., 156.

Under paragraph 5 of section 15, as under paragraph 4 of section 26 of the Indian Limitation Act XV of 1877, the statutory title to an easement must be acquired in a suit.

As under Limitation Act Statutory title must be acquired in suit.

On the analogy of the decisions relating to the Indian Limitation Acts it may be inferred that the Indian Easements Act does not exclude other modes of acquiring easements, there being no words in the Act to which such a construction can be given.[1]

Like Limitation Act does not exclude other modes of acquiring easements.

Thus when a right of easement is not claimed under the Act, but by prescription, proof of enjoyment within two years next before suit is not necessary.

Explanation IV to section 15 follows the rule laid down in *Goldsmidt* v. *Tonbridge Wells Improvement Commissioners.*[2]

Expl. IV to s. 15. *Goldsmidt* v. *Tonbridge Wells Improvement Commissioners.*

By the last paragraph of section 15 rights of easement can be acquired against Government after enjoyment of the necessary character for "sixty years" instead of "twenty years" as in other cases.

Length of enjoyment as against Government.

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[1] See *supra*, p. 400.

[2] (1865) L. R., 1 Ch. App., 349. And see *supra*, Chap. III, Part III, F.

CHAPTER VIII.

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Part I.—Extent and mode of enjoyment of Easements.

The effect of an easement being to restrict the ordinary rights of property, it is of obvious importance to both dominant and servient owner that the rights of the former and the obligations of the latter should be clearly defined both in their extent and in the mode of their enjoyment and imposition, so that there may be neither an excessive use on the one side, nor an unnecessary obstruction on the other. It has been seen that the principal methods of acquiring an easement are (1) grant by deed, express or implied, (2) presumption of law, (3) prescription or long enjoyment, and as the general rule is that the extent and mode of enjoyment of an easement are usually to be ascertained from the manner of its acquisition, and as,

independently of this, there are certain rules as to the extent and mode of enjoyment applying to easements in general and in particular, it becomes necessary to consider the present subject, *first*, generally, in relation to the mode of enjoyment of all easements by whatever method acquired ; *secondly*, generally, in relation to the three different methods of acquisition above enumerated, and, *thirdly*, in particular, in relation to easements of way which still remain to be considered in this connection.

A.—General rules as to the extent and mode of enjoyment of Easements.

Easement cannot be used by dominant owner for any purpose disconnected with dominant tenement.

It is a well-established rule that an easement cannot be used by the dominant owner for any purpose disconnected with the enjoyment of the right of property in the dominant tenement.[1] This is a rule of such obvious necessity as hardly to require enunciation.

It is in accordance with justice and reason that the acquisition of an easement which is for the advantage of the dominant tenement and the result of which is to impose a burthen on the servient tenement should preclude the user of the acquired right by the dominant owner for the advantage of any other tenement.

Thus, if a man is the owner of two houses and acquires a right of way over his neighbour's land for the advantage of one of them, he exceeds the legal limits of his easement if he uses it for the purpose of going to the other house.[2]

If the law were otherwise and allowed an easement to be used for some purpose in no way connected with the dominant tenement, the exercise of an easement might be indefinitely extended in all kinds of ways never contemplated by the servient

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[1] See *supra*, Chap. II ; I. E. Act, ss. 4 & 21.

[2] *Howell* v. *King* (1685), 1 Mod., 190 ; *Lawton* v. *Ward* (1697), 1 Ld. Raym., 75 ; *Culliandoss* v. *Cleveland* (1863), 2 Ind. Jur., O. S. 15 ; I. E. Act, s. 21, ill (*a*). The rule that a right of way acquired for one purpose cannot be used for another falls within the same principle. See *Senhouse* v. *Christian* (1787), 1 T. R., 560 ; and the other cases *infra* under "Extent and mode of enjoyment of easements of way."

owner, and an easement would in many cases be nothing more than a mere right in gross.

Simpson v. The Mayor of Godmanchester.

The principle was recognised by the House of Lords in the case of *Simpson* v. *The Mayor of Godmanchester*,[1] where the appellant sued the respondent corporation for an injunction to restrain them from trespassing upon or interfering with his locks on the River Ouse. The respondent corporation set up in defence a prescriptive right to open such locks in time of flood in order to protect their lands from inundation. The House decided in favour of the respondent. In the course of this judgment Lord Watson says :[2]—" If the appellant had been able to shew that the corporation had carried their operations beyond what was necessary to protect their own lands, so as to clear other lands of flood water when their own were neither flooded nor threatened with inundation, the appellant would have been entitled to restrain the respondents from doing more than was reasonably necessary in order to protect their dominant lands. But he has made no such complaint and there is no evidence in this case which could support it."

The same rule appears in a different form in my second chapter on the characteristic feature of easements, and the authorities in support of it are there referred to.

Dominant owner must exercise his right in mode least onerous to servient owner.

Another essential rule relating to the use of easements is that the dominant owner shall exercise his right in the mode least onerous to the servient owner.[3]

This rule proceeds upon the same ground as the last, namely, that as an easement in restricting the ordinary rights of property imposes a burthen upon the servient tenement, such burthen shall be made as light as possible consistently with the proper and necessary enjoyment of the easement.

This rule finds its ordinary illustration in the case of affirmative easements, as where a man having the selection of a right of way over his neighbour's land is bound to exercise his choice

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[1] (1897) App. Cas., 696.

[2] At p. 702.

[3] *Abson* v. *Fenton* (1823), 1 B. & C., 195 ; *Dudley* v. *Horton* (1826), 4 L. J. Ch. (old series), 104 ; *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665 ; on appeal, I. L. R., 8 Cal., 677 ; I. E. Act, s. 22.

in a reasonable manner, the proper measure of his conduct being what a reasonable man would do under similar circumstances on his own land.[1]

If possible, he must take the nearest way.[2]

So where a man has a right of way over his neighbour's land for a particular purpose, the law imposes upon him the duty of exercising his easement in a way which will least affect the servient owner in his enjoyment of the servient tenement.[3]

And it is not only the servient owner who is entitled to complain of an excessive, improper or offensive user, but also any person having a right of easement over the same subject-matter.[4]

Novel user lawful, if not excessive.

Subject to the rule that the owner of an easement may not place a new burthen or restriction upon the servient tenement, or do anything whereby the original and rightfully imposed burthen or restriction is increased, a dominant owner has the right to alter the mode and place of enjoyment of the easement.[5]

Instances of the exercise of this qualified right are to be found in the case of easements of light and air where the dominant owner is allowed to change the purpose for which the dominant tenement is employed, provided the rightful user of the easement is not exceeded.

This rule has already been partially discussed in considering the extent of the prescriptive right to light, and it has been seen that the modern view is that a dominant owner may change the purpose for which he uses the dominant tenement, as and how he pleases, provided, as regards the amount of light, he does not exceed the limits of enjoyment to which his acquired right entitles him.[6]

Upon the same principle it has been held that the conversion of fulling mills into corn mills is not such a change of the

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[1] *Abson* v. *Fenton* (1823), 1 B. & C., 195.

[2] *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), L. R., 1 Ch. D., 362.

[3] *Chunder Coomar Mookerjee* v. *Koylash Chunder Sett*.

[4] *Ibid.*

[5] *See* I. E. Act, ss. 23 & 29, and *infra*, the cases cited in reference to this subject.

[6] *See* Chap. III, Part I.

mode of enjoyment as will enable the servient owner to object to the use of a watercourse for working the mills.[1]

Similarly in the case of an easement to polluted water, the method of the pollution may be changed so long as the pollution itself is not increased.[2]

But in the case of a right of way a change of character and purpose in the dominant tenement involving a change in the mode of user of the easement as originally acquired will defeat a claim to use the easement for the purpose of the converted tenement. Thus it has been held that a right of way used for the advantage of a tenement while it continued as farming land could not be used for building purposes whilst the tenement was being converted into a building site, and for all purposes connected with the houses when they had been erected.[3]

But a change not in the purpose for which a way is used, but in the system by which such purpose is effected, is not necessarily such a material aggravation of the easement as to entitle the servient owner to its discontinuance.

Thus an easement of way used for the purpose of cleansing the privies of the dominant owner is not materially aggravated by a change of system, which causes such privies to be cleansed daily instead of less frequently.[4]

The general rule is that the owner of the dominant tenement cannot, by changing the character of the occupation of the land in respect of which the right of way or easement existed, impose a greater burthen upon the servient tenement.[5]

The test to be applied in each case is to see whether any additional burthen has or will be imposed on the servient tene-

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[1] *Luttrel's case* (1738), 2 Coke Rep., Part IV, p. 86.

[2] *Baxendale* v. *McMurray* (1867), L. R., 2 Ch. App., 790.

[3] *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), L. R., 1 Ch. D., 362 ; *Desai Bhaoorai* v. *Desai Chunilal* (1899), I. L. R., 24 Bom., 188; *see* further *infra* under C "Extent and mode of enjoyment of easements of way."

[4] *Jadulal Mullick* v. *Gopal Chandra Mukerji* (1886), I. L. R., 13 Cal., 136 ; L. R., 13 I. A., 77.

[5] *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), L. R., 1 Ch. D., 362 ; *Bradburn* v. *Morris* (1876), L. R., 3 Ch. D., 812 ; *Jesang* v. *Whittle* (1899), I. L. R., 23 Bom., 595.

ment by the way in which the dominant owner has used or seeks to use his easement.[1]

The question whether any actual alteration in the form and structure of the dominant tenement may be said to be an excessive enjoyment of the easement entitling the servient owner to a remedy depends upon the materiality of such alteration. As to what is "a material alteration," the Master of the Rolls expressed the following opinion in *Cooper* v. *Hubbock* :[2] "It is important to state, particularly, what my view is of what is meant by the word 'material.' Every alteration is, no doubt, material to the person who makes it, but as I understand it, it means 'material' to the person over whose land the easement is enjoyed, that is, whether he is prejudiced thereby, or the enjoyment of his property is, to any extent, diminished, by reason of the alteration made in the lights. The materiality consists in that, for if a man has four windows almost touching one another looking over his neighbour's land, and he should unite the two centre windows, it is difficult to see how that could be, in any degree, prejudicial to the neighbour's land. If there were any wrong done by uniting the windows, it would be *damnum, absque injuria*, for it would be no injury to the neighbour's land and no prejudice to the enjoyment of his property. Accordingly, in these matters, I always regard the materiality, and see whether, in fact, the land of the person over which the easement is obtained is, in any degree, prejudicially affected by the alteration made by the person entitled to the easement."

Cooper v. *Hubbock.*

The opening of a new window in a substantially different position from that occupied by an old window, or the enlargement of an old window, is a material alteration,[3] for which the servient owner has his remedy in acts of obstruction on the servient tenement.[4]

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[1] *Jesang* v. *Whittle*, where no additional burthen being imposed a way for agricultural purposes was allowed to be used for the purposes of a factory.

[2] (1862) 30 Beav., 160, 163.

[3] *Cooper* v. *Hubbock* (1862), 30 Beav., 160; *Tapling* v. *Jones* (1865), 11 H. L. C., 290 ; *Scott* v. *Pape* (1886), L. R., 31 Ch. D., 554 ; *Provabutty Dabee* v. *Mohendro Lall Bose* (1881), I. L. R., 7 Cal., 453 ; *Bai Hariganga* v. *Tricamlal* (1902), I. L. R., 26 Bom., 374.

[4] See *infra*.

According to English law, the owner of ancient lights can alter in form and structure the aperture through which he obtains his light even so as to increase the amount of such light, provided he does not enlarge the aperture itself.[1] Thus it has been held in England that the removal of old easements and the substitution in their place of others of lighter construction without increasing the aperture occupied by their frames but resulting in an increased access of light and air, is not an additional user from which the servient owner is entitled to be relieved.[2]

I. E. Act, s. 28, cl. (*c*).

It has been seen that the language of section 28, clause (*c*) of the Indian Easements Act, shows a variation from the English law in this respect.[3] But it is presumed that in Bengal and in other parts of British India where the Indian Easements Act is not in force the English rule would still prevail.

The opening of the new window or the enlarging of the old one is not a wrongful, but an innocent act, which is at any time open to the dominant owner for he may use his land as he pleases, but which the servient owner is at liberty to counteract by building on his own land if he be able to do so, subject to the conditions which the law imposes.[4]

Such additional user will not increase the original easement, but it cannot diminish it so as to deprive the dominant owner in any degree of his right to the amount of light originally acquired.[5]

Obstruction of excessive use by servient owner.

Any act on the part of the dominant owner which oversteps the limits of enjoyment conferred by the acquired right may be obstructed on the servient tenement by the servient owner.

It will be perceived that this right of obstruction is really one of the ordinary rights of ownership available either before

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[1] *Turner* v. *Spooner* (1861), 1 Dr. & Sm., 467; 30 L. J. N. S. Ch. 801; and see *Cooper* v. *Hubbock* (1862), 30 Beav., 160; *Scott* v. *Pape* (1886), L. R., 31 Ch. D., 554.

[2] *Turner* v. *Spooner*, *supra*.

[3] See *supra*, Chap III, Part I.

[4] *Ibid*, and see *infra* with reference to the question of obstruction of excessive user by servient owner.

[5] *Tapling* v. *Jones*; *Scott* v. *Pape*. And see *Cooper* v. *Hubbock*; *Provabutty Dabee* v. *Mohendro Lall Bose*, and *see* Chap. IX, Part II, D.

the acquisition of the easement by what is technically known as "interruption" or after the acquisition of the easement when the limits of the right are exceeded.

In the case of affirmative easements the obstruction must be the obstruction of a trespass, whereas in the case of negative easements the obstruction is the rightful act of the servient owner counteracting the no less rightful act of the dominant owner. This will clearly appear from an examination of the cases.

Thus to put the case of an affirmative easement, if a man who has acquired a right to irrigate his land by placing a board or fender across a stream fastens the board or fender by means of stakes, which proceeding he has no prescription to justify, the person whose rights in the stream are restricted by the easement may remove the stakes, but not the board.[1]

So if a man having acquired a right to a stone weir erects buttresses, the person whose ordinary rights of property are restricted by the stone weir, may remove the buttresses, though he may not demolish the weir.[2]

So if a man enlarges an ancient window, the servient owner may build on his own land so as to obstruct the enlargement.[3] But this right is subject to restriction as will presently be seen.

In case of easements of light, right of obstruction limited.

In the case of easements of light, it is now well-established that the rights of a servient owner to build on his own land in such a way as to obstruct the additional user on the part of the dominant owner is subject to certain limitations, which though unrecognised in some earlier decisions, received authoritative acceptance in the important case of *Tapling* v. *Jones* before the House of Lords.

Renshaw v. *Bean*. *Hutchinson* v. *Copestake*.

The earlier cases of *Renshaw* v. *Bean*[4] and *Hutchinson* v. *Copestake*[5] had decided that if the owner of a dwelling-house with ancient lights, opens new windows in such a position as that the new windows cannot be conveniently obstructed by

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[1] *Greenslade* v. *Halliday* (1830), 6 Bing., 379.

[2] *Ibid.*

[3] *Chandler* v. *Thompson* (1811), 3 Camp., 80.

[4] (1852) 18 Q. B., 112.

[5] (1860) 8 C. B. N. S., 102; in error 9 C. B. N. S., 863.

the servient owner without obstructing the old, the latter has, nevertheless, the right to obstruct so long as the new windows continue in existence.

An examination of the judgments in these cases shews, that the opening of the new windows was treated as a wrongful act on the part of the owner of the existing easement, for which he paid the penalty of losing the old rights he possessed.

Tapling v. *Jones.*

But in *Tapling* v. *Jones*,[1] the House of Lords took the converse view, and in overruling *Renshaw* v. *Bean* and *Hutchinson* v. *Copestake*[2] decided that if the owner of ancient lights opens new windows or enlarges his old ones, the adjoining proprietor may exercise a right of obstruction so long as he can obstruct the new openings without obstructing the old, but that if he cannot do so, he may not obstruct at all.

Under such circumstances it is not the dominant owner who loses his old rights, as he was said to do according to the earlier decisions, but the servient owner who loses his right of obstruction.

The reasoning of the judgments in *Tapling* v. *Jones*, clearly exposes the fallacy involved in the conclusions arrived at by the judges in *Renshaw* v. *Bean* and *Hutchinson* v. *Copestake.*

They proceeded upon the erroneous assumption that the act of opening the new windows or enlarging the old ones was a wrongful act of the natural consequence of which the dominant owner could not complain.

Misled by this erroneous assumption they considered that if any one was to suffer it should be the dominant owner.

The case of *Tapling* v. *Jones* corrects this erroneous reasoning by shewing in the clearest way that what was assumed to be a wrongful act in the earlier cases, was an innocent act open at any time to the dominant owner in the enjoyment of his rights of property and involving in the eye of the law no injury or wrong to the adjoining owner who was at liberty to build up against the new or enlarged openings, subject

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[1] (1865) 11 H. L. C., 290.

[2] The case of *Davies* v. *Marshall* (1861), 7 Jur. N. S., 720, appears to be open to the same objection as these cases.

always to the condition that by so doing he did not obstruct the old windows, for no innocent act could destroy the existing right of the one party, or give any enlarged right to the other, namely, the adjoining proprietor.

But where a dominant owner has constructed new windows in the place of his old windows, and the new windows do not substantially include the area of the old windows, but only a small portion thereof, he is not entitled to complain of an obstruction which shuts out the light from his new windows.[1]

Scott v. *Pape.*

The principle established in *Tapling* v. *Jones* was followed in the later case of *Scott* v. *Pape*,[2] which is also an important decision in relation to the law of extinction of easements by abandonment or forfeiture, and will in this connection be fully considered hereafter.[3]

Same law in India as in England.

In India the same principle has been recognised outside the Indian Easements Act,[4] and by section 31 of the Indian Easements Act.

Provabutty Dabee v. *Mohendro Lall Bose.*

In *Provabutty Dabee* v. *Mohendro Lall Bose*,[5] Wilson, J., said :—" With regard to the law, the question is set at rest by the judgment of the House of Lords in *Tapling* v. *Jones*, and it is clear that if a man has a right to light from a certain window and opens a new window, the owner of an adjoining house has a right to obstruct the new opening if he can do so without obstructing the old, but if he cannot obstruct the new without obstructing the old, he must submit to the burden."

These remarks apply with equal force to the case of an old window being enlarged.[6]

Additional user in case of easement of support.

In the case of an easement of support, an alteration of the dominant tenement throwing a greater burthen on the servient tenement than that justified by the acquired right has this result that the servient owner is not liable for any damage which his acts may have caused the dominant owner by reason of the

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[1] *Newson* v. *Pender* (1884), L. R., 27 Ch. D., 43, and *see* Chap. IX, Part II, D.

[2] (1886) L. R., 3 Ch. D., 554. *See* also *Cooper* v. *Hubbock* (1860), 30 Beav., p. 164, where the Master of the Rolls appears to take a similar view of the law.

[3] *See* Chap. IX, Part II, C. & D.

[4] *Provabutty Dabee* v. *Mohendro Lall Bose* (1881), I. L. R., 7 Cal., 453.

[5] (1881) I. L. R., 7 Cal., 453.

[6] *Provabutty Dabee* v. *Mohendro Lall Bose.*

modern alteration. This, in effect, is the proposition enunciated by Lord Justice James in *Corporation of Birmingham* v. *Allen*[1] where he explains that whether the acts of alteration are due to the dominant owner or some third party, it does not lie in the mouth of the dominant owner to say, "I have done no wrong; I have done nothing that I was not lawfully entitled to do. I have worked out my mines under my land as far as I might lawfully do so, and, having done that, I have now a cavity under my land, and I now warn you, my neighbour, that you must not follow my example and work your mines, because if you work your mines in addition to my working my mines you will let down my house or the surface from which I have removed my support." The Lord Justice goes on to say that there is authority against a position of that kind. His words are, "in the case of the Court of Exchequer, *Partridge* v. *Scott*,[2] as it appears to me, we have a direct authority for saying that where a man has himself diminished the subjacent support of his own land, he has no right of action or complaint against his neighbour whose acts by reason of that previous weakening have caused subsidence of the plaintiffs' soil. That we have authority for."

Corporation of Birmingham v. *Allen.*

The case of *Corporation of Birmingham* v. *Allen*[3] is an authority for the further proposition that as the servient tenement cannot have its servitude or obligation increased by any act of the dominant owner, neither can such servitude or obligation be increased by the act of a third person intervening between the dominant and servient owners.

The burthen imposed on the servient tenement cannot be increased by act of third person intervening between dominant and servient owners.

In that case it appeared in evidence that between the land of the plaintiffs and that of the defendants who were colliery owners, there was an intermediate piece of land the coal under which had been worked out some years before by a third party. The effect of such excavation was that when the defendants came to work the coal under their land, subsidence was caused of the surface of the plaintiffs' land and the buildings thereon erected, and on these facts the plaintiffs asked for an injunction against the defendants.

Corporation of Birmingham v. *Allen.*

[1] (1877) L. R., 6 Ch. D., 284, 293.
[2] (1838) 3 M. & W., 220.
[3] (1877) L. R., 6 Ch. D., 284.

The plaintiffs had themselves extracted coal under their land, and it was found that such excavation would interfere with the support and increase subsidence, though not materially.

The Master of the Rolls came to the conclusion that the plaintiffs' case failed entirely because the defendants could not be considered adjacent owners so as to be liable for support, and the acts of the plaintiffs and the intervening owners by reason whereof the subsidence had occurred, could not deprive the defendants of the right of working their mines as they pleased, even if such working caused damage to the plaintiffs.

The Court of Appeal affirmed the judgment of the Master of the Rolls. Lord Justice James made the following observations : "I agree with the Master of the Rolls that it seems a very startling thing to say that a man who has got a property in valuable mines, can be deprived of those valuable mines because some one else between him and somebody else, a third person, has been doing something with his property. Whatever you call it, an easement, or a natural right incident to property, or a right of property, it seems to me those are only different modes of expressing the origin of the right, and do not express any difference in the right itself. Whatever it be, there must be, whether you use those terms or not, the idea and the substance of a dominant and servient tenement ; and it does seem to me rather startling to find that the servient tenement can have its servitude or obligation increased by the act of the owner of the dominant tenement, or by the act of a third person intervening between the owners of the dominant and servient tenement."[1]

Effect of increase or diminution of dominant tenement by alluvion or diluvion.

By section 29 of the Indian Easements Act no easement is affected by any change in the extent of the dominant or servient tenement, except where the extent of an easement being proportionate to the extent of the dominant tenement, the easement is proportionately increased or diminished according as the dominant tenement is increased by alluvion or diminished by diluvion.

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[1] At p. 292.

The severance or partition of the dominant tenement into two or more parts annexes all its easements to the severed portions, provided no additional burthen is imposed on the servient tenement.

Effect of severance or partition of dominant tenement.

In *Tyrringham's case*[1] it was resolved that common appendant may be apportioned, because it is of common right ; so if A has common appendant to 20 acres of land, and enfeoffs B of part of the said 20 acres, the common shall be apportioned, and B shall have common *pro rata* and no prejudice accrues to the tenant of the land in which common is to be had, for he shall not be charged with more upon the matter than he was before the severance.[2]

Tyrringham's case.

In *Codling* v. *Johnson*[3] the defendant in an action for trespass pleaded a right of way in respect of land which had formerly been part of an uninclosed common, but which had afterwards been inclosed under the provisions of an Act of Parliament and allotted to the defendant's ancestor. The existence of an immemorial right of way having been proved, the Court decided that the defendant and each of the allottees of land within the inclosure were entitled to a right of way.

Codling v. *Johnson.*

In *Harris* v. *Drewe*[4] it was held that the right to sit in a pew may be apportioned, so where a pew has been appropriated to a particular house and the house is afterwards divided into two parts, the occupiers of each part have some right to the pew and may maintain an action in respect of it.

Harris v. *Drewe.*

A person claiming an easement after partition or severance of the dominant tenement must shew that he comes within the description of the grantee of the easement, either being the grantee himself or claiming through him, and that the easement has ceased to be appurtenant to the dominant tenement, as a whole, and belongs to the severed portion.[5]

Position of person claiming easement after partition of dominant tenement.

Failure to shew this lost the plaintiff his case in *Bower* v. *Hill.*

Bower v. *Hill.*

[1] (1584) Coke's Rep., Part IV, p. 36*b*.

[2] *See* also on this subject *Baring* v. *Abingdon* (1892), 2 Ch., pp. 395, 402.

[3] (1829) 9 B. & C., 933.

[4] (1831) 2 B. & Ad., 164.

[5] *Bower* v. *Hill* (1835), 2 Bing. N. C. 339 ; 1 Scott's Cas., 526.

That was an action upon the case for obstruction of a right of way claimed by the plaintiff from his close unto and along a certain stream or watercourse. It appeared at the trial that the close in respect of which the plaintiff claimed the right, abutted on the stream or watercourse in question, and had formerly constituted parcel of one entire property called the *King's Head Inn* or yard; but about five years prior to action the occupier of the *King's Head Inn* had put up a pair of gates at the bottom of his yard, and had thereby separated the yard from the stream or watercourse, leaving the space of ground between the yard and the stream in possession of the plaintiff. There had been no user of the spring for the last sixteen years, but before that period it appeared that there had been a user for various purposes.

Littledale, J., directed a non-suit on two grounds, the one which is material to the present question, being that the right of way had been proved to belong to the *King's Head Inn* and yard as one entire subject.

A rule, which was granted by the Court of Common Pleas to set aside the non-suit, was discharged on the same ground as that above referred to, on which the learned Judge at the trial had directed the non-suit, the Court pointing out that it would be a most unreasonable construction of the grant of the easement to the owner of the *King's Head Inn* and yard to hold that as the plaintiff had the possession of the frontage of the ground adjoining to the stream, he had also a right of passage which was the subject of the grant. If the grant had ever existed, it was still in full force, and there was nothing to shew that there had been an infringement of the original easement or that there was any incapacity on the part of the occupier of the *King's Head Inn* to resume the use of it, and independently of this there was the broad ground that if the grant had been produced in evidence, the plaintiff could not bring himself within the description of the grantee.

Newcomen v. Coulson.

In *Newcomen* v. *Coulson*,[1] which was a case of a severance of lands under an Inclosure Act, Jessel, M. R., said: "The first

[1] (1877) L. R., 5 Ch. D., 133.

point made was this: It was said that as this was a grant to the owner, and owners for the time being of the lands, if the lands became severed, the owners of the severed portions could not exercise the right of way. I am of opinion the law is quite clear the other way. Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands. On principle, this is clear."

Indian Easements Act, s. 30.

Section 30 of the Indian Easements Act provides that where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the sharers, but not so as to increase substantially the burden on the servient heritage; provided that such annexation is consistent with the terms of the instrument, decree or revenue proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive period.

B.—Rules as to the extent and mode of enjoyment of easements in relation to the different methods of acquisition.

(1) *Easements created by deed of grant.*

General rule.

The general rule that the extent and mode of enjoyment of easements created by deed of grant are limited by the particular instrument from which the rights and intentions of the parties are to be ascertained,[1] must be taken, with this qualification that in construing the terms of a grant, reference should be made, whenever necessary, to the state of surrounding circumstances, so that the right of user claimed may be reasonably consistent therewith.[2]

Qualification.

Where, however, there is nothing in the circumstances of the case, or in the situation of the parties, or in the situation

[1] *Hodgson* v. *Field* (1806), 7 East. 613; *Allan* v. *Gomme* (1840), 11 A. and E. 759: *Henning* v. *Burnet*, 8 Exch., 187; *Northam* v. *Hurley* (1853), 1 E. & B., 665; *Whitehead* v. *Parks* (1858), 2 H. & N., 870; 27 L. J. Exch., 169; *Williams* v. *James* (1867), L. R., 2 C. P., 577. See I. E. Act, s. 28.

[2] *Wood* v. *Saunders* (1875), 44 L. J. Ch., 514; *Kay* v. *Oxley* (1875) L. R., 10 Q. B., 360 (368); *Morgan* v. *Kirby* (1878), I. L. R., 2 Mad., pp. 54, 57.

of the land, to restrict the extent and mode of enjoyment of the right granted, the words of the deed or act granting the right should have their full operation.[1]

(2) *Quasi-easements.*

The extent and mode of enjoyment of quasi-easements are apparently to be measured by the extent and mode of their enjoyment at the time of the severance of the dominant and servient tenements.

Wheeldon v. Burrows.

The rule laid down in *Wheeldon* v. *Burrows*[2] as to the acquisition of quasi-easements points obviously to this conclusion.

It states that on a grant by the owner of a tenement or part of that tenement *as it is then used and enjoyed*, there will pass to the grantee all those continuous and apparent easements, meaning quasi-easements, or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been *and are at the time of the grant* used by the owners of the entirety for the benefit of the part granted.

(3) *Easements of necessity.*

General rule.

In the case of an easement of necessity the rule broadly stated is that the user of the right must be limited by the actual necessity of the case.

Holmes v. Goring.

In *Holmes* v. *Goring*[3] Best, C. J., after referring to the proposition that "a way of necessity, when the nature of it is considered, will be found to be nothing else than a way by grant," proceeds to enunciate the correct rule. It is a grant, he says, "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 1,000 yards of another's land, when by a subsequent purchase he might reach his destination by passing over 100 yards of his own. A grant, therefore, arising out of the implication

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[1] *United Land Co.* v. *Great Eastern Ry. Co.* (1875), L. R., 10 Ch. App., 586.

[2] (1879) L. R., 12 Ch. D., p. 49. *See* also *Holmes* v. *Goring* (1824), 2 Bing. 76.

[3] (1824) 2 Bing, 96.

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."

Measure of necessity in relation to mode of enjoyment of dominant tenement.

In relation to the use to which the dominant tenement may be put, the question arises as to the point of time to which the actual necessity is to be referred. Is the actual necessity to be judged by the state of circumstances existing at the time of the grant, or by the purposes for which at any future time the dominant tenement may be used? The answer is that the state of circumstances existing at the time of the grant must determine the necessity of the case. Otherwise the necessity, which is the foundation of the right, might be converted into a mere question of convenience, changing its character according as the dominant owner chose to alter the mode of his enjoyment of the dominant tenement.

Corporation of London v. Riggs.

The principle is laid down in the case of *Corporation of London* v. *Riggs*[1] where the question was raised whether the right to a way of necessity to and from a landlocked close over the surrounding land is a general right of way for all purposes, or whether it is limited to such a right of way as was suitable or necessary for the enjoyment of the close in the condition it happened to be at the time the right first arose. The point was one of first impression and was elucidated by Sir George Jessel, the Master of the Rolls, in his usually clear and convincing manner.

After referring to an observation of Lord Chancellor Cairns in *Gayford* v. *Moffatt*,[2] from which it was obvious that that very eminent judge thought a way of necessity meant a way suitable for the user of the premises at the time when the way of necessity was created he proceeds as follows :—

"Well, now, if we try the case on principle, treating this right of way as an exception to the rule, ought it to be treated as a larger exception than the necessity of the case warrants? That, of course brings us back to the question, what does the necessity of the case require? The object of implying the re-grant, as stated by the older judges, was that, if you did not

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[1] (1880) L. R., 13 Ch. D., 798.

[2] (1868) L. R., 4 Ch. App. at p. 135.

give the owner of the reserved close some right of way or other, he could neither use nor occupy the reserved close, nor derive any benefit from it. But what is the extent of the benefit he is to have? Is he entitled to say, I have reserved to myself more than that which enables me to enjoy it as it is at the time of the grant? And if that is the true rule, that he is not to have more than necessity requires, as distinguished from what convenience may require, it appears to me that the right of way must be limited to that which is necessary at the time of the grant; that is, he is supposed to take a re-grant to himself of such a right of way as will enable him to enjoy the reserved thing as it is. That appears to me to be the meaning of a right of way of necessity. If you imply more, you reserve to him not only that which enables him to enjoy the thing he has reserved as it is, but that which enables him to enjoy it in the same way and to the same extent as if he reserved a general right of way for all purposes: that is, as in the case I have before me, a man who reserves two acres of arable land in the middle of a large piece of land is to be entitled to cover the reserved land with houses, and call on his grantee to allow him to make a wide metalled road up to it.

I do not think that is a fair meaning of a way of necessity, and think it must be limited by the necessity at the time of grant; and that the man who does not take the pains to secure an actual grant of a right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made. I am not aware of any other principles on which this case can be decided."

Esubai v. Damodar Ishvardas.

The English rule that a way of necessity must be limited by the necessity at the time of grant was applied by the Bombay High Court in the case of *Esubai* v. *Damodar Ishvardas*,[2] where the plaintiff having, on a piece of land surrounded by the defendant's land and granted to the plaintiff's predecessor in title for building purposes, erected a substantial building with a privy and claimed a right of way over the

[2] (1891) I. L. R., 16 Bom., 552.

defendant's land to the privy as a way of necessity, it was held that the suitable enjoyment of the dwelling implied the use of a privy wherever it might be thought fit by the occupants of the dwelling to build one, and that the plaintiff was, therefore, entitled to build a privy and consequently also to a way of necessity for a sweeper to have access to the privy when built.

Indian Easements Act, s. 28, para. 2.

The same rule is observed in the second paragraph of section 28 of the Indian Easements Act.

In considering the limits of a way of necessity, the extent to which and the purposes for which the way has been granted are proper questions to be determined.

Serff v. *Acton Local Board.*

Thus in *Serff* v. *Acton Local Board*,[1] where land was conveyed to the local board with knowledge on the part of the grantors of the purposes for which it was to be used by the grantees, namely, that of sewage works and the only way to the grantees' land was a warple way over the grantor's land and formerly used for the purposes of cultivation, it was held that such way passed to the grantees for all necessary purposes in connection with the sewage works.

Selection of the way. By whom to be made.

On the creation of a way of necessity the person by whose act the way is created, that is, the grantor, has the right to select the way, provided it be reasonably convenient to the grantee. If he does not do so, the grantee has the right to select the way.[2]

In the exercise of this right the grantee must select such direction as a person of reasonable and ordinary skill would select, and must adopt such mode of making the road as a prudent and rational person would adopt, if he were making the road over his own land, and not over some one else's.[3]

In the case of a devise it is obviously impossible for the testator, by whose act the way is created, and who is dead, to do

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[1] (1886) L. R., 31 Ch. D., 679.

[2] *Clark* v. *Cogge*, 2 Roll. Abr., 60, pl. 17; (1607), Cro. Jac., 170; *Packer* v. *Welstead* (1657), 2 Sid. 111; *Pearson* v. *Spencer* (1863), 1 B. & S., 571, 585; 3 B. & S., 761; *Bolton* v. *Bolton* (1879), L. R., 11 Ch. D., 968. And see Gale on Easements, 7th Ed., p. 162, and I. E. Act, s. 14. The selection must be reasonably convenient to the grantee, *Taylor* v. *Corporation of St. Helens* (1877), L. R., 6 Ch. D., 264.

[3] *Abson* v. *Fenton* (1823), 1 B. & C., 195.

any subsequent act of selection; and if the line of way depends on his intention it must be discovered from the language of the will, understood with reference to the state of the property.[1]

Though it may be difficult to state what line the way is to take if the land before severance was so occupied as to afford no indication of what was the usual way in the testator's time, yet it rarely happens that there has not been some occupation of the land, as by a tenant, from which the measure of the right taken to be the way as it was enjoyed at the time the will was made, may be derived.[2]

Only one way of necessity.

A grantee is not entitled to more than one way of necessity, to the ascertainment of which, when there is more than one means of access to the grantee's tenement over the grantor's tenement, the abovementioned rule of election applies.[3]

Mooted modification of the rule in India.

The expediency of a strict observance of this rule in India has been questioned under circumstances involving considerations of caste, as where, owing to the particular mode of sanitation, persons of higher caste being restricted to one way only might be brought into proximity with persons who followed the occupation of sweepers.[4]

Once ascertained cannot be varied.

When once a way of necessity has been ascertained, neither the dominant owner nor the servient owner has the right to vary it. It must remain the same way so long as it continues.[5]

(4) *Prescriptive easements.*

General rule.

The extent and mode of enjoyment of prescriptive easements, other than easements of light and air, and easements to pollute air and water, are to be measured by the user as proved.[6]

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[1] *Pearson* v. *Spencer supra.*

[2] *Ibid.*

[3] *Bolton* v. *Bolton* (1879), L. R., 11 Ch. D., 968.

[4] *Esubai* v. *Damodar Ishwardas* (1891), I. L. R., 16 Bom., 559.

[5] *Pearson* v. *Spencer* (1863), 1 B. & S., 571.

[6] *Howell* v. *King* (1686), 1 Mod., 190; *Lawton* v. *Ward* (1697), 1 Ld. Raym., 75; *Bealey* v. *Shaw* (1805), 6 East, 209; *Ballard* v. *Dyson* (1808), 1 Taunt., 279; *Williams* v. *James* (1867), L. R., 2 C. P., 577; *United Land Co.* v. *Great Eastern Ry. Co.* (1875), L. R., 10 Ch. App., 586 (590), *Desai Bhaorai* v. *Desai Chunilal* (1899); I. L. R., 24 Bom., 188. *See* also I. E. Act, s. 28, cl. (*e*).

The extent and mode of enjoyment of easements of light and air have already been fully discussed.[1]

Exceptions Easements of light and air.

The other exception still remains to be considered.

As to the extent of the prescriptive right to pollute, it is necessary to refer to the case of *Crossley & Sons, Limited* v. *Lightowler*[2] which is the leading authority on the subject.

Right to pollute.

The plaintiff sued for an injunction to restrain the defendants as occupiers of large dye-works from polluting the water of a river in which the plaintiffs had riparian rights, and two questions, amongst others, arose for determination ; first, whether there was a prescriptive right to pollute in the defendants, and secondly, if there was such right, what was the extent of it.

Crossley & Sons, Ld. v. *Lightowler.*

It was proved in evidence that on the site of the dye-works established by the defendants in 1864, other dye-works had been used by former occupiers for twenty years prior to 1839, and the foul water from those works had been discharged into the stream. It appeared that the pollution, though similar in kind, was considerably less in degree than since the defendants' works had been in operation.

The first question having been established in favour of the defendants, it was contended on their behalf that the extent of their prescriptive right was to be measured by the means which they had of discharging their foul water into the river, and that if the watercourses used for such purpose by the former occupiers had not been enlarged, and it was proved they had remained the same, the plaintiffs had no ground of complaint.

In dealing with this contention Lord Chancellor Chelmsford said :—" In answer to this argument, however, it may be observed that the right upon which the defendants insist is, not to pour water, but to pour foul water into the *Hebble*. It may be difficult to fix a limit to such a right where the quantity of fouling to which the prescription extends has not been far exceeded, but where the excess is considerable the proof will be comparatively easy.

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[1] See *supra*, Part I, &c.; Chap. III, Part I.

[2] (1877) L. R., 2 Ch. App., 478.

"The user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person."

This decision shews that the extent of an easement to pollute water is to be measured by the pollution as it existed at the commencement of the prescriptive period, and that such pollution is to be ascertained not by the means of disharge at the disposal of the owner of the easement, but by the amount of polluting matter which is poured into the stream. To the same effect is section 28, clause (*d*) of the Indian Easements Act.

Method of pollution may be varied if extent of pollution not increased.

It appears that the mode of enjoyment of an easement to pollute may be changed either as regards the purpose for which the dominant tenement is used or as regards the material employed for such purpose, provided the pollution is not thereby substantially or tangibly increased.

Baxendale v. *McMurray.*

Thus in *Baxendale* v. *McMurray*, [1] where the plaintiff in suing for an injunction contended that the defendant's user of an ancient paper mill had become unlawful because for the rags from which the paper had formerly been made during the prescriptive period a new vegetable fibre had been substituted, it was held that in order to succeed it was not sufficient for the plaintiff to shew that the defendant was using in the manufacture of paper a new and different material, but that he must go further and shew that a greater amount of pollution and injury arose from the use of such material, and that the onus of so shewing lay on the plaintiff.

C.—Extent and mode of enjoyment of Easements of Way.

(1) *Easements of way created by deed of grant.*

General rule. Questions of construction.

When an easement of way is created by deed of grant the extent and mode of its enjoyment must, in conformity with the general rule, be ascertained from the terms of the deed itself taken with the surrounding circumstances of the case, but difficult questions have from time to time arisen as to

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[1] (1867) L. R., 2 Ch. App., 790.

whether, when the instrument is silent as to the purpose for which the way is to be used, or expresses it in general terms, the measure of the right is to be defined by the actual use which is being made of the dominant tenement at the time of the grant or being unrestricted by the deed, is to be liberally construed in favour of the grantee.

The authorities that bear upon the subject are conflicting and require examination, but the modern view appears to be that if the grant of a way is in general terms, it should receive liberal construction consistently with the surrounding circumstances of the case, without restriction to the use that was made of the way at the time of the grant.

Senhouse v. *Christian.*

In *Senhouse* v. *Christian*[1] Ashhurst, J., states the question to be whether under the general grant for the purpose of carrying coals, the party "has not 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 waggon-ways and the case itself expressly states that the defendant cannot so commodiously enjoy this way in any other manner. Therefore, under the original grant, he has a right to make a framed waggon-way, which is necessary for the purpose of carrying his coals." It appeared that this kind of waggon-way had been introduced into use since the date of the grant.

Dand v. *Kingscote.*

In *Dand* v. *Kingscote*[2] the defendant under a reservation of coal mines "together with a sufficient way leave and stay leave to and from the mines, with liberty of sinking and digging pit and pits," made a steam engine for the purpose of wiring and working the lower seams in the coalfield, constructed a railroad along which to carry his coal to a place of shipment, and made embankments and cuttings in two other places for a railroad, which was abandoned.

These three acts were complained of by the plaintiffs as acts of trespass, but as regards the first two it was said that under the reservation the defendant was not confined to such a description of way as was in use at the time of the grant or in such

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[1] (1787) 1 T. R., 560.

[2] (1840) 6 M. and W., 174.

a direction as was then convenient, but that according to the object of the reservation which was to get coals *beneficially* to the owner of them, the defendant might have such a description of way and in such a direction as would be reasonably *sufficient* to enable the coal owner to get, from time to time, all the seams of coal to a reasonable profit.

As regards the third alleged act of trespass it was held that the defendant having by his conduct shewn the railway in that direction was unnecessary, the plaintiff was entitled to recover for the damage occasioned by it.

Allan v. *Gomme.*

The next case which calls for notice is that of *Allan* v. *Gomme*[1] in which the matter in issue was whether the grant of "a right of way and passage over a close to a stable and loft over the same, and the space and opening under the said loft, and then used as a wood house" precluded the defendant from using the right of way for the purposes of a cottage which had been built on the site of the opening under the loft. It was held that the meaning of such grant was not to give the defendant the right of way claimed by him, but to confine him "to the use of the way to a place which should be in the same predicament as it was at the time of making the deed."

The Court did not consider that he could only use it to make a deposit of wood there, for in their opinion the words "then used as a wood-house" were used merely for ascertaining the locality and identity of the place called a space or opening under the loft and did not debar the defendant from using the way to deposit articles there, or in any way he pleased, provided it continued in a state of open ground, but they thought he could only use it for purposes compatible with the ground being open, and that if any buildings were erected on it, it could no longer be considered as open for the purpose of the deed.

The case was one of first impression, and that the point was a new one is seen from the observation of Lord Denman, C. J., that "there is no direct authority to shew whether, if the use of a place to and from which a way is by express words

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[1] (1840) 11 A. and E., 759.

reserved or granted, be completely changed, the way can still be continued to be used."

In *Henning* v. *Burnet* [1] Parke, B., appears to have thought that the decision in *Allan* v. *Gomme* erred on the side of strictness, for he says :—

Henning v. *Burnet.*

"In *Allan* v. *Gomme* a more strict rule was laid down than I should have been disposed to adopt; for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of making the deed. No doubt, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard, the right of way ceases, but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered."[2]

In *Hawkins* v. *Carbines*,[3] where a right of way was expressed to be through the gateway of the plaintiff "at all reasonable times" it was considered by the Court that the defendants who pleaded the easement had a right to make use of the way for all purposes for which persons ordinarily avail themselves of such a right, and were accordingly entitled, in the reasonable exercise of their right, to take carts through the gateway, load and unload, turn round, and go out again, although owing to an alteration of the premises by the grantor subsequent to the grant, they could not do so without slightly trenching upon the plaintiff's premises.

Hawkins v. *Carbines.*

In a more recent case, that of *Finch* v. *Great Western Railway Co.*,[4] it was considered that the proper view to take of *Allan* v. *Gomme* was that it established no general principle, but turned on the construction of a particular deed.

Finch v. *Great Western Railway.*

In *Watts* v. *Kelson*[5] the plaintiff and defendant were owners of two adjoining properties which had formerly belonged to the same owner. The plaintiff's property was conveyed to him, together with a right of way through the

Watts v. *Kelson.*

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[1] (1852) 8 Exch. 187, 192.

[2] This expression of opinion was referred to with approval by Malins, V. C., in *United Land Co.* v. *Great Eastern Ry. Co.* (1873), L. R. 17 Eq., 158.

[3] (1857) 27 L. J. Exch. 44.

[4] (1879) L. R., 5 Exch. D., 254.

[5] (1870) L. R., 6 Ch. App., 166.

gateway of the vendor, which opened into premises afterwards purchased by the defendant, to a wicket gate to be erected by the plaintiff at a given point, leading into a piece of garden ground, part of the premises purchased by the plaintiff. The Plaintiff, having built a cart shed on the piece of garden ground near where the wicket gate was to be erected, claimed a right of way for carriages to it.

The defendant contended that the right granted to the plaintiff by his conveyance was only a right of foot-way, but the Master of the Rolls held that the way, to which the plaintiff was entitled, was not to be limited to a foot-way, but was a way for all purposes.

He thought that, on the construction of the deed, it was intended to give the plaintiff a right of way for all purposes, and that there was nothing to limit the right of way in any particular manner.

He admitted the cases were difficult to reconcile, and considered that the test as to whether the burthen was heavier than was originally intended, was not altogether a reliable one, as with respect to a right of way it would be very difficult to say whether one burthen would be more onerous than another.

United Land Co. v. Great Eastern Ry. Co.

The next case which deserves attention is the *United Land Company* v. *Great Eastern Railway Company.*[1] In that case the plaintiff Company had become the owner of certain lands through which the defendant Company's railway ran. In accordance with a clause in the Act, under which the Eastern Union Railway Company, the predecessor in title of the defendant Company, acquired so much of the plaintiff Company's lands as were necessary for the purposes of a railway, four level crossings were made for the convenient enjoyment and occupation of the remaining lands, which at the time of the making of the railway belonged to the Crown, and were marsh or pasture lands chiefly, but which afterwards passed into the ownership of the plaintiff Company and were offered by them for sale in building lots.

[1] (1875) L. R., 10 Ch. App. 586.

The defendant Company thereupon gave notice to the plaintiff Company that the level crossings were not to be used by the owners of any of the houses so to be built, and the plaintiff Company accordingly filed their bill, praying that the defendant Company might be restrained from obstructing the plaintiff Company or their tenants from the free use of the level crossings.

The defence of the defendant Company was that the plaintiff Company were entitled to only such use of the level crossings as was necessary for the convenient enjoyment and occupation of the lands exactly in their present condition and for their present purposes, but the Appeal Court, in upholding the decision of the Lord Chancellor granting the injunction prayed for, was unable to accept so restricted a view of the plaintiff Company's rights. Lord Justice Mellish said: "But when a right of way is created by grant, or by Act of Parliament, then it must depend on the proper construction of the grant or Act of Parliament, whether the right of way is to be used for all purposes, or for only limited purposes. No doubt there are authorities that, from the description of the lands to which the right of way is annexed, and of the purposes for which it is granted, the Court may infer that the way was intended to be limited to those purposes. But if there is no limit to the grant, the way may be used for all purposes."

After referring to the clause in the Act and the conveyance to the Railway Company and stating that there was no limitation in either, the Lord Justice proceeded as follows:—

"It appears to me that there is nothing which can possibly operate to restrain the Crown, or the persons who claim under the Crown, from using both level crossings for any purposes for which they can be used, subject, of course, to not improperly interrupting the traffic."

The opinion of Lord Justice James, which clearly shews the *ratio decidendi*, was that there was nothing in the circumstance of the case, or in the situation of the parties, or in the situation of the land, to prevent the words of the clause from having their full operation.

Newcomen v. *Coulson.*

The same principle was applied in the later case of *Newcomen* v. *Coulson,*[1] where it was decided that allottees of inclosures were entitled to use a way set out in pursuance of an award under an Inclosure Act not only for agricultural purposes for which the inclosures were being used at the time of the award, but for all purposes to which the land might be applied thereafter.

Finch v. *Great Western Railway Co.*

Finch v. *The Great Western Railway Company*[2] was decided on the same principle, and shews that where the grant of a way is unrestricted, the grantee is not limited to the use of the way for purposes which existed at the time of grant, but may use it for every purpose for which he may think fit to appropriate his land.

Thus upon the facts in this case where at the time of an award a way had been set out from a highway to certain of the enclosed lands and used merely for agricultural purposes, but afterwards upon some of the enclosed lands purchased by the defendant Company, the Company had built a cattle pen adjoining their railway and used the way in question for the passage to and from the highway of cattle that were to be or had been conveyed on their railway, thereby greatly increasing the user, it was held that there was nothing in the award to prevent such user of the way. And it was pointed out that there was a clear distinction between such a case and the case of where there being a private right of way to one close it is used colourably with the real intention of going to a different though adjoining close.[3]

Cases of special construction.

Before leaving the subject of the extent and mode of enjoyment of easements of way acquired by deed of grant, it will be useful to notice a few cases which, by reason of the special construction placed upon the terms of the grant, do not fall within any of the general rules which have already been considered.

Selby v. *Crystal Palace District Gas Co.*

In *Selby* v. *The Crystal Palace District Gas Company*[4] it was held that where the owner of a property had laid it out

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[1] (1877) L. R., 5 Ch. D., 133.

[2] (1879), L. R., 5 Exch. D., 254.

[3] *Skull* v. *Glenister* (1864), 16 C. B. N. S., 81.

[4] (1862) 30 Beav., 606.

for building purposes and appropriated a portion of it to roads, and there had afterwards been a partition whereby the soil in the roads had vested in one of the co-sharers who covenanted that the owners and occupiers of all the land should have the full use and enjoyment of the roads "as if the same were public roads," the defendant Company could on the requisition of the owners and occupiers break the soil of the roads to lay down pipes without the assent of the covenantor and his representatives.

Metcalfe v. Westaway.

In *Metcalfe* v. *Westaway*[1] it was held that the reservation to a railway company and their "assigns" of the free access to and from a slip for the purpose of working and repairing the same did not limit the word "assigns" to persons taking an estate in the land, but could include a license of the Company.

A grant of a way to a particular class of persons is to be distinguished from a general right of way to a place, and confers a right of footway only.[2]

When a right is granted to use a road to or from any part of the dominant tenement and there is nothing on the part expressly limiting the grantee to one line of access, or to access only at the points, if any, where his land actually adjoins the way, the grantee is entitled to make use of any intervening strip of land belonging to the grantor between the road and the dominant tenement for the purpose of having access to the road, provided the right claimed is not unreasonable or destructive of the object of the grant. In other words, the grantee is not limited to one line or any particular points of access, but is entitled to cross any intervening strip of land belonging to the grantor, the denial of the right to use which, would be inconsistent with the description contained in the grant.[3]

A right of way which is granted by deed to the grantee, "his executors, administrators, and assigns, under tenants and

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[1] (1864), 34 L. J. C. P., 113.

[2] *Cousens* v. *Rose* (1871), L. R., 12 Eq., 366.

[3] *Cooke* v. *Ingram* (1893), 68 L. T., 671.

servants" has been held to extend to all licenses of the grantee provided such extension of the right is consistent with the necessary or reasonable user of the dominant tenement.[1]

(2) *Prescriptive rights of way.*

It is a well-established proposition that where there is a right of way proved by user, the estate of the right must be measured by the extent of the user.[2]

This proposition is a logical sequence of the general rule of prescription that the knowledge of the servient owner is necessary to the acquisition of the right, for if there is no knowledge, there is no capability of interruption, and if there is no capability of interruption, there can be no prescription.

Way acquired for one purpose cannot be used for an entirely different purpose.

Thus a man cannot make use of a way during the prescriptive period for a particular purpose, and then when he has acquired an easement claim to use the way for an entirely different purpose. Nor does a right of way of any one kind necessarily include a right of way of any other kind.

Ballard v. *Dyson.*

In *Ballard* v. *Dyson*[3] where the plaintiff claimed a right of way for cattle, but only proved a carriage-way, it was held that a carriage-way did not necessarily include a way for cattle.

Cowling v. *Higginson.*

In *Cowling* v. *Higginson*[4] Parke, B., said: "If the way is confined to a particular purpose, the jury ought not to extend it."

Wimbledon and Putney Commons Conservators v. *Dixon.*

Similarly it was held in *Wimbledon and Putney Commons Conservators* v. *Dixon*[5] that immemorial user of a way over Wimbledon Common for agricultural purposes did not authorize its use for the purpose of carting building materials to a place on which houses were to be erected.

Bradburn v. *Morris.*

So too in *Bradburn* v. *Morris*[6] it was said, following the decision in the last-mentioned case, that evidence of the use of a road for twenty years for purely agricultural purposes

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[1] *Baxendale* v. *North Lambeth Liberal and Radical Club, Ld.* (1902), 2 Ch., 427.

[2] *Howell* v. *King* (1686), 1 Mod., 190; *Lawton* v. *Ward* (1697), 1 Ld. Raym., 75; *Ballard* v. *Dyson* (1808), 1 Taunt., 279; *Williams* v. *James* (1867), L. R., 2 C. P., 577; *Finch* v. *Great Western Ry. Co.* (1879), L. R., 5 Ex. Ch. D., 254 (258); *Jadulal Mullick* v. *Gopal Chandra Mukerji* (1886), I. L. R., 13 Cal., 136; L. R., 13 I. A., 77.

[3] (1808), 1 Taunt., 279.

[4] (1838), 4 M. & W., 245.

[5] 1875), L. R., 1 Ch. D., 362.

[6] (1876), L. R., 3 Ch. D., 812.

was not of itself sufficient to prove a right to use the road for the purpose of getting minerals, no minerals ever having been got on the lands in question. And the same is the law in India.[1]

System by which purpose effected may be changed.

But as already observed, though the purpose for which the prescriptive right has been gained cannot be changed, yet the system by which such purpose is effected may be changed provided the burthen of the servient tenement is not increased.[2]

Question whether right of way of one kind, includes a right of way of another kind.

The statement of the general rule that one kind of right of way does not necessarily include another must be taken with this explanation that the rule is not an absolute prohibition, as the use of the word "necessarily" shews, but is qualified to this extent that as the user is the recognised indication of the extent of prescriptive right evidence of the user of any one kind of way may, if uncontradicted, be sufficient to raise the inference that a right of way of another kind has been acquired. But it is entirely a matter of evidence to be determined upon the various facts established in each case, and the rule is the same whether the question is as to a right of way of one kind including a right of way of another kind, or a right of way for several purposes being a right of way for general purposes.

Ballard v. *Dyson*.

In *Ballard* v. *Dyson*,[3] the plaintiff claimed a right of way for cattle along a narrow passage communicating with a building which at the time of the action was being used as a slaughter-house for oxen.

It was proved that the plaintiff's building had anciently been a barn, but had not been used as such for a great many years, that for many years it had been utilised as a stable, that the plaintiff's predecessor had used it as a slaughter-house for hogs, and that the plaintiff had lately begun to drive fat oxen along the passage in question to the building for the purpose of killing them there.

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[1] *Jadulal Mullick* v. *Gopal Chandra Mukerji* (1886), I. L. R., 13 Cal., 136; L. R., 13 I. A., 77; *Jesang* v. *Whittle* (1899), I. L. R., 23 Bom., 595; I. E. Act, s. 28, cl. (*a*).

[2] *Jadulal Mullick* v. *Gopal Chandra Mukerji*.

[3] (1808), 1 Taunt., 279.

No other evidence was given of the user of the road for cattle.

The defendant admitted a way for all manner of carriages, and produced no evidence to shew he had ever interrupted the plaintiff in driving his cattle along the passage.

It further appeared that the passage which was bounded by a row of houses was so narrow that when carts or carriages were driven through it, passengers could not pass them, but were compelled on account of the limited space to retreat into the houses, and that they would be exposed to considerable danger if they were to meet horned cattle driven through it.

Upon these facts the jury found a verdict for the defendant. A rule *nisi* obtained for a new trial was discharged on the ground that evidence of a prescriptive right of way for all manner of carriages did not necessarily prove a right of way for all manner of cattle.

Chief Justice Mansfield's judgment is important, and it will be useful to quote his own words.

After observing that the authority cited from *Hawkins* only refers to *Co. Litt.*, and that 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 realised to restrict the usual import of the grant, he proceeds :—

"The general description given by Lord *Coke* does not seem to touch the question. He refers to *Bracton*, *lib. ex fol.*, 232, 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 person 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 the 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 the 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 any, inconvenience to himself, yet there it would be a monstrous inference 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 the larger grant.

I can find no case in which it has been decided that a carriage-way necessarily implies a drift-way though it appears sometimes to have been taken for granted."

Cowling v. *Higginson.*

In *Cowling* v. *Higginson*[1] the question at issue was whether a right of way pleaded by the defendant for horses, carts, waggons, and carriages to a farm which the defendant partly occupied included a right of carting coals. The evidence shewed a user of the way for any purpose for which it was wanted, and that it was never interrupted, but it was proved by the plaintiff that no coals had been raised under the farm for the last seventy years. The defendant objected that the issue was whether there was a right of way for horses, carts, and

[1] (1838), 4 M. & W., 250.

carriages, whilst the plaintiff contended that the defendant by loading his carts with coal instead of agricultural produce had exceeded his rights. The judge at the trial decided this point in favour of the plaintiff. On a rule obtained by the defendant the Court of Exchequer granted a new trial upon the view that without giving any opinion as to the effect of the evidence there was evidence to go to the jury that the defendant had a right to the way for all purposes.

Lord Abinger, C.B., said: "I do not give any opinion upon the effect of the evidence; but I should certainly say that it is not a necessary inference of law, that a way for agricultural purposes is a way for all purposes, but that it is a question for the jury in each particular case, to be determined upon the various facts established in each case. If a way has been used for several purposes there may be a ground for inferring that there is a right of way for all purposes, but if the evidence shews a user for the purpose, or for particular purposes only, an inference of a general right would hardly be presumed. I wish to say nothing as to the inference to be drawn by the jury in this particular case. The question is entirely for them to determine by the facts submitted to them."

Parke, B., said: "If the way is confined to a particular purpose, the jury 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 generalise 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."

Effect of *Ballard* v. *Dyson* and *Cowling* v. *Higginson*.

The effect of *Ballard* v. *Dyson* and *Cowling* v. *Higginson*, is to shew that the extent of a right of way is always a matter of evidence to be determined upon the particular facts and circumstances of each case.

If a road leads through a park it may reasonably be inferred that the right is to be limited, but if it went over a common it might be a way for all purposes. Using a road as a foot-path would not be proof of a general right; nor would the user

of a road for going to church only.[1] Proof of a larger class of a right of way would apparently include the smaller. Thus proof of a carriage-way would establish a horse-way or foot-way.[2]

Extent of right of way cannot go beyond purposes connected with occupation of dominant tenement in its existing state.

Wimbledon and Putney Commons Conservators v. *Dixon.*

But the extent of a right of way cannot be carried beyond the purposes connected with the occupation of the land in its existing state, nor is it supposed that Baron Parke in his judgment in *Cowling* v. *Higginson*, intended to decide more than this, and his judgment is so explained in *Wimbledon and Putney Commons Conservator* v. *Dixon*,[3] by Mellish, L. J., who states the true rule to be as expressed by Lord Chief Justice Bovill in *Williams* v. *James*,[4] that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which the land might be applied at the time of the supposed grant. In *Cowling* v. *Higginson*, Lord Abinger is careful to say "if a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shews a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed. If a way has been used only for purposes connected with the occupation of the land in its existing state, that may be considered to be a user for particular purposes, and Mellish, L. J., doubted whether Baron Parke really intended the contrary, for if the facts in *Cowling* v. *Higginson* are looked at, it will be found that the mines had been opened, and therefore, though they had not been worked for seventy years, it was a property with existing mines in it. The way, it is true, had not been used for those mines, but as the property was a property within which there were opened mines, it might fairly be inferred that the right extended to using the road for the purposes of the mines, the working them being a reasonable use of the land in the condition in which it was.

Williams v. *James.*
Cowling v. *Higginson.*

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[1] See *per* Lord Abinger, C. B., in *Cowling* v. *Higginson* (1878), 4 M. & W., p. 252.

[2] *See* Gale on Easements, 7th Ed., p. 313.

[3] (1875), L. R., 1 Ch. D., pp. 370, 371.

[4] (1867), L. R., 2 C. P., 577.

Wimbledon and Putney Commons Conservators v. Dixon.

This rule was applied by the Appeal Court in *Wimbledon and Putney Commons Conservators* v. *Dixon*[1] where it was decided that user of a way by the defendants during the prescriptive period for agricultural purposes and other purposes connected with the dominant tenement used as a farm, did not give him the right to use the way for carting the materials required for building a number of new houses on the dominant tenement, which was clearly not an ordinary or reasonable use of the land in the condition it was at the time of the acquisition of the right of way.

Desai Bhaoorai v. Desai Chunilal.

To the same effect is the very recent decision of the Bombay High Court in *Desai Bhaoorai* v. *Desai Chunilal*[2] where the facts were similar.

The way in question had, until a recent date before suit, been used for purely agricultural purposes.

The defendants then converted their dominant tenement into a timberyard, and the question was whether they were entitled to use the way for this new purpose.

It was held that they could not as they were limited to a reasonable use of the way for the purpose of the land in the condition it was when the acquisition of the right took place.

Special cases in India as to extent of way for general purposes.

In India it has been held that user of a way for general purposes includes the right to pass along with marriage and funeral processions, unless it can be shown that the user has been so restricted as to exclude such processions.[3] But evidence that such processions have not been held during the prescriptive period is not of itself sufficient to exclude the right.[4]

And the right to use a passage, as incident to a house, has been held to ordinarily include a right to use it for all ordinary household purposes, for the passage of mehters amongst the rest.[5]

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[1] (1875), L. R., 1 Ch. D., 362.

[2] (1899), I. L. R., 24 Bom., 188.

[3] *Raj Manick Singh* v. *Rattun Manick Bose* (1871), 15 W. R., 46; *Lokenath Gossamee* v. *Manmohun Gossamee* (1873), 20 W. R., 293.

[4] *Ibid.*

[5] *Coomar Chunder Mookerji* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665 (674).

But such a way is not to be used as a place either for the deposit of night-soil or into which the privies of the dominant tenement can be cleaned direct, for such a user is clearly wrongful and is liable to be restrained.[1]

Way of common occupation.

Where a private road is bounded on one side by the property of one landowner and on the other side by the property of another there is a *primâ facie* presumption that the boundary between the two properties to the *medium filum* of the road, and, if in this state of things each landowner gives up his portion of the road in order that there may be a road for the common advantage, it appears that the road might then become one for all purposes, for the use of the whole road could not be restricted.

A greater burthen would not be imposed on the servient tenement, because each tenement is in that point of view as much a dominant tenement as the other, and they would mutually get the advantage of having the right of way and using it for all purposes.[2]

Repetition of act of user must be reasonable.

When the act of user if sufficiently repeated would become excessive and there is nothing in the prescriptive user to assign definite limits to the exercise of the easement in this respect, the user must be reasonable.

Thus where a right of way was acquired for the purpose of cleansing the privies of the dominant tenement and there was nothing in the proved facts to indicate a limit to the user of the way in this respect, it was held that the dominant owner might use the way at reasonable and convenient times for giving access to the sweepers who came to cleanse the privies.[3]

Right of way does not necessarily entitle dominant owner to use of whole road.

A right of way does not entitle the dominant owner to the use of the whole width of the road unless it is necessary for the purposes of the easement.

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[1] *Coomar Chunder Mookerji* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665 (674).

[2] See *per* Mellish, L. J., in *Bradburn* v. *Morris* (1876), L. R., 3 Ch. D. p. 823.

[3] *Jadulal Mullick* v. *Gopal Chandr Mukerji* (1886), I. L. R., 13 Cal., 136; L. R., 13 I. A., 77.

Where the road is of a particular width and the easement can conveniently and reasonably be exercised within a lesser width, the servient owner is at liberty to restrict extent of the user accordingly.[1] On the same principle where a way is granted either as a foot-way or a carriage-way, part must be set out for a foot-way and part for a carriage-way.[2]

The same principle has been applied in India to the analogous right of passage for boats in the rainy season over another man's land, and it has been held that the servient owner is at liberty to narrow the channel so long as he does not prevent the dominant owner from passing and repassing as conveniently as formerly.[3]

Nor can a dominant owner complain of the projection of a verandah over the road which is the subject of his right of way, so long as the reasonable exercise of his right is not interfered with.[4]

Direction of way.

A right of way is not the right to wander at pleasure over a neighbour's land, but a right which is restricted within certain physical limits whereby the points of departure and arrival and the direction must be ascertained and fixed.

Termini.

These points of departure and arrival have been called the terminus *a quo* and the terminus *ad quem*, and it may be shortly stated that a right of way is a right of passage over a particular line from a terminus *a quo* to a terminus *ad quem* which are fixed.[5] As a rule the party seeking to establish a right of way must prove the particular line between the termini over which he claims the right.[6]

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[1] *Hutton* v. *Hanboro* (1860), 2 F. and F., 218 ; *Clifford* v. *Hoare* (1874), L.R., 9 C. P., 362 ; *Toolseemony Dabee* v. *Jogesh Chunder Shaha* (1877), 1 C. L. R., 425 ; *Doorga Churn Dhur* v. *Kally Coomar Sen* (1881), I. L. R., 7 Cal., 145. *See* this subject further considered in Part III in connection with the obligation of the servient owner.

[2] *Clifford* v. *Hoare*.

[3] *Doorga Churn Dhur* v. *Cally Coomar Sen*.

[4] *Toolseemony Dabee* v. *Jogesh Chunder Shaha*.

[5] *Albon* v. *Dremsall* (1610), 1 Browne 216 ; *Rouse* v. *Bardin* (1790), 1 Black. Rep., 351 ; *Woodyer* v. *Hadden* (1813), 5 Taunt., 132 ; *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty* (1865), 4 W. R., 49 ; S. C. *sub. nom.; Tarinee Churn Chuckerbutty* v. *Tarinee Chunder Chuckerbutty*, 1 Ind. Jur. N. S., 6 ; *Radhanath* v. *Baidonath* (1869), 3 B. L. R. (App)., 118.

[6] *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty* ; *Radhanath* v. *Baidonath* ; *Doorga Churn Dhar* v. *Kali Coomar Sen* (1881), I. L. R., 7 Cal., 145.

Wimbledon and Putney Commons Conservators v. *Dixon.*

But if the way is over a common where a road in an absolutely direct line between the termini is often impossible, the fact of the track which is used going in a varying line, does not prevent the acquisition of the right. As was said by Mellish, L. J., in *Wimbledon and Putney Commons Conservators* v. *Dixon* :[1] "No doubt if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to adjoin it, sometimes in one place and sometimes in another, and then went over the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way. But if you can find the terminus *a quo* and the *terminus ad quem*, the mere fact that the owner does not go precisely in the same track for the purpose of going from one place to the other, would not enable the owner of the servient tenement to dispute the right of road."

But that is a very different thing from propounding the general rule that a particular route is immaterial and that a man may establish any number of different paths between the termini which the servient owner may reduce to one path, provided the convenience of the passers-by and the right of easy passage are not curtailed.[2]

That this is an erroneous view, cannot be doubted, for if the rule were such, it is obvious that the obligation imposed on the servient owner would be excessive and contrary to well conceived notions of law and justice.[3]

Difference between public and private way in the manner of enjoyment.

It is one of the points of difference between a public and a private right of way that a public road may be entered at different places along its length whilst a private road must always be entered at the usual and accustomed place, and the reason is that private rights of way are given for particular purposes, and the party claiming them must show that they were used for such purposes.[4]

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[1] (1875), L. R., Ch. D., p. 369.

[2] *See* Campbell, J.'s, opinion in *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty.*

[3] *See* the decisions in *Goluck Chunder Chowdhry* v. *Tarinee Churn Chuckerbutty* and *Radhanath* v. *Baidonath.*

[4] *Rouse* v. *Bardin* (1790), 1 Black. Rep., 351 (355) ; *Woodyer* v. *Hadden* (1813), 5 Taunt., 132 ; *Hatton* v. *Hamboro* (1860), 2 F., and F., 218.

Selection of line of way.

The servient owner has the right to set out the line of way to be followed by the dominant owner, and if he fails to set it out, the dominant owner must take the nearest way he can.[1] He cannot claim the right of passage in a particular tortuous and indirect course between the termini.[2]

In any case the selection of the road must be such as a person of reasonable and ordinary skill and experience would make, and if the road has to be made it must be made in such a manner as a reasonable and prudent person would adopt if he were making a road over his own land.[3]

In the case of a right of way over a common where the nearest direct way between the termini may not be feasible, if the servient owner wishes to confine the dominant owner to a particular track he must set out a reasonable way, and then the party is not entitled to go out of the way hereby because the way is rough and inconvenient.[4]

Once selected cannot be varied.

When the line of way has been set out neither the dominant owner [5] nor the servient owner [6] have any right to vary it.

Rule of deviation.

It has been held that if a way becomes impassable otherwise than through the act of the servient owner, the dominant owner may not deviate from it on to other roads belonging to the servient owner, for by the common law he who has the use of a way is bound to repair it.[7]

But if the dominant owner be wrongfully obstructed by the servient owner in his exercise of the way he may deviate from the original line of way, provided the deviation

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[1] *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), L. R., 1 Ch. D., p. 370; and see *Hutton* v. *Hamboro.*

[2] *Syed Hamid Hossein* v. *Gerrain* (1871), 15 W. R., 496.

[3] *Abson* v. *Tenton* (1823), 1 B. and C., 195.

[4] *Wimbledon and Putney Commons Conservators* v. *Dixon.*

[5] *Goluck Chunder Chowdhury* v. *Tarinee Churn Chuckerbutty* (1865), 4 W. R., 49; S. C. *sub-nom; Tarinee Churn Chuckerbutty* v. *Tarinee Churn Chuckerbutty*, 1 Ind. Jur. N. S., 6; *Radhanath* v. *Baidonath* (1869), 3 B. L. R. (App.), 118.

[6] *Syed Hamid Hossein* v. *Gerrain* (1871), 15 W. R., 496; *Beacon* v. *South Eastern Ry. Co.* (1889), W. N., 79.

[7] *Pomfret* v. *Ricroft* (1681), 1 Sand. Rep., 322 C (3); *Taylor* v. *Whitaker* (1781), 2 Dougl, 744; *Ballard* v. *Harrison* (1815), 4 M. and S., 387.

goes no further than what is reasonably required for the use of the way.

Thus in *Hawkins* v. *Carbines*[1] where the defendant had a right of way through the plaintiff's gateway to the premises demised to the defendant, consisting of a large shed and the defendant's carts had been used to come through the gateway, load and unload and turn round and go out again, and the plaintiff had so altered his premises that the defendant's carts could no longer turn round after unloading in the gateway without coming a little way into the premises and breaking a chain at the end of the gateway, it was held that this was a reasonable use of the way by reason of the wrongful alteration of the plaintiff's premises.

Hawkins v. *Carbines.*

In *Selby* v. *Nettlefold*,[2] Lord Chancellor Selborne said :— "It is admitted that if *A* grants a right of way to *B* over his field, and then places across the way an obstruction not allowing of easy removal, the grantee may go round to connect the two parts of his way on each side of the obstacle over the grantor's land without trespass."

Selby v. *Nettlefold.*

The English law in this respect has been followed in the Indian Easements Act.[3]

The right of deviation will be protected by the Court without compelling the dominant owner to proceed against the servient owner for the removal of the obstruction.[4]

But the servient owner can, if he pleases, substitute a more convenient route of deviation than that adopted by the dominant owner.[5]

(3) *Rights of way created by Statute.*

In England, the provisions contained in the Railways Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 20), for the construction of "accommodation works" for the benefit of a landowner whose land is severed by the railway, entitle such landowner to a convenient passage over the railway sufficient

[1] (1857), 27 L. J. Exch., 44.

[2] (1873), L. R., 9 Ch. App., 111.

[3] *See* s. 24, ill. (*d*).

[4] *Selby* v. *Nettlefold* (1873), L. R., 9 Ch. App., 111.

[5] *Ibid.*

to make good, so far as possible, any interruption which the construction of the railway has caused by the severance in the working and use of the land, including any alteration or extension of such working or use of the land which could or ought to have been in the contemplation of the parties when the accommodation works were made and were accepted.[1]

The extent of a right of passage across a railway, acquired by a landowner under the provisions of the above-mentioned Act, is to be measured by the use to which the land was being put at the time of its severance by the railway, and not by any future requirements caused by an alteration in the working or use of the land which, were not or could not have been in the contemplation of the parties at that time.[2]

Part II.—Accessory Easements.

Accessory easements are rights to do all acts necessary to secure the full enjoyment of the principal easement.

They are analogous to easements of necessity, are recognised upon the same principle, arise in the same manner, by presumption of law, and, like easements of necessity, can be incident either to a reservation or a grant.

It is justice and good reason and an undoubted principle of law that when a man has an easement granted to him he should have the right to do all such acts as are necessary to make the grant effective, that is, to enable him to exercise the right.[3]

Ordinary instances.

Ordinary instances of necessary easements occur where a dominant owner having a right of way or a right to carry water in pipes over his neighbour's land is permitted by law to enter the land in order to repair the way or the pipes.[4]

So if the dominant owner has a right of support for his house from the servient owner's wall and the wall requires

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[1] *Great Western Railway* v. *Talbot* (1902), 2 Ch., 759.

[2] *Ibid.*

[3] *Newcomen* v. *Coulson* (1877), L. R., 5 Ch. D., 133 (143); *Taylor* v. *Corporation of St. Helens* (1877), L. R., 6 Ch. D., 264 (275).

[4] *Pomfret* v. *Ricroft* (1681), 1 Saund. Rep. 322 C. (3); *Colebeck* v. *Girdlers Co.* (1876), L. R., 1 Q. B. D., p. 234; *Newcomen* v. *Coulson*; *Goodhart* v. *Hyett* (1883), L. R., 25 Ch. D., 182; I. E. Act, s. 24, ills. (*a*) and (*c*).

repairing or rebuilding, the dominant owner may enter on the servient tenement for such purpose.[1]

Similarly where a dominant owner had the easement of a drain, and the sewer with which the drain communicated was altered by the public authority, it was held that the former had a right to go on the servient tenement and alter the drain so as to adapt it to the new sewer.[2]

A right to the flow of water through an artificial channel in the servient tenement carries with it the incidental or accessory right on the part of the dominant owner to cleanse such watercourse.[3]

But a right to go on a neighbour's land to pick the fruit of overhanging trees is not accessory to the right to have such trees overhanging. It is a distinct right.[4]

Instances in connection with mining rights.

A further illustration of accessory easements is to be found in mining cases where the person who has the right to win the minerals is also entitled to do all such acts on the servient tenement as are necessary for such purpose.

Senhouse v. *Christian.*

Thus in *Senhouse* v. *Christian*[5] the grant of a right of way to carry coals was held to include the right to make any such way as was necessary for the carrying of that commodity.

Dand v. *Kingscote.*

In *Dand* v. *Kingscote*[6] where the right of getting coals together with *sufficient* way leave and stay leave connected therewith was reserved in a grant of lands, it was held that the object of the reservation being to get coals *beneficially* to the owner of them, there passed by it a right to such a description of way-leave and in such a direction as would be reasonably sufficient to enable the coal owner to get the coal from time to time to a reasonable profit.

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[1] *Colebeck* v. *Girdlers Co.*, I. E. Act, s. 24, ill. (*f*).

[2] *Finlinson* v. *Porter* (1875), L. R., 10 Q. B., 188; I. E. Act, s. 24, ill. (*h*).

[3] *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (1878), L. R., 4 App. Cas., p. 133; I. L. R., 4 Cal., p. 644.

[4] *Naik Parshotam Ghela* v. *Gandrap Fatelal Gokuldas* (1892), I. L. R., 17 Bom., 745.

But, as already seen, the right to have trees overhanging a neighbour's land is not a right which can be acquired by prescription, see Chap. IV, Part II, C.

[5] (1787), 1 Tem. Rep., 560.

[6] (1840), 6 M. & W., 174.

In such cases the accessory right is practically inseparable from the principal right, and in this respect may be regarded as an easement of necessity, in which character it has already been considered.[1] A right of way along a bank for the purpose of fishing in a river can exist as appendant to a right of fishery.[2]

Instances in connection with rights of way.

The grantee of a right of way has the accessory right to enter on the servient tenement not only for the purpose of repairing the way as already remarked, but of making it, if necessary.

Thus the grantee of a carriage-way may make a way sufficient to support the ordinary traffic of a carriage-way.[3]

Exercise of accessory right must be reasonable.

The means adopted by the dominant owner for making the grant of the easement effective must be reasonable so as to cause no unnecessary damage to the servient tenement.[4]

Thus where a man has the right of making a road over his neighbour's land it has been held that he must make it in such a manner as a prudent and rational person would adopt if he were making a road over his own land.[5]

Similarly, it was held that where a dominant owner was entitled to have the roof of his house projecting over the servient tenement, his right to go on to the servient tenement for the purpose of repairing thereof would be reasonably satisfied by requiring him to execute the repairs once a year after one month's notice to the servient owner between the hours of 9 A.M. and 5 P.M.[6]

Damage caused must be repaired.

The dominant owner is bound to repair, so far as is practicable, any damage caused to the servient owner by the exercise of the accessory easement.[7]

Disturbance of accessory easements.

An accessory easement is as much the subject of protection by the Court as a principal easement, and the relief granted for the disturbance thereof proceeds upon the same principle.

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[1] *See* Chap. I, Part I, and Chap. VI, Part IV, A.

[2] *Hanbury* v. *Jenkins* (1901), 2 Ch., 401.

[3] *Newcomen* v. *Coulson* (1877), L. R., 5 Ch. D., 133 (143).

[4] *Abson* v. *Fenton* (1823), 1 B. & C., 195; *Dand* v. *Kingscote* (1840) 6 M. & W., 174; *Taylor* v. *Corporation of St. Helens* (1877), L. R., 6 Ch. D., p. 274; I. E. Act, s. 24.

[5] *Abson* v. *Fenton*.

[6] *Hayagreeva* v. *Sami* (1891), I. L. R., 15 Mad., 286.

[7] Gale on Easements, 7th Ed., 468; I. E. Act, s. 24.

In *Goodhart* v. *Hyett*[1] it appeared that the defendant had begun to build a house over the line of pipes through which the plaintiff had an easement for the supply of water to his house and grounds, and the Court being of opinion that the result of such building if completed, would largely increase the difficulty and expense to which the plaintiff was put in repairing the pipes, granted an injunction restraining the defendant from so building.

Goodhart v. *Hyett.*

Part III.—Obligations connected with the use and preservation of easements.

As a general rule the dominant owner is obliged to carry out all repairs and do all acts on the servient tenement necessary for the use and preservation of his easement and to bear the expense of so doing.[2]

General liability of dominant owner.

Corresponding to this obligation is the right, already considered in connection with accessory easements, to go on to the servient tenement for the purpose of discharging the obligation.

In *Pomfret* v. *Ricroft*[3] Twisden, J., says, "Where I grant a way over my land, I shall not be bound to repair it," and in *Taylor* v. *Whitehead*[4] Lord Mansfield said, "By common law, he who has the use of a thing ought to repair it."

Pomfret v. *Ricroft.*

Taylor v. *Whitehead.*

The liability of the dominant owner to repair is a necessary corollary to the rule that the servient owner is under no personal or active obligation to do anything for the benefit of the dominant tenement.

In *Highway Board, &c., of Macclesfield* v. *Grant*,[5] Lopes, J., said, "As a general rule easements impose no personal obligation upon the owner of the servient tenement to do anything, the burden of repair falls upon the owner of the dominant tenement. There is abundance of authority for this, and it is in accordance with the principle of the civil law which imposed

Highway Board, etc., of Macclesfield v. *Grant.*

[1] (1883), L. R., 25 Ch. D., 182.

[2] *Pomfret* v. *Ricroft* (1681), 1 Saund. Rep., 322C. (3); *Taylor* v. *Whitehead* (1781), 2 Dougl., 745; I. E. Act, s. 25.

[3] At p. 322*a*.

[4] At p. 749.

[5] (1882) 51 L. J. N. S. Q. B., 357.

the burden of repair in cases of easements upon the owner of the dominant and not upon the owner of the servient tenement.

Dominant owner when liable for damage arising from want of repairs.

Where the enjoyment of the easement is had by means of some artificial work on the servient tenement, the dominant owner is liable for any damage arising from its want of repair.[1]

Lord Egremont v. Palman.

In *Lord Egremont* v. *Palman*,[2] the reversioner of certain land sued the defendant for failure to repair a certain gutter running through the said land to a mill of the defendant whereby the water had oozed through the gutter and carried away the soil, and it was held that the owner of the easement was liable for whatever damage had been caused by his failure to repair, and that it was no defence to the action to allege that the damage had been caused by the wrongful act of the tenant in possession, for the defendant might have maintained an action against him in respect thereof.

Bell v. *Twentyman.*

To the same effect is the later decision in *Bell* v. *Twentyman*,[3] and in that case it was said that an action for damage caused by failure to repair is an action for compensation for damage sustained by the neglect of a legal duty, and that it is accordingly no ground of defence to the action that the defendant promptly repaired as soon as he had notice of the injury, or repaired as soon after the injury as was possible, for he is under an obligation to repair, and the cause of action arises as soon as the damage is sustained.

Or repaired as soon after the injury as possible.

Special liability of servient owner to repair.

Though it is contrary to the incidents of easement that a servient owner should repair, he may be compelled to do so either on the ground of tenure, prescription or special agreement.[4]

This rule is now of general application to all easements.

It appears to have been a question at one time whether the owner of the servient tenement was not bound to repair in cases of sevitudes *oneris is facedi*, or easements of support.

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[1] *Lord Egremont* v. *Pulman* (1829), 1 M. & M., 404; *Bell* v. *Twentynan* (1841), 1 Q. B., 766; I. E. Act, s. 26.

[2] (1829) 1 M. & M., 404.

[3] (1841) 1 Q. B., 766.

[4] *See* Gale, 7th Ed., pp. 450, *et. sec.*; Note to *Pomfret* v. *Ricroft*, 1 Saund. Rep., p. 322 C.; *Highway Board, etc., of Macclesfield* v. *Grant* (1882), 51 L. J. N. S., Q. B., 357.

But in *Highway Board, etc., of Macclesfield* v. *Grant*[1] it was treated as settled law that in the case of such easements in town property, the additional obligation to repair could only be imposed on the servient owner by virtue of an express stipulation in the deed of grant or prescription, and this rule was extended to easements of support outside towns, such as in this case, the case of a highway supported by a wall.

Highway Board, etc., of Macclesfield v. Grant.

The liability of the servient owner to repair being contrary to the ordinary incidents of easements requires strong evidence to support it.

Thus where an easement of support to a highway by a wall had been acquired, it was considered by the court that the fact that the servient owner had on various occasions repaired the wall was not of itself sufficient to impose on him a liability to repair.[2]

As to the nature of the obligation resting upon the servient owner, it may be stated that it is purely negative and requires no more on his part than an abstention from interfering with the full enjoyment of the easement by the dominant owner or rendering its exercise less convenient.

Obligation of servient owner is not to interfere with full enjoyment of dominant owner's right.

Consistently with such duty the servient owner may use the servient tenement in any way he pleases. He may, as has been seen, impose subordinate easements upon it, or exercise on it in his own favour any of the ordinary rights of ownership.

Consistently with such obligation servient owner may use servient tenement as he pleases.

In *Hawkins* v. *Carbines*[3] it was considered that the defendants having acquired a right of way through the plaintiff's gateway for the purpose of loading and unloading their cars at a particular place, such right of way could not be limited by the erection of a brick wall by the plaintiff, and that the defendants were accordingly justified in slightly encroaching on the plaintiff's premises to obtain the full enjoyment of their right.

Hawkins v. *Carbines.*

In *Hutton* v. *Hamboro*[4] where the defendant alleged that the plaintiff by putting up gate posts had obstructed his right

Hutton v. *Hamboro.*

[1] (1882) 51 L. J. N. S., Q. B., 357.

[2] *Highway Board, etc., of Macclesfield* v. *Grant.*

[3] (1857) 27 L. J. Ch. N. S. Exch., 44.

[4] (1860) 2 F. & F., 218.

of way, Cockburn, C. J., directed the jury that the question was, whether practically and substantially the right of way could be exercised as conveniently as before, or whether the defendant had really lost anything by the alteration. There was a verdict for the plaintiff.

So long as a dominant owner obtains a reasonable enjoyment of his easement, he cannot complain of anything done on the servient tenement.

Clifford v. *Hoare.*

In *Clifford* v. *Hoare*,[1] the plaintiff had been granted a right of way for all purposes with or without carriages along a road forty feet in width.

Across this road a portico had been erected, the bases of the columns of which projected about two feet into the road, and the plaintiff's ground of complaint was, that this projection was an interference with his easement which he was entitled to have removed.

The judgment of the Court was against the plaintiff. Lord Coleridge, C. J., said : "Now what right or easement did the plaintiff acquire in reference to that road ? A right for himself and his friends, servants, and workmen to pass along the roads or intended roads and ways delineated on the plan. It was pointed out in the course of the argument that that could not be an absolute grant of every part of the road for all the purposes mentioned ; part must be set out for a carriage-way and part for a foot-way. What has the plaintiff got ? As far as a carriage-way is concerned, he has all he bargained for, except that the bases of the columns supporting the portico incroach a little upon it. If this had been an absolute conveyance of a forty-foot road set out by metes and bounds, and a portion of it had been obstructed by the conveying party, no doubt an action might have been maintained for that trespass. But that is not the case ; that which is granted is a right of way, an easement, over a road the soil of which remains in the grantor. All deeds are to be construed according to the intention of the parties as expressed therein : and we gather from the language

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[1] (1874) L. R., 9 C. P., 362.

of this deed that the intention was to grant the plaintiff an easement only, the reasonable use and enjoyment of an ascertained way; and it is not suggested that the plaintiff has not such reasonable enjoyment."[1]

Toolseemony Dubee v. Jogesh Chunder Shaha.

The principle laid down in *Clifford* v. *Hoare*, has been followed in India in the case of *Toolseemony Dubee* v. *Jogesh Chunder Shaha*[2] where the plaintiff sued for the removal of a verandah which projected over a street along which she had a right of way to her home.

Kennedy, J., being of opinion that there had been no substantial obstruction of the plaintiff's right of way, dismissed the suit, and it was held on appeal that as the plaintiff had failed to shew that the erection of the verandah was an interference with the reasonable exercise of her right, the suit had been rightly dismissed.

Doorga Churn Dhur v. Cally Coomar Sen.

An application of the same principle is to be found in the case of *Doorga Churn Dhur* v. *Kally Coomar Sen*[3] where it was held that the servient owner was entitled to narrow the channel over which the dominant owner had a prescriptive right of passage for boats in the rainy season, so long as he did not interfere with the convenient exercise by the easement.

Bala v. Maharu.

The case of *Bala* v. *Maharu*[4] is another illustration of the same principle.

There the lower Appellate Court had ordered the removal of a building recently erected by the defendant on a piece of vacant ground, over which the plaintiff had acquired an easement to discharge the waste water from his drain and the rain-water from the roof of his house. On second appeal the Bombay High Court reversed so much of the lower Appellate Court's decree as directed the removal of the building on the ground that the plaintiff had no right to demand that the defendant's land should be kept open and unbuilt upon, and the defendants could build on their land as they had done provided that they made necessary arrangements to

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[1] (1874) L. R., 9 C. P., 370.
[2] (1878) 1 C. L. R., 425.
[3] (1881) I. L. R., 7 Cal., 145.
[4] (1895) I. L. R., 20 Bom., 788.

receive the water from the plaintiff's drain and roof and carry it away.

Similar principle applies to the case of *profits à prendre.*

The same principle is to be found applied to the case of *profits à prendre.*

Duke of Sutherland v. Heathcote.

In *Duke of Sutherland* v. *Heathcote*,[1] it was explained by Lindley, J., that in the absence of clear and explicit language in the deed of grant a *profit à prendre*, which is an incorporeal hereditament lying in grant, and is a right to take something off another person's land, does not prevent the servient owner taking the same sort of thing to his own land, for the first right may limit, but does not exclude the second.

Thus a right to take mineral which is a *profit à prendre*, does not prevent the servient owner from working the minerals which the dominant owner is not himself in a position to get.

Indian Easements Act, s. 27.

In India the same principle has been recognised both by the courts in the cases above cited and by the Legislature in section 27 of the Indian Easements Act.

[1] (1892) 1 Ch., 475.

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Extinction of Easements.

Part I.—By Express Release.

As easements may be created by express grant, so easements may be extinguished by express release.

In India writing unnecessary.

Since in India writing is not essential to the valid creation of an easement, it is presumed that writing is not necessary to release an easement, but if writing is employed and the easement is of the value of one hundred rupees or upwards, the writing must be registered.[1]

In England it is the rule of law that the express release of an easement should be effected by an instrument under seal, but the equitable modification of the rule allows easements to be extinguished by agreement merely.[2]

Power of dominant owner to release.

The dominant owner is at liberty to abandon an easement whenever he pleases, for, as already seen, the servient owner has no right to compel him to continue the easement for his benefit.[3]

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[1] *See* Indian Registration Act, III of 1877, s. 3, "immoveable property," and s. 17.

[2] *See* Gale on Easements, 7th ed., p. 482.

[3] *Arkwright* v. *Gell* (1839), 5 M. and W., 203; *Mason* v. *Shrewsbury and Hereford Ry. Co.* (1871), L. R., 6 Q. B., 578; *Khoorshed Hossein* v. *Teknarain Singh* (1878), 2 C. L. R., 141; and *see* Chap. II and Chap. III, Part III.

The power of the dominant owner to release an easement appurtenant to the dominant tenement is of course commensurate with his power to alienate the dominant tenement.[1]

Release by co-owner.

Thus, if the dominant owner be a tenant for years he cannot release any easement appurtenant to the dominant tenement for a period longer than the term of his lease. And where there are three co-owners of a house to which an easement is appurtenant, and one of them releases the easement, the release is effectual only as against him and his legal representative.[2]

Release as to part of servient tenement.

Under section 38 of the Indian Easements Act, an easement may be released as to part only of the servient tenement.

Extinction through operation of legislative enactment.

Easements may be extinguished through the operation of a legislative enactment.

This mode of extinction has the effect of an express release,[3] and instances of it are to be found in England under the Land Clauses and Railway Clauses Acts,[4] and in India under the Land Acquisition Acts.[5]

The acquisition of land under these Acts discharges it of all easements appurtenant thereto, and the remedy of the dominant owner is not by suit for disturbance of his rights, but for compensation for injurious affection.[6]

But when the disturbance is caused not by the exercise of any power conferred by the Act, but by something done independently of it, an action will lie for disturbance.[7]

Under the provisions of the Bengal Tenancy Act, VIII of 1885, a purchaser may, under certain conditions, annul incumbrances including easements attaching to the holding or tenure sold at an execution-sale and purchased by him.[8]

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[1] *See* I. E. Act, s. 38, para. 2.

[2] *See* I. E. Act, s. 38, ill. (*a*).

[3] Gale on Easements, 7th ed., p. 482.

[4] *Ibid*, p. 484.

[5] *Collector of 24-Perganahs* v. *Nobin Chunder Ghose* (1865), 3 W. R., 27; *Taylor* v. *Collector of Purneah* (1887), I. L. R., 14 Cal., 423.

[6] *Eagle* v. *Charing Cross Ry. Co.* (1867), L. R., 2 C. P., 638; *Wigram* v. *Fryer* (1887), L. R., 36 Ch. D., 87; *Taylor* v. *The Collector of Purneah* (1887), I. L. R., 14 Cal., 423.

[7] *Turner* v. *Sheffield and Rotherham Ry. Co.* (1842), 10 M. and W., 425.

[8] Ss. 161, 163—167.

Easements may also be lost by operation of the law of limitation when the dominant owner fails to bring a suit for the disturbance of his right within the time allowed by the Limitation Act.[1] This matter will be more conveniently considered hereafter in connection with the disturbance of easements.[2]

Part II.—By Presumed Release.

It is interesting to observe that for every method of acquisition of easements there is a corresponding method of extinction.

Express grant has its converse in express release.

As there are circumstances from which the law will presume a grant, so there are circumstances from which it will presume a release.

The easement which arises by presumption of law on a severance of the tenements, is extinguished by presumption of law when those tenements are re-united in the same ownership.

As an easement may be acquired as a matter of necessity, so will it be extinguished when the necessity ceases.

As user may be evidence of a prescriptive right, so non-user may be evidence of its abandonment.

In dealing with the loss of easements by presumed release it is proposed to examine the subject from four different aspects, namely :—

(*a*) Extinction by unity of absolute ownership.

(*b*) Extinction through the authorised act of the servient owner.

(*c*) Extinction by abandonment.

(*d*) Extinction by forfeiture.

A.—Extinction by unity of absolute ownership.

Easements are extinguished by unity of seisin or the absolute ownership of the dominant and servient tenements becoming vested in the same person.[3]

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[1] *Kena Mahomed* v. *Bohatoo Sircar* (1863), 1 Marsh., 506.

[2] *See* Chap. XI, Part III (5).

[3] 2 Coke's First Inst., sec. 561, p. 313*b*; *Wood* v. *Waud* (1849), 3 Exch., p. 775; *Modhoosoodun Dey* v. *Bissonath Dey* (1875), 15 B. L. R., 365; *Lord Dynevor* v. *Tennant* (1886), L. R., 32 Ch. D., 375; L. R., 33 Ch. D., 420; I. E. Act, s. 46.

It will be seen hereafter that unity of possession causes the suspension, but not the extinction of an easement.[1]

The two estates must be equally "great, high, and perdurable."

It is only the union of the two tenements held in fee and for an equally perdurable estate that will work extinction.

"*But where the tenant hath as great and as high estate in the tenements as the lord hath in the seigniory; in such case, if the lord grant the services to the tenant in fee, this shall enure by way of extinguishment*, causa patet."[2]

Upon this Lord Coke makes the observation :—

"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."[3]

Effect of merger of one tenement in the other.

The merger of one tenement in the other so as to result in the absolute ownership of both in fee causes the easement to disappear in the ordinary rights of property.[4]

Easement once extinguished cannot be revived.

When once the easement is extinguished it cannot be revived, but must be created *de novo*.

This proposition, though coinciding with the principle which governs the creation of discontinuous easements on a severance of the tenements,[5] may at first sight appear to be at variance with the usual acceptation of a quasi-easement, or an easement of necessity, which requires no special act of creation on the part of the servient owner.[6]

It might be said of these rights that being in existence as easements prior to unity they had remained dominant during the period of unity to revive upon severance.

But this view is not strictly in accordance with true principles.

In the view that an easement is a restriction of the rights of property it is contrary to the policy of the law to favour its revival when once it has been extinguished by any of the

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[1] See *infra*, Chap. X, Part II.
[2] 2 Coke's First Inst., s. 561.
[3] *Ibid.*
[4] *Lord Dynevor* v. *Tennant.*
[5] *See* Chap. VI, Part III.
[6] *See* Chap. VI, Part IV.

recognised methods. If it is to re-appear, it must do so not as the former right revived, but as a new creation.

Holmes v. *Goring.*

This certainly appears to have been the opinion of the court in *Holmes* v. *Goring*,[1] and is in consonance with the proper legal conception of an easement.

There need not be unity of possession as well as of ownership.

In order to extinguish an easement it is not necessary that unity of possession should be coupled with unity of seisin or ownership. It is sufficient if there is unity of ownership.[2]

Easements of necessity extinguished by unity of absolute ownership.

Easements of necessity are extinguished by unity of absolute ownership as well as other easements. On a severance of the tenements they do not revive, but come into existence as new rights arising out of the necessity of the case. As says Best, C. J., in *Holmes* v. *Goring*[3] : "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."

The second part of the second paragraph of section 51 of the Indian Easements Act is not strictly speaking in conformity with the English law as just stated.

B.—Extinction through the authorised act of the servient owner.

Easements are extinguished where the dominant owner authorises an act of a permanent nature to be done on the servient tenement, the necessary consequence of which is to prevent the future enjoyment of the easement.

Winter v. *Brockwell.*

Thus in *Winter* v. *Brockwell*,[4] where the defendant with the consent of the plaintiff erected a skylight at his own expense in such a position as to shut out light and air from the plaintiff's windows to which he had previously been entitled, it was held that the plaintiff had no right of action against the defendant.

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[1] (1824), 2 Bing., 76.

[2] See *Buckby* v. *Coles* (1814), 5 Taunt., 311 ; *England* v. *Wall* (1842), 10 M. & W., 699.

[3] (1824), 2 Bing., 83.

[4] (1807), 8 East., 309.

In *Liggins* v. *Inge*,[1] the court considered itself bound by the authority of *Winter* v. *Brockwell*, and held that the plaintiff could not maintain an action against the defendants for confining a weir whereby the flow of water to the plaintiff's mill as formerly enjoyed had been diminished, inasmuch as the defendants had erected the said weir under parol license for the plaintiff's father and had incurred expense in so doing.

Davis v. *Marshall*.

Davis v. *Marshall*,[2] a case very similar in its circumstances to *Winter* v. *Brockwell*, was decided on the same principle.

The license may be express or presumed.

The license by which the servient owner commits the act of obstruction may be express, as already seen, or presumed from the acquiescence of the dominant owner.

Bower v. *Hill*.

In *Bower* v. *Hill*[3] the defendant had permanently obstructed the defendant's right of way by the erection of a bridge with a tunnel under it, and Tindal, C. J., said : "We think the erection of the tunnel is in the nature of, and until removed, is to be considered as, a permanent obstruction of the plaintiff's right, and therefore an injury to the plaintiff, even though he receives no immediate damage thereby. The right of the plaintiff to this way is injured if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way."

Kena Mahomed v. *Bohatoo Sircar*.

In *Kena Mahomed* v. *Bohatoo Sircar*[4] the plaintiff and defendant were owners of adjoining estates, and the plaintiff claiming the right of having the drainage water from the defendant's land flow over his own land, sued the defendant for having eight years prior to suit diverted the water so that it no longer flowed over his land. It was held that the mere interruption would not extinguish the right, but that if it were found that the plaintiff had acquiesced in the interruption for eight years, such conduct on his part would be evidence of an intention not to resume the right.

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[1] (1831), 7 Bing., 682.

[2] (1861), 10 C. B. N. S., 697.

[3] (1835), 1 Scott, 526 (534).

[4] (1863), 1 Marsh., 506, and see *Roy Luchmee Pershad* v. *Mt. Fuzeelutoonissa Bibi* (1867), 7 W. R., 367.

Baneemadhub Doss v. *Ram Joy Rokh.*

In *Banee Madhub Doss* v. *Ram Joy Rokh*,[1] it was held that the plaintiff's claim for the demolition of the defendant's house which obstructed the plaintiff's right of way, was such as a Court of Equity and good conscience ought not to enforce on the ground that the defendant had incurred expense in erecting the house and had used it for the convenience and comfort of himself and his family for seven years without opposition from the plaintiff.

Ponnusawmi Tevar v. *The Collector of Madura.*

In *Ponnusawmi Tevar* v. *The Collector of Madura*,[2] it was observed that "acquiescence in the sense of mere submission to the interruption of the enjoyment does not destroy or impair an easement. To be effectual for that purpose it must be attributable to an intention on the part of the owner of the dominant tenement to abandon the benefit before enjoyed and not merely to a temporary suspension of the enjoyment, or be evidenced by acts or words which had induced the owner of the servient tenement to incur expense on the reasonable belief that the enjoyment had been entirely relinquished."

Stronger case of acquiescence required at hearing than on interlocutory application.

A much stronger case of acquiescence must be made out at the hearing than is required at an interlocutory application, "for at the hearing of a cause it is the duty of the court to decide upon the rights of parties, and the dismissal of the bill, upon the ground of acquiescence, amounts to a decision, that a right which has once existed is absolutely and for ever lost."[3]

The mere delay, therefore, of a few weeks on the part of the dominant owner in raising an objection and taking proceedings is not of itself sufficient to extinguish the right.[4]

Under I. E. Act license must be express.

Under the Indian Easements Act the authority given to the servient owner must be express.[5]

Express license may be oral. Extinction under s. 47 of I. E. Act by cessation of enjoyment following obstruction.

The express authority may, however, be oral.[6] Under section 47 of the Indian Easements Act a cessation of enjoyment

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[1] (1868) 10 W. R., 316; 1 B. L. R., A. C., 213.

[2] (1869). 5 Mad. H. C., 6 (23).

[3] *Johnson* v. *Wyatt* (1864), 9 Jur. N. S., 1333 (1334), *per* Turner, L. J.

[4] *Johnson* v. *Wyatt.*

[5] S. 38, expl. I (*a*).

[6] *Winter* v. *Brockwell* (1807), 8 East., 308; *Liggins* v. *Inge* (1831), 7 Bing., 682; *Muddun Gopal Mukerji* v. *Nilmonee Banerjee* (1869), 11 W. R., 304: and see *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98.

for twenty years following the obstruction of the easement by the servient owner will extinguish the right.

Such positive rule not found elsewhere.

A similar provision is not contained in the Indian Limitation Act, and no such positive rule is to be found in the English authorities,[1] or in the Indian case law outside the Easements Act,[2] non-user being merely regarded as evidence of abandonment.

This doctrine has been expressly rejected by the Act.[3]

C.—Extinction by abandonment.

Extinction of an easement by abandonment depends upon some conduct on the part of the dominant owner shewing his intention to discontinue the enjoyment of the light.

In the case of negative easements such conduct usually takes the form of some act of the dominant owner causing a permanent alteration by the dominant tenement.

In the case of affirmative easements such conduct is usually established by non-user following either an actual disclaimer of the right or some other act on his part shewing an intention to abandon.

(1) *Abandonment of Negative Easements.*

Easements of light. Permanent alteration of dominant tenement shewing intention to abandon.

A negative easement is extinguished by abandonment when there is a permanent alteration of the dominant tenement of such a nature as to shew an intention on the part of the dominant owner to cease enjoyment of the light.

Moore v. *Rawson.*

The leading case on this subject is that of *Moore* v. *Rawson.*[4] The facts were that the plaintiff's predecessor in title had at one time enjoyed the access of light and air to the dominant tenement by means of certain windows in a wall in his house. He subsequently pulled down this wall and in its place and on the same site erected a blank wall with no windows in it.

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[1] *Moore* v. *Rawson* (1824), 3 B. & C., 332; *Crossley* v. *Lightowler* (1867), L. R., 2 Ch. App., 478.

[2] *Kena Mahomed* v. *Bohatoo Sircar* (1863), 1 Marsh., 506; *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *Raj Beharee Roy* v. *Tara Pershad Roy* (1873), 20 W. R., 188.

[3] *Gazette of India* (1880), July to Dec., Part V, p. 479.

[4] (1824), 3 B. & C., 332.

This state of things continued for seventeen years, during which time the defendant erected a building opposite the plaintiff's blank wall, and the plaintiff then opened a window in his blank wall, and because it was darkened by the defendant's building, he sued the defendant for the obstruction.

It was held that the pulling down of the old wall with windows and the erection of the new blank wall in its place without windows amounted to an abandonment of the easement, and that the plaintiff was not entitled to maintain the action. The opinions of the judges are important, and the following passages may usefully be quoted :—

Abbott, C. J., said :[1] "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 for a considerable period of time, it lies upon him at least to shew 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 the burthen of shewing 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."

Bayley, J., said :[2] "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 shews an intention to continue it." The same learned judge points out that by the erection of the blank wall, the plaintiff's predecessor ceased to enjoy the light in the mode he had been used to, and his right ceased with it. The judgment concludes with the following words : "Suppose that instead of doing that (*i.e.*, pulling down the wall), he had pulled down

[1] At p. 336. [2] At p. 336.

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 shew that he means to resume it within a reasonable time."

Holroyd, J.,[1] explained that if the plaintiff's predecessor had intimated, or had done some act shewing, his intention of building a similar wall in the place of the old one, the rights attaching to the latter would have continued, but that the interval of a long period of time between the pulling down of the old wall and the erection of a new though similar one without any intention previously shewn to make a similar use of the land, or the pulling down of the old wall and the substitution of something entirely different in its place would constitute an abandonment of the easement as being the creation of a new thing. There was not only nothing to shew that he intended to rebuild the old wall within reasonable time, but the actual erection of a new wall different from the old one shewed he did not intend to renovate the old one.

Littledale, J.,[2] thought as the right to light and air might be acquired by user, so it might be lost by non-user, such non-user being of course the necessary result of the permanent alteration of the dominant tenement.

He could not agree to the proposition that as the right to light and air could only be acquired by occupancy for twenty years, there was a corresponding rule that there could be no loss of the right without abandonment for twenty years.

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[1] P. 337. [2] P. 339.

"I think," he says, "that if a party does any act to shew 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 re-building 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 anything to shew he did not mean to convert the land to a different purpose, then his right would not cease."

Liggins v. *Sage.*

In *Liggins* v. *Sage*[1] Tindal, C.J., who delivered the judgment of the court said: "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 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 enquiry 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."

Stokoe v. *Singers.*

In *Stokoe* v. *Singers*[2] the plaintiffs had blocked up their ancient windows from the inside, leaving the bars remaining so that it was obvious there had been windows there. The windows remained in this state for nineteen years, when the defendant shewed an intention to build in such a way as would have prevented the windows from being ever re-opened. To assert their easement the plaintiffs opened the windows, and the defendant to raise the question whether they had such right,

[1] (1831) 7 Bing., p. 693.

[2] (1857) 8 E. & B., 31; 26 L. J. Q. B., 257.

erected a board on his own land so as to obstruct the windows. The plaintiff then brought an action for the obstruction. Baron Martin at the trial directed the jury that the easement might be lost by an abandonment, and that closing the windows with the intention of never opening them again would be an abandonment destroying the right, but that closing them for a mere temporary purpose would not be so. He also stated that, though the person might not really have abandoned his right, yet if he manifested such an appearance of having abandoned it as to induce the adjoining proprietor to alter his position in the reasonable belief the right was abandoned, he would be precluded from claiming the right. The jury found for the plaintiffs. In discharging the rule for a new trial on the ground of misdirection, the court of Queen's Bench thought the true points were left by the judge to the jury and found for the plaintiffs. They considered the jury to have found that the plaintiffs' predecessor did not so close up his light as to lead the defendants to incur expense or loss on the reasonable belief that they had been permanently abandoned, nor so as to manifest an intention of permanently abandoning them.

When abandonment may become effectual.

Stokoe v. *Singers* did not actually decide what would be the effect of closing up lights in such a manner as to shew an intention of permanently abandoning them when such intention had not been communicated to the adjoining owner and not acted upon by him, but from the reported *dicta* in the case, the impression on the minds of some of the judges appears to have been that the abandonment would not become effectual, until it had been communicated to and acted upon by the adjoining owner.

But it will be seen from a careful examination in the cases that this question cases to be material when once the intention on the part of the dominant owner to permanently abandon his right has been clearly shewn.

Fixed period of non-user not essential. Real question whether there

Further no fixed period of cessation of enjoyment is essential to the extinction of the right. The real question is whether the circumstances of the case have disclosed an

has been intention to abandon.

intention on the part of the dominant owner to abandon the easement.[1]

If they have, the shortest period of non-user will not prevent extinction [2] ; if they have not, even a long period of non-user is insufficient to destroy the right.[3]

Tapling v. *Jones.*

In *Tapling* v. *Jones*,[4] Lord Chelmsford said : "The right continues uninterruptedly until some unequivocal act of intentional abandonment is done by the person who has acquired it, which will remit the adjoining owner to the unrestricted use of his own premises. It will, of course, be a question in each case, whether the circumstances satisfactorily establish an intention to abandon altogether the future enjoyment and exercise of the right. If such an intention is clearly manifested, the adjoining owner may build as he pleases on his own land."

Barnes v. *Loach.*

In *Barnes* v. *Loach*,[5] it was held that where there was a right to the access of light and air to windows in the walls of certain cottages, the easement was not destroyed by the setting back of the walls and the opening in the walls so set back of new windows of the same size, and in the same relative position, as the former windows in the former walls.

Effect of pulling down dominant tenement with intention to restore building and the old windows. *Staight* v. *Burn*. *Eccles. Commsrs.* v. *Kino.*

The mere suspension of the enjoyment of the easement caused by the pulling down of the dominant tenement, will not cause the destruction of the right if there is an intention to restore the building with its ancient lights, and this though the character and purposes of the building may be entirely altered. This was decided in *Staight* v. *Burn*[6] *and Ecclesiastical Commissioners for England* v. *Kino*.[7] In the latter case James, L. J., said : "It appears to me that when a building in which there are ancient lights, has been taken down, though the actual enjoyment of the right has been suspended, there is nothing

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[1] *Moore* v. *Rawson* (1824), 3 B. & C., 332 ; *Stokoe* v. *Singers* (1857), 8 E. & B., 31 ; *Tapling* v. *Jones* (1865), 11 H. L. C. p. 319 ; *Ecclesiastical Commissioners* v. *Kino* (1880), L. R., 14 Ch. D., 213.

[2] *Moore* v. *Rawson*.

[3] *Stokoe* v. *Singers*.

[4] (1865), 11 H. L. C. p. 319.

[5] (1879), L. R., 4 Q. B. D., 494.

[6] (1869), L. R., 5 Ch. App., 163.

[7] (1880), L. R., 14 Ch. D., 213, and see *Scott* v. *Pape* (1886), L. R., 31 Ch. D., pp. 569, 573, 574 ; *Smith* v. *Baxter* (1900), 2 Ch., 138.

to prevent the owner from applying to the Court for an injunction to restrain an erection which would interfere with the easement of the ancient lights, where the Court is satisfied, that he is about to restore the building with its ancient lights.

That was so decided by Lord Justice Giffard in *Straight* v. *Burn*, which unfortunately was not brought to the attention of the Vice-Chancellor. I cannot see any distinction between that case and this. There the house was taken down and a wall was left standing with holes in it. Here the church has been taken down, and the fact that no wall has been left standing with holes in it, does not, in my opinion, make any substantial difference, because there is no doubt that the property, which is in the city of London, will be sold for the purpose of being built on, and there is very little doubt that, so far as possible, the purchaser from the Ecclesiastical Commissioners will take care to preserve the rights of light."

In *Newson* v. *Pender*,[1] the plaintiffs were the owners of a house containing ancient windows. This house they pulled down and in its place erected a much larger building. A few of the new windows were in substantially the same positions as the old windows though covering a larger space, but the greater number of windows occupied only a part of the spaces occupied by the old windows and extended beyond them on one side or the other. Some of the new windows were in entirely different positions from any of the old ones, and some of the old windows had been bricked up.

Upon these facts it was decided that no intention to abandon had been disclosed on the part of the plaintiffs and that they were entitled to an injunction restraining the defendants from raising their building so as to obstruct or interfere with the plaintiff's lights.

Scott v. *Pape.*

In *Scott* v. *Pape*,[2] the plaintiff pulled down a building in which were ancient lights, and on its site erected a new building with larger and more numerous windows.

In the new building the area of some of the old windows was entirely occupied by a brick wall, but it was found, as a

[1] (1884) L. R., 27 Ch. D., 43.

[2] (1886) L. R., 31 Ch. D., 554.

fact that six of the new windows coincided subtantially with three of the old windows. It was held that, as regards the first set of windows, the erection of the brick wall unquestionably shewed an intention on the part of the plaintiff to abandon the use and enjoyment of the light formerly had in respect of them, but that there had been no intention to abandon the easement in respect of the second set of windows and that the plaintiff was entitled to protection accordingly.

Greenwood v. Hornsey.

In *Greenwood* v. *Hornsey*,[1] following *Tapling* v. *Jones* and *Scott* v. *Pape*, it was held that an intention to abandon must be clearly established by the evidence, and that no intention to abandon an easement of light could be inferred from the pulling down of the old building and the advancement of the front a new building two feet beyond the sites of the front of the old building, care having been taken so to arrange the new windows as to preserve the easement of light enjoyed in respect of the old windows.

In *Smith* v. *Baxter*,[2] the observations made by Cotton, L. J., in *Scott* v. *Pape*,[3] were applied *mutatis mutandis* to the windows, in respect of which the plaintiff claimed.

Easements of support.

The abandonment of easements of support by a permanent alteration of the dominant tenement is governed by the same principles as that of other negative easements.

Angus v. Dalton.

Thus it was said by Cockburn, C. J., in *Angus* v. *Dalton*.[4] "It is scarcely necessary to observe that any easement of lateral support, which may have attached to the plaintiff's premises as the house before stood, was lost by the taking down of the old house and substituting a building of an entirely different construction as regards the wall or foundation on which it rested."

Burthen of proof when thrown on a dominant owner.

It is a rule applicable to both negative and affirmative easements. That a long period of non-user or an alteration of the dominant tenement inducing the adjoining owner to alter his position in the belief that the dominant owner intended to abandon his easement, throws on the latter the burthen of shewing that he had done something during the period of

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[1] (1886) L. R., 33 Ch. D., 471.
[2] (1900) 2 Ch., 138 (142).
[3] (1886) L. R., 31 Ch. D., p. 567.
[4] (1877) L. R., 3 Q. B. D., p. 102.

non-user or before the adjoining owner had altered his position indicating his intention to preserve the right.[1] But if the dominant owner, though intending only to temporarily abandon, does nothing to shew his intention to preserve the right, and the adjoining owner is accordingly induced to alter his position in the reasonable belief that the other intended to permanently abandon, the easement will be lost.[2]

It should be observed that though a continuous or negative easement may be lost by a permanent alteration, of the dominant tenement shewing an intention to abandon, no such result is caused by a mere alteration of the purpose for which the dominant tenement is used, or by an alteration of the dominant tenement which leaves the easement as capable of enjoyment as before, for a man is entitled to make such use as he pleases of the light and air or water to which he is entitled, provided his enjoyment does not exceed its proper limits.

Luttrel's case.

Thus it was resolved in *Luttrel's case*[3] that the alteration of falling mills into grit mills did not destroy the right to have water come to the mills, provided there was no diversion or stopping of the water by reason of the change. "So if a man has an old window in his hall, and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house,[4] and although in this case the plaintiff has made a question, forasmuch as he has not prescribed generally to have the said water-course to his mills generally, but particularly to his falling 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 of the quality, or the name of the mill, and that without any prejudice in the water-course to the owner

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[1] *Moore* v. *Rawson* (1824), 3 B. & C., 332; *Crossley* v. *Lightowler* (1867), L. R., 2 Ch. App., 478 (482).

[2] *Moore* v. *Rawson*; *Stokoe* v. *Singers*, (1857), 8 E. & B., 31; 26 L. J. Q. B., 257; *Cook* v. *Mayor of Bath* (1868), L. R., 6 Eq., 177; *Ponnusawmi Tevar* v. *The Collector of Madura* (1869), 5 Mad. H. C., 6; and see Indian Evidence Act, I of 1872, s. 115.

[3] (1738) 2 Coke's Rep., Part IV, 86.

[4] *See* further as regards easements of light and air, Chap. III, Part I, and Chap. VIII, Part I.

thereof ; for these reasons it was resolved that the prescription remained."

Watts v. *Kelson.*

In *Watts* v. *Kelson*[1] Mellish, L. J., observed: "It was further objected, that the fact of the plaintiff having pulled down the cattle-sheds and erected cottages in their place, deprived him of the right to the use of water. We are of opinion, however, that what passed to the plaintiff was a right to have the water flow in the accustomed manner through the defendant's premises to his premises, and that when it arrived at his premises he could do what he liked with it, and that he would not lose this right to the water by any alteration he might make in his premises."

Easement once abandoned is abandoned for ever.

In conclusion it is to be remarked that a right once abandoned is abandoned forever. Therefore when once an abandonment has taken place, and the servient owner has built on his land, the dominant owner cannot, by restoring the dominant tenement to its original condition, compel him to remove the obstruction.[2]

I. E. Act, s. 38, expl. I (*b*).

Section 38, Explanation I (*b*) of the Indian Easements Act, is in conformity with the English law and provides that an easement is implied by release where any permanent alteration is made in the dominant heritage of such a nature as to shew that the dominant owner intended to cease to enjoy the easement in future. Explanation II provides that mere non-user of an easement is not an implied release within the meaning of this section. This is equally so under the English law.

I. E. Act, s. 47, variation from other law.

But in providing as it does by section 47 that an unbroken period of non-user for twenty years following the alteration of the dominant tenement shall extinguish a continuous easement, the Act converts what is a question of fact or a matter of presumption under the English law into a legal rule. The Act expressly rejects the English and Indian doctrine outside the Act that non-user is merely evidence of abandonment.[3]

[1] (1871) L. R., 6 Ch. App. 166 (175).

[2] *See per* Lord Chelmsford in *Tapling* v. *Jones* (1865), 11 H. L. C. p. 319.

[3] See *Gazette of India* (1880), July to Dec., Part V, p. 479. For the Indian authorities not governed by the Act see *Kena Mahomed* v. *Bohatoo Sircar* (1863), 1 Marsh., 506 ; *Ponusawmi Tewar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6 ; *Raj Beharee Roy* v. *Tara Pershad Roy* (1873), 20 W. R., 188.

A similar provision does not appear in the Indian Limitation Act.

(2).—*Abandonment of Affirmative Easements.*

Non-user accompanied by other circumstances shewing intention to abandon.

The extinction of affirmative easements by abandonment, consists in the cessation of the right to make active use of the servient tenement accompanied by other circumstances shewing an intention to abandon.

It will be convenient to study the law first, as it now exists in England and in India where the Indian Easements Act is not in force, and secondly, as it is to be found in the Indian Easements Act.

Law in England and in India outside the I. E. Act. Non-user only evidence of abandonment.

In England and in India where the Indian Easements Act does not apply mere non-user does not amount to abandonment, but it may be evidence of abandonment and will work the extinction of an easement when coupled with an express disclaimer of the right, or accompanied by other circumstances shewing an intention to abandon.

Fixed period of non-user not essential.

Further, it will be found that time is not a necessary element in a question of abandonment as it is in the case of the acquisition of an easement. No precise period of non-user is essential to the extinction of an easement, for it is not so much the duration of the non-user as the nature of the act done by the grantee of the easement, and the intention thereby indicated which are the material questions for consideration.

Material questions.

Non-user, how far material.

The period of non-user becomes material only as an element in the question whether the dominant owner intends to abandon, and such intention is only to be ascertained from the particular circumstances in each case.

Norbury v. *Meade*. Non-user coupled with disclaimer.

It will be useful to consider the authorities. The case of *Norbury* v. *Meade*[1] shews that non-user coupled with a disclaimer of the right will amount to an extinguishment. Thus if the dominant owner ceases to use a way and says that he has no right to it, he will be presumed to have permanently abandoned the easement.

Bower v. *Hill*.

In *Bower* v. *Hill*[2] the defendant as the occupier of premises having a frontage on a stream along which he had a right of

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[1] (1821) 3 ligh., p. 241.

[2] (1835) 2 Bing. N. C., 339.

passage put up a pair of gates in such a position as to separate a portion of his premises from the stream. The space of ground between the gates and the stream was left in the possession of the plaintiff and at the time of action had so remained for five years.

The only uses of the easement had been by persons frequenting the defendant's premises. In dismissing the action brought by the plaintiff for the obstruction of the alleged right, the Court observed that there was nothing in the evidence to shew that the easement belonging to the owner of the defendant's premises had ever been extinguished or released ; there had been only a temporary discontinuance or at most a temporary suspension of the right, for the defendant could at any time resume user of the right by taking any part of the frontage into his possession so as to have access to the stream.

The Queen v. Chorley.

In *The Queen* v. *Chorley*[1] the law is clearly stated by Lord Denman, C.J., who delivered the judgment of the Court. He said, "The learned judge appears to have proceeded on the ground that, as twenty years' user in the absence of an express grant would have been necessary for the acquisition of the right, so twenty years' cesser of the use in the absence of any express release was necessary for its loss. But we apprehend that, as an express release of the easement would destroy it any moment, so the cesser of use coupled with any act clearly indicative of an intention to abandon the right would have the same effect without any reference to time. For example, there being a right of way to the defendant's malthouse yard, and the mode of user by driving carts and waggons to an entrance from the lane into the malthouse yard, if the defendant had removed this malthouse, turned the premises to some other use, and walled up the entrance, and then for any considerable period of time acquiesced in the unrestrained use by the public, we conceive the easement would have been clearly gone. It is not so much the duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention

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[1] (1848) 12 Q. B., 515 (518).

in him which either the one or the other indicates, which are material for the consideration of the jury. The period of time is only material as one element from which the grantee's intention to restrain or abandon his easement may be inferred against him ; and what period may be sufficient in any particular case must depend on all the accompanying circumstances. This is the principle on which the judgments of all the members of this Court proceeded in *Moore* v. *Rawson*,[1] and which was adopted in *Liggins* v. *Inge*.[2]

Ward v. *Ward*.

In *Ward* v. *Ward*[3] it was held that a discontinuance of user for more than twenty years did not deprive the defendant of his easement of way when it was shown that the reason of the discontinuance was the existence of a more easy and convenient means of access to the dominant tenement.

In the course of the argument Alderson, B., observed : "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user."

Cook v. *Mayor*, *etc.*, *of Bath*.

In *Cook* v. *Mayor and Corporation of Bath*, the plaintiff closed the back door in his premises in respect of which he claimed a right of way, and it remained so closed for thirty years. About four years prior to suit he re-opened the door. It was held that these circumstances of themselves constituted an abandonment of the easement. Vice-Chancellor Maling said : "A right of way or a right to light may be abandoned, and it is always a question of fact to be ascertained by a jury, or by the court, from the surrounding circumstances, whether the act amounts to an abandonment, or was intended as such."

General principle of abandonment.

Crossley v. *Lightowler*.

The general principle was recognised in the case of *Crossley and Sons, Limited* v. *Lightowler*,[4] both by Vice-Chancellor Page Wood at the original hearing, and by Lord Chancellor Chelmsford on appeal.

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[1] (1824) 3 B. and C., 332.
[2] (1831) 7 Bing., 682, 693.
[3] (1852) 7 Exch., 838.
[4] (1866) L. R., 3 Eq., 279, on appeal (1867), L. R., 2 Ch. App., 478.

The former judge said :[1] " The question of abandonment, I quite concede to the Counsel for the defendants, is a very nice one. On that a great number of authorities have been cited, which appear to me to come to this, that the mere non-user of a privilege or an easement is not in itself an abandonment that in any way concludes the claimant ; but the non-user is evidence with reference to the abandonment. The question of abandonment is a question of fact that must be determined upon the whole of the circumstances of the case."[2]

On appeal Lord Chelmsford referred with approval to *Moore* v. *Rawson* and *The Queen* v. *Chorley*, as establishing general principles, and said :[3] " The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case."

Teaka Ram v. Doorga Pershad.

In *Teaka Ram* v. *Doorga Pershad*[4] the plaintiff sought to enforce the right to discharge rain-water on to the defendant's land in respect of a house which had not been in existence for several years, and it was held that the destruction of the house and the discontinuance of enjoyment clearly shewed an intention on the part of the plaintiff to permanently abandon the easement, and the suit must therefore fail.

Huree Doss Nundee v. Judoonath Dutt.

In *Huree Doss Nundee* v. *Judoonath Dutt*[5] the plaintiff failed to establish a right of way to a tank on the fact that the house in respect of which the easement was claimed had remained unoccupied for six years, and it was thought that this was sufficient to shew an intention to abandon a right which was one that required to be kept up by constant use.

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[1] L. R., 3 Eq. at p. 292.

[2] *James* v. *Stevenson* (1893), App. Cas., 162.

[3] L. R., 2 Ch. App., p. 482.

[4] (1866), 1 Agra H. C. R. N. W. P., 196.

[5] (1870) 14 W. R., 79.

Chunder Kant Chowdhry v. Nund Lall Chowdhry[1] shews that every case must be decided on its special circumstances, and that non-user may be accepted as evidence of abandonment.

Chunder Kant Chowdhry v. Nund Lall Chowdhry.

Raj Beharee Roy v. Tara Persad Roy[2] recognises the proposition to be found in all the English authorities that abandonment is a question of fact to be determined upon the particular circumstances of each case, and that non-user when accompanied by acts shewing an intention to abandon, is fatal to the resumption of an easement and need not extend over any definite period of time.

Raj Beharee Roy v. Tara Persad Roy.

Non-user attributable to some cause over which the dominant owner has no control cannot of course be made a ground of abandonment. Thus the excessive dryness of seasons causing a discontinuance of an easement in water, or a succession of rainy seasons causing the non-user of a right of way, does not cause an extinguishment of the right.[3]

Effect of non-user attributable to *vis major.*

Neither the Prescription Act nor the Indian Limitation Act deals with the loss of an easement by non-user.

But under the Indian Easements Act a discontinuous easement is extinguished by mere non-user for twenty years, such period to be reckoned from the day on which it was last enjoyed by any person as dominant owner.

Law under the I. E. Act.

This is a departure from the English law, and the intention of the framers of the Act that it should be so, is to be found in the express refusal to regard non-user. Thereby as evidence of abandonment instead of itself constituting abandonment after a fixed period of time.[4]

Departure from English law.

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[1] (1871) 16 W. R., 277.

[2] (1873) 20 W. R., 188.

[3] *Hall v. Swift* (1838), 6 Scott, 167. This rule finds its analogy repeatedly laid down in Indian cases that interruption during the prescriptive period in the user of a right which is limited in its exercise to a certain period or season of the year is not fatal to the acquisition of the right. See *Ramsoonder Burul v. Woomakant Chuckerbutty* (1864), 1 W. R., 217; *Oomur Shah v. Ramzan Ali* (1868), 10 W. R., 368; *Makoondonath Bhadoory v. Shib Chunder Bhadoory* (1874), 22 W. R., 302; *Shaik Mahomed Ansan v. Shaik Sefatoolla* (1874), 22 W. R., 340; *Koylash Chander Ghose v. Sonatun Chung Baroie* (1881), I. L. R., 7 Cal., 132; S. C., 8 C. L. R., 281.

[4] *Gazette of India* (1880), July to December, Part V, p. 479.

They appear to have adopted this principle of extinction by analogy to the principle of acquisition of easements by long enjoyment as contained in the Act.[1]

Other provisions of s. 47 of the I. E. Act.

By paragraph 4 of section 47 of the Indian Easements Act if the dominant owner in the case of a discontinuous easement, registers under the Indian Registration Act, III of 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

By paragraph 5 of the same section, the enjoyment of a limited easement in any way or for any purpose beyond its limits will not prevent its extinction under the section.

By paragraph 6 the circumstance that during the period of twenty years, no one was in possession of the servient tenement, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under the section.

But an easement is not extinguished under the section.—

(*a*) Where the cessation is in pursuance of a contract between the dominant and servient owners ;

(*b*) Where the dominant tenement is held in co-ownership and one of the co-owners enjoys the easements within the said period of twenty years ;

(*c*) Or where the easement is a necessary easement,[2]

Where several tenements are respectively subject to rights of way for the benefit of a single tenement, and the ways are continuous, such rights shall, for the purposes of the section, be deemed to be a single easement.[3] Apart from the point of variance already noticed, the section appears to be in conformity with the English law and the Indian law outside the Act.

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[1] *Gazette of India* (1880), July to December, Part V, p. 479.

[2] *See* Chap. X, Part I (*d*).

[3] The word "continuous" as used here is evidently not meant to express the legal phrase as applied to easements, but to mean, "physically continuous."

D.—*Extinction by Forfeiture.*

Additional user.

The method of extinction now to be considered is that which arises from some act of the dominant owner extending the enjoyment of the easement beyond its original limits and thereby causing in law a forfeiture of the right.

The question here is not one of cessation of enjoyment as in the case of an abandonment, but one of additional user and its effect upon the existence of the easement.

It is necessary to consider the present subject in connection with two different classes of easements, first, that class of easements of which, from the nature of them, the excessive user is easily separable from the rightful user ; and secondly, that class of easements of which the additional user takes the form of a permanent alteration of the dominant tenement. For the law makes a distinction in such cases permitting in the first case the lawful user to continue and restraining the wrongful user, but in the other case where the enjoyment of the easement depends upon a permanent arrangement of the dominant tenement, causing the additional user under certain conditions to work the forfeiture of the easement.

(1).—*Where the excessive user is separable from the rightful user.*

Law relating to easements of way and easements to take water.

In the cases of easements requiring for their enjoyment the repeated acts of man on the servient tenement, such as easements of way and easements to take water, the excessive user, being easily ascertainable, does not affect the pre-existing easement.[1]

Thus where a man having a right of foot-way along a road uses it as a carriage-way, such excessive user does not destroy the right of foot-way, as the two kinds of user are distinguishable and separable, and whilst it renders the owner of the right of foot-way liable in trespass, it does not prevent him from maintaining an action for the disturbance of his right.[2]

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[1] *See* Gale on Easements, 7th ed., p. 498.

[2] *Ibid.*

(2).—*Where the dominant tenement is permanently altered.*

This branch of the subject refers to those easements which depend for their enjoyment on a permanent arrangement of the dominant tenement, and to their extinction through forfeiture by a permanent alteration of the dominant tenement, causing, it must be remembered, not a cessation of enjoyment, but an additional enjoyment resulting in an increased burthen on the servient tenement.

The question, so far as easements of light and air are concerned, is one which has been attended with considerable difficulty, but modern decisions have established the law on a clear and intelligible basis, and have placed these easements on a different footing from other easements to which the rule of forfeiture applies.

This being so it will be convenient to examine the law on this subject, first, as it applies to easements of light, and secondly, as it applies to other easements generally.

Law relating to easements of light.

In the first place, it should be taken as a general rule that the fact of pulling down the old building and of erecting a new building on the same site, does not of itself work a forfeiture of the easement, but that the question for decision in each case is whether the imposed burthen by the new apertures is substantially the same, or greater than, that which previously existed.[1]

Upon the question as to how far the rule of forfeiture is applicable to easements of light, the following propositions, as referring to special points, may now be taken as settled :—

Alteration in size, position, and plane.

First, alterations in the size, and plane of the aperture do not extinguish the easement.

Secondly, there is no loss of an easement of light whatever the alteration may be, and however powerless the servient owner may be to obstruct, so long as the dominant owner continues to enjoy the same cone of light as he formerly enjoyed or a substantial part of that cone of light.

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[1] *Curriers' Co.* v. *Corbett* (1865), 2 Dr. and Sm., 355; *Fowlers* v. *Walker* (1881), 49 L. J., Ch., 598 ; 51 L. J. Ch., 443 ; *Pendarves* v. *Munro* (1892), 1 Ch., 611 ; *Caspersz* v. *Rajkumar* (1898), 3 Cal. W. N., 28.

Thirdly, the opening of a new window by the side of the old window or at a different angle to the old window does not cause a forfeiture of the right enjoyed in respect of the old window.

Opening of new window.

Fourthly, the easement is extinguished if the effect of the alteration is to leave no trace of the size and position of the former aperture, or to exclude from the area of the new window, all but a small portion of the area of the old window.

Effect of leaving none or only a small portion of area of old window.

This last proposition brings the subject into close connection with that, already considered, of the abandonment of easements by a permanent alteration of the dominant tenement, since if the former aperture disappears altogether, the right must also go, and the result is the same whether the extinction is ascribed to abandonment or forfeiture.

It has been thought, however, more convenient to deal with this subject as one of forfeiture and as completing the consideration of the question as to what effect the alteration of the aperture has on the existence of the right.

With these preliminary remarks it is proposed to examine the authorities supporting the foregoing propositions.

In the *East India Company* v. *Vincent*[1] Lord Chancellor Hardwicke said : "If I should give an opinion that lengthening of windows, or making more lights in the old wall than there were formerly, would vary the rights of persons, it might create innumerable disputes in populous cities, especially in *London*, and therefore I do not give an absolute opinion, but I should rather think it does not vary the right."

East India Co. v. *Vincent.*

Chandler v. *Thompson*[2] was an action on the case for stopping up a window in the plaintiff's dwelling-house. It appeared that about three years before action the plaintiff considerably enlarged an ancient window in his dwelling-house, both in height and width, and put in a sash frame instead of a leaded casement. The defendant, who was the adjoining owner, then erected the building complained of, which completely obstructed several inches of the space occupied by the old

Chandler v. *Thompson.*

[1] (1740) 2 Atkyns, 82.

[2] (1811) 3 Camp., 80.

window, but still admitted more light to pass through the new window than the plaintiff had enjoyed before the alteration.

It was contended that as the plaintiff was only entitled to so much light as he had appropriated by twenty years' enjoyment, he could not complain of the existing obstruction which still left him more light than he had enjoyed before the alteration, but it was decided that the whole of the space occupied by the old window was privileged; and that it was actionable to prevent the light and air from passing through the window, 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.[1]

Tapling v. *Jones.*

Tapling v. *Jones*[2] is a very important and instructive case and has already been considered in connection with the extent and mode of enjoyment of easements of light and the power of the servient owner to obstruct the additional user, or, to speak more accurately, the right of the servient owner to use his own land, though in so doing he may obstruct the additional light received through the window of the dominant tenement.[3] The case also requires careful attention in connection with the present subject.

The facts as they appeared in this case shortly were that the defendant in error had made extensive alterations in his house, and in so doing opened new and enlarged old windows. To this the plaintiff in error had replied by erecting a permanent building on his own land so near to the house of the defendant in error as to obstruct not only the new windows, but also the old. Thereafter the defendant in error had caused the altered windows to be restored to their original condition and filled up with brickwork the spaces occupied by the new windows, which being done, he had called on the plaintiff in error

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[1] This case though considered to be overruled by *Renshaw* v. *Bean* (1852) 18 Q. B., 112, was reinstated *by Tapling* v. *Jones* (1865), 11 H. L. C., 290, which overruled *Renshaw* v. *Bean*.

[2] (1865) 11 H. L. C., 290.

[3] *See* Chap. VIII, Part I.

to remove the obstructing building, and this requisition not being complied with, he had brought his action in the Court of Common Pleas for the obstruction of his ancient lights.

At the trial a verdict was found for the plaintiff in error subject to a special case which was afterwards argued before the Court of Common Pleas. The majority of the Court having found in favour of the right of the defendant in error to the removal of the obstruction, the case was taken to the Court of Error where the majority of the judges concurred with the Court of Common Pleas.

The case was then brought by Court of Error to the House of Lords with the result that the judgment of the Court below was affirmed.

An examination of the judgments of Lord Chancellor Westbury, and Lords Cranworth and Chelmsford, before whom the case was argued in the House of Lords and all of whom delivered exhaustive opinions on the important questions raised in the case, shews that so far as the present subject is concerned, it must now be taken as settled law that any attempt to extend the right to light and air beyond its original limits will not cause its forfeiture, though it will give the servient owner the right to obstruct the additional user provided the original user is not interfered with, and that the opening of a new window being an innocent act cannot therefore destroy existing rights in one party, or give new, or revive old rights in another.

This of course means that the opening of a new window, or the enlargement of an old window, will not destroy the right to the access of light and air through an old window or an old window as it originally existed, nor will it give a new right to obstruct the old window or revive an old right of obstruction which existed before the window became an ancient one.

Lord Westbury said :[1] "It must also be observed, that after an enjoyment of access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible, and it would seem therefore that it cannot be lost

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[1] At p. 304.

or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment. Moreover this absolute and indefeasible right, which is the creation of the statute, is not subjected to any condition or qualification ; nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated."

In dealing with the alteration of the windows which the counsel for the appellant argued caused a forfeiture of the easement, Lord Chelmsford said :[1]

"As to these, they contended that the owner of ancient windows is bound to keep himself within the original dimensions, and that if he changes or enlarges them in any way, although he retains the old openings in whole or in part, he must either be taken to have relinquished his right or to have lost it. But upon what principle can it be said that a person by endeavouring to extend a right must be held to have abandoned it, when, so far from manifesting any such intention, he evinces his determination to retain it, and to acquire something beyond it ? If under such circumstances abandonment of the right cannot be assumed, as little can it be said that it is a cause of forfeiture."

National Provincial Plate Glass Insurance Co. v. Prudential Assurance Co.

The National Provincial Plate Glass Insurance Company v. *The Prudential Assurance Company*,[2] is an authority for the proposition that a change of plane of old windows cannot affect the right of access to light. Mr. Justice Fry in this case said :[3] "But then it is said that the case of *Blanchard* v. *Bridges*[4] is an authority for the proposition that a change in the plane of the window puts an end to the right under the statute, although a change of the aperture by expansion in the same plane would not put an end to that right. Now, such a conclusion seems to me one to which the Courts ought not to come, if they can help it. I am at a loss to see why putting back a window which has enjoyed light for twenty years, supposing the planes of

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[1] At p. 320.

[2] (1877), L. R., 6 Ch. D. 757.

[3] At p. 766.

[4] (1835) 4 A. & E., 176.

the windows to be parallel, should effect an absolute surrender of the right which but for the putting back would have existed. Such a conclusion seems to me to have no reason or common sense to support it. And if putting back in a parallel plane will not work a forfeiture of the right, why does putting back the front at an angle with the original plane do so? I confess that I see no reason for the proposition."

Barnes v. *Loach.*

Barnes v. *Loach*[1] decides that an alteration in the inclination of ancient windows or the opening of a new window at a different angle to an old window does not destroy the easement of light enjoyed in respect of the old windows.

Newson v. *Pender.*

In *Newson* v. *Pender*[2] a building containing ancient windows had been pulled down by the plaintiffs and a larger building erected in its place. In the new building some of the windows occupied substantially the same positions as the old windows, but others covered only a part of the spaces occupied by the old windows and extended considerably beyond them on one side or the other. The defendants commenced building operations on the opposite side of the street, but the walls had not risen above the surface of the ground when the plaintiffs applied for and obtained an interim injunction restraining the erection of the building on the ground that such building if completed would shut out the light from the plaintiff's windows.

On appeal it was contended, or at the original hearing, that in respect of all the windows in the plaintiff's new building there had been a forfeiture of the right to light and air.

The Appeal Court in deciding that the balance of convenience required that the injunction should be continued, considered that as regards the windows which occupied substantially the same positions as the old windows there had been no forfeiture of the right, but that the same could not be said with reference to such of the new windows as were not coincident with any portion of the old windows or included only a little bit of their area.

Tapling v. *Jones* explained.

Tapling v. *Jones* was explained as deciding that "where there is a modern light in a reconstructed building coincident

[1] (1879) L. R., 4 Q. B. D., 494. [2] (1884) L. R., 27 Ch. D., 43.

with an old light there, the right to be protected was not lost by putting other lights in the building which were not entitled to any protection from being ancient lights, that is to say, a neighbour could not, under the guise of these new lights having been added, claim to obstruct the windows in respect to which the right to an ancient light could be claimed."[1]

It was pointed out that the principle laid down by Lord Blackburn and Lord Bramwell that when there was no window in a new building which was coincident with the old windows or there was no light in the new building which could be called a continuation of any ancient light, was not overruled by *Tapling* v. *Jones* which decided that, "although there is a portion of the ancient light coincident with a portion of the new light, yet if the new light does not include the area of the old light or if there is not substantially the area of the ancient light, included in the new, it cannot be said to be a continuance of the ancient light, and a plaintiff cannot seek protection in respect of the existing windows simply because he has got a little bit of the area of the ancient light included in the area of the new, which is not a continuance of the ancient light."[2]

Scott v. *Pape.*

Next comes the very important case of *Scott* v. *Pape*[3] which definitely settles the law relating to the loss of an easement of light by alteration of the dominant tenement.

The plaintiff was originally the owner of a building having ancient lights in its east wall.

This building the plaintiff pulled down and on its site erected a new building of greater elevation and lighted by larger and more numerous windows.

The east wall had been advanced by varying distances, the effect of which was slightly to alter the plane of the new windows.

No formal record was preserved of the exact positions or dimensions of the old windows, but on a reference made for the

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[1] *Per* Cotton, L. J., at p. 60.

[2] *Per* Cotton, L. J., at p. 61; and see *Carriers Co.* v. *Corbett* (1865), 2 Dr. and Sm., 355.

[3] (1886) L. R., 31 Ch. D., 554.

purpose, it was found that six of the new windows coincided substantially with three of the ancient windows.

At the hearing, the plaintiff's case for relief was limited to these windows to which the access of light had been obstructed by the defendant's building operations, and an injunction was granted accordingly.

It was held on appeal affirming the judgment of the Lower Court that the plaintiff's right to light in respect of these windows had not been lost either by the moving forward of the wall or the alteration, such as it had been of the windows.

It was considered that after the enjoyment of the access and use of light for twenty years an absolute right is acquired under the Prescription Act to what has been used and enjoyed, that the quantum of the enjoyment is to be defined by, and must depend on, the area of the windows and also on the position of other buildings, that the "access and use of light" depends upon the number of pencils of light which come directly and by refraction into the windows and that the real question in each case is whether the alteration has been such as to preclude the dominant owner from alleging that he is using through the new windows the same cone of light or a substantial part of that cone of light which formally went to the old windows.

"If that is established," said Cotton, L. J.,[1] "although the right must be claimed in respect of a building, it may be claimed in respect of any building which is substantially enjoying a part, or the whole, of the light which went through the old aperture. It may be that in some cases, even although there is not such an alteration as would deprive the plaintiff of his right, he may by other means have precluded himself from insisting on it, because he may have so altered his building, or be so wanting in evidence as to what the position of the old window was, that though he may be actually enjoying a portion of the old light, he cannot shew it, and so by a mere defect of evidence he will be unable to enforce such a right as he has."

[1] (1886) L. R., 31 Ch. D., 570.

Bowen, L. J., said :[1] " What the person who has acquired the right is entitled to is not the window but the free access of such an amount of light as has passed through that window. Is that right lost by anything short of abandonment ? In the first place how can you lose a right to a definite amount of light by trying to enjoy for your own purposes more light than you had acquired a prescriptive right to enjoy ? If a man has a certain amount of light at his disposal for use, it seems to me that he has a perfect right to make the best of it, as Mr. Rigby said, and that he is not bound only so to use his land as to exercise the minimum of enjoyment which is to come by the twenty years' user. He may use his land as he pleases. It is true that any additional user will not increase the right, but it does not seem to me that any additional user can diminish it. I think that must follow from *Tapling* v. *Jones*[2] which established that a man by adding to his own property, by adding new windows, did not lose his right to the access of light through the old windows, and, applying reason to work out the logic of that decision it must follow that a man may lessen his light without losing everything. A man by blocking up a part of old lights and adding new windows does not lose his right to so much of the old light as is not blocked up."

Next, as regards the question as to whether the previous light had been affected by the alteration of the building so as to alter the plane of the windows, it was pointed out that in cases of this kind the real test was not the structural identity of the aperture but the size and position of the aperture, and that in this view the mere advancing or setting back the building could not cause a forfeiture of the easement.

The observations of Bowen, L. J., on this point are clear. He said : " If the light is a right to a definite amount of the pencils of light for the use of the dwelling-house, why may not the owner of the house advance or recede as he chooses ? He will obtain by so doing no more enjoyment of light than that to which he is entitled. He does not increase the burden or his neighbour's tenement, and he does not, as it seems to me,

[1] (1886) L. R., 31 Ch. D., 572. [2] (1865) 11 H. L. C. 290.

do anything which affects the right given to him by Act of Parliament itself. It has been decided in the cases of *Staight* v. *Burn*[1] and *Ecclesiastical Commissioners* v. *Kino*[2] that the right to these pencils of light remains even though the dominant tenement may be pulled down or altered with a view to being rebuilt. They shew that the structural identity of the building is not the test, but I think they shew more. *viz.*, that the measure of enjoyment is not the aperture itself but the size and dimensions of an aperture in that position. Alteration of the building has nothing to do with the question, the question is whether any change is being made in the measure of the volume of light that arrives there."

Greenwood v. *Hornsey.*

In *Greenwood* v. *Hornsey*[3] the defendant had altered the dominant tenement by removing his old building containing ancient windows and substituting a new building in which the windows were so arranged as to preserve the light which had been enjoyed in respect of the old windows. The new building was rather higher than the old, and its front was advanced about two feet beyond the line occupied by the front of the old building.

It was held on the reasoning adopted in *Scott* v. *Pape* that the plaintiff was entitled to an injunction restraining the defendant from building in such a way as to obstruct the access of light and air to the new windows.

Smith v. *Baxter.*

Smith v. *Baxter*[4] is the latest case on the subject of rebuilding. It was decided on the same principles as *Scott* v. *Pape*[5] and lays down that where new windows receive a substantial portion of the light that went through the old windows, evidence of the plaintiff's intention to preserve ancient lights upon the rebuilding is unnecessary.

Result of modern English decisions.

The decisions in *Tapling* v. *Jones*, *Newson* v. *Pender*, and *Scott* v. *Pape* have cleared up what was at one time a difficult and uncertain state of the law, and the principles by which

[1] (1869) L. R., 5 Ch., 163.

[2] (1880) L. R., 14 Ch. D., 213.

[3] (1886) L. R., 33 Ch. D., 471.

[4] (1900) 2 Ch.,

[5] See *supra*, and specially that portion of Cotton, L. J.'s judgment reported i L. R., 31 Ch. D., at p. 569.

the abandonment and forfeiture of easements of light are now to be governed rest upon a clear and intelligible basis.

Though in India opportunity has not as yet been furnished to the Courts to follow the English decisions in all their varied applicability, there seems no doubt that should similar questions of law require adjudication in this country, English principles which point the way to reason, justice, and common sense will be adopted as a useful and reliable guide.

It should be observed also that the language of the English and Indian Acts for the purposes of the present subject is practically the same, and that the reasoning employed in the English cases as regards the effect of the statutory acquisition of the right applies equally to the case of easements of light acquired under the Indian Limitation Act and the Indian Easements Act.[1]

Indian decisions.

In conclusion it is necessary to refer to the few Indian decisions relating to the loss of easements of light and air by abandonment or forfeiture.

Kalee Dass Banerjee v. Bhoobun Mohun Dass.

The first, *Kalee Dass Banerjee* v. *Bhoobun Mohun Dass*,[2] lays down too broad a proposition, according to latest principles, in deciding that where a man pulls down a house and builds another on the same ground, his right to light and air enjoyed in respect of the old house *ipso facto* disappears. In the absence of evidence shewing the relative positions of the old and the new windows and that all trace of the size and position of the old windows had substantially disappeared, it seems clear that this decision could not now be supported.

Procabutty Dabee v. Mohendro Lall Bose.

The second decision is that of *Procabutty Dabee* v. *Mohendro Lall Bose*[3] which deals merely with the question of enlargement and the servient owner's limited power of obstruction and follows *Tapling* v. *Jones.*

Caspersz v. Raj Kumar.

The third case that of *Caspersz* v. *Raj Kumar*[4] lays down, as a general rule, that the question whether the easement is, or is not extinguished, depends on whether the new doors and

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[1] *See* Prescription Act (2 & 3 Will. IV., c. 71), s. 3; Indian Lim. Act XV of 1877, s. 26; I. E. Act V of 1882, s. 15.

[2] (1873) 20 W. R., 185.

[3] (1881) I. L. R., 7 Cal., 453.

[4] (1898) 3 Cal. W. N., 28.

windows are in the same position and of the same dimensions as the old doors and windows, or on whether the newly constructed houses imposes a different and greater burthen on the servient tenement.

The mere pulling down of the old house and the building of the new one does not of itself extinguish the easement.

Law relating to other easements.

With reference to easements other than easements of light, it may be stated as a general proposition that any alteration of the dominant tenement which has the effect of throwing a materially increased burthen on the servient tenement will cause a forfeiture of the right. If, on the other hand, the alteration of the dominant tenement does not materially increase the burthen on the servient tenement, the right of course continues. And this is a principle of general application to all easements.[1]

Luttrell's case.

In *Luttrell's case*[2] the plaintiffs contended that the defendants by pulling down their fulling-mills and erecting grist-mills in their place had destroyed their prescription and could not prescribe to have any water-course to their grist-mills. But it was resolved "that the mill is the substance and thing to be demanded, and the addition of grist, or fulling, are but to shew the quality or nature of the mill, 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, that 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 will build a mill before he is 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."

Saunders v. Newman.

To the same effect is the decision in *Saunders* v. *Newman*,[3] a very similar case where it was held that an alteration in the

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[1] *Hall* v. *Swift* (1838), 6 Scott, 167; *Curriers Co.* v. *Corbett* (1865), 2 Dr. and Sm., 355; I. E. Act, s. 43, cl. (*b*).

[2] (1738) 2 Coke's Rep., Part IV, 86.

[3] (1818) 1 B. & Ald., 258.

size of a mill-wheel did not cause a forfeiture of the right to the use of water for the purposes of a mill, provided such alteration did not prejudice the right of the owner of the lesser mill, for to hold that the owner of a mill was bound to use water in the same precise manner or to apply it to the same mill would be to stop all improvements in machinery.

Thomas v. *Thomas.*

The principle was the same in *Thomas* v. *Thomas.*[1] There the plaintiff who had the right to have the rain-water drip from the roof of his house on to the defendant's land raised the wall and increased the projection from which the dripping took place. Upon this the defendant erected a wall to prevent any water dripping on to his land, and an action being brought against him for disturbance of the easement, there was a verdict in favour of the plaintiff.

Hall v. *Swift.*

In *Hall* v. *Swift*[2] the plaintiff had the right of enjoyment of a certain stream which, flowing from springs rising in the defendant's field, flowed in an underground course or drain to a spout in the defendant's hedge whence, after running a few yards down a lane, it crossed to the plaintiff's land.

The plaintiff altered the course of the stream in such a way as to make it flow from the spout in the hedge to his land.

The plaintiff having brought an action for the obstruction of the stream on the defendant's land whereby the supply of water to his land had been entirely stopped, it was objected by the defendant that the plaintiff's alteration of the course of the stream had destroyed his former right. This objection was rejected by Tindal, C. J., in the following words: "I agree, that, if the course of the water had been set out or described by metes and bounds, a variance between the statement and the proof might have been fatal. But here the right is described generally. 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 footpath 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 can base itself."

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[1] (1835) 2 C. M. & R., 34.

[2] (1838) 6 Scott, 167.

As regards easements of support, though it is undoubted that the pulling down of the dominant tenement and the substitution of an entirely different building in its place will result in an extinction of the right of support formerly enjoyed in respect of the old building, there appears to be no authority for the conclusion that if the dominant tenement continues to stand but is so altered that the original limits of the easement are exceeded by an additional weight being imposed on the servient tenement, that circumstance of itself will cause an extinction of the easement by forfeiture.

Additional observations regarding easements of support.

There is, of course, express authority for the proposition that if an additional weight is imposed for which no right of support has been acquired and the injury caused to the dominant tenement by excavation or other act on the servient tenement would not have happened but for the imposition of the additional weight, no action is maintainable for the injury.[1]

But the Courts have not in any reported decision gone so far as to hold that the servient owner would not be liable if it could be shown that the injury would have been caused to the dominant tenement notwithstanding the imposition of the additional weight.

In fact the authorities already considered in relation to this subject point the other way.[2]

The question whether the dominant owner who has lost his easement through forfeiture can regain the right by restoring the dominant tenement to its original condition must apparently be answered in the negative. There is the express *dictum* of Lord Chelmsford in *Tapling* v. *Jones*,[3] that a right once abandoned is abandoned for ever. If, therefore, restoration cannot be made after abandonment with the effect of regaining the easement, it is difficult to see how it can be so made after a forfeiture.[4]

Dominant owner having lost his easement through forfeiture cannot regain it by restoring dominant tenement to original condition.

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[1] See *Dodd* v. *Holme* (1834), 1 A. & E., 493; *Partridge* v. *Scott* (1838), 3 M. & W., 220; and the treatment of this subject in Chap. III, Part IV.

[2] See *Browne* v. *Robins* (1889), 28 L. J. Exch., 250; *Stroyan* v. *Knowles* (1861), 6 H. & N., 454; 30 L. J. Exch., 102; and Chap. V, Part IV.

[3] (1865) 11 H. L. C., p. 319.

[4] And *see* the observations in Gale on Easements, 7th Ed., p. 524.

CHAPTER X.

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Extinction, Suspension and Revival of Easements.

Part I.—Extinction of easements by miscellaneous methods.

There still remain to be enumerated certain miscellaneous methods of extinction which, obvious in themselves, hardly require more than passing notice.
They are the following :—

(a) Extinction by dissolution of right of servient owner.

I. E. Act, s. 37.

Section 37 of the Indian Easements Act provides that when, from a cause which preceded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient tenement, the easement is extinguished.

Exception.—Nothing in the section applies to an easement lawfully imposed by a mortgagor in accordance with section 10.

(*b*) *Extinction by revocation.*

By section 39 of the Indian Easements Act an easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.

I. E. Act, s. 39.

(*c*) *Extinction of limited easements.*

An easement acquired for a limited period is extinguished by the completion of such period.[1]

Similarly an easement which is acquired subject to an express[2] or implied condition[3] is extinguished by the fulfilment of the condition.

Thus where an easement passed by implication of law to a lessee on a lease to him of the dominant tenement for a period of twenty-one years subject to a condition of re-entry by the lessor, it was held that on determination of the lease under such condition and recovery of possession by the lessor's vendee, the easement was extinguished.[4]

So an easement created for a particular object is extinguished when the object of its existence disappears.

Thus an easement to take water for the purpose of filling a canal ceases when the canal no longer exists.[5]

(*d*) *Extinction of easements of necessity.*

An easement of necessity is extinguished neither by alteration of the dominant tenement[6] nor by non-user,[7] but only by the disappearance of the necessity.

This is almost a self-evident proposition and scarcely needs authority to support it.

Holmes v. *Goring*[8] clearly establishes the law in this respect and decides that a way of necessity is limited by the necessity

Holmes v. *Goring.*

[1] *Lord Dynevor* v. *Tennant* (1886), L. R., 32 Ch. D., 375; 55 L. J. Ch., 817; I. E. Act, s. 40.

[2] I. E. Act, s. 40.

[3] *Beddington* v. *Atlee* (1887), L. R., 35 Ch. D., 317; 56 L. J. Ch., 655.

[4] *Beddington* v. *Atlee.*

[5] *National Guaranteed Manure Co.* v. *Donald* (1859), 4 H. & N., 8.

[6] *See* I. E. Act, s. 43, cl. (*c*).

[7] *See* I. E. Act, s. 47.

[8] (1824) 2 Bing., 76.

which creates it, and that if subsequently to the acquisition of the easement it becomes possible for the dominant owner to reach the same point by another way over his own land, the way of necessity ceases.

To the same effect is section 41 of the Indian Easements Act.

(e) Extinction of useless easements.

I. E. Act. s. 42.

Under section 42 of the Indian Easements Act an easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner. It would be more accurate to say "dominant tenement."[1]

(f) Extinction on permanent alteration of servient tenement by superior force.

I. E. Act, s. 44.

According to section 44 of the Indian Easements Act an easement is extinguished where the servient tenement is so permanently altered by superior force that the dominant owner can no longer enjoy it.

The illustrations to the section explain the application of the rule. A river changing its course from the servient owner's land to some one else's will, of course, extinguish the dominant owner's right to fish in it or any other easement relating to water.

And a path over which there is a right of way may be permanently destroyed by an earthquake.

If the way destroyed is a way of necessity, the dominant owner has the right to another, and if the servient owner fails to set it out, he may do so himself.

(g) Extinction by destruction of either tenement.

An easement is extinguished when either the dominant or servient tenement is completely destroyed.[2]

Thus if the servient tenement consisted of a strip of land on the sea-shore, a permanent encroachment of the sea to the extent of the strip, would put an end of any easement existing over it.

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[1] See *supra*, Chap. II, and I. E. Act, s. 4.

[2] I. E. Act, s. 45.

(*h*) *Extinction of accessory easements.*

If the principal easement ceases, the accessory easement must also come to an end.[1]

Thus if a man has the right to work minerals, and the right comes to an end through exhaustion by the minerals, the accessory easement of way over the servient tenement for the purpose of removing the minerals disappears also.

Part II.—Suspension and Revival of Easements.

It has been seen that when the dominant and servient tenements are united in the same person, an easement is extinguished by unity of seisin.[2]

Unity of possession, that is to say, anything that falls short of unity of seisin, does not cause the extinction of an easement but its suspension.[3]

Thomas v. *Thomas.*

As Alderson, B., said in *Thomas* v. *Thomas* :[4]—" If I am seized of freehold premises, and possessed of lease-hold premises adjoining and there has formerly been an easement enjoyed by the occupiers of the one as against the occupiers of the other, while the premises are in my hands, the easement is necessarily suspended, but it is not extinguished, because there is no unity of seisin ; and if I part with the premises, the right not being extinguished, will revive."

Upon a severance of the tenements the easement, whether it be an easement of necessity or any other kind of easement, revives.[5]

I. E. Act, s. 51.

Section 51 of the Indian Easements Act deals with various methods of revival which may be classified as follows :—

(1) Restoration within twenty years by deposit of alluvion of the dominant or servient tenement which has been completely destroyed—cl. (*a*).

(2) Rebuilding of servient tenement on the same site within twenty years—cl. (*b*).

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[1] I. E. Act, s. 48.

[2] *See* Chap. IX, Part II, A.

[3] *Thomas* v. *Thomas* (1835), 2 Cr., M. & Ros., 34 ; *Modhoosoodun Dey* v. *Bissonauth Dey* (1875), 15 B. L. R., 361 ; I. E. Act, s. 49.

[4] 2 Cr., M. & Ros., p. 41.

[5] *Buckby* v. *Coles* (1814), 5 Taunt., 311 ; *Thomas* v. *Thomas* (1835), 2 Cr., M. & Ros., 34 ; I. E. Act, s. 51, last para.

(3) Rebuilding of dominant tenement on the same site within twenty years in such a manner as not to impose a greater burthen on the servient tenement—cl. (c).

(4) The setting aside by a decree of a competent Court of the grant or devise by which the unity of ownership was produced.

(5) Revival of easement of necessity when the unity of ownership ceases from any other cause.

This, strictly speaking, is hardly in accord with English notions which point to a fresh creation of the right after extinction, and not to a revival.[1]

(6) Revival of suspended easement if cause of suspension is removed before the right is extinguished by non-user under section 47.

Under this paragraph an easement which has been suspended by unity of possession, revives.

I. E. Act, s. 50. Servient owner not entitled to continuance of easement.

Section 50 of the Indian Easements Act negatives any right of the servient owner to require that an easement should continue.[2]

It also negatives his right to demand compensation for damage caused by its extinguishment or suspension if the dominant owner has given him such notice as will enable him, without unreasonable expense, to protect the servient tenement from such damage. Where such notice has not been given, the servient owner will be entitled to compensation for damage caused to the servient heritage in consequence of such extinguishment or suspension.

When entitled under I. E. Act to compensation on discontinuance of easement.

As regards the right to compensation the section in this respect deviates from the English law as declared in *Mason* v. *The Shrewsbury and Hereford Railway Co.*[3]

The illustration to the section is obviously framed on the facts of this case.

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[1] See *Holmes* v. *Goring* (1824), 2 Bing., 76 ; and Chap. IX, Part II, A.

[2] *See* this subject considered in Chap. II and Ch. III, Part III.

[3] (1871) L. R., 6 Q. B., 578.

CHAPTER XI.

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Disturbance of Easements and the Legal Remedies therefor.

Part I.—General Principles relating to the Disturbance of Easements.

Preliminary observations.

The *rights* of dominant owners in relation to the extent and mode of enjoyment of easements have already been considered.

The *remedies* which the law provides for the wrongful obstruction of these rights form a no less important subject for inquiry in the present chapter.

The material questions connected with this subject as to what constitutes a wrongful obstruction and the nature of the remedy therefor, will be found to rest mainly on the application of general principles, though there are certain rules which apply specially to particular easements, and these will be separately considered.

For the purposes of the present subject the disturbance of an easement must be understood to have reference to some act done on the servient tenement either by the servient owner or occupier, licensee, or a trespasser since, an easement being a right *in rem* whoever creates the disturbance is liable therefor to the injured party.

It, therefore, becomes necessary to consider the following subjects :—

(1) The nature of the disturbance or wrongful obstruction for which the law provides a remedy.

(2) The nature of the remedy open to the injured party.

What constitutes a disturbance.

With reference to what constitutes the disturbance of an easement, the first question that arises for consideration is the nature of the obstruction entitling the dominant owner to relief. The answer is four fold :—

First.—The law does not concern itself with an obstruction which is trivial or immaterial. *De minimis non curat lex.*

Thus it is not the obstruction of a ray or two of light,[1] or the obstruction by a riparian owner of a watering potful of water,[2] that will sustain an action for disturbance. From this follows the third proposition below stated, that the act complained of must have caused substantial damage.

Secondly.—The law takes no note of an obstruction which finds its origin in the caprice or sentiment of the injured party, or in any peculiarity of health or temperament.[3]

Thirdly.—In order to amount to a disturbance the act or acts complained of must have caused substantial damage.[4]

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[1] *Pringle* v. *Wernham* (1836), 7 C., p. 377; *Currier Co.* v. *Corbett* (1865), 2 Dr. & Sm., 355, and see *Robson* v. *Whittingham* (1866), L. R., 1 Ch. App., 442.

[2] *Embrey* v. *Owen* (1851), 6 Exch., 353 (372).

[3] *See* Gale on Easements, 7th ed., p. 536.

[4] *See* the cases cited in the next footnote.

Condition of substantial damage how satisfied.

Fourthly.—The condition of substantial damage is satisfied when there has been a material diminution of the enjoyment of the easement, or of the value of the dominant tenement,[1] or an invasion of the legal right from which substantial damage will be presumed.

In the latter case the governing principle appears to be that any action which injures another's right and would be evidence in future in favour of the wrong-doer is an invasion of the right for which an action may be maintained without proof of specific injury.[2]

Bower v. *Hill.*

In *Bower* v. *Hill*,[3] the defendant had erected a tunnel which prevented the plaintiff from getting as near to his premises as he might have done through a watercourse along which he had a right of navigation, and Chief Justice Tindal said : "The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way."

Harrop v. *Hirst.*

In *Harrop* v. *Hirst*,[4] the plaintiffs, together with other inhabitants of a certain district, had been accustomed to enjoy the use of water from a certain spout in a highway for domestic purposes. The defendant abstracted water in such quantities from the stream from which the spout was supplied as to render what water remained insufficient for the requirements of the district. It was held that, though there was no proof of personal or particular actual damage, the action was maintainable upon the principle that the act of the defendant, if repeated, might furnish evidence of a right in derogation of the right of the inhabitants of the district amongst whom were the plaintiffs.

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[1] *Parker* v. *Smith* (1832), 5 C., p. 438 ; *Pringle* v. *Wernham* (1836), 7 C., p. 377 : *Wells* v. *Ody* (1836), 7 C., p. 410 ; *Carriers Co.* v. *Corbett*, 1865, 11 Jur. N. S., 719 ; *Robson* v. *Whittingham* (1866), L. R., 1 Ch. App., 442 ; *Kino* v. *Rudkin* (1877), L. R., 6 Ch. D., 160, and *see* Indian Easements Act, s. 33, Expl. I. As to support *see Smith* v. *Thackerah* (1866), L. R., 1 C., p. 564 ; and generally in illustration of the same principle, see *supra*, p. 168 ; *Kelk* v. *Pearson* (1871), L. R., 6 Ch. App., 809. And see *Warren* v. *Brown* (1901), 1 K. B., 15.

[2] *See* Notes to *Mellor* v. *Spateman*, 1 Saund. Rep., 346*b*.

[3] (1835) 1 Bing. N. C. 549, 1 Scott, 526.

[4] (1868) L. R., 4 Exch., 43.

Kelly, C. B., observed : "It is conceded that any inhabitant who had suffered actual damage from want of water could maintain an action for the injury done him. But that actual damage is not in such a case a necessary ingredient, is established by the passage cited by my Brother Martin from 1 Wms. Saunders, 346 (*a*) in the note to *Mellor* v. *Spateman*, where it is laid down that a commoner may have an action on the case without proving any *specific injury* to himself against a person wrongfully depasturing cattle on the common, and the author observes : 'The law considers that the *right* of the commoner is 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. For wherever any act injures another's right, and would be evidence in future in favour of the wrong-doer, an action may be maintained for an invasion of the right without proof of any specific injury.' The proposition there laid down amounts to this, that whenever one man does an act which, if repeated, would operate in derogation of the right of another, he is liable to an action without particular damage at the suit of a person whose right may be affected."

On the same principle an action is maintainable for the disturbance of an easement causing substantial subsidence even though unaccompanied by proved pecuniary damage.[1]

The same principle has been enunciated in many other cases.[2]

Disturbance of accessory easements.

The principles that apply to the disturbance of principal easements apply also to the disturbance of accessory easements.[3]

Effect of disturbance by collective acts of a number of persons.

When the disturbance of an easement is attributable to the collective acts of a number of persons the damage caused thereby must be taken in the aggregate, and it is no answer to

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[1] *Atty.-Genl.* v. *Conduit Colliery Co.* (1895), 1 Q. B., p. 310 *et seq.*

[2] *Wood* v. *Waud* (1849), 3 Exch., 748 (772) ; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 590 ; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Nav. Co.* (1875), L. R., 7 App. Cas. 697 (705) ; *Subramaniya* v. *Rama Chandra* (1877), I. L. R., 1 Mad., 335 (340) ; *John Young & Co.* v. *Bankier Distillery Co.* (1893), App. Cas. 691 (698) ; and *see* I. E. Act, s. 33, Expl. 1.

[3] *See* Chap. VIII, Part II, and I. E. Act, s. 33.

the complaining party for any of such persons to say that the damage caused by himself is inappreciable.[1]

Thorpe v. *Brumfitt.*

The law is clearly stated in *Thorpe* v. *Brumfitt*[2] by James, L. J., who says :—" Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheel-barrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person, entitled to a use of the way has a right to prevent ; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant."

There is as much a remedy for disturbance against Government as against a private individual.[3]

In suits relating to the disturbance of easements, it lies on the plaintiff to prove his title to the particular easement in question if the same is disputed.[4].

The essentials of a disturbance of easements having been ascertained, it now becomes necessary to inquire into the nature of the remedy open to the injured party. This subject may be conveniently decided under the following two heads. namely :—

(1) Remedy without the intervention of the Court, by act of the injured party abating the disturbance.

(2) Remedy with the intervention of the Court, by suit.

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[1] *Thorpe* v. *Brumfitt* (1873), L. R., 8 Ch. App., 650 ; *Chunder Coomar Mookerji* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665 ; *Lambton* v. *Mellish* (1894), 3 Ch. D., 163.

[2] L. R., 8 Ch. App., p. 656.

[3] *Ponnusawmi Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6 ; *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil* (1878), I. L. R., 7 Bom., 209.

[4] *Onraet* v. *Kishen Soondaree Dossee* (1871), 15 W. R., 83 ; *Hari Mohun Thakoor* v. *Kissen Sundari* (1884), I. L. R., 11 Cal., 52.

Part II.—Remedy of abatement by act of injured party.

In England the law has, in certain cases, allowed the party injured by the disturbance to remove it by his own act.

Rex v. *Rosewell.*

Thus in *Rex* v. *Rosewell*[1] it was resolved :—"If H builds a house so near him that it stops my light, 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."

Rakes v. *Townsend.*

So in *Rakes* v. *Townsend*[2] it was held that, if a man in his own soil erects a thing which is a nuisance to another, as by stopping a rivulet, and so diminishing the water used by him for his cattle ; the party injured may enter on the soil of the other and abate the nuisance, and justify the trespass.

Not favoured in England in modern times.

But this form of remedy has not been in favour with the English Courts in modern times as being one which is opposed to the policy of the law and likely to lead to a breach of the peace.

Hyde v. *Graham.*

As Pollock, C. B., said in *Hyde* v. *Graham*,[3] "No doubt, in Blackstone's Commentaries some instances are given where a person is allowed to obtain redress by his own act, as well as by operation of law, but the occasions are very few, and they might constantly lead to breaches of the peace, for if a man has a right to remove a gate placed across the land of another, he would have a right to do it even though the owner was there and forbade him. The law of England appears to me, both in spirit and on principle, to prevent persons from redressing their grievances by their own act."

In India apparently recognised outside I. E. Act. Rejected by I. E. Act.

In India outside the Indian Easements Act this form of remedy appears to have been contemplated as one which might be adopted by the injured party,[4] but by section 36 of the Indian Easements Act it has been expressly repudiated, for the reason as appears in the statement of objects and reasons, that it is opposed to the policy of the modern systems of law, and is likely to encourage riot and trespass.[5]

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[1] (1699) Salkeld, 459.

[2] (1804) 2 Smith, 9.

[3] (1862) 1 H. & C., p. 598.

[4] *Sheikh Monoour Hossein* v. *Kanhya Lal* (1865), 3 W. R., 218 ; *Chunder Coomar Mookerji* v. *Koylash Chunder Set* (1881), I. L. R., 7 Cal., 665 (673).

[5] See *Gazette of India*, July to Dec., Part V, p. 478.

Abatement how to be effected.

The abatement should be effected with reasonable care not to cause more damage than necessary.[1]

Demand previous to abatement is unnecessary except where the cause of disturbance cannot be removed without trespassing on the servient tenement, and the tenement is in actual occupation of the owner, so that an abatement without notice is likely to cause a breach of the peace, or where it has passed into new hands since the doing of the act causing the disturbance.[2]

And demand may also be made either on the lessor or lessee of the servient tenement.[3]

Part III.—Remedy by Suit.

If the injured party desires to obtain a remedy for the disturbance of an easement otherwise than by himself removing the cause of the disturbance, he must seek the intervention of the Court by suit.

The first question, therefore, that arises is what persons are entitled to sue for a disturbance of an easement.

(1) *Who may Sue.*

Owner or occupier of dominant tenement.

The owner or occupier of the dominant tenement has a right to the undisturbed enjoyment of all easements or rights appurtenant and can therefore sue for disturbance thereof.[4]

Reversioner, subject to certain conditions.

Under certain conditions a reversioner of the dominant tenement has also a right of suit for the disturbance of an easement.

The fulfilment of these conditions depends on the nature of the act causing the disturbance, and the real foundation of the right to sue is some act either necessarily injurious to the reversion, or of so permanent a character as possibly to injure the reversion, by operating in denial of the right.[5]

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[1] *See* Gale on Easements, 7th ed., p. 547.

[2] *Ibid.*

[3] *Ibid.*

[4] I. E. Act, s. 32.

[5] *Jackson* v. *Pesked* (1813), 1 M. & Sel., 234; *Alston* v. *Scales* (1832), 9 Bing., 3; *Baxter* v. *Taylor* (1832), 4 B. & Ad., 72; *Bower* v. *Hill*, 1 Bing. N. C. 549 (555); 1 Scott. Cas., 526 (534) *Tucker* v. *Newman* (1839), 11 A. & E., 40; *Kidgill* v. *Moor* (1850), 9 C. B., 364; *Sampson* v. *Hoddinott* (1857), 1 C. B. N. S., 590; *Metropolitan Association* v. *Petch* (1858), 5 C. B. N. S., 504.

Thus the erection of a roof with eaves from which water was discharged through a spout on to the reversioner's premises,[1] the locking, chaining, and fastening of a gate across the way,[2] and the erection of a hoarding near windows whereby the light and air were prevented from entering and the house rendered unfit for habitation,[3] have all been held to be acts of disturbance for which a reversioner may sue.

But a single temporary act, such as a mere trespass consisting in another's entering upon the reversioner's land even though accompanied by a claim of right, does not give the reversioner a right of action.[4]

Certain passages occurring in some of the judgments are important and deserve quotation.

Bower v. *Hill.*

In *Bower* v. *Hill*,[5] Tindall, C. J., said : "The right of the plaintiff to this way is injured, if there is an obstruction in its nature permanent. If acquiesced in for twenty years, it would become evidence of a renunciation and abandonment of the right of way. That is the ground upon which a reversioner is allowed to bring his action for an obstruction, apparently permanent, to lights and other easements which belong to the premises."

Kidgill v. *Moor.*

In *Kidgill* v. *Moor* [6] on a motion in arrest of judgment, Cresswell, J., said : "*Jackson* v. *Pesked* decides that a declaration of this sort is insufficient, unless it contains an averment that the acts charged injured the plaintiff's reversionary interest. That case, however, impliedly recognises the validity of a declaration which contains such an averment, and states facts which may or may not amount to such injury of the reversion. Here the declaration alleges certain things to have been done by the defendant so as to occasion injury to the plaintiff's reversionary interest. I agree with my brother *Maule* that that is an allegation of fact, and that we must take it to have been proved if the facts stated could so operate. It

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[1] *Tucker* v. *Newman*, ibid.

[2] *Kidgill* v. *Moor*, ibid.

[3] *Metropolitan Association* v. *Petch*, ibid.

[4] *Baxter* v. *Taylor*, ibid.

[5] (1835) 1 Bing. N. C., 555 ; 1 Scott. Cas., 531.

[6] (1850) 9 C. B., 379.

is impossible to state that a gate *may* not be so fastened as to enure as an injury to the reversion."

In *The Metropolitan Association* v. *Petch*,[1] Williams, J., said :—"The simple question, therefore, which we have to decide, is whether upon this declaration we can see that it is impossible that the hoarding can be otherwise than a temporary structure, and so not injurious to the reversion. If at the trial it appears that the thing complained of is of a mere transitory character, the jury will come to the conclusion that it is not such an injury as to entitle the plaintiffs to maintain the action. But it may be that this hoarding may have been kept up in denial of the right of the plaintiffs to the windows in question ; in which case, if acquiesced in by the plaintiffs for any length of time, it might furnish a serious body of evidence against them if ever their right should come to be contested." Later on his judgment, the same Judge said,[2] "Then there is the case of *Kidgill* v. *Moor*, which appears to me completely to govern the present case. There, a declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and charged that the defendant wrongfully locked, chained, shut, and fastened a certain gate standing in and across the way, and wrongfully kept the same so locked, etc., and thereby obstructed the way ; and that by means of the premises, the plaintiff was injured in his reversionary estate ; and it was held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction *might* occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given. There is no distinction now between the construction of a declaration before and after verdict. The obstruction here complained of *may* be an injury to the plaintiff's reversionary interest, and therefore we cannot consistently with the authorities hold the declaration to be insufficient."

But, of course, neither a dominant owner or occupier nor a reversioner can complain of any act done on the servient

[1] (1858) 5 C. B. N. S., p. 510.   [2] *Ibid* at p. 513.

tenement either by the servient owner or a trespasser so long as such act does not disturb his right.[1]

(2) *Who are liable to be sued.*

An easement being a right *in rem*, it follows that any one creating the disturbance is liable therefor, whether he be the owner or occupier of the servient tenement or not.

So long as the disturbance continues not only the person who directs its creation, or the person or persons actually creating it, is liable, but also the person who is responsible for its continuance.[2]

Thus the principal ordering the creation of the disturbance, and the servants or agents actually concerned in its creation,[3] the landlord responsible for the creation of the disturbance and the tenant responsible for its continuance,[4] or similarly any grantor and grantee, or devisor and devisee,[5] are each and all liable to be sued for the disturbance.

Thompson v. *Gibson.*

In *Thompson* v. *Gibson*,[6] the defendants had erected a building which was and continued to be a nuisance to the plaintiff's market by excluding the public from a part of the space on which the market was held. The building had been erected under the superintendence and direction of the defendants, not on their land, but on land belonging to the Corporation of Kendal, of which they were members.

The defendants contended that they were not liable for the continuance of the nuisance, that they were distinct persons from the Corporation, and that though they were guilty of

[1] *See* Chap. VIII, Part III, and I. E. Act, s. 27.

[2] *Some* v. *Barwish* (1610), Cro. Jac., 231 ; *Rosewell* v. *Pryor* (1702), 2 Salk., 459 ; *Stone* v. *Cartwright* (1795), 6 T. R., 411 ; *Wilson* v. *Peto* (1821), 6 Moore, 47 ; *Thompson* v. *Gibson* (1841), 7 M. & W., 456 ; *Broder* v. *Saillard* (1876), L. R., 2 Ch. D., 692 ; *Jenks* v. *Viscount Clifden* (1897), L. R., 1 Ch., 694.

[3] *Stone* v. *Cartwright ; Wilson* v. *Peto; Thompson* v. *Gibson ; Born* v. *Turner* (1900), 2 Ch., 211. In an action for disturbance against an adjoining owner and his builder, the latter may on reasonable grounds sever from the former in his defence and, where he is entitled to a complete indemnity from his employer, he may further get his solicitor and client costs from him. *Born* v. *Turner*.

[4] *Rosewell* v. *Pryor ; Broder* v. *Saillard*.

[5] *Some* v. *Barwish ; Jenks* v. *Viscount Clifden*.

[6] (1841) 7 M. & W., 456.

having erected the nuisance, they could not be regarded as having continued it, inasmuch as they were not in possession of or interested in the soil on which the building had been erected. The rule *nisi* granted to enter a non-suit was accordingly discharged.

In delivering the judgment of the Court Baron Parke said :[1] "If they," meaning the defendants, "are considered merely as servants of the Corporation, they would be liable, just as the servant or the individual is, if he is actually concerned in erecting a nuisance ; *Wilson* v. *Peto :* and as they would clearly have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market, or what other limit can be assigned to their responsibility other than the continuance of the injury itself ? Is he, who originally erects a wall by which ancient lights are obstructed, to pay damage for the loss of the light for the first day only ? or does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time ?

In the case of *Rosewell* v. *Pryor*, which was an action against the defendant who erected an obstruction to the ancient lights of the plaintiffs, and then aliened, Lord Holt lays it down, that "it is a fundamental principle in law and reason, that he that does the first wrong shall answer for all consequential damages, and here," he says, "the original creation does influence the continuance and it remains a continuance from the very erection. and by the erection, till it be abated," and he adds, "that it shall not be in his power to discharge himself by granting it over."

"It was also said that the defendants could not now remove the nuisance themselves, without being guilty of a trespass to the Corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong ; and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by shewing their inability to remove it, without exposing themselves to another action."

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[1] At p. 460.

This case shows that in an action for a disturbance for which the defendant is responsible it is no answer on his part to say that he is not in possession of or interested in the servient tenement, and that he cannot remove the disturbance himself without being guilty of a trespass.

If defendant responsible for disturbance it is no answer that he is not interested in servient tenement or is not in possession thereof.

The person directing the erection of the disturbance and the person or persons actually concerned in erecting it may be joined as co-defendants, or an action can be brought at option against either of them.[1]

Joinder of parties.

The same rule applies to the author of the disturbance and the person continuing it.[2]

If the party in possession of the servient tenement is not the author of the disturbance, a request should be made to him to remove the disturbance before the action is brought.[3]

Request to remove disturbance, when to be made.

A landlord is not liable if the disturbance occurs for the first time during the tenancy unless it was created with his authority.[4]

Landlord when not liable.

In every case the defendant must be shewn to be responsible for the creation of the disturbance or its continuance and to have the power to abate it.

Responsibility for, and power to abate, disturbance essential to liability.

Thus it appears to have been considered that a tenant for years who occupies a house erected by his landlord which obstructs another's light and air, is not liable for the continuance of the nuisance provided he does no other act to prejudice the dominant owner or occupier besides inhabiting the house, since he has no authority to abate the nuisance.[5]

Similarly if the servient tenement is held under a repairing lease, and the disturbance is caused by the tenant's failure to repair, the landlord is not liable.[6]

Although before a prescriptive right is required there is no cause of action against the owner of the servient tenement or his

Remedy against wrongdoer before prescriptive right acquired.

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[1] *Stone* v. *Cartwright* (1795), 6 T. R., 411; *Wilson* v. *Peto* (1821), 6 Moore, 47; *Thompson* v. *Gibson* (1841), 7 M. & W., 456.

[2] *Some* v. *Barwish* (1610), Cro. Jac., 231; *Rosewell* v. *Pryor* (1702), 2 Salk., 459; *Broder* v. *Saillard* (1876), L. R., 2 Ch. D., 692.

[3] Gale on Easements, 7th ed., p. 557.

[4] *Ibid.*

[5] *Ryppon* v. *Bowles* (1615), Cro. Jac., 373.

[6] *Gwinnell* v. *Eamer* (1875), L. R., 10 C. P., p. 658.

licensee for disturbance of the incomplete right, except on the ground of negligence,[1] it appears that there is a remedy against a trespasser or wrong-doer who is guilty of such disturbance.

Thus the *de facto* support of a house by the soil of a neighbour is sufficient title against any one but that neighbour, or one claiming through him.[2]

"Just as one who should prop his house up by a shore resting on his neighbour's ground, would have a right of action against a stranger, who, by removing it, causes the house to fall; but none against his neighbour, or one authorised by the neighbour to do so, if he took it away and caused the same damage."[3]

Similarly the obstruction of light and air before the acquisition of the prescriptive right may be actionable if caused by a trespasser.[4]

The question of the responsibility of a servient owner or occupier for the negligence or wrongful act of the contractor employed by him has already been considered in connection with the question of support.

(3) *The Pleadings.*

General rules.

As an easement is not one of the ordinary rights of ownership, it is necessary that a plaintiff claiming an easement or suing for its obstruction or a defendant pleading an easement should state his right to the easement, and the origin from which the easement proceeds, whether from prescription, or express or implied grant.[5]

When an easement is claimed or pleaded by prescription, and there is any danger of the prescriptive title failing to meet the requirements of the fourth paragraph of section 26 of the Indian Limitation Act, or of the corresponding paragraph of section 15 of the Indian Easements Act, it is expedient to rely

[1] As in the case of support, *see* Chap. III, Part IV, C.

[2] *Jeffries* v. *Williams* (1850), 5 Exch., 792; *Bibby* v. *Carter* (1859), 4 H. & N., 153.

[3] *Jeffries* v. *Williams*, per Parke, B., ibid, p. 800.

[4] *Dhuman Khan* v. *Muhammed Khan* (1896), I. L. R., 19 All., 153.

[5] *Harris* v. *Jenkins* (1882), L. R., 22 Ch. D., 481; 52 L.J. Ch., 437; *Spedding* v. *Fitzpatrick* (1888), L. R., 38 Ch. D., 410; 58 L. J. Ch., 13

also on the common law method of acquisition, so that if the claim or plea fail in the one respect it may be saved in the other, for it will be remembered that in India as in England, the common law method of acquisition is as available as the statutory.[1]

In every case the statement of the title should be exact.[2] The nature of the disturbance should be clearly stated, and the obstruction should be of that in which the right is asserted. Thus where a plaintiff alleged a right to the use of a cistern and that the defendant had fastened up a door and doorway leading to the cistern and thereby prevented the plaintiff from having access to the cistern, it was held that the declaration was bad for not showing a right to use the door.[3]

The proof of an easement larger than the easement alleged but not different in kind, is not such a variance as is fatal to the case set up.[4]

The right claimed must not be larger than the right proved, but if the right claimed is divisible, such portion thereof as is proved may be decreed. Thus if a man claim a right of ferry from one place to another, and then again to another place, and prove the right only for the latter distance, he may have a decree to that extent.[5]

But if a party claims the right to do a particular thing by virtue of a right of ownership of land itself, he cannot turn round afterwards and claim to use it by virtue of an easement.[6] For a claim to ownership of land is quite inconsistent with a claim of easement over it.[7]

In claiming or pleading a title under the Indian Limitation Act or the Indian Easements Act, the requirements of those

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[1] *See* Chap. I, Part II, E, Chap. VII, Part II, and *Bullen* v. *Leake*, Precedents of Pleading, 5th Ed., 989. 995, 996.

[2] *Fentiman* v. *Smith* (1803), 4 East., 107; *Whaley* v. *Laing* (1857), 2 H. & N., 476; in error 27 L. J. Exch., 422; *Tebbutt* v. *Selby* (1837), 6 A. & E., 786.

[3] *Tebbutt* v. *Selby* (1837), 6 A. & E., 7-6.

[4] *Duncan* v *Louch* (1845), 6 Q. B., 904.

[5] *Giles* v. *Groves* (1848), 12 Q. B., 721.

[6] *Chunilal Fulchand* v. *Mangaladas Govardun Das* (191), I. L. R., 16 Bom., 592.

[7] *Sham Churn Addy* v. *Tariny Churn Banerjee* (1876), 25 W. R., 228; I. L. R., 1 Cal., 422.

Acts necessary to the acquisition of the easement should, of course, be specifically stated.[1]

The defendant in an action for the obstruction of an easement must, where the allegation of such right is disputed, expressly deny or state that he does not admit the allegation.

Where the plaintiff claims by virtue of possession the allegation of possession should also be denied.[2]

Easements of light and air.

In claiming an easement of light and air by prescription, the allegation that the windows in respect of which the right is claimed are "ancient lights" may be sufficient, but in order that there may be no risk of the defendant's not knowing what case he has to meet, and if the plaint is found to be embarrassing, there should be a specific allegation that the claim arises by prescription, stating the necessary elements in the acquisition of the right.[3]

If the right is claimed under section 26 of the Indian Limitation Act or under section 15 of the Indian Easements Act, there should be an express allegation of the acquisition of the right in accordance with the requirements of those sections.

Private rights of way.

In defending an action for the obstruction of light and air the defendant should specifically deny every allegation of fact constituting the right which he wishes to deny, and there should be a specific statement by him of the facts upon which he relies as controverting the plaintiff's claim and justifying the act on his part of which the plaintiff complains.[4]

As regards a private right of way the plaintiff claiming such easement, or suing for its obstruction, or the defendant pleading such easement, should state the right and how it arises, whether by grant or prescriptive user, and should shew with reasonable precision and exactitude the *termini* of the way and the course which it takes.[5]

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[1] Indian Limitation Act, XX of 1877, s. 26 ; Indian Easements Act V of 1882, s. 15.

[2] See *Bullen* v. *Leake*, Precedents of Pleading, 5th Ed., p. 992.

[3] See *Harris* v. *Jenkins* (1882), L. R., 22 Ch. D., 481 ; 52 L. J. Ch., 437 ; *Spedding* v. *Fitzpatrick* (1881), L. R., 38 Ch. D., 410 ; 58 L. J. Ch., 139; *Bullen* v. *Leake*, Precedents of Pleading, 5th Ed., 456. And see *Home & Colonial Stores Ltd.*, v. *Cotls.*. (1902), 1 Ch., 302.

[4] See *Bullen* v. *Leake*, 5th Ed., 915.

[5] *Rouse* v. *Bardin* (1790), 1 H. Bl., 351 ; *Harris* v. *Jenkins ; Spedding* v. *Fitzpatrick.*

When the way is one of necessity, the plaintiff who claims it, or the defendant who pleads it in justification, must allege that there is no way to or from the dominant tenement other than by the particular way claimed or pleaded.[1]

Ways of necessity.

A way of necessity should not be pleaded in general terms without specifying the manner in which the easement has arisen, as that the plaintiff or defendant for necessity has a way over a covenant part of the opposite party's land to his own land, as a necessary incident to the land ; for it is an essential to set forth the title to a way of necessity as it is to a way by grant.[2]

If the origin of a way of necessity has been lost sight of, but the easement has been used without interruption, it can be claimed as a way either by grant or prescription according to the circumstances of the particular case.[3]

If there has at one time been unity of possession, the easement must then be claimed as a way by grant, and it should be stated that the same person was the absolute owner of both tenements, and being such, granted one of them. But where there has been no unity of possession, the easement should be claimed by prescription.[4]

A public way and a private particular way by prescription cannot be claimed or pleaded together as the two are inconsistent.[5]

Public and private way cannot be claimed or pleaded together.

Where a private way becomes public in part of its course, it is not necessary in pleading the private way to state that part of it has become public.[6]

Rule where private way becomes partly public.

In claiming or pleading a public way or highway it is not necessary to set out the *termini* because the public have a right to use the way, for all purposes, and at all times.[7]

Public rights of way.

The mode in which or the title under which the particular way has become a public way must be shown, and if the plain-

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[1] *Bullen* v. *Leake*, Precedents of Pleading, 5th Ed., 998 : Notes to *Pomfret* v. *Ricroft*, 1 Wms. Saund., 570 ; *Proctor* v. *Hodgson* (1855), 10 Exch., 824.

[2] Notes to *Pomfret* v. *Ricroft*, 1 Wms. Saund., pp. 570, *et seq.*

[3] *Ibid*, p. 572.

[4] Notes to *Pomfret* v. *Ricroft*, 1 Wms. Saund., pp. 572, 573.

[5] *Chichester* v. *Lethridge* (1738), Willes, 71.

[6] *Duncan* v. *Louch* (1845), 6 Q. B., 904, 916.

[7] *Rouse* v. *Bardin* (1790), 1 H. Bl., 351.

tiff or defendant, as the case may be, relies on any specific acts of dedication, or specific declarations of intention to dedicate whether alone, or jointly, with evidence of user, he should set forth the nature and dates of such acts or declarations, and the names of the persons by whom the same were done or made.[1]

Easements relating to water.

In the case of easements relating to water as well as in the case of other easements the mode in which the right arises, whether by grant, prescription, or under the Indian Limitation Act or Indian Easements Act, should be stated in the plaint.[2]

Easements of support.

Where a plaintiff's claim relates to an easement of support, and discloses some right on the part of the defendant by virtue of ownership of the adjoining or subjacent land to do the act complained of, it will be a sufficient defence if the defendant denies the plaintiff's allegations of title to the easement, and all allegations of fact supporting such title.[3]

But where the plaint discloses no such right on the part of the defendant, and deals with him *primâ facie* as a trespasser or wrong-doer, there must be not only the denials aforesaid, but also a statement by the defendant showing a *primâ facie* right on his part to do the act complained of.[4]

Suits by reversioners.

If a reversioner sues, he must sue in that capacity, and must either allege something which is necessarily an injury to his reversion, or where the act complained of may or may not be injurious, he must allege that such act is an injury to his reversionary interest.[5]

(4) The Nature of the Remedy.

Influence of English principles.

Before proceeding to consider the present state of the law in India as relating to the different remedies afforded for the disturbance of easements, it is essential to note that its development has in the main been shaped by the guiding influence of English principles.

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[1] *Spedding* v. *Fitzpatrick* (1888), L. R., 38 Ch. D., 410 ; 58 L. J., Ch., 139.

[2] Bullen and Leake, Precedents of Pleading, 5th Ed., 537.

[3] *Ibid*, p. 965.

[4] *Jeffries* v. *Williams* (1850), 5 Exch., 792 ; *Bibby* v. *Carter* (1859), 4 H. & N., 153.

[5] *Jackson* v. *Pesked* (1813), 1 M. & S., 234 ; *Baxter* v. *Taylor* (1832), 4 B. & Ad., 72 ; *Kidgill* v. *Moor* (1850), 9 C. B., 364 ; *Jeffries* v. *William* (1850), 5 Exch., 792 (799-780) ; *Metropolitan Association* v. *Petch* (1858), 5 C. B. N. S., 504.

Courts and Legislature have in turn appealed to English decisions for guidance, and if any difference can be said to exist between the present state of the law in India and in England, it is only to be found where the codification of the law in India has settled a vexed or doubtful question.

It is necessary, therefore, that a proper understanding of this important branch of the law should involve careful examination of, and constant reference to, the English authorities.

Coming to the present state of the law in India, the subject for consideration is the relief that may be afforded by the Court for the disturbance of easements by damages,[1] or by injunction, temporary,[2] perpetual[3] or mandatory,[4] or by damages combined with injunction perpetual or mandatory,[5] or by perpetual injunction combined with mandatory injunction.[6]

(a) *Relief by temporary Injunction.*

Temporary injunction when granted.

Temporary or interlocutory injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.[7]

Such injunctions may be granted to restrain a threatened or continuing injury at any time after the commencement of the suit, and either before or after judgment,[8] and either during term or vacation, and whether the Court is sitting or not.[9] They will not be granted in chambers when the Court is sitting.[10]

Apart from the special circumstances which determine whether the Court should, in its discretion, grant a temporary injunction, the same general principle apply to the granting of temporary and perpetual injunctions.[11]

These general principles will be considered in connection with perpetual injunctions,[12] and it is not proposed to do more

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[1] Spec. Rel. Act (I of 1887), s. 54 ; I. E. Act, s. 33.

[2] Spec. Rel. Act, ss. 52 and 53 ; Civ. Pro. Code, XIV of 1882, ss. 492-497.

[3] Spec. Rel. Act, s. 54 ; I. E. Act, s. 35.

[4] Spec. Rel. Act, s. 55.

[5] See *infra*.

[6] See *infra*.

[7] Spec. Rel. Act, s. 53, first para. *See* ss. 492-7 of the Civ. Pro. Code.

[8] Civ. Pro. Code, s. 493.

[9] Kerr on Injunctions, 3rd Ed., 615.

[10] *Ibid*.

[11] *Nusserwanji* v. *Gordon* (1881), I. L. R., 6 Bom., 266 (279).

[12] See *infra* (b).

at this stage than refer to such rules and principles as apply specially to temporary injunctions.

Function of the Court in relation to temporary injunctions.

The function of the Court is not to ascertain the existence of a legal right, but solely to protect property, and to keep things *in statu quo*, until the right can be determined by the jurisdiction to which it properly belongs.[1]

In order to obtain the interference of the Court by temporary injunction the plaintiff must show a strong *primâ facie* case in support of the title to that which he asserts.[2]

When they will not be granted.

The injunction will not be granted when adequate relief can be obtained in damages, and where the injury is neither a serious nor a material one, and in every case the Court must exercise a judicial discretion and compare the possible injury on the one side and the other, the injury to the plaintiff if the injunction is refused, and that to the defendant if it is granted.[3]

Comparative injury a consideration.

"Adequate relief."

"Adequate relief" has been defined as "such a compensation as will in effect, though not in specie, place the plaintiffs in the same position in which they previously stood."[4]

Before the Court will interfere by temporary injunction there must be an actual or threatened invasion of an easement.[5]

Mere belief that a right will be invaded is not a sufficient ground for the Court to act upon, nor will relief by temporary injunction be granted where the defendant states positively that

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[1] *Saunders* v. *Smith* (1838), 3 M. & C., 711 (728); *Harman* v. *Jones* (1841), 1 Cr. & Ph., 299; *Hilton* v. *Earl of Granville* (1841), 1 Cr. & Ph., 283 (292); *Plimpton* v. *Spiller* (1876), L. R., 4 Ch. D., 286.

[2] *Hilton* v. *Earl of Granville*; *Shrewsbury and Chester Ry. Co.* v. *Shrewsbury and Birmingham Ry. Co.* (1851). 1 Sim. N. S., 410 (426); *Sparrow* v. *Oxford, Worcester and Wolverhampton Ry. Co.* (1851), 9 Hare's Rep., 436.

[3] *Doherty* v. *Allman* (1878), L. R., 3 App. Cas., 709; *Nussarwanji* v. *Gordon* (1881), I. L. R., 6 Bom., 266; *Newson* v. *Pender* (1884), L. R., 27 Ch. D., 43; *Mogul Steamship Co.* v. *McGregor Gow & Co.* (1885), L. R., 15 Q. B. D., 476; *Shamnugger Jute Factory* v. *Ramnarain Chatterjee* (1886), I. L. R., 14 Cal., 189; *Madras Ry. Co.* v. *Rust* (1890), I. L. R., 14 Mad., 18; and *see* Daniell's Chancery Practice, 6th ed., Vol. II, Part I, p. 1607, and Kerr on Injunction, 3rd ed., p. 14.

[4] *Per* Kindersley, V. C., in *Wood* v. *Sutcliffe* (1851), 2 Sim. N. S., 165, and *see* this definition discussed in *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., p. 488, and in *Boyson* v. *Deane* (1898), I. L. R., 22 Mad., p. 254, and *infra* (*b*).

[5] Kerr on Injunctions, 3rd ed., p. 12.

he does not intend to invade the plaintiff's right, and there is no evidence of his intention to do so.[1]

Effect of acquiescence or delay of party claiming injunction.

Failure to come into Court with clean hands, or acquiescence in the injury complained of, will disentitle a man to relief.[2] Though delay may not amount to absolute proof of acquiescence, it is always an element to be considered by the Court in determining the question whether relief, interlocutory or perpetual, should be granted.[3]

Mere abstention from legal proceedings is not of itself sufficient to disentitle the complaining party to relief, provided the other party has not altered his position during the delay.[4]

But a party seeking relief on interlocutory application should come in at the earliest possible moment.[5]

Terms upon which injunction granted in discretion of Court.

It is in the discretion of the Court to grant a temporary injunction on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court may think fit.[6]

Practice in India.

Following the practice in England it is usual in India for the Court to insert in its order granting a temporary injunction, an undertaking on behalf of the plaintiff to abide by any order that may thereafter be made as to damages in the event of its being found that the injunction was wrongly granted.[7]

Injunction may be withheld upon terms.

On the other hand, the Court may withhold the injunction and protect the plaintiff from damage during the interval before the hearing by imposing certain terms upon the defendant with his consent.[8]

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[1] Kerr on Injunctions, 3rd ed., p. 13.

[2] *Ibid*, pp. 15, 16 *et seq.* As to "acquiescence" see *supra*, Chap. IX. Part II, B, and *infra* (*b*) "Relief by injunction or damages at the hearing."

[3] *Att.-Gen.* v. *Sheffield Gas Consumers Co.* (1853), 3 DeG. M. & G., 304 (324); *Ware* v. *Regents Canal Co.* (1858), 3 DeG. & J., 212 (230); *Gaunt* v. *Fynney* (1872), L. R., 8 Ch. App., 8 (1) 4.

[4] *Rochdale Canal Co.* v. *King* (1851), 2 Sim. N. S., 78; *Archibald* v. *Scully* (1861), 9 H. L., 360 (388); *Gale* v. *Abbott* (1862), 8 Jur. N. S., 987. *See* further as to "Delay," Chap. IX, and *infra* (*b*) "Relief by injunction or damages at the hearing."

[5] *Gale* v. *Abbott*.

[6] Civ. Pro. Code, s. 493.

[7] *See* Kerr on Injunctions, 3rd ed., p. 627; Gale on Easements, 7th ed. p. 574.

[8] Belchambers' Practice of the Civil Courts, p. 178; Kerr on Injunctions, 3rd ed., p. 26.

These terms may take the form either of doing some act or work, or removing some work, or doing some other thing in connection with the same as the Court may direct, or of refraining from doing in the interval the act or acts complained of, or of abiding by any order the Court may thereafter make as to damages, provided the legal right be found in the plaintiff.[1]

But the Court has carefully to consider the effect of withholding the injunction and allowing the defendant to continue his building and to give an undertaking that he will pull it down if the Court shall so think fit, for at the hearing the Court may find itself addressed with the argument of comparative injury, and left with no alternative but to give compensation in damages, rather than inflict disproportionate injury on the defendant by compelling him to remove his building.[2] Such a result would practically deprive the Court of its discretionary power to grant a mandatory injunction.[3]

Temporary injunctions usually granted on notice.

The Court must in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting a temporary injunction, direct notice of the application for the same to be given to the opposite party.[4]

Practice.

The practice of the Court is ordinarily to grant a rule *nisi* for an injunction, together with, where the emergency of a case so requires, an *interim* order operating as an injunction until the day mentioned in the rule[5] or until the disposal of the rule.[6]

Injunction directed to Corporation or Public Company on whom binding.

An injunction directed to a Corporation or Public Company is binding not only on the Corporation or Company itself, but also on all members and officers of the Corporation or Company whose personal action it seeks to restrain.[7]

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[1] Kerr, p. 27, and see *Greenwood* v. *Hernsey* (1886), L. R., 33 Ch. D., 471 ; *Smith* v. *Baxter* (1900), 2 Ch. 138.

[2] *Aynsley* v. *Glover* (1874), L. R., 18 Eq., p. 553 ; *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., p. 260.

[3] As to which see *infra* (*b*).

[4] Civ. Pro. Code, s. 494.

[5] Belchambers' Practice of the Civil Courts, p. 177.

[6] *Ibid.* This, according to Mr. Belchambers, is the form ordinarily used in the Calcutta High Court.

[7] Civ. Pro. Code, s. 495.

Discharge, variation, or setting aside of injunction.

Any order for an injunction may be discharged, or varied or set aside by the Court, on application made thereto by any party dissatisfied with such order.[1]

Compensation to defendant for issue of injunction on insufficient grounds.

If it appears to the Court that an injunction which it has granted was applied for on insufficient grounds, or if, after the issue of the injunction, the suit is dismissed or judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit, the Court may, on the application of the defendant, award against the plaintiff in its decree such sum not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the issue of the injunction.

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

An award made as abovementioned shall bar any suit for compensation in respect of the issue of the injunction.[2]

Mandatory injunction when granted on interlocutory application.

As a rule the Court will not grant a mandatory injunction except at the hearing,[3] but in extreme cases this form of relief will be granted on interlocutory application.[4]

Thus in *Daniel* v. *Ferguson*,[5] which was an action to restrain the defendant from so building as to darken the plaintiff's lights, the defendant upon getting notice of motion for injunction set a gang of men to work and ran up his wall to a height of thirty-nine feet before receiving notice that an injunction had been granted. It appeared to be a nice question whether the plaintiff was entitled to an easement of light, but he had made out a case enabling him to have matters kept *in statu quo* by injunction until the trial.

It was held that the building thus run up should be pulled down at once, without regard to what the result of the trial might be, on the ground that the erection of it was an attempt to anticipate the order of the Court.

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[1] *Ibid*, s. 496.

[2] *Ibid*, s, 497.

[3] *Gale* v. *Abbott* (1862), 8 Jur. N. S., p. 988.

[4] *Beadel* v. *Perry* (1866), L. R., 3 Eq., 465 ; *Daniel* v. *Ferguson* (1891), 2 Ch., 27 ; *Von Joel* v. *Hornsey* (1895), 2 Ch., 774.

[5] (1891) 2 Ch., 27.

In the case of *Von Joel* v. *Hornsey*,[1] a mandatory injunction was granted on the same principle.

(*b*) *Relief by injunction or damages at the hearing.*

Forms of relief at the hearing.

At the hearing of a suit for the disturbance of an easement the relief granted may, according to the circumstances of the case and the jurisdiction of the Court, take one or other of the following forms :—

(1) Damages only,
(2) Preventive or perpetual injunction only,
(3) Preventive or perpetual injunction combined with damages,
(4) Mandatory injunction only,
(5) Mandatory injunction combined with preventive or perpetual injunction,
(6) Mandatory injunction combined with damages.

Jurisdiction of Court of Chancery.

Before dealing with the present state of the Indian law in relation to the subject of relief, whether preventive, mandatory or in damages, for the disturbance of easements, it is important to advert to the jurisdiction of the Court of Chancery in the granting of injunctions or the substituting of damages therefor. and to the principles upon which such jurisdiction was exercised, since it is upon this foundation that the Indian Statute Law and Case Law will be found to rest.

Prior to Lord Cairns' Act.

It will be remembered that before Lord Cairns' Act, 21 & 22 Vict., c. 27, the relief granted by the Court of Chancery, for the disturbance of easements, could only be by injunction.

In determining the question whether the plaintiff was entitled to relief by injunction or should be left to seek his remedy in damages at common law, a Court of Chancery had always the following considerations before it : the materiality and permanency of the injury, the diminution of enjoyment of the easement, the invasion of the legal right from which, as has been seen, substantial damage could be presumed, and the adequacy of damages as a means of compensation.[2]

[1] (1895) 2 Ch., 774.

[2] *Att.-Gen.* v. *Nichol* (1809), 16 Veg. Junr. 342 ; *Jackson* v. *Duke of Newcastle* (1864), 3 DeG. J. & S., 275 ; *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238 ; *Goldsmid* v. *Tonbridge Wells Im-*

The foundation of the equitable jurisdiction is stated as follows by Lord Justice Gifford in *Staight* v. *Burn* :[1] "I take the course of this Court to be that when there is a material injury to that which is a clear legal right, and it appears that damages from the nature of the case, would not be a complete compensation, the Court will interfere by injunction."

Staight v *Burn.*

By Lord Cairns' Act, the Courts of Chancery were empowered to award damages in addition to, or in substitution for, an injunction.[2]

After Lord Cairns' Act.

The power was a discretionary one, but the law as to the circumstances under which the Courts could exercise that jurisdiction was not confined to fixed rules owing to the disinclination of the Judges to tie the hands of the Court.[3]

The furthest they would go was to say that the discretion was a reasonable discretion depending for the manner of its exercise on the particular circumstances of each case.[4]

The effect of Lord Cairns' Act on the jurisdiction of the Chancery Courts is discussed by Jessel, M. R., in *Aynsley* v. *Glover*[5] and his observations are instructive. He says :[6]

Aynsley v. *Glover.*

"It will deserve the most serious consideration hereafter as to what class or classes of cases, this enactment is to be held to apply. Although in terms so wide and so long, it never could have been meant, and I do not suppose it will ever be held to mean, that in all cases the Court, of its own will and pleasure or at its own mere caprice, will substitute damages for an injunction.

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provement Commissioners (1866), L. R., 1 Ch. App., 349 ; *Staight* v. *Burn* (1869), L. R., 5 Ch. App., 163 ; *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544, and *see* the history of the law discussed in *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181 ; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 ; *Dhanjibhoy* v. *Lisboa* (1883), I. L. R., 13 Bom., 253 ; *Ghanasham* v. *Moroba* (1894). I. L. R. 18 Bom., 474. And see also as to presumption of substantial damage from invasion of the legal right, *supra*, pp. 212-214, 244.

[1] (1869) L. R., 5 Ch. App., 163.

[2] As to the scope and effect of the Act, see *Cowper* v. *Laidler* (1903), 2 Ch., 337 (339).

[3] *Aynsley* v. *Glover* (1874), L. R., 18 Eq., pp. 554 *et seq* ; *Holland* v. *Worley*, (1884), L. R., 26 Ch. D., 578; *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., p. 487.

[4] *Aynsley* v. *Glover* ; *Greenwood* v. *Hornsey* (1886), L. R., 33 Ch. D., p. 476 ; *Dicker* v. *Popham Radford & Co.* (1890), 63 L. T. R., p. 381 ; *Martin* v. *Price* (1894), 1 Ch., p. 280.

[5] (1874), L. R., 18 Eq., pp. 554 *et seq.*

[6] *Ibid* at p. 555.

"I am not now going, and I do not suppose that any Judge will ever do so, to lay down a rule which, so to say, will tie the hands of the Court. The discretion being a reasonable discretion, should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a plaintiff who is enabled—I do not like to use the word "extort"—to obtain a very large sum of money from a defendant merely because the plaintiff has a legal right to an injunction. I think the enactment was meant in some sense or another to prevent that course being successfully adopted. But there may be some other special cases to which the Act may be safely applied, and I do not intend to lay down any rule upon the subject."

Where considerable damage at law, there injunction in equity.

In the same case the Master of the Rolls considered it as a rule to be generally followed that wherever an action could be maintained at law and really considerable damages could be recovered, there the injunction ought to follow in equity.[1]

Indian Legislation.

This being the state of the English law at the time of the passing, in India, of the Specific Relief Act, I of 1877, it becomes necessary to consider the provisions of this enactment relating to relief, by injunctions or damages, for the disturbance of easements.

Specific Relief Act I of 1877.

Section 53.—Section 53 (second paragraph) enacts that a perpetual injunction can only be granted by the decree made at the hearing, and upon the merits of the suit, and the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the right of the plaintiff.

Section 54.—Section 54 provides that when the defendant invades or threatens to invade the plaintiff's right to, or enjoy-

[1] (1874), L. R., 18 Eq., p. 552. The Master of the Rolls states the rule as general, not universal, having regard to his subsequent observations on the subject of comparative injury in connection with mandatory as to which see *infra*. As to the general rule *see* also *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238 (246).

ment of, property, the Court may grant an injunction, " where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion,"[1] and also " where the invasion is such that pecuniary compensation would not afford adequate relief.[2]"

Section 55.—Section 55 provides for relief by mandatory injunction by enacting that when, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Nature, origin and effect of provisions of Specific Relief Act, and general principles upon which relief granted in India for the disturbance of easements.

It may be useful, for the sake of greater clearness, to formulate, in a series of propositions, the nature, origin, and effect of these provisions and the principles which should guide Courts in India at the present day in granting relief for the disturbance of easements.

(*a*) In applying the foregoing provisions Courts in India should be guided by the decisions of the Courts of Chancery in England which are the source from which they have been drawn.[3]

(*b*) The limitation contained in clause (*c*) of section 54 of the Specific Relief Act is identical with the principles upon which Courts of Chancery have proceeded in England.[4]

(*c*) The Specific Relief Act whilst laying down general principles leaves it entirely to the discretion of the Court whether relief is to be granted by injunction or damages, and this places the Court in much the same position as the Chancery Court found itself in England after Lord Cairns' Act.[5]

(*d*) The last proposition must be taken subject to the reservation that the question whether damages are

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[1] Cl. (*b*).

[2] Cl. (*c*).

[3] *The Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., p. 67.

[4] *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., p. 259.

[5] *The Land Mortgage Bank of India* v. *Ahmedbhoy*, ibid, p. 70.

a sufficient compensation does not present itself to the Courts of this country in precisely the same manner and form as it does to a Court of Equity in England, inasmuch as the latter Court in awarding damages under Lord Cairns' Act exercises a discretionary power in departing from the injunctive relief it had hitherto exclusively afforded, whilst in India the Court has to take a broader view of the subject, it being its "duty" not to grant an injunction where damages afford sufficient compensation.[1]

The respective positions therefore amount to this, that in the one case the statutory discretion is as to the damages, and in the other, as to the injunction.[2]

Wood v. *Sutcliffe.*

(*e*) The expression "adequate relief" is not defined in the Specific Relief Act, but it is probably used in the same sense as by Kindersley, V.C., in *Wood* v. *Sutcliffe*,[3] as meaning such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before.[4]

(*f*) Though the foregoing definition may in some cases prevent the possibility of awarding damages, the plaintiff is not in such cases necessarily entitled to an injunction inasmuch as the discretion created by the Act has still to be exercised, and in exercising such discretion the Court must consider not only the nature of the disturbance, but whether an injunction would be a proper and appropriate remedy for such disturbance.[5]

(*g*) In considering whether the remedy for the disturbance of an easement should be by injunction

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[1] *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., p. 261; *Ghanasham* v. *Maroba* (1894), I. L. R., 18 Bom., p. 488; *Bhoysen* v. *Deane* (1898), I. L. R., 22 Mad., 251.

[2] *Ibid.*

[3] (1852), 21 L. J. Ch., p. 235. And *see* this subject further discussed *infra* with reference to easements of light and air.

[4] *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., p. 488. *See* this matter discussed *infra* in relation to easements of light.

[5] *Ghanasham* v. *Moroba.*

or damages, Courts in India should be guided by the following principles, *viz.* :—

(1) Where the obstruction is slight and the injury sustained is trifling, the Court will not interfere by injunction except in rare and exceptional cases.[1]

(2) When the obstruction, if persisted in, would render the dominant tenement absolutely useless or substantially less useful than before, the remedy should be by injunction and not by damages.[2]

The reason of this rule is that the effect of the injunction is to save the dominant tenement by stopping the obstruction, whereas the effect of an award of damages would be to impose on the plaintiff an enforced sale of the dominant tenement to the defendant.[3]

(*h*) Between the two extremes stated in the foregoing principles where the Court considers the obstruction is not so serious as to destroy the substantial utility of the dominant tenement, the Court is vested with a discretion to withhold or grant an injunction according to the circumstances of the particular case before it.[4]

(*i*) To warrant relief by way of injunction there must be serious and permanent injury.[5]

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[1] *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., p. 488. For the English cases from which this principle is deduced see *Herz* v. *Union Bank of London* (1859), 2 Giff., 686; *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 249; *Shelfer* v. *City of London Electric Co.* (1895), 1 Ch., 287; and see *Cowper* v. *Laidler* (1903), 2 Ch., 337 (342).

[2] *Nandkishore* v. *Bhagubhai* (1883), I. L. R., 8 Bom., p. 97; *Kadarbhai* v. *Rahimbhai* (1889), I. L. R., 13 Bom., 674; *Ghanasham* v. *Moroba*; *Boyson* v. *Deane* (1898), I. L. R., 22 Mad., p. 254. For the English cases see *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., p. 246; *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544, 552; *Smith* v. *Smith* (1875), L. R., 20 Eq., 500; *Krehl* v. *Burrell* (1878), L. R., 7 Ch. D., 551; *Holland* v. *Worley* (1884), L. R., 26 Ch. D., 587; *Greenwood* v. *Hornsey* (1886), 33 Ch. D., 471, 477. And see *Home and Colonial Stores, Ld.* v. *Colls* (1902); 1 Ch., 302; *Cowper* v. *Laidler* (1903), 2 Ch. 337.

[3] *See* the cases in last footnote except *Home and Colonial Stores, Ltd.* v. *Colls.*

[4] *Gharasham* v. *Moroba.* This is a matter of discretion, for it was never intended by the Legislature to lay down the fixed rule that a man should not get an injunction unless his property would be practically destroyed if the injunction were not granted. *Yaro* v. *Sanaullah* (1897), I. L. R., 19 All., 259.

[5] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238; *Goldsmid* v. *Tonbridge Wells Improvement Commissioners*

(*j*) Where the disturbance is of a temporary nature only, either from the nature of the disturbance itself,[1] or from conditions affecting the dominant tenement,[2] no injunction will be awarded, and the plaintiff will be left to his remedy in damages.

Thus in the case of pollution of air where the nuisance complained of is merely occasional and accidental such as a truck of manure temporarily left in a siding, or an accidental and infrequent escape of chemical gas, the Court will not interfere by injunction.[3]

Nor is the Court disposed to grant relief by injunction where the whole of the dominant tenement is about to cease immediately, as where a house has been acquired under legistive enactment, and is to be destroyed and razed to the ground in a few days' time.[4]

(*k*) An injunction may be awarded to restrain an injury not yet committed, but only threatened or intended.[5]

In such a case the interference of the Court must depend very much upon the nature and extent of the apprehended mischief and upon the certainty and uncertainty of its arising or continuing.[6]

There must in each case be a reasonable probability of damage[7] and to call for the interference of the Court a much

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(1866), L. R., 1 Ch. App., 349; *Staight*, v. *Burn* (1869), L. R., 5 Ch. App., 163; *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544; *Ponuswami Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6; *Nandkishore* v. *Bhagabhai Ghanasham* v. *Moroba*. And see *Home and Colonial Stores Ld.* v. *Colls* (1902), 1 Ch., 392.

[1] *Swaine* v. *Great Northern Ry. Co.* (1864), 10 Jur. N. S., 191; *Cooke* v. *Forbes* (1867), L. R., 5 Eq., 166.

[2] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238 (247).

[3] *Swaine* v. *Great Northern Ry. Co.*; *Cooke* v. *Forbes*.

[4] *Dent* v. *Auction Mart Co.*

[5] *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (1866), L. R., 1 Ch. App., 349; *Corporation of Birmingham* v. *Allen* (1877), L. R., 6 Ch. D., 284 (287); *Siddons* v. *Short* (1877), L. R., 2 C. P. D., 572; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; and see I. E. Act, s. 35. And see *Home and Colonial Stores, Ld.* v. *Colls* (1902), 1 Ch. 302. Though in such a case an *injunction* may be granted, it would seem that there is no discretion under Lord Cairns' Act to give *damages* in lieu of an injunction. *Cowper* v. *Laidler* (1903), 2 Ch., 337.

[6] *Goldsmid* v. *Tonbridge Wells Commissioners*, p. 354; and see *Land Mortgage Bank of India* v. *Ahmedbhoy*, pp. 66, 69.

[7] *Siddons* v. *Short*, p. 577.

stronger and clearer case must be made out than where damage has actually occurred,[1] because, as says Jessel, M. R., in *Corporation of Birmingham* v. *Allen*,[2] "in the one case you have no facts to go by, but only opinion, and in the other case you have actual facts to go by."

Corporation of Birmingham v. *Allen*.

(*l*) In England it appears to be still an open question whether damages can be awarded for a threatened or intended disturbance merely.[3]

In India, under the Specific Relief Act, damages can apparently be awarded for the threatened invasion of an easement,[4] though section 33 of the Indian Easements Act seemingly contemplates the case of *actual* disturbance only.[5]

(*m*) In India both before and after the passing of the Specific Relief Act there has been nothing to prevent the Court from granting mixed relief by injunction, preventive or mandatory, and damages where the circumstances of the particular case so required.[6]

(*n*) Where a plaintiff sues for an injunction or for such other relief as the Court may think fit to grant and his remedy is found to be by damages, the Court should not dismiss the suit and refer the plaintiff to another suit for damages, but should itself take evidence and find what pecuniary compensation the plaintiff is entitled to recover from the defendant for the injury complained of and proved.[7]

Special principles applying to mandatory injunctions.

(*o*) It is in the discretion of the Court to grant or withhold a mandatory injunction according to the particular circumstances of each case.

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[1] *Corporation of Birmingham* v. *Allen*, p. 2-7.

[2] At p. 288.

[3] *Martin* v. *Price* (1894), 1 Ch., p. 284.

[4] Specific Relief Act, s. 54, cl. (*c*).

[5] See *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., p. 487.

[6] *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., 133; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35; *Abdul Hakim* v. *Gonesh Dut* (1885), I. L. R., 12 Cal., 323.

[7] *Kalliandas* v. *Tulsidas* (1899), I. L. R., 23 Bom., 786.

As to how such discretion should be exercised the authorities appear to establish the following propositions :—

(1) As a general rule where damages are an adequate compensation, a mandatory injunction will not be granted.[1]

(2) In deciding whether to grant or withhold a mandatory injunction, High Courts in India being Courts both of law and equity must, according to all the circumstances of each case, consider not only the materiality of the injury to the plaintiff, but the amount which has been laid out by the defendant.[2]

(3) If the plaintiff comes to the Court as soon as possible after the commencement of the obstruction or as soon as it is apparent to him that the obstruction will interfere with his easement, and a mandatory injunction is found to be necessary, such injunction will be granted.[3]

(4) If the plaintiff neglects to seek the assistance of the Court until after the obstruction complained of has been completed, as in the case of a building obstructing ancient lights, the Court will, as a general rule, withhold the mandatory injunction and grant compensation in damages, except in cases where extreme or very serious injury would

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[1] *Isenberg* v. *East Indian House Estate Co.* (1864), 10 Jur. N. S., 221 ; *Bagram* v. *Khettra Nath Karfurmah* (1869), 3 B. L. R. (O. C. J.), p. 45 ; *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181 ; *Ranchhod Jamnadas* v. *Lallu Haridas* (1873), 10 Bom. H. C., 95 ; *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287 (322).

[2] *Curriers Co.* v. *Corbett* (1865), 2 Dr. & Sm., 355 (360) ; *Smith* v. *Smith* (1875), L. R., 20 Eq., 500 (505) ; *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.* (1876), L. R., 6 Ch. D., 757 (768) ; *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., 252 (261) ; *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474 (484), and see *Shelfer* v. *City of London Electric Lighting Co.*, *ubi sup.* at p. 323.

[3] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238 ; *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544 ; *Smith* v. *Smith* (1875), L. R., 20 Eq., 500 ; *Krehl* v. *Burrell* (1877), L. R., 7 Ch. D., 551 ; *Greenwood* v. *Hornsey* (1886), L. R., 33 Ch. D. 471 ; *Benode Coomaree Dassee* v. *Soudaminey Dassee* (1889), L. R., 16 Cal., 252 (264).

be caused to the plaintiff by the refusal of the injunction, or where other special circumstances call for mandatory relief.[1]

(5) Where there has been no laches on the part of the plaintiff in coming to the Court, and where the defendant has had notice of the plaintiff's right, and with the knowledge that he is injuring the plaintiff and without any reasonable ground, has continued to build, a mandatory injunction will be granted.[2]

To withhold it would be to compel the plaintiff to sell his property at a valuation.[3]

(6) Where the circumstances of a case so require, a mandatory injunction as well as a preventive or perpetual injunction can be granted.[4]

(7) A mandatory injunction, if granted, will be limited to removing so much only of the obstruction as interferes with the easement.[5]

Delay and laches.

It is obvious that the question whether there has been delay or laches on the part of a plaintiff in coming into Court is one of fact, and must depend on the particular circumstances of each case. The effect of such delay or laches on the plaintiff's right to relief is a question of law and appears to resolve itself into the following propositions.

Effect thereof on the right to relief.

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[1] *Isenberg* v. *East Indian House Estate Co.* (1864). 10 Jur. N. S., 221 ; *Durell* v. *Pritchard* (1865), L. R., 1 Ch.App., 244 ; *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App., 212 ; *Stanley of Alderly* v. *Shrewsbury* (1875), L. R., 19 Eq., 616 ; *Benode Comaree Dassee* v. *Soudaminey Dassee* (1889), I. L. R., 16 Cal., 252 (265) ; *Abdul Rahman* v. *Emile* (1893), I. L. R. 16 All., 69 (72).

[2] *Bhuban Mohun Banerjee* v. *Elliott* (1870), 6 B. L. R., 85 ; *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181 (195, 196) ; *Smith* v. *Smith* 1875), L. R., 20 Eq., 500 ; *Krehl* v. *Burrell* (1877), L. R., 7 Ch. D., 551 ; *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., 133 (139) ; *Nandkishor* v. *Bhagubai* (1883), I. L. R., 8 Bom., 95 (97) ; *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287 (323).

[3] *Smith* v. *Smith ; Krehl* v. *Burrell*, *supra*.

[4] *Dent* v. *Auction Mart Co.* (1866), L. R., 2 Eq., 238 ; *Bottlewalla* v. *Bottlewalla* (1871), 8 Bom. H. C. (O. C. J.), 181.

[5] Specific Relief Act, s. 55, ills. (*a*) and (*b*) ; *Procabutty Dabee* v. *Mohendro Lall Bose* (1881), I. L. R., 7 Cal., 453 (460) ; *Abdul Hakim* v. *Gonesh Dutt* (1885), I. L. R., 12 Cal., 323 ; *Bala* v. *Maharv* (1896), I. L. R., 20 Bom., 788.

Mere delay in taking proceedings is not of itself a bar to equitable relief,[1] but where the delay amounts to laches and the defendant has changed his position, acquiescence will be presumed and an injunction, whether preventive or mandatory, will be refused.[2]

Lindsay Petroleum Co. v. *Hurd.*

On this subject the observations of the Privy Council in *Lindsay Petroleum Company* v. *Hurd*,[3] are instructive. They say : "Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted ; in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

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[1] *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R., 5 P. C., 221 ; *Hogg* v. *Scott* (1874), L. R., 18 Eq., 444 ; *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., 133 (138) ; *De Bussche* v. *Alt* (1878), L. R., 8 Ch. D., 286 (314) ; *Land Mortgage Bank of India* v. *Ahmedbhoy* (1883), I. L. R., 8 Bom., 35 (85). *See* this subject also considered in Chap. IX, Part II B.

[2] *Cooper* v. *Hubbuck* (1860), 30 Beav., 160 (166) ; *Heera Lall Koer* v. *Purmessur Koer* (1871), 15 W. R., 401 ; *Jamnadas* v. *Atmaram*, *supra* ; *De Bussche* v. *Alt*, *supra* ; *Gaskin* v. *Balls* (1879), L. R., 13 Ch. D., 324 (328) ; *Chunder Coomar Mukerji* v. *Koylash Chunder Sett* (1881), I. L. R., 7 Cal., 665 (673); *Land Mortgage Bank of India* v. *Ahmedbhoy*, *supra* ; *Benode Coomaree Dassee* v *Soudaminey Dassee* (1889), I. L. R., 16 Cal., 252. *See* this subject also considered in Chap. IV, Part I A, and in Chap. IX, Part II B.

[3] (1874), L. R., 5 P. C., p. 239, cited in *Jamnadas* v. *Atmaram* (1877), I. L. R., 2 Bom., p. 138.

And in *De Bussche* v. *Alt*[1] it was pointed out by Thesiger, L. J., that mere submission to an injury for any time short of the period limited by statute for the enforcement of the right of action for such injury cannot take away such right, although under particular circumstances, it may amount to laches and afford a ground for refusing relief.

And as already seen, neglect to come to the Court until after the particular building complained of has been completed will in general afford good ground for withholding a mandatory injunction.[2]

Mere notice to the party obstructing not followed by legal proceedings will not obviate the above-mentioned consequences of delay.[3]

It does not necessarily follow that such delay will disentitle a plaintiff to recover damages.[4]

But such damages, if awarded, are a final remedy, and will prevent any recurring right of action.[5]

The Specific Relief Act appears to deal with the questions of delay and acquiescence as affecting the discretion of the Court in the granting of injunctive relief by providing that when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court, an injunction cannot be granted.[6]

Penalty for breach of injunction.

When once an injunction has been granted, the person committing a breach thereof renders himself liable to committal.[7]

Relief for breach of covenant creating easement.

Where a right does not arise as an ordinary easement but as a special right created by covenant, a Court of Equity

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[1] (1878), L. R., 8 Ch. D., p. 314.

[2] See *supra*, proposition (4).

[3] *Benode Coomaree Dassee* v. *Soudaminey Dassee* (1889), I. L. R., 16 Cal., 252.

[4] *Ranchhod Jamnadas* v. *Lalla Haridas* (1873), 10 Bom. H. C., 95; *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App., 49; *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287 (322).

[5] *City of London Brewery Co.* v. *Tennant*, *supra*.

[6] S. 55, cl. (*j*).

[7] *Pranjivandas* v. *Meyaram* (1864), 1 Bom. H. C., 148.

will grant an injunction for its actual or intended disturbance without regard to the amount of damage sustained.[1]

Leech v. *Schweder.*

In *Leech* v. *Schweder*, Mellish, L. J., said :[2]—" Of course it would be possible to insert in any covenant words which would increase the right of the covenantee to damages at law if his rights were violated, and would entitle him to an injunction in equity to enforce that right. For instance, it might be said in a covenant that the lessee should freely enjoy the house, with an uninterrupted view from the drawing-room windows over all the existing land of the lessor. If that were inserted, no doubt it would give a larger right than had previously been granted, and damages might be recovered at law if the lessor broke that covenant, and a Court of Equity would grant an injunction against the lessor if he were intending to break it, and no doubt would also grant an injunction against the person claiming under the lessor if he took with notice of the covenant."[3]

Effect of agreement preventing acquisition of easement.

Conversely if there is an agreement preventing the acquisition of an easement the Court will not grant relief for an obstruction created in pursuance of such agreement.[4]

Provisions of I. E. Act relating to relief for disturbance of easements. S. 33.

Under section 33 of the Indian Easements Act, damages may be claimed for the disturbance of an easement or any right accessory thereto, provided the disturbance has actually caused substantial damages to the plaintiff.[5]

Explanations I, II and III define " substantial damage."[6]

The section does not appear to contemplate the case of threatened or intended damage.[7]

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[1] *Leech* v. *Schweder* (1874), L. R., 9 Ch. App., 463 ; and see *Rolason* v. *Levy* (1868), 17 L. T. Rep., 641 ; *Allen* v. *Seckham* (1878), 47 L. J. Ch., 742.

[2] At p. 474.

[3] The instance given here is of a right not amounting to a covenant, but the same principle would apply to the case of an easement.

[4] *See* I. E. Act, s. 15, expl. I, and *Sultan Nawaz Jung* v. *Rustomji* (1899), I. L. R., 24 Bom. (P. C.), 156. The agreement in this case was between two adjoining land owners, and was to the effect that an obstruction by one of them of the access of light and air to the windows of the other's house would not be objected to.

[5] *See* App. VII.

[6] *Ibid.*

[7] See *supra*, proposition (*l*), and *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474 (487).

Subject to sections 52 to 57 of the Specific Relief Act, an injunction may be granted under section 35 of the Indian Easements Act.[1]

S. 35.

(*a*) On actual disturbance of an easement if the disturbance is such as to justify an award of damages under Chapter IV of the Act;[2]

(*b*) On a threatened or intended disturbance of an easement.

Discretionary power of Courts relating to relief for disturbance of easements of light and air.

The discretionary power vested in the Indian Courts by section 54 of the Specific Relief Act has been the subject of frequent discussion within recent years in relation to the question of relief for the disturbance of easements of light and air.[3]

How exercised.

The view taken by Pearson, J., in *Holland* v. *Worley*[4] as to the circumstances under which the discretion of the Court might be appropriately exercised in favour of relief by damages rather than by injunction has been followed by High Courts in India,[5] and the tendency has been to grant relief in damages for the disturbance of easements of light and air in all cases which do not fall within the scope of proposition (*g*), cl. (2) above stated.[6]

Holland v. *Worley.*

In *Holland* v. *Worley*[7] Pearson, J., interpreted the opinions expressed by Jessel, M. R., in *Aynsley* v. *Glover*,[8] *Smith* v. *Smith*,[9] and *Krehl* v. *Burrell*,[10] as indicating the grounds upon which the Court would grant an injunction or award damages, and though the classification adopted by Pearson, J., and based on those grounds has, as regards the question of injunction, been criticised in later English cases as too narrow,[11] it has, as regards the question of damages, been accepted as a useful guide, under similar circumstances, by the Courts of this country.

In *Holland* v. *Worley*, the circumstances of the case brought it within the scope of the rule stated in proposition (*h*),

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[1] *See* App. VII.

[2] This provision appears to be founded on the judgment of Jessel, M. R., in *Aynsley* v. *Glover* (1874), L. R., 18 Eq., 544.

[3] *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., 252; *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474; *Boyson* v. *Deane* (1899), I. L. R., 22 Mad., 251.

[4] (1884), L. R., 26 Ch. D., 578.

[5] *See* the cases cited in footnote 10.

[6] *Ibid.*

[7] *See* pp. 586, 587.

[8] (1874), L. R., 18 Eq., 544.

[9] (1875), L. R., 20 Eq., 500.

[10] (1878), L. R., 7 Ch. D., 551.

[11] *Martin* v. *Price* (1894), 1 Ch., 276 (280).

and Pearson, J., thought that, looking at the nature of the property, and considering its situation in the heart of a great city like *London*, he would not be doing wrong if, instead of granting an injunction, he exercised his discretion in giving the plaintiff damages.[1]

This view has been more than once adopted under similar circumstances by High Courts in India when the servient tenement has been situated in a large and crowded city incapable of extension except in a vertical direction, and where land suitable for building has been limited and very valuable, and where it was expedient that owners of property should, as far as possible, consistently with the existing rights of their neighbours, be allowed to utilise it to the utmost extent.[2]

Dhunjibhoy Cowasji Umrigar v. Lisboa.

In the Bombay High Court in *Dhunjibhoy Cowasji Umrigar* v. *Lisboa*[3] Sargent, C. J., said :—"The question, however, whether damages are a sufficient compensation does not, we think, present itself to the Courts of this country, in precisely the same manner and form as it does to a Court of Equity in England. This latter Court in awarding damages under Lord Cairns' Act exercises a discretionary power in departing from the specific relief which it had hitherto exclusively afforded ; and could scarcely be expected to take so broad a view of the subject as the Courts of this country whose 'duty' it is, under the Specific Relief Act, not to grant an injunction where damages afford adequate compensation. The result has been that this Court has in several cases adopted the view taken by Pearson, J., as being one which, if applied with caution, is suited to the circumstances of this city, which from its nature can in most parts of it only extend itself vertically upwards ; and we think, therefore, that it ought to be considered as the general practice of this Court, although doubtless one to be administered with much care and with due regard to the special circumstances of each case."

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[1] *See* L. R., 26 Ch. D., p. 587. *And see Vaughan Williams, L. J.'s approval of Lord Cranworth's observations as to a different rule being applied in towns from that in the country, in Home and Colonial Stores, Ld.* v. *Colls* (1901) 1 *Ch., p.* 307.

[2] *Dhunjibhoy* v. *Lisboa* (1888), I. L. R., 13 Bom., 252 ; *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., 474 ; *Boyson* v. *Deane* (1899), I. L. R., 22 Mad., 251.

[3] (1888), I. L. R., 13 Bom., p. 261.

And in the same Court in *Ghanasham Nilkanti Nadkarni* v. *Moroba Ramchandra Pai*,[1] Farran, J., in dealing with the provisions of the Specific Relief Act and the principles stated in propositions (*g*) and (*h*), said :—" Between these two extremes, where the injury to the plaintiff would be less serious, where the Court considers the property may still remain with the plaintiff and be substantially useful to him as it was before, and where the injury is one of a nature that can be compensated by money, the Courts are vested with a discretion to withhold or grant an injunction, having regard to all the circumstances of the particular case before them, including the fact that the premises are situated in a city, like this, where land suitable for building is limited and very valuable, and where property owners should, so far as is possible, consistently with the existing rights of their neighbours be allowed to utilize it to the utmost extent."

Ghanasham Nilkanti Nadkarni v. Moroba Ramchandra Pai.

The expression "adequate relief" to be found in section 54, cl. (*c*) of the Specific Relief Act, is not defined, but it is probably used in the sense in which it is used by Kindersley, V. C., in *Wood* v. *Sutcliffe*[2] as meaning "such a compensation as would, though not in specie, in effect place the plaintiffs in the same position in which they stood before."[3]

"Adequate relief." Wood v Sutcliffe.

If that be the correct meaning of the phrase, it would be difficult to predicate of any material obstruction to ancient lights that pecuniary compensation for it would bring about that result except in the case in which money might be spent in the structural alteration or rearrangement of the premises.[4]

But however that may be, there does not appear to be any insuperable difficulty in assessing the pecuniary compensation for disturbance of ancient lights in cases falling within the scope of proposition (*h*), and it has been considered that clause (*b*) of section 54 of the Specific Relief Act applies rather to illustrations (*b*) and (*c*) to that section than to a case of disturbance of ancient lights.[5]

Specific Relief Act, s. 54, cl. (*b*).

[1] (1894), I. L. R., 18 Bom., p. 489.

[2] (1852). 21 L. J. Ch., p. 255.

[3] See *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., p. 488.

[4] *Ghanasham* v. *Moroba, supra* ; *Boyson* v. *Deane* (1899), I. L. R., 22 Mad., p. 254.

[5] *Ghanasham* v. *Moroba* (1894), I. L. R., 18 Bom., p. 489.

Rule as to angle of 45 degrees.

In some cases the circumstance that 45 degrees of sky have been left unobstructed has been accepted as an element in the question of fact whether the access of light has been unduly interfered with.[1]

In one case the Court granted a mandatory injunction reducing the defendant's wall to such extent as to bring the angular height of the obstruction down to 45 degrees.[2]

The test of 45 degrees is neither a rule of law nor a rule of evidence,[3] but may be adopted as a valuable guide in cases where the proof of obscuration is not definite or satisfactory.[4]

City of London Brewery Co. v. *Tennant.*

In *City of London Brewery Co.* v. *Tennant*[5] Lord Selborne said :—" Further, with regard to the forty-five degrees, there is no positive rule of law upon that subject ; the circumstance that forty-five degrees are left unobstructed being merely an element in the question of fact, whether the access of light is unduly interfered with ; but undoubtedly there is ground for saying that if the Legislature, when making general regulations as to buildings, considered that when new buildings are erected, the light sufficient for the comfortable occupation of them will, as a general rule, be obtained if the buildings to be erected opposite to them have not a greater angular elevation than forty-five degrees, the fact that forty-five degrees of sky are left unobstructed may, under ordinary circumstances, be considered *primâ facie* evidence that there is not likely to be material injury ; and of course that evidence applies more strongly where only a lateral light is partially affected and all the lights are not obstructed. I make that observation, not imagining that either at law or in this Court any judge has ever meant to lay down as a general proposition that there can be no material injury to light if forty-five degrees of sky

[1] *Beadel* v. *Perry* (1866), L. R., 3 Eq., 465; *City of London Brewery Co.* v. *Tennant* (1873), L. R., 9 Ch. App., 212; *Ecclesiastical Commissioners* v. *Kino* (1880), L. R., 14 Ch. D., 213; *Delhi and London Bank* v. *Hem Lall Dutt* (1887), I. L. R., 14 Cal., 839; *Bala* v. *Maharu* (1895), I. L. R., 20 Bom., 788 (790).

[2] *Beadel* v. *Perry*, *supra*.

[3] *City of London Brewery Co.* v. *Tennant*, *ubi sup.*, p. 220; *Ecclesiastical Commissioners* v. *Kino*, *ubi sup.*, p. 220. And see *Home and Colonial Stores, Ld.* v. *Colls* (1902), 1 Ch., 302.

[4] *Delhi and London Bank* v. *Hem Lall Dutt*, *ubi sup.*, p. 858.

[5] At p. 220.

are left open ; but I am of opinion that if forty-five degrees are left, this is some *primâ facie* evidence of the light not being obstructed to such an extent as to call for the interference of the Court—evidence which requires to be rebutted by direct evidence of injury."

Contribution to diminution of light by dominant owner will not prevent injunction.

Where there has been an obstruction of ancient lights, the fact that the dominant owner has himself contributed to the diminution of light will not preclude him from getting an injunction against the person causing the obstruction.[1]

Circumstances under which the injunction postponed on undertaking by defendant.

In conclusion, it should be observed that where the act of the defendant is to be ascribed to a desire to ascertain the plaintiff's rights rather than to infringe them, and no intention is shown on the former's part at the time the action was brought to cause the anticipated disturbance, the Court, instead of granting an injunction, may consider the rights of the plaintiff sufficiently protected by reserving him liberty to apply thereafter for an injunction, provided the defendant undertakes to give the plaintiff reasonable notice of his intention to rebuild, and at the same time to produce to the plaintiff upon request his building plans.[2]

(5) *Limitation.*

The sections and articles (Sched. II) of the Indian Limitation Act, XV of 1877, applying to easements, have already been referred to and discussed[3], and attention has been drawn to the effect of the provision contained in the fourth paragraph of section 26 upon the limitation of suits brought for the disturbance of prescriptive easements.[4]

Limitation Act XV of 1877, Sched. II, Art. 120. Its application to easements.

In order to complete the subject, it becomes necessary to consider the application of Article 120 to suits for injunction under the Specific Relief Act, and the question of recurring causes of action.

Although the limitation of suits for the disturbance of prescriptive easements appears to be controlled by section 26 of the Indian Limitation Act in the manner already noticed, there

[1] *Staight* v. *Burn* (1869), L. R., 5 Ch. App. 163.

[2] *Smith* v. *Baxter* (1900), 2 Ch., 138.

[3] See Chap. I, Part II, E.

[4] See Chap. VII, Part II.

is no express provision in the Act meeting the case of suits for injunction brought for the disturbance of easements other than those arising by long enjoyment.

This being the case, the Courts have apparently had no alternative but to hold that there being no express provision in the Act relating to suits for injunction under the Specific Relief Act, the article in Sched. II of the Indian Limitation Act, which applies to such suits, is Article 120, which provides a six years' limitation.[1]

So far as easements are concerned, this must be taken as subject to the effect of the provision in section 26 of the Indian Limitation Act applying to prescriptive easements.

Limitation in case of easements of support.

With reference to easements of support, it has been seen that it is not the subsidence of the adjacent or subjacent soil which gives the cause of action, but the damage caused by such subsidence.[2]

And it is now settled that each recurrence of damage constitutes a fresh cause of action.[3]

Continuing cause of action.

In respect of obstructions or disturbances which are continuing acts, the cause of action accrues *de die in diem*.[4]

Within this category fall obstructions to rights in water,[5] and obstructions to ancient lights.[6]

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[1] *Kanakasami* v. *Muttu* (1890), I. L. R., 13 Mad., 445.

[2] See Chap. III, Part IV, and Chap. V, Part IV.

[3] *Mitchell* v. *Darley Main Colliery Co.* (1884), L. R., 14 Q. B. D., 125; affirmed in L. R., 11 App. Cas., 127; *Crumbie* v. *Wallsend Local Board* (1891), 1 Q. B., 503.

[4] *See* Indian Limitation Act, s. 23, and *infra* the cases there cited.

[5] *Ponnasawmy Tevar* v. *Collector of Madura* (1869), 5 Mad. H. C., 6 (24); *Rajroop Koer* v. *Syed Abdul Hossein* (1880), I. L. R., 6 Cal., 394, S. C.; L.R., 7 I.A., 240; 7 C. L. R., 529; *Punja Kuvarji* v. *Bai Kuvar* (1881), I. L. R., 6 Bom., 20.

[6] *Thompson* v. *Gibson* (1841), 7 M. & W., p. 460; *Jenks* v. *Viscount Clifden* (1897), 1 Ch., 694.

CHAPTER XII.

Licenses.

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Mere license.

In the reference already made to the subject of licenses it has been seen that a mere license is a purely personal privilege or right enabling the licensee to do something on the land of the licensor which would otherwise be unlawful.[1]

[1] *See* Chapter I, Part I. Another example of a license is to be found in cases where the licensor permits the licensee to do something on the latter's land

Nature and legal incidents. *Wood* v. *Leadbitter.*

The nature and legal incidents of a license were considered in the cases of *Muskett* v. *Hill*[1] and *Wood* v. *Leadbitter*,[2] and the elaborate judgment of Chief Justice Vaughan in the old case of *Thomas* v. *Sorrell*[3] was quoted with approval. In *Wood* v. *Leadbitter*, Baron Alderson in delivering the judgment of the Court, said[4] :—

In the course of the judgment the Chief Justice says, "a dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use ; to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to license a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of *eating*, firing by wood, and warming him, they are licenses ; but it is consequent necessarily to those actions that my property may be destroyed in the meat eaten, and the wood burnt. So as in some cases, by consequent and not directly, and as its effect, a dispensation or license may destroy and alter property."

Newby v. *Harrison.* *Heap* v. *Hartley.*

This definition of license has also been quoted with approval in later cases, such as *Newby* v. *Harrison*[5] and *Heap* v. *Hartley*,[6] and in the last mentioned case stress was laid on the point that a license pure and simple is merely leave to do a thing enabling the licensee to do lawfully, what he could not otherwise do except unlawfully, that it confers no interest or property in the thing and that, though it may be coupled with

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whereby the former's right of easement is affected. This class of license will be hereafter considered in connection with the revocability of a mere license.

[1] (319), 5 Bing. N. C., 694.

[2] (1845), 13 M. & W., 838.

[3] (1679), Vaughan's Rep., 344 (351).

[4] (1845), 13 M. & W., 844.

[5] (1861), 1 J. & H., 393.

[6] (1889), L. R., 42 Ch. D., 461.

a grant which conveys an interest in property, by itself it never conveys an interest in property.

English definitions followed in India.

In India, judicial and legislative definitions of license have evidently followed the English definitions of the term.[1]

Section 52 of the Indian Easements Act enacts that where one person grants to another, or to a definite number of persons, a right to do or to continue to do, in or upon the immoveable property of the grantor, something which would in the absence of such right be unlawful and such right does not amount to an easement or interest in property, the right is called a license.

The two other distinctive features of a mere license are that it is revocable,[2] and that, being purely a personal right, it cannot be assigned.[3]

Essential points of difference between a mere license and an easement.

Keeping in view the nature and incidents of a license as above defined, it will be observed that the essential points of difference between a mere license and an easement including a *profit à prendre* are that a license by itself is a mere personal right to do on the land of the grantor something which without such license would be unlawful, it is not a right appurtenant, it cannot be assigned, and it is revocable, whereas an easement is a right appurtenant, and a right *in rem*, and so long as it continues, the benefit and burthen of it continue also and are enforceable by all and against all into whose hands the dominant and servient tenements respectively come.[4]

Cases of construction as to nature of particular grant.

With these general observations on the nature and legal incidents of a license, it is proposed now to consider the principal authorities in which questions have been raised and decided as to the nature of the particular grant; as to whether it was an easement that had been granted, or a *profit à prendre*, or a

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[1] *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98; I. E. Act, § 52.

[2] See *infra*.

[3] See *infra*.

[4] *Thomas* v. *Sorrell* (1679), Vaughan's Rep., 344; *Muskett* v. *Hill* (1839), 5 Bing. N. C., 694; *Wickham* v. *Hawker* (1840), 7 M. & W., 63; *Wood* v. *Leadbitter* (1845), 13 M. & W., 838; *Hill* v. *Tupper* (1863), 2 H. & C., 121; 32 L. J. Exch., 217; *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98; *Prosonna Coomar Singha* v. *Ram Coomar Ghose* (1889), I. L. R., 16 Cal., 640; *Heap* v. *Hartley* (1889), L. R., 42 Ch. D., 461; *Ramakrishna* v. *Unni Check* (1892), I. L. R., 16 Mad., 280; *Vishnu* v. *Rango Ganesh Purandare* (1893), I. L. R., 18 Bom., 382; *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397.

license coupled with an interest in immoveable property, or the immoveable property itself, or a license for profit, or an ordinary license, that is a mere license for pleasure.

It is hoped that this treatment of the subject will serve to accentuate the essential points of difference between the merely personal right, revocable and unassignable, and the higher rights above enumerated.

Webb v. *Paternoster.*

The first case to which it is necessary to refer is that of *Webb* v. *Paternoster.*[1]

That was an action of trespass brought against the defendant for eating, by his cattle, the plaintiff's hay. The defendant justified under the owner of the fee of the close in which the hay was, averring that such owner had leased the above to him, and therefore, as lessee, he turned his cattle into the close, and they ate the hay. The plaintiff replied that, before the making of the lease, the owner of the fee had licensed him to place the hay on the close until he could conveniently sell it, and that, before he could conveniently sell it, the owner of the fee had leased the land to the defendants.

License coupled with an interest.

The case was ultimately decided on the ground that the plaintiff has had more than reasonable time to sell the hay, and the view taken of the case by the Court of Exchequer[2] in the subsequent case of *Wood* v. *Leadbitter* shews that if, as was very probable, the plaintiff had purchased the hay from the owner of the fee with liberty to stock it on the land, the license would not have been a mere license for pleasure but a license coupled with an interest.

Wood v. *Lake.*

In *Wood* v. *Lake*[3] the defendant had, by parol agreement, given liberty to the plaintiff to stock coals on the defendant's land for a term of seven years. When the plaintiff had enjoyed the liberty for seven years the defendant locked up the gate of the close.

License and not lease.

The defendant contended that the agreement amounted to a lease which was void after three years under the Statute

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[1] (1620), 2 Roll. Rep., 143; Poph., 151; Palmer, 71.

[2] (1845), 13 M. & W., 838.

[3] (1751), Sayer., 3, and *see* the case reported in *Wood* v. *Leadbitter* (1845), 13 M. & W., p. 848.

of Frauds for not being in writing. Judgment, however, was given for the plaintiff, it being decided that the agreement was one of license and not of lease, since if a man licenses to enjoy lands for five years, there is a lease, because the whole interest passes, but this was only a license for a particular purpose.

Taylor v. *Waters.* License.

In *Taylor* v. *Waters*[1] a right conferred by ticket to enter and remain in a theatre during a performance was considered not to be an interest in land but a license to permit the enjoyment of certain privileges thereon.

Doe d. Hanley v. *Wood.* License coupled with a grant, not lease.

The case of *Doe dem Hanley* v. *Wood* shews that the grant of a free liberty to dig, work, mine, and search for tin and all other metals throughout certain lands for a particular term, does not amount to a demise of the metals and minerals, nor convey the legal estate in them during the term as a chattel real, so as to entitle the grantee to maintain an ejectment for mines lying within the limits of the set, but not connected with the workings of the grantee, and is nothing more than a mere license to search and get coupled with a grant of such of the ore as should be found or got.[2]

Wood v. *Manley.* License coupled with an interest.

In *Wood* v. *Manley*[3] the defendant who was the owner of a large quantity of hay stored on the plaintiff's land and purchased on the condition assented to by the plaintiff that he should have until a particular date to remove it. Before such date the plaintiff locked up the close and the defendant broke open the gate in order to remove the hay. A verdict in the defendant's favour on the direction that the license was irrevocable was upheld by the Court of Queen's Bench, and this decision was approved by the Court in *Wood* v. *Leadbitter*[4] on the ground that the license in question was not a mere license, but a license coupled with an interest, like the case of the tree and the deer put by Vaughan, C. J., in *Thomas* v. *Sorrell.*[5]

[1] (1817) 7 Taunt., 374.

[2] (1819) 2 B. & Ald., 724; *see* this case referred to and explained in *Musket* v. *Hill* (1839), 5 Bing., N. C., 694; *Ramakrishna* v. *Unni Check* (1892), I. L. R., 16 Mad., 280; *Sundrabai* v. *Joyawant* (1898), I. L. R., 23 Bom., 397, and see *infra* the view taken in *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch., 483, that the liberty to work mines is a *profit à prendre.*

[3] (1839) 11 Ad. & E., 34.

[4] *See* 13 M. & W., p. 853.

[5] See *supra.*

Muskett v. *Hill.* License coupled with a grant.

In *Muskett* v. *Hill*,[1] the indenture of grant was substantially the same as that in *Doe dem Hanley* v. *Wood* above-mentioned and was considered to operate not as a mere license, but as a license carrying an interest, or as it is called a license coupled with a grant.

Wickham v. *Hawker.* License of profits, or *profit à prendre.*

In *Wickham* v. *Hawker*,[2] it was decided that the liberties to fowl, hawk and fish are not mere licenses of pleasure, but licenses of profit in the sense of *profits à prendre*, since they imply that the person taking the water fowl, or birds by hawks, or fish, takes for his own benefit. In the same case it was thought that the liberty of hunting was open to more question, as that of itself does not import the right to the animal when taken; and that if it were a license given to one individual, either for one occasion, or for a time, or for his life, it would amount only to a mere personal license of pleasure, to be exercised by the individual licensee.[3]

Wood v. *Leadbitter.* License.

The well-known case of *Wood* v. *Leadbitter*[4] has decided that the privilege of entering a race-stand or enclosure attached to it to which admission is allowed by ticket for which a valuable consideration has been paid is nothing more than a mere license, and is revocable at any time.[5]

Newby v. *Harrison.* License coupled with a grant.

In *Newby* v. *Harrison*[6] it was said by Pye-Wood, V. C., following the definition of license in *Thomas* v. *Sorrell* that the license to enter upon a canal, and take away the ice is a mere license; and that the right of carrying it away is a grant of the ice so to be carried away, which is the property of the licensor. This again is the case of a license coupled with a grant.

Hill v. *Tupper.* License.

In *Hill* v. *Tupper*[7] there was a grant by deed to the plaintiff of the sole and exclusive right or liberty to put or

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[1] (1839) 5 Bing. N. C., 694.

[2] (1840) 7 M. & W., 63. *See* also infra, *Webber* v. *Lee* (1882), L. R., 9 Q. B. D., 315; *Fitzgerald* v. *Firbank* (1897), 2 Ch., 96.

[3] Where, however, the grant is to persons, their heirs and assigns, the liberty becomes a *profit à prendre* assignable and exerciseable by the licensee's servants. *See* further *infra* in connection with the question as to when licenses can and cannot be assigned.

[4] (1845) 13 M. & W., 838.

[5] See *infra;* this case fully considered in connection with the revocability of licenses.

[6] (1861) 1 J. & H., 393; 30 L. J. Ch., 863; 4 L. T., 424.

[7] (1863) 2 H. & C., 121; 32 L. J. Exch., 217; 8 L. T., 792.

use boats on a canal for purposes of pleasure, and to let out the boats for hire for purposes of pleasure and it was decided that this grant operated merely as a license or covenant, on the part of the grantors and was binding on them only as between themselves and the grantee.[1]

Russell v. Harford. License.

In *Russell* v. *Harford*[2] two persons occupied adjoining premises as tenants of the same landlord, and one tenant's premises were supplied with water by means of a pipe from the other tenant's premises. Both premises were put up to sale with rights of way and water and other easements subsisting thereon, and both tenants purchased at the sale the premises severally occupied by them. In an action by the purchaser of the premises from which the water was supplied for specific performance of the contract for sale without any reservation of the right of the purchaser of the adjoining premises to the use of the water, it was held, in granting a decree for specific performance without the above-mentioned reservation, that the right of water was not an easement which could be enforced against a purchaser, but simply a license from the landlord to the tenant to have a supply of water from the adjoining premises so long as the tenancy lasted.

Kesava Pillai v. Peddu Reddi. License.

In *Kesava Pillai* v. *Peddu Reddi*[3] a tenant with the permission of his landlord erected a dam upon his holding whereby he obstructed the natural flow of water to other lands belonging to his landlord. It was held that this right did not amount to a grant, but was a mere license.

Krishna v. Rayappa Shanbhaga. Easement.

In *Krishna* v. *Rayappa Shanbhaga*[4] the plaintiff and defendant had by parol agreement constructed a dam across a main channel, and from thence a smaller channel was made through the land of the defendant to the lands of the plaintiff by means of which it was agreed that the plaintiff should be at liberty to bring water for the irrigation of his

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[1] That part of the license referring to letting out the boats on hire may be called a "license for profit"—a term applied to licenses which result in profit in some form or another to the licensee. For similar licenses see *supra*, *Webb* v. *Paternoster*; *Wood* v. *Manley*. And see *infra* in connection with the subject of revocability.

[2] (1866) 15 L. T., 171; L. R., 2 Eq., 507.

[3] (1863) 1 Mad. H. C., 258.

[4] (1868) 4 Mad. H. C., 98.

fields. This agreement had been executed and acted on for many years. It was held that this agreement created not a mere parol license revocable at the will of the defendant, but a valid easement in respect of the plaintiff's tenement over the defendant's easement.

Webber v. *Lee.* *Profit à prendre.*

In *Webber* v. *Lee*[1] it was decided, in accordance with the principle laid down in *Wickham* v. *Hawker*[2] that the right to shoot game and take it away when shot is an interest in land and a *profit à prendre.*

Prosonna Coomar Singha v. *Ram Coomar Ghose.* License.

In *Prosonna Coomar Singha* v. *Ram Coomar Ghose*[3] the Calcutta High Court, on the authority of *Wood* v. *Leadbitter*[4] allowed a special appeal on the ground that an agreement between the plaintiff and defendant that the former should have the use of a plot of land belonging to the latter as a privy was a mere license revocable at the will of the defendant, subject to the right of the other to damages if the license were revoked contrary to the terms of any express or implied contract.

Duke of Sutherland v. *Heathcote.*

The case of *Duke of Sutherland* v. *Heathcote*[5] establishes that a right to work mines is something more than a mere license, that it is a *profit à prendre*, an incorporeal hereditament lying in grant.

Ramakrishna v. *Unni Check.* License.

In *Ramakrishna* v. *Unni Check*[6] it was held by the Madras High Court with special reference to the definitions of "easement" and "license" contained in sections 4 and 52 respectively of the Indian Easements Act that a permission to capture and remove fifty elephants given by the owner of a forest in consideration of a certain payment in respect of each elephant captured, was a mere license and unassignable.

Having regard to the *dicta* in *Thomas* v. *Sorrell*, *Wickham* v. *Hawkes*, *Wood* v. *Leadbitter*, and other cases above cited, it is questionable whether outside the Indian Easements Act and under the English Law, this decision could be supported, since though the liberty to enter the forest is only a mere

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[1] (1882) L. R., 9 Q. B. D., 315.
[2] See *supra*.
[3] (1889) I. L. R., 16 Cal., 640.
[4] See *supra*.
[5] (1892) 1 Ch. at 483.
[6] (1892) I. L. R., 16 Mad., 280.

icense, the permission to capture and remove the elephants is certainly a grant of those animals causing the agreement to operate as a license coupled with a grant or as a *profit à prendre.*

Vishnu v. *Rango Gonesh Purandare.*

In *Vishnu* v. *Rango Gonesh Purandare*[1] the deed whereby one portion of a house was mortgaged gave the mortgagee the use of a privy in another portion of the house and a right of way to it through a certain passage.

Easement.

It was contended on the authority of *Wood* v. *Leadbitter*, and *Prosonna Coomar Singha* v. *Ram Coomar Ghose* above cited, that the mortgage-deed had conferred only a license and not an easement, but it was held that the privilege had been granted by the very instrument creating the mortgage and must be regarded by the very terms of the provision as a privilege ancillary to the use of the house, and, therefore, an easement.

Fitzgerald v. *Firbank.*

In *Fitzgerald* v. *Firbank*,[2] there was a grant to the plaintiff of "the exclusive right of fishing" for a certain term in a certain river with a proviso that "the right of fishing hereby granted shall only extend to fair rod and line angling at proper seasons, and to netting for the sole purpose of procuring fish-baits."

Profit à prendre.

It was held that this was not a mere revocable license but a *profit à prendre* entitling the person having the enjoyment of it to such possessory rights that he can bring an action for trespass at common law for the infringement of those rights.

In the course of his judgment in the Court of Appeal Lindley, L. J., said :—"The right of fishing includes the right to take away fish unless the contrary is expressly stipulated. I have not the slightest doubt about that. Therefore the plaintiffs have a right as distinguished from a mere revocable license. What kind of a right is it? It is more than an easement: it is what is commonly called a *profit à prendre*, and it is of such a nature that a person who enjoys that right has such possessory rights that he can bring an action for

[1] (1893) I. L. R., 18 Bom., 382.

[2] (1897) 2 Ch., 96.

trespass at common law for the infringement of those rights. The law on this subject was very carefully considered, and will be found laid down in *Holford* v. *Bailey*[1] in the Exchequer Chamber. Again, if he has a possessory right, and if not a grantee by deed but only claiming under an agreement, he can be said to have the use and occupation of the right. That was decided in the case of *Holford* v. *Pritchard*.[2] The plaintiffs' rights are, therefore, pretty accurately defined."

Sundrabai v. *Jayawant.*

In *Sundrabai* v. *Jayawant*[3] the plaintiff and his predecessors in title had enjoyed from time immemorial the use of land belonging to the defendant's mortgagor for the purpose of there growing young rice plants to be after transplanted to his own land. This right which originated in prescription was afterwards confirmed by a grant from the said mortgagor who agreed to pay compensation in case of obstruction.

The covenant as to compensation, the use of the word *nirantar* in the grant without further specification, and the absence of all mention of the land owned by the plaintiff in which the transplantation was to take place, were all circumstances relied on by the defendant as shewing that the grant was a license not binding on the defendant as the mortgagee of the person giving it, and not an easement or lease of lands.

Easement of the nature of *profit à prendre.*

It was held that the right was appurtenant to the plaintiff's land, which fell within the definition of "easement" contained in section 4 of the Indian Easements Act, and was therefore an easement of the nature of *profits à prendre* appurtenant to land, and not a license which is not connected with the ownership of any property, but creates only a personal right neither assignable by the license, nor binding on the assignee of the licensor. With reference to section 52 of the Indian Easements Act, it was said that the negative definition of a license therein contained makes it necessary that, before a right can be shewn to be a license only, it must be proved not to be an easement, or an interest in property.[4]

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[1] (1850) 13 Q. B., 426.
[2] (1849) 3 Exch., 793.
[3] (1898) I. L. R., 23 Bom., 397.
[4] *Ibid* at p. 400.

It is to be observed that where a license has been created by deed, the question, whether the right is a mere license or a license coupled with a grant of immoveable property or of an interest in immoveable property, must depend for its determination upon the construction of the terms of the grant.[1]

When grant by deed, nature of grant must depend on construction of deed.

An "exclusive license" in no way differs in its incidents from an ordinary license, though in its nature it does so to the extent that its name imports.[2]

Its true nature has been explained to be "a leave to do a thing, and a contract not to give leave to anybody else to do the same thing."[3]

Thus it has been held that an exclusive license to use a certain invention for a certain time, within a certain district, does not amount to a grant of the patent right so as to enable the licensee to sue in his own name for an alleged infringement of the right.[4]

"Exclusive license:" Its nature and incidents.

Where the license is exclusive, any violation of the contract not to give any body else leave to do the same thing would of course give the licensee a right of action against the licensor.[5]

But though an exclusive license or an exclusive right to all the profits of a particular kind can be granted, such a right is only to be inferred from langrage that is clear and explicit.[6]

Exclusive license must be clearly granted.

Where by a lease a canal company in consideration of the expense the lessees had incurred in the erection of buildings for storing ice upon the demised premises, and of the rents and covenants reserved and contained, demised certain pieces of land on the banks of a canal together with liberty to take ice from the said canal within a certain distance, it was held that such a license was not exclusive so as to entitle the lessee to

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[1] *Doe dem. Hanley* v. *Wood* (1819), 2 B. & Ald., 724 ; *Muskett* v. *Hill* (1839), 5 Bing. N. C., 694 ; *Wood* v. *Leadbitter* (1845), 13 M. & W., 838 (845) ; *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch., 475 (485).

[2] *Heap* v. *Hartley* (1889), L. R., 42 Ch. D., 461.

[3] *Ibid*, per Fry, L. J., p. 470.

[4] *Ibid*. And see *infra* where this question is further considered in connection with the obstruction of licenses.

[5] *Heap* v. *Hartley* (1889), L. R., 42 Ch. D., 461 (469),

[6] See *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch., p. 485, and the cases there cited.

all the ice, but amounted merely to a grant of sufficient ice to enable the lessee to fill the ice-houses, and that, so long as this right was not interfered with, the lessee had no ground of complaint.[1]

So it has been frequently held that, in the absence of clear and explicit language conferring an exclusive right, the grant of a liberty to work mines is not the grant of an exclusive right to work them, even if the grant is in terms without any interruption by the grantor.[2]

By whom license may be granted.

A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interest in the property affected by the license.[3]

Thus just as one of two or more co-tenants may lawfully enjoy the whole of the demised property in any way not destructive of the substance so as to amount to an ouster of the other co-tenant or co-tenants, so may such co-tenant license another person to do what he may do himself.[4]

And a mortgagee in possession of one of the co-tenants has the same power to grant a license.[5]

Upon this principle it has been held that the co-tenant of a forest or his mortgagee in possession may lawfully license another person to cut wood in the forest, and that in equity the rights of the co-tenants *inter se* would be to an account of the profits realised, and a distribution of them according to their proportions of ownership.[6]

Grant of license may be express or implied.

The grant of a license may be express or implied from the conduct of the grantor.[7]

Express grant.

In India as in England the express grant of a mere license need not be in writing.[8]

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[1] *Newby* v. *Harrison* (1861), 1 J. & H., 393; 30 L. J. Ch., 863; 4 L. T., 424.

[2] Lord Mountjoy's case, 1 And., 307; 4 Leon, 147; *Chatham* v. *Williamson* (1804), 4 East. 468; *Doe dem Hanley* v. *Wood* (1819), 2 B. & Ald., 724; *Carr* v. *Benson* (1868), L. R., 3 Ch. App., 524; *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch., 475.

[3] I. E. Act, s. 53.

[4] *Balvantrav Oze* v. *Gandpatrav Jadhav* (1883), I. L. R., 7 Bom., 336.

[5] *Ibid.*

[6] *Ibid.*

[7] I. E. Act, s. 54.

[8] *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98; *Wood* v. *Leadbitter* (1845), 13 M. & W., 838.

But where in India a license is coupled with a grant of immoveable property or an interest in immoveable property, such a grant must be in writing and registered if it falls within the provisions of the Transfer of Property Act[1] and the Registration Act[2] requiring such writing and registration.

It is obvious that the grant must exist independently of the license, unless it is a grant capable of being made by parol, or by the instrument giving the license.[3]

Failure to comply with the above-mentioned requirements of writing and registration would result in the avoidance of the grant, and the license would remain a mere license.[4]

Implied grant. Two classes of cases.

A license may be implied from the conduct of the licensor where by acquiescence or encouragement he allows something to be done on his own land by another person who believes the land to be his own.[5]

***Ramsden* v. *Dyson*.**

The equitable principle is clearly stated in *Ramsden* v. *Dyson*[6] by Lord Chancellor Cranworth in the following words :—

"If a stranger begins to build on any land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of Equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title ; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

But, it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land ; and, second-

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[1] Ss. 54, 59, 107 and 123.

[2] S. 17.

[3] *Wood* v. *Leadbitter*, *ubi sup.* at p. 852

[4] *Wood* v. *Leadbitter*, *ubi sup.* at p. 845 ; *Hewitt* v. *Isham* (1851), 21 L. J. N. S. Exch., 35 ; I. E. Act, s. 54.

[5] *Rochdale Canal Co.* v. *King* (1851), 2 Sim. Rep. N. S., 78 (88) ; *Ramsden* v. *Dyson* (1865), L. R., 1 H. L., 129.

[6] *Ubi sup.* at p. 140.

ly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.

It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that, if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest and it was his folly to expend money upon a title which he knew would or might soon come to an end."

Another class of cases in which a license may arise by implication is where the licensor allows the licensee to do something on the latter's land the effect of which is to narrow or extinguish an incorporeal right or easement enjoyed by the former over such land.

This subject has already been considered in connection with the extinction of easements,[1] and will be further considered in this chapter in connection with the revocability of licenses.

Accessory license.

Accessory licenses are licenses which are given by law as being necessary to the enjoyment of any interest or exercise of any right.[2]

Richard Liford's case.

Thus it was resolved in *Richard Liford's case*[3] 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 trees to those who would have them; for without sight none would buy, and without entry they could not see them.

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[1] *See* Chap. IX, Part II, B.

[2] I. E. Act, s. 55. For the general law see *Richard Liford's case* (1615), 6 Coke's Reg., Part XI, p. 46; *Dennett* v. *Grover* (1739), Willes, 195; *Hewitt* v. *Isham* (1851), 21 L. J. N. S., Exch., 35.

[3] *Ibid*, p. 52.

And in the same case it was said: "If I grant you trees in my wood, you may come with carts over my land to carry the wood."

It is presumed that accessory licenses like accessory easements can be allowed only on the ground of absolute necessity to the enjoyment of the interest or to the exercise of the right in respect of which they are claimed.[1]

Mere license not assignable nor exercisable by licensee's servants or agents.

The personal character of a mere license is demonstrated by the rule that it can neither be assigned by the licensee, nor exercised by his servants or agents.[2]

Distinction between mere license and license coupled with a grant.

It should be observed that in this respect a distinction is made in the cases between a mere license, that is a license for pleasure, and a license coupled with a grant of immoveable property, or of an interest in immoveable property or a *profit à prendre*, all of which last-mentioned rights are assignable and can be exercised by the licensee's servants or agents.[3]

Muskett v. *Hill*. *Wickham* v. *Hawker*.

This distinction was clearly pointed out in the cases of *Muskett* v. *Hill*[4] and *Wickham* v. *Hawker*.[5]

The first of these two cases was, as already seen, that of a license to search for and get minerals coupled with a grant of the minerals when found or got.

The second was the case of a license of "hawking, hunting, fishing and fowling."

License of hawking, hunting, fishing and fowling.

In this case the exhaustive judgment of Baron Parke demonstrates that, with reference to the license of hawking, fishing, and fowling, such right implies both the catching and killing and the taking away for the licensee's own benefit and is a *profit à prendre*, or, as was said in *Webber* v. *Lee*,[6] an interest in land, and capable both of being assigned and of being exercised by the licensee's servants or agents.

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[1] *See* Chap. VIII, Part II.

[2] *Muskett* v. *Hill* (1839), 5 Bing. N. C., 691; *Wickham* v. *Hawker* (1840), 7 M. & W., 63; *Ramakrishna* v. *Unni Check* (1892), I. L. R., 16 Mad., 280; *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397.

[3] *Muskett* v. *Hill*; *Wickham* v. *Hawker*; *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98.

[4] *Ubi sup.*

[5] *Ubi sup.*

[6] (1882) L. R., 9 Q. B. D., 315 (318).

As regards the license of hunting it appears questionable whether the mere permission to hunt, without further words, can be put as high as a *profit à prendre*, but a grant to persons, their *heirs and assigns*, "of free liberty *with servants* or otherwise" to go into and upon the licensor's land and there hunt, shews that not a personal license, but a license of profit, or *profit à prendre*, was intended to be granted.

The result, therefore, is, that a mere license of pleasure can neither be assigned by the licensee nor exercised by his servants or agents when unaccompanied by words shewing that the larger grant is intended, but a *profit à prendre* or a license coupled with a grant of immoveable property is of itself assignable and can be exercised by the licensee's servants or agents.

Ramakrishna v. Unni Check.

As already seen, it is doubtful whether in a case not fully within the Indian Easements Act and the construction placed on sections 4 and 52 of that Act, the right to capture and remove elephants would be held as in *Rama Krishna* v. *Unni Check*[1] to be a mere license and unassignable by the licensee, since according to the English authorities it would appear to be a license of profit, or a *profit à prendre*.

To the rule that a mere license cannot be assigned the Indian Easements Act creates an exception by the provision that unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee.[2]

License to attend place of public entertainment assignable under I. E. Act.

This provision appears to be a variation of the English law, for since permission to attend a place of public entertainment is a mere license,[3] and a mere license is founded in personal confidence and unassignable,[4] such permission would also seem to be unassignable.

By section 57 of the Indian Easements Act a licensor is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or

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[1] (1892) I. L. R., 16 Mad., 280. *See* this case considered *supra*.

[2] S. 56.

[3] *Wood* v. *Leadbitter* (1845), 13 M. & W., 838.

[4] 3 Kent's Comm., 583.

property of the licensee, of which the licensor is, and the licensee is not, aware.

Duties of licensor.

By section 58 of the Indian Easement Act a licensor is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.

Under the English law the liability of the licensor for injury sustained by the licensee in the exercise of the license depends upon some wrongful act or breach of positive duty. Something like fraud must be shewn.

There must be wilful deception, or the doing of some act which may place the licensee in danger.[1]

Thus, if the licensor places an obstruction on his land which is likely to cause injury to the licensee, he may be responsible; but a licensor is not responsible for injury caused to the licensee merely by allowing a way to remain out of repair, and in the absence of proof of the licensee's ignorance of the route of the way, or that the licensor deliberately put the way into such condition in order to cause injury to the licensee, or misrepresented its condition to him.[2]

Effect of assignment of property affected by license.

When the licensor assigns the property affected by the license, he ceases to be bound by the license and the assignee is not as such bound by it.[3]

This rule of course refers to a mere license, and further demonstrates the strictly personal character of the right.

Wallis v. *Harrison.*

In *Wallis* v. *Harrison*, Lord Abinger, C. B., said:[4]—"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 neighbour allows him to pass over his land, the transferee of that land is bound to do so likewise."[5]

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[1] *Gautret* v. *Egerton* (1867), L. R., 2 C. P., 371.

[2] *Ibid.*

[3] *Wallis* v. *Harrison* (1838), 4 M. & W., 538; *Roffey* v. *Henderson* (1851), 17 Q. B., 574; *Russell* v. *Harford* (1866), 15 L. T., 171; *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397; I. E. Act. s. 89.

[4] *Ubi sup.* at p. 543.

[5] It will be remembered that in England the express grant of an easement to be valid must be by deed. *See* Chap. IV, Part II.

Nor is the licensee entitled to have notice of the transfer, for a person is bound to know who is the owner of the land upon which he does that which, *primâ facie*, is a trespass.[1]

Here, again, must be noted the distinction between a mere license and a license coupled with the creation of an interest in immoveable property, for whilst the former by reason of its personal character is not binding on the transferee of the property affected by it, the latter follows the land when transferred, and is as binding on the transferee as it was on the transferor.[2]

License coupled with grant irrevocable.

A mere license is revocable, but when it is coupled with a grant of immoveable property or of an interest in immoveable property, it is irrevocable.[3]

Wood v. *Leadbitter.*

This subject was fully considered by the Court of Exchequer in the important case of *Wood* v. *Leadbitter*.[4]

The action was for trespass, for assault and false imprisonment, and, at the trial before Baron Rolfe, it appeared that the plaintiff, on the occasion of one of the Doncaster race-meetings, had purchased for one guinea a ticket, issued under the authority of the stewards, and entitling the holder to admission to the grand stand and to the enclosure surrounding it, during every day of the races which lasted four days.

The plaintiff came into the enclosure on one of the race days ; and while the races were going on, the defendant, who was an officer of police, under the authority and direction of Lord Eglintoun, who was one of the stewards, desired the plaintiff to leave the enclosure, telling him that if he did not do so, force would be used to turn him out.

Upon the plaintiff refusing to go, the defendant, by the order of Lord Eglintoun, took him by the arm, and, without using any unnecessary violence, put him out of the enclosure.

The learned judge directed the jury, that, assuming the ticket to have been sold to the plaintiff under the sanction of Lord Eglintoun, it still was lawful for Lord Eglintoun, without

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[1] *Wallis* v. *Harrison*. *Ibid* at p. 543.

[2] *Krishna* v. *Rayappa* (1868), 4 Mad. H. C., 98 The same principle applies to the case of an easement. *Sundrabai* v. *Jayawant* (1898), I. L. R., 23 Bom., 397.

[3] *Wood* v. *Leadbitter* (1845), 13 M. & W., 844 ; *Krishna* v. *Rayappa ; Prosonna Coomar Singha* v. *Ram Coomar Ghose* (1889), I. L. R., 16 Cal., 640.

[4] *Ubi sup.*

returning the guinea, and without giving any reason, to order the plaintiff to quit the enclosure, which admittedly was his property; and that, if the jury were satisfied that notice was given to the plaintiff, requiring him to leave the enclosure, and that, before he was forcibly removed by the defendant, a reasonable time had elapsed during which he might have gone away voluntarily, then the plaintiff was not, at the time of the removal, on the ground by the leave and license of Lord Eglintoun.

Upon this direction, the jury found a verdict for the defendant.

A rule *nisi* having been obtained for a new trial, on the ground of misdirection, it was contended in support of the rule on the authority of *Tayler* v. *Waters* and other cases, that, independently of any grant from Lord Eglintoun, the plaintiff had license from him to be in the enclosure at the time he was turned out, and that such license was under the circumstances irrevocable.

The Court, in discharging the rule, held that a parol license to come and remain for a certain time on the land of another, though money be paid for it, is revocable at any time, and without returning the money.

It will here be useful to quote from the judgment of the Court, which, delivered by Baron Alderson, contains a masterly and exhaustive exposition of the law. He said[1]:—"A mere license is revocable: but that which is called a license is often something more than a license; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may further be observed, that a license under seal (provided it be a mere license) is as revocable as a license by parol; and, on the other hand, a license by parol, coupled with a grant, is as irrevocable as a license by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a license by parol, coupled with a parol grant, or pretended grant, of something which is

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[1] 13 M. & W. at p. 844.

incapable of being granted otherwise than by deed, there the license is a mere license ; it is not an incident to a valid grant, and it is therefore revocable. Thus, a license by A to hunt in his park, whether given by deed or by parol, is revocable ; it merely renders the act of hunting lawful, which, without the license, would have been unlawful. If the license be, as put by Chief Justice Vaughan, a license not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer with a license annexed to come on the land : and supposing the grant of the deer to be good, then the license would be irrevocable by the party who had given it, he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol license to come on my lands, and there to make a watercourse, to flow on the land of the licensee. In such a case there is no valid grant of the watercourse,[1] and the license remains a mere license, and therefore capable of being revoked. On the other hand. if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse ; and if it did, then the license would be irrevocable."

License to go on licensor's land unaccompanied by grant not irrevocable. *Tayler* v. *Waters.* *Wood* v. *Leadbitter.*

In another part of the judgment in *Wood* v. *Leadbitter*, the learned Baron severely criticises the decision in *Tayler* v. *Waters*[2] that the right under a ticket to admission to a theatre, purchased for valuable consideration, was an irrevocable license, and points out that it is contrary to general principles and unsupported by the earlier authorities.

His words are[3] :—

" The judgment is stated by the learned reporter to have comprised the substance of the arguments on both sides, and which, therefore, he does not give in his report. We must infer from this that the attention of the Court was not called in the argument to the principles and earlier authorities,

[1] Because under the English law, the grant of the watercourse must be by deed. In India the same consequence could follow in a case to which the provision of the Transfer of Property Act and Registration Act applied, and such provisions were not complied with.

[2] (1817) 7 Taunt., 374.

[3] At page 851.

to which we have adverted. Brooke, in his Abridgment, Dodderidge, in the case of *Webb* v. *Paternoster*, [1] and Lord Ellenbrough, in the case of *Rex* v. *Horndon-on-the-Hill*,[2] all state in the most distinct manner that every license is and must be in its nature revocable, so long as it is a mere license. Where, indeed, it is connected with a grant, there it may, by ceasing to be a naked license, become irrevocable ; but then it is obvious that the grant must exist independently of the license, unless it be a grant capable of being made by parol, or by the instrument giving the license. Now in *Tayler* v. *Waters* there was no grant of any right at all, unless such right was conferred by the license itself. C. J. *Gibbs* gives no reason for saying that the license was a license irrevocable, and we cannot but think that he would have paused before he sanctioned a doctrine so entirely repugnant to principle and to the earlier authorities, if they had been fully brought before the Court."

Mere license revocable though granted for valuable consideration. *Wood* v. *Leadbitter.*

The circumstance that a mere license has been granted for valuable consideration does not affect its revocability. This point was dealt with in the judgment in *Wood* v. *Leadbitter*, and the following observations were made upon it[3] :—

"It was suggested that, in the present case, a distinction might exist, by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference : whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorised its being issued and sold to him, is a point not necessary to be discussed ; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going upon the stand, in spite of the owner of the soil ; and it is sufficient, on this point, to say, that in several of the cases we have cited, *Hewlins* v. *Shippam*,[4] for instance, and *Bryan* v. *Whistler*,[5] the alleged license had been granted for

[1] (1620), 2 Roll, Rep., 143 ; Poph., 151 ; Palmer, 71.

[2] (1816), 4 M. & Sel., 562.

[3] At p. 855.

[4] (1826), 5 B. & C., 221.

[5] (1828), 8 B. & C., 288.

a valuable consideration, but that was not held to make any difference."

Law in *Wood* v. *Leadbitter* followed in India.

The law on the subject of revocation of licenses as laid down in *Wood* v. *Leadbitter* has ever since been regarded by the Courts as good law and binding upon them, and has been followed in India.[1]

But a mere license may be irrevocable under certain conditions.

Further, a license is irrevocable when the licensee, acting upon the license, has executed a work of a permanent character and incurred expense in so doing.[2]

Two classes of cases.

This principle applies to two classes of cases, one where the license refers to something to be done on the land of the licensor, the other where the license is to do something on the land of the licensee affecting an easement acquired therein or thereon by the licensor.

Rochdale Canal Co. v. *King.* *Ramsden* v. *Dyson.*

The judgments in *Rochdale Canal Co.* v. *King*,[3] and *Ramsden* v. *Dyson*[4] sufficiently illustrate the application of the principle to the first class of cases, and have already been referred to.[5]

In India the same principle has been recognised by legislature and Court.[6]

The second class of cases has already been considered in connection with the extinction of easements by presumed release.[7]

In case of revocable license, licensor cannot revoke without reserving right.

In cases falling within the general rule, if the licensor desires to be able to revoke he must expressly reserve the right when he grants the license, or limit it as to duration.[8]

Case of landlord and tenant. Exception to rule of irrevocability.

It has been held as an exception to the general rule that when a license has been granted by a landlord to a tenant and acted upon by the tenant with the result of causing injury to the natural rights of other tenants, such license is revocable on

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[1] I. E. Act, s. 60 (*a*); *Prosonna Coomar Singha* v. *Ram Coomar Ghose* (1889), I. L. R., 16 Cal., 640.

[2] *See* I. E. Act, s. 60 (*b*).

[3] (1851), 2 Sim. N. S., 78.

[4] (1866), L. R., 1 H. L., 129.

[5] See *supra*.

[6] I. E. Act, s. 60 (*b*); *Land Mortgage Bank of India* v. *Moti* (1885), I. L. R., 8 All., 69.

[7] *See* Chap. IX, Part II, B.

[8] *Liggins* v. *Inge* (1831), 7 Bing., 682 (694).

the ground that in such cases there can be no implied grant of a right to derogate from such natural rights.[1]

In such a case where the tenant has acted on the license and incurred expense, the Court will usually permit the revocation of the license upon the terms of the licensor paying the licensee the expenses which he was induced by such license to incur.[2]

Further exception when license has injurious consequences not contemplated by licensor.

Further where according to the general rule a license would be otherwise irrevocable a licensor may be entitled to relief when the act which he licensed is found to have such injurious consequences as could not have been contemplated by him in its inception.[3]

The question whether or not the licensor is entitled to relief must depend upon the particular facts of each case.[4]

Extinction of licenses.

A license may be determined either by express or implied revocation.[5]

Implied revocation.

A license is determined by implied revocation in, amongst other and, the following ways :—

(*a*) By alienation of the property affected by the license.[6]

Wallis v. *Harrison.*

In *Wallis* v. *Harrison*, Baron Parke said[7] : — "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."

(*b*) By an obstruction of the license by the licensee.

Hyde v. *Graham.*

Thus in *Hyde* v. *Graham*[8] where the defendant had a right of way by license from the plaintiff, it was held that the plaintiff was entitled to revoke it by placing a gate across the way and fastening and locking it, and that the defendant was not justified in breaking the gate open.[9]

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[1] *Kesara Pillai* v. *Peddu Reddi* (1863), 1 Mad. H. C., 258.

[2] *Ibid.*

[3] *Bankart* v. *Houghton* (1859), 27 Beav., 425 ; *Kesara Pillai* v. *Peddu Reddi* (1863), 1 Mad. H. C., 258 (260).

[4] *Ibid.*

[5] I. E. Act, s. 61.

[6] *Wallis* v. *Harrison* (1838), 4 M. & W., 538 ; *Coleman* v. *Foster* (1856), 1 H. & N., 37 ; I. E. Act, s. 61, ill. (*b*).

[7] *Ubi sup.* at p. 544.

[8] (1862) 1 H. & C., 593.

[9] *See* I. E. Act, s. 60, ill. (*a*), evidently taken from this case.

Notice of revocation.

Under a revocable license a licensee is entitled to have reasonable notice of the revocation of the license,[1] and if he has goods on the licensor's land which he has been licensed to put there, he is entitled to take away such goods and have reasonable time for so doing.[2]

Cornish v. *Stubbs.*

In *Cornish* v. *Stubbs*,[3] Willes, J., said :—

"Under a parol license the licensee has the right to a reasonable time to go off the land after it has been withdrawn before he can be forcibly thrust off it ; and he could bring an action if he were thurst off before such a reasonable time had elapsed. That was Lord Craneworth's opinion in *Wood* v. *Leadbitter*[4]; for he did not tell the jury that if they were satisfied that notice had been given to the plaintiff to quit the ground the defendant was justified in removing him, but that if they were satisfied that such notice had been given, and that before he was forcibly removed by the defendant a reasonable time had elapsed during which he might have gone away voluntarily, then the plaintiff was not, at the time of the removal, on the ground by the leave and license of Lord Eglintoun ; and I take it that the Court of Exchequer adopted that summing up. In looking into the judgment in that case, it will be found that the cases as to persons putting goods on other person's land were all reviewed, and the Court seems to have held that they were to be dealt with on the same principle as cases of personal license. Applying that view to the present case, I think that the barons would clearly have thought that the license to put the goods on the defendant's land involved a right to take away his goods, and to have a reasonable time for doing so. It was on that ground that the Court approved of the decision in *Wood* v. *Manley*[5] which was the case of a license coupled with an interest."

I. E. Act, s. 62. Extinction by non-user.

Section 62 of the Indian Easements Act provides for various other ways of determining a license to which it is not necessary to refer in detail here, beyond noticing that under

[1] *Mellor* v. *Watkins* (1874), L. R., 9 Q. B., 400 ; *Aldin* v. *Latimer, Clark Muirhead & Co.* (1894), 2 Ch., 437 (448).

[2] *Cornish* v. *Stubbs* (1870), L. R., 5 C. P., 334 ; *Mellor* v. *Watkins*, I. E. Act, s. 63.

[3] *Ibid* at p. 339.

[4] (1845), 13 M. & W., 838.

[5] (1839), 11 Ad. & E., 34.

clause (h) of the section twenty years' non-user operates to put an end to a license, just in the same way as non-user, for the same period, under section 47 of the Act, extinguishes an easement, and that in both cases the Act has substituted a positive rule for what under the English law is a matter of evidence.[1]

Licensor when liable for revocation of revocable license.

Where a license has been granted for valuable consideration, and is revoked before the licensee has fully enjoyed the right for which he contracted, the licensor renders himself liable to an action for damages for breach of contract.

This principle has been recognised both in India[2] and in England.[3]

Kerrison v. *Smith.*

In the recent case of *Kerrison* v. *Smith*[4] in the Queen's Bench Division, it was expressly decided that the right to revoke a license and the right to maintain an action for damages for breach of contract by reason of such revocation are compatible with one another.

This conclusion appears to have been contemplated in *Wood* v. *Leadbitter*,[5] *Wells* v. *Kingston upon Hull Corporation*[6] and *Butler* v. *Manchester, Sheffield and Lincolnshire Railway*,[7] but prior to *Kerrison* v. *Smith*, there does not appear to have been any case in which the point was specifically raised and decided.

In *Kerrison* v. *Smith* the facts were that the plaintiff who was a bill-poster had entered into a verbal agreement with the defendant that in consideration of a yearly payment by the plaintiff, the defendant should let him his wall for posting advertisements, it being one of the conditions of the agreement that the plaintiff should erect in front of the wall a boarding, on which his advertisements were to be posted. In pursuance of this agreement, the plaintiff continued for some time to post his advertisements, and made payments from time to time to

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[1] *See* Chap. IX, Part II, c. (2).

[2] *Kesava Pillai* v. *Peddu Reddi* (1863), 1 Mad. H. C., 258; *Prosonna Coomar Singha* v. *Ramcoomar Ghose* (1889), I. L. R., 16 Cal., 640; I. E. Act, s. 64.

[3] *Kerrison* v. *Smith* (1897), 2 Q. B., 445. And see *Smart* v. *Jones* (1864), 33 L. J. C. P., 154.

[4] *Ibid.*

[5] (1845), 13 M. & W., p. 855.

[6] (1875), L. R., 10 C. P., 402.

[7] (1888), L. R., 21 Q. B.D., 207.

the defendant when requested. Thereafter the defendant wrote two letters to the plaintiff requiring him to remove his boarding and advertisements. These not having been removed, the defendant caused them to be taken down and sent to the plaintiff. In an action by the plaintiff to recover damages for breach of the agreement, the County Court judge held that, as the agreement amounted to a mere license, the plaintiff had no cause of action and accordingly non-suited him. The Court of Queen's Bench Division decided that the plaintiff was entitled to prove the contract, and to give evidence of such damage as he could shew to have arisen from the breach of the contract by the defendant, and the case was sent back to the County Court for a new trial.

It has been seen that the obstruction of a mere license by the licensor operates as a revocation of it, and that the licensee cannot prevent the revocation, though he may be entitled to damages for breach of contract.

Obstruction of mere license by third party. Licensee's remedy.

Supposing, however, the obstruction is not caused by the licensor, but by a third party, it remains to be considered what in such case is the remedy of the licensee.

Hill v. *Tupper.* *Heap* v. *Hartley.*

This question was considered in the cases of *Hill* v. *Tupper*,[1] and *Heap* v. *Hartley*,[2] where it was decided that a mere license does not create such an estate or interest in the licensee as to enable him to maintain an action in his own name against a third person, for the infringement of his right, and that the only course open to the licensee is to obtain permission from the licensor to sue the wrong-doer in the licensor's name.

And it makes no difference that the license is an exclusive license, provided that the person acting in alleged violation of the licensee's rights, has no notice of such rights.[3]

Obstruction of irrevocable license by third party and licensee's remedy.

Where, however, the license is irrevocable through being coupled with a grant of immoveable property, or of an interest in land, or profit *à prendre*, the authorities shew that the licensee has a sufficient possessory title to enable him to

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[1] (1863), 2 H. & C., 121.

[2] (1889), L. R., 42 Ch. D., 461.

[3] *Heap* v. *Hartley* (1889), L. R., 42 Ch. D., 461.

maintain an action in his own name against a third person for the infringement of his rights.[1]

Obstruction of irrevocable license by licensor, and licensee's remedy.

Where in the case of an irrevocable license it is the licensor who obstructs the enjoyment of the license, the licensee's remedy is either by injunction restraining the licensor from so obstructing,[2] or in damages for breach of contract.[3]

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1 *Northam* v. *Bowden* (1855), 11 Exch., 70; *Fitzgerald* v. *Firbank* (1897), 2 Ch., 96.

2 *Phillips* v. *Treeby* (1862), 8 Jur. N. S., 711.

3 See *Smart* v. *Jones* (1864), 33 L. J. N. S. C. P., 154; *Kerrison* v. *Smith* (1897), 2 Q. B., 445.

APPENDIX I.

2 & 3 WILL. IV, 554.

Chapter LXXI.—An Act for shortening the Time for Prescription in certain cases.

[1*st August* 1832.]

'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 shewing the Commencement of such Enjoyment, which is in many Cases productive of Inconvenience and Injustice;' for Remedy thereof be it enacted by the King's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, 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 provided for, and except Tithes, Rent, and Services, shall, where such Right, Profit, or Benefits 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 shewing 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 these same is now liable[1] 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[2] expressly made or given for that Purpose by Deed or Writing.

Claims to Right of Common and other Profits *à prendre*, not to be defeated after Thirty Years' Enjoyment by showing the Commencement.

After Sixty Years' Enjoyment the Right to be absolute, unless had by Consent or Agreement.

II. And be it further enacted, That no Claim which may be lawfully made at the Common Law, by Custom, Prescription, or Grant, to any

In Claims of Right of Way or other Easement the Periods to be Twenty Years and Forty Years.

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[1] Under the Short Titles Act, 1892 (55 Vict., c. 10), may be cited as "The Prescription Act, 1832." As to history and object of the Act, see *supra*, pp. 350, 355, 356, 357, 376.

[2] *Supra*, p. 402.

Way or other Easement, or to any Water-course, 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 mentioned 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 shewing only that such Way or other Matter was first enjoyed at 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,[1] 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.[2]

Claims to the Use of Light enjoyed for Twenty Years.

III. 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 indefeasible, 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.[3]

Before mentioned Periods to be deemed those next before Suits.

IV. 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.[4]

In Actions on the Case, the Claimant may allege his Right generally, as at present.

V. And be it further enacted, That 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 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[5] 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

In Pleas to Trespass and certain other Pleadings, the Period mentioned in this Act may be alleged.

Exceptions, &c., to be replied to specially.

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[1] *Supra*, pp. 355, 373.

[2] *Supra*, p. 402.

[3] *Supra*, pp. 356, 402, 490.

[4] *Ibid*, pp. 368, 373, 375, 376, 377, 393, 398.

[5] *Supra*, p. 359.

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.

Presumption not to be allowed in Claims herein provided for.

VI. 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 favour 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.[1]

Proviso for Infants, &c.

VII. Provided also, That the time during which any Person otherwise capable of resisting any Claim to any of the Matters before mentioned 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.[2]

What time to be excluded in computing the Term of Forty Years appointed by this Act.

VIII. 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.[3]

Limitation.

IX. And be it further enacted, That this Act shall not extend to *Scotland* or *Ireland*.

Commencement of Act.

X. And be it further enacted, That this Act shall commence and take effect on the First Day of *Michaelmas* Term now next ensuing.

Act may be amended.

XI. And be it further enacted, That this Act may be amended, altered, or repealed during this present Session of Parliament.

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1 *Supra*, p. 374. 2 *Supra*, p. 369. 3 *Ibid*, pp. 379, 401.

APPENDIX II.

Act XIV of 1859,[1] section I, clause 12.

[*Received the assent of the Governor-General on the 5th May* 1859.]
An Act to provide for the Limitation of Suits.

Preamble.

WHEREAS it is expedient to amend and consolidate the laws relating to the limitation of suits; It is enacted as follows:—

Limitation of suits.

I. No suit shall be maintained in any Court of judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:—

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Limitation of twelve years' suits for immoveable property.

Clause 12. To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies, the period of twelve years for the time the cause of action arose.[2]

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[1] *Supra*, p. 45.

[2] *Ibid*, pp. 45, 381.

APPENDIX III.

Act IX of 1871,[1] Sections 1, 27 and 28.

An Act for the Limitation of Suits and for other purposes.

Preamble.

WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; And whereas it is also expedient to provide rules for acquiring ownership by possession; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Indian Limitation Act, 1871:"

Extent of Act.

It extends to the whole of British India; but nothing contained in Sections two and three or in Parts II and III applies—

(*a*) to suits instituted before the first day of April, 1873,

(*b*) to suits under the Indian Divorce Act,

(*c*) to suits under Madras Regulation VI of 1831.

Commencement.

This Act shall come into force on the first day of July, 1871.

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Acquisition of right to easements.

27.[2] Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.[3]

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(*a*). *A suit is brought in* 1871 *for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that*

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1 *Supra*, pp. 45, 46, 47, 380, 400.

2 *Ibid*, p. 45.

3 *Supra*, pp. 394, 395.

the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1*st January* 1850 *to* 1*st January* 1870. *The plaintiff is entitled to judgment.*

(*b*).—*In a like suit also brought in* 1871 *the plaintiff merely proves that he enjoyed the right in manner aforesaid from* 1848 *to* 1868. *The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.*

(*c*).—*In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.*

Exclusions in favour of reversioner of servient tenement.

28. Provided[1] that, when any land or water upon, over or from which any easement (other than the access and use of light and air)[2] has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term, shall be excluded in the computation of the said last mentioned period of twenty years in case it is, within three years next after the determination of such interest of term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a deceased Hindu widow, had a life-interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

[1] *Supra*, p. 46.

[2] *Supra*, p. 401.

APPENDIX IV.

Act XV of 1877,[1] Sections 1, 3, 26 and 27.

An Act for the Limitation of Suits, and for other purposes.

Preamble.

WHEREAS it is expedient to amend the law relating to the limitation of suits, appeals and certain applications to Courts; And whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows :—

Short title. Extent of Act.

1. This Act may be called "The Indian Limitation Act, 1877." It extends to the whole of British India; but nothing contained in Sections two and three or in Parts II and III applies—

(*a*) to suits under the Indian Divorce Act, or

(*b*) to suits under Madras Regulation VI of 1831;

Commencement

And it shall come into force on the first day of October, 1877.

Interpretation clause.

3. In this Act, unless there be something repugnant in the subject or context—

'easement' includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing[2] in, or attached to, or subsisting, upon the land of another :—

26[3]. Where the access and use of light or air[4] to and for any building have been peaceably[5] enjoyed therewith, as an easement,[6] and as of right[7] without interruption,[8] and for twenty years,[9]

and where any way or watercourse,[10] or the use of any water, or any other easement (whether affirmative or negative[11]) has been peaceably and openly[12] enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.[13]

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1 See *supra*, pp. 45, 46, 47, 48, 49, 51, 52, 53, 55, 64, 194, 202, 389, 391, 400.

2 See *supra*, pp. 9, 46, 184, 185, 190, 193, 201.

3 *Supra*, p. 514.

4 *Supra*, p. 388, 490.

5 *Supra*, pp. 389, 393.

6 *Supra*, p. 389.

7 *Supra*, pp. 205, 389, 390.

8 *Supra*, p. 390.

9 *Supra*, p. 390.

10 *Supra*, p. 18.

11 *Supra*, p. 94.

12 *Supra*, pp. 392, 393.

13 *Supra*, pp. 393, 394, 395, 396, 397, 403, 539, 540.

Explanation.—Nothing is an interruptions within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.[2]

Illustrations.

(*a*).—*A suit is brought in* 1881 *for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from* 1*st January* 1860 *to* 1*st January* 1880. *The plaintiff is entitled to judgment.*

(*b*).—*In a like suit also brought in* 1881 *the plaintiff merely proves that he enjoyed the right in manner aforesaid from* 1858 *to* 1878. *The suit shall be dismissed, as no exercise of the right by actual user*[1] *has been proved to have taken place within two years next before the institution of the suit.*

(*c*).—*In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right, the suit shall be dismissed.*

Exclusion in favour of reversioner of servient tenement.

27. Provided that, when any land or water upon, over, or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting therof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.[4]

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a Hindu widow, had a life-interest in the land, that on C's death, B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

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1 *Supra*, p. 398.

2 *Supra*, pp. 398, 402.

3 *Supra*, pp. 91, 396, 397.

4 *Supra*, pp. 378, 392, 401, 402.

APPENDIX V.

The Specific Relief Act, 1877 (I of 1877),[1] Sections 52-57.

PART III.

Of Preventive Relief.

Chapter IX.—Of Injunctions Generally.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

Preventive relief how granted.

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.[2]

Temporary injunctions.

A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiffs.[3]

Perpetual injunctions.

Chapter X.—Of Perpetual Injunctions.

54. Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction[4] may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

Perpetual injunctions when granted.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

When the defendant invades or threatens[5] to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases[6] (namely) :—

(*a*) where the defendant is trustee of the property for the plaintiff;

(*b*) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion ;[7]

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1 *Supra*, pp. 49, 50, 53, 54, 55, 168.

2 Now Act XIV of 1882, see s. 3 of that Act, *see* also App. IX and *supra*, p. 517.

3 *Supra*, p. 525.

4 *Supra*, p. 517.

5 *Supra*, p. 528.

6 *Supra*, p. 535.

7 *Supra*, pp. 525, 537.

(c) where the invasion is such that pecuniary compensation would not afford adequate relief ;[1]

(d) where it is probable that pecuniary compensation cannot be got for the invasion ;

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.[2]

EXPLANATION.—For the purpose of this section a trade-mark is property.

Illustrations.

*   *   *   *   *   *   *

(j) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.

*   *   *   *   *   *   *

(p) The inhabitants of a village claim a right of way over A's land. In a suit against several of them, A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

*   *   *   *   *   *   *

(r) A and B are in possession of contiguous lands and of the mines underneath them. A works his mine so as to extend under B's mine and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(s) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier B. B may sue for an injunction restraining A from making the noise.

(t) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

*   *   *   *   *   *   *

Mandatory injunctions.

55. When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.[3]

Illustrations.

(a) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act[4] B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.[5]

(b) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.[6]

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[1] *Supra*, pp. 525 *et seq.* As to meaning of "adequate relief," *see* p. 537.

[2] *Supra*, p. 170.

[3] *Supra*, pp. 517, 525.

[4] Now Act XV of 1877, *see* s. 2 of that Act.

[5] *Supra*, p. 531.

[6] *Ibid.*

(c) *In the case put as illustration* (i) *to section* 54, *the Court may also order A's letters to be destroyed.*

56. An injunction cannot be granted—

Injunction when refused.

(a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to stay proceedings in a Court not subordinate to that from which the injunction is sought;

(c) to restrain persons from applying to any legislative body;

(d) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government;

(e) to stay proceedings in any criminal matter;

(f) to prevent the breach of a contract the performance of which would not be specifically enforced;

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(h) to prevent a continuing breach in which the applicant has acquiesced;

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

(j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court;[1]

(k) where the applicant has no personal interest in the matter.

* * * * * * *

Injunction to perform negative agreement.

57. Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement, to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him.

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[1] *Supra*, 533.

APPENDIX VI.

Transfer of Property Act, IV of 1882, Sections 6 (c) 8, and 43.

What may be transferred.

6. Property of any kind may be transferred except as otherwise provided by this Act or by any other law for the time being.

* * * * * * *

(c) *An easement cannot be transferred apart from the dominant heritage.*[1]

* * * * * * *

8. Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto.[2] * * * * * *

* * * * * * *

And where the property is a house the easements annexed thereto.

* * * * * * *

Operation of *transfer*. Transfer by unathorized person who subsequently acquires interest in property transferred.

43. Where a person erroneously represents that he is authorized to transfer certain immoveable property, and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property, at any time during which the contract of transfer subsists.[3]

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

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[1] *Supra*, pp. 49, 51, 52, 55, 58.

[2] *Supra*, pp. 51, 52, 55, 254, 256, 257, 258.

[3] *Supra*, p. 261, for the application of the same principle to the case of an easement.

APPENDIX VII.

The Indian Easements Act, 1882.

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Act No. V of 1882.[1]

(AS AMENDED BY ACT XII OF 1891).

An Act to define and amend the law relating to Easements and Licenses.

Whereas it is expedient to define and amend the law relating to Easement and Licenses: It is hereby enacted as follows:— Preamble.

PRELIMINARY.

1. This Act may be called "The Indian Easements Act, 1882": Short title.

[2] It extends to the territories respectively administered by the Governor of Madras in Council and the Chief Commissioners of the Central Provinces and Coorg: Local extent.

and it shall come into force on the first day of July, 1882. Commencement.

2. Nothing herein contained shall be deemed to affect any law not hereby expressly repealed; or to derogate from— Savings.

(*a*) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation;

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[1] For Statement of Objects and Reasons of the Bill which became Act V of 1882, *see Gazette of India*, 1880, Pt. V, p. 494; for Report of Select Committee, see *ibid*, 181, Pt. V, p. 1021; and for proceedings and debates in Council relating to the Bill, see *ibid*, 1881, Supplement, pp. 687, 766; and *ibid*, 1882, Supplement, p. 172.

The Act has been extended under s. 5 of the Scheduled Districts Act, 1874 (XIV of 1874), General Acts, Vol. II, to the Scheduled District of Ajmer-Merwara, see *Gazette of India*, 1897, Pt. II, p. 1415.

[2] The Act was extended to the territories respectively administered by the Governor of Bombay in Council and the Lieutenant-Governor of the N.-W. P. and Chief Commissioner of Oudh by Act VIII of 1891, printed, Bombay Code, Ed. 1894, Vol. 1. As to the scope and application of the Act, see *supra*, pp. 49, 194, 203, 305.

(b) any customary or other right (not being a license in or over immoveable property which the Government, the public or any person may possess irrespective of other immoveable property ; or

(c) any right acquired, or arising out of a relation created, before this Act comes into force.

Repeal of Act XV of 1877, sections 26 and 27.

3. Sections 26 and 27 of the Indian Limitation Act, 1877, and the definition of "easement" contained in that Act, are repealed in the territories to which this Act extends. All references in any Act or Regulation to the said sections, or to sections 27 and 28 of Act No. IX of 1871, shall, in such territories, be read as made to sections fifteen and sixteen of this Act.

Chapter I.—Of Easements generally.

"Easement" defined.

4. An easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own.[1]

Dominant and servient heritages and owners.

The land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner ; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner.[2]

Explanation.—In the first and second clauses of this section, the expression "land" includes also things permanently attached to the earth : the expression "beneficial enjoyment" includes also possible convenience, remote advantage, and even a mere amenity ; and the expression "to do something" includes removal and appropriation by the dominant owner for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or anything growing or subsisting thereon.[3]

Illustrations.

(a) *A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. This is an easement.*[4]

(b) *A, as the owner of a certain house, has the right to go on his neighbour B's land, and to take water for the purposes of his household out of a spring therein. This is an easement.*[5]

(c) *A, as the owner of a certain house, has the right to conduct water from B's stream to supply the fountains in the garden attached to the house. This is an easement.*[6]

(d) *A, as the owner of a certain house and farm, has the right to graze a certain number of his own cattle on B's field, or to take, for the purpose of being used in the house, by himself, his family, guests, lodgers and servants, water or fish out of C's tank, or timber out of D's wood, or to use, for the purpose of manuring his land, the leaves which have fallen from the trees on E's land. These are easements.*[7]

(e) *A dedicates to the public the right to occupy the surface of certain land for the purpose of passing and re-passing. This right is not an easement.*[8]

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[1] *Supra*, pp. 9, 62, 205, 259, 406.

[2] *Supra*, pp. 4, 58, 496.

As regards the words "beneficial enjoyment," see *supra*, p. 60.

[3] *Supra*, pp. 6, 9, 10, 193.

[4] *Supra*, p. 89.

[5] *Supra*, pp. 7, 114.

[6] *Supra*, p. 114.

[7] *Supra*, pp. 4, 175, 186, 190.

[8] *Supra*, pp. 32, 195.

(*f*) *A is bound to cleanse a watercourse running through his land and keep it free from obstruction for the benefit of B, a lower riparian owner. This is not an easement.*[1]

Continuous and discontinuous, apparent and non-apparent, easements.

5. Easements[2] are either continuous or discontinuous, apparent or non-apparent.[3]

A continuous easement is one whose enjoyment is, or may be, continual without the act of man.[4]

A discontinuous easement is one that needs the act of man for its enjoyment.[5]

An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.[6]

A non-apparent easement is one that has no such sign.[7]

Illustrations.

(*a*) *A right annexed to B's house to receive light by the windows without obstruction by his neighbour A. This is a continuous easement.*[8]

(*b*) *A right of way annexed to A's house over B's land. This is a discontinuous easement.*[9]

(*c*) *Rights annexed to A's land to lead water thither across B's land by an aqueduct and to draw off water thence by a drain. The drain would be discovered upon careful inspection by a person conversant with such matters. These are apparent easements.*[10]

(*d*) *A right annexed to A's house to prevent B from building on his own land. This is a non-apparent easement.*[11]

Easement for limited time or on condition.

6. An easement may be permanent, or for a term of years or other limited period, or subject to periodical interruption, or exercisable only at a certain place, or at certain times, or between certain hours, or for a particular purpose, or on condition that it shall commence or become void or voidable on the happening of a specified event or the performance or non-performance of a specified act.[12]

Easements restrictive of certain rights.

7. Easements are restrictions of one or other of the following rights (namely) :—

Exclusive right to enjoy.

(*a*) The exclusive right of every owner of immoveable property (subject to any law for the time being in force) to enjoy and dispose of the same and all products thereof and accessions thereto.[13]

Rights to advantages arising from situation.

(*b*) The right of every owner of immoveable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation.[14]

Illustrations of the Rights above referred to.

(*a*) *The exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force.*[15]

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1 *Supra*, pp. 222, 226.

2 *Supra*, p. 256.

3 *Supra*, p. 18.

4 *Supra*, p. 19.

5 *Supra*, pp. 19, 91.

6 *Ibid.*

7 *Ibid.*

8 *Ibid* and see *supra*, pp. 74, 256, 257, 304.

9 *Supra*, pp. 19, 304.

10 *Supra*, p. 257.

11 *Supra*, pp. 70, 179.

12 *Supra*, pp. 20, 90.

13 *Supra* pp. 12, 13, 27, 28, 69, 91.

14 *Supra*, pp. 12, 13, 27, 28, 69, 91, 216.

15 *Supra*, p. 69.

(b) *The right of every owner of land that the air passing thereto shall not be unreasonably polluted by other persons.*[1]

(c) *The right of every owner of a house that his physical comfort shall not be interfered with materially and unreasonably by noise or vibration caused by any other person.*[2]

(d) *The right of every owner of land to so much light and air as pass vertically thereto.*[3]

(e) *The right of every owner of land that such land, in its natural condition, shall have the support naturally rendered by the subjacent soil of another person.*[4]

Explanation.—Land is in its natural condition when it is not excavated and not subjected to artificial pressure; and the "subjacent and adjacent soil" mentioned in this illustration means such soil only as in its natural condition would support the dominant heritage in its natural condition.[5]

(f) *The right of every owner of land that, within his own limits, the water which naturally passes or percolates by, over or through his land shall not, before so passing or percolating, be unreasonably polluted by other persons.*[6]

(g) *The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel.*[7]

(h) *The right of very owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature.*[8]

(i) *The right of every owner of upper land that water naturally rising in, or falling on, such land, and not passing in defined channels, shall be allowed by the owner of adjacent lower land to run naturally thereto.*[9]

(j) *The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners.*[10]

Explanation.—A natural stream is a stream, whether permanent or intermittent, tidal or tideless, on the surface of land or underground, which flows by the operation of nature only and in a natural and known course.[11]

Chapter II.—The Imposition, Acquisition and Transfer of Easements.

Who may impose easements.

8. An easement may be imposed by any one in the circumstances, and to the extent, in and to which he may transfer his interest in the heritage on which the liability is to be imposed.[12]

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1 *Supra*, pp. 13, 88, 89, 216.
2 *Supra*, p. 13.
3 *Supra*, pp. 13, 27.
4 *Supra*, pp. 13, 27, 150, 164, 255.
5 *Supra*, pp. 248, 249.
6 *Supra*, pp. 13, 115, 164.
7 *Supra*, pp. 13, 237.
8 *Supra*, pp. 13, 27, 93, 94, 223, 232, 233.
9 *Supra*, pp. 13, 104, 116.
10 *Supra*, pp. 13, 225 *et seq.*
11 *Supra*, pp. 219, 220.
12 *Supra*, p. 21.

Illustrations.

(*a*) *A is tenant of B's land under a lease for an unexpired term of twenty years, and has power to transfer his interest under the lease. A may impose an easement on the land to continue during the time that the lease exists or for any shorter period.*[1]

(*b*) *A is tenant for his life of certain land with remainder to B absolutely. A cannot, unless with B's consent, impose an easement thereon which will continue after the determination of his life-interest.*

(*c*) *A, B and C are co-owners of certain land. A cannot without the consent of B and C, impose an easement on the land or on any part thereof.*

(*d*) *A and B are lessees of the same lessor, A of a field X for a term of five years, and B of a field Y for a term of ten years. A's interest under his lease is transferable; B's is not. A may impose on X, in favour of B, a right of way terminable with A's lease.*

9. Subject to the provisions of section eight, a servient owner may impose on the servient heritage any easement that does not lessen the utility of the existing easement. But he cannot, without the consent of the dominant owner, impose an easement on the servient heritage which would lessen such utility.[2]

Servient owners.

Illustrations.

(*a*) *A has, in respect of his mill, a right to the uninterrupted flow thereto, from sunrise to noon, of the water of B's stream. B may grant to C the right to divert the water of the stream from noon to sunset: provided that A's supply is not thereby deminished.*[3]

(*b*) *A has, in respect of his house, a right of way over B's land. B may grant to C, as the owner of a neighbouring farm, the right to feed his cattle on the grass growing on the way: provided that A's right of way is not thereby obstructed.*[4]

10. Subject to the provisions of section eight, a lessor may impose, on the property leased, any easement that does not derogate from the rights of the lessee as such, and a mortgagor may impose, on the property mortgaged, any easement that does not render the security insufficient. But a lessor or mortgagor cannot, without the consent of the lessee or mortgagee, impose any other easement on such property, unless it be to take effect on the termination of the lease or the redemption of the mortgage.[5]

Lessor and mortgagor.

Explanation.—A security is insufficient within the meaning of this section unless the value of the mortgaged property exceeds by one-third, or, if con. sisting of buildings, exceeds by one-half, the amount for the time being due on the mortgage.

11. No lessee or other person having a derivative interest may impose on the property held by him as such an easement to take effect after the expiration of his own interest, or in derogation of the right of the lessor or the superior proprietor.[6]

Lessee.

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1 *Supra*, p. 258.
2 *Supra*, p. 21.
3 *Supra*, p. 22.
4 *Supra*, p. 22.
5 *Supra*, p. 258.
6 *Supra*, p. 259.

Who may acquire easements.

12. An easement may be acquired by the owner of the immoveable property for the beneficial enjoyment of which the right is created, or, on his behalf, by any person in possession of the same.[1]

One of two or more co-owners of immoveable property may, as such, with or without the consent of the other or others, acquire an easement for the beneficial enjoyment of such property.

No lessee of immoveable property can acquire, for the beneficial enjoyment of other immoveable property of his own, an easement in or over the property comprised in his lease.

Easements of necessity and *quasi*-easements.

13. Where one person transfers or bequeaths immoveable property to another,[2]—

(*a*) if an easement in other immoveable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; [3]or

(*b*) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement;[4]

(*c*) if an easement in the subject of the transfer or bequest is necessary for enjoying other immoveable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement;[5] or

(*d*) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.[6]

Where a partition is made of the joint property of several persons,—

(*e*) if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement,[7] or

(*f*) if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled, to such easement [8]

The easements mentioned in this section, clauses (*a*), (*c*) and (*e*), are called easements of necessity.

Where immoveable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.

Illustrations.

(a) *A sells B a field then used for agricultural purposes only. It is inaccessible except by passing over A's adjoining land or by trespassing on the land of a stranger. B is entitled to a right of way, for agricultural purposes only, over A's adjoining land to the field sold* [9]

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[1] *Ibid.*

[2] *See* the comments on this section, *supra*, pp. 256, 257, 258, 304.

[3] *Supra*, pp. 24, 25.

[4] *Supra*, pp. 25. 287, 288, 290, 304.

[5] *Supra*, pp. 24, 288, 290.

[6] *Supra*, pp. 25, 26, 323, 324, 325, 327.

[7] *Supra*, p. 24.

[8] *Supra*, pp. 304, 328, 329.

[9] *Supra*, p. 25.

(b) *A, the owner of two fields, sells one to B, and retains the other. The field retained was at the date of the sale used for agricultural purposes only and is inaccessible except by passing over the field sold to B. A is entitled to a right of way, for agricultural purposes only, over B's field to the field retained.*[1]

(c) *A sells B a house with windows overlooking A's land, which A retains. The light which passes over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. B is entitled to the light, and A cannot afterwards obstruct it by building on his land.*[2]

(d) *A sells B a house with windows overlooking A's land. The light passing over A's land to the windows is necessary for enjoying the house as it was enjoyed when the sale took effect. Afterwards A sells the land to C. Here C cannot obstruct the light by building on the land, for he takes it subject to the burdens to which it was subject in A's hands.*[3]

(e) *A is the owner of a house and adjoining land. The house has windows overlooking the land. A simultaneously sells the house to B and the land to C. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. Here A impliedly grants B a right to the light, and C takes the land subject to the restriction that he may not build so as to obstruct such light.*[4]

(f) *A is the owner of a house and adjoining land. The house has windows overlooking the land. A, retaining the house, sells the land to B, without expressly reserving any easement. The light passing over the land is necessary for enjoying the house as it was enjoyed when the sale took effect. A is entitled to the light, and B cannot build on the land so as to obstruct such light.*[5]

(g) *A, the owner of a house, sells B a factory built on adjoining land. B is entitled, as against A, to pollute the air, when necessary, with smoke and vapours from the factory.*

(h) *A, the owner of two adjoining houses, Y and Z, sells Y to B, and retains Z. B is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Y as it was enjoyed when the sale took effect, and A is entitled to the benefit of all the gutters and drains common to the two houses and necessary for enjoying Z as it was enjoyed when the sale took effect.*[6]

(i) *A, the owner of two adjoining buildings, sells one to B, retaining the other. B is entitled to a right to lateral support from A's building, and A is entitled to a right to lateral support from B's building.*[7]

(j) *A, the owner of two adjoining buildings, sells one to B and the other to C. C is entitled to lateral support from B's building, and B is entitled to lateral support frrm C's building.*[8]

(k) *A grants lands to B for the purpose of building a house thereon. B is entitled to such amount of lateral and subjacent support from A's land as is necessary for the safety of the house.*[9]

(l) *Under the Land Acquisition Act,* 1870,[10] *a Railway Company compulsorily acquires a portion of B's land for the purpose of making a siding. The*

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[1] *Ibid*, and p. 257.

[2] *Supra*, pp. 288, 290.

[3] *Supra*, p. 257

[4] *Supra*, pp. 329 *et seq.*

[5] *Supra*, 257.

[6] *Supra*, pp. 291, 297.

[7] *Supra*, p. 297.

[8] *Ibid*, and p. 328.

[9] *Supra*, pp. 144, 145.

[10] *See* now the Land Acquisition Act, 189 (I of 1894), General Acts, Vol. VI, Ed. 1898, p. 97, by which Act X of 1870 has been repealed.

Company is entitled to such amount of lateral support from B's adjoining land as is essential for the safety of the siding.

(m) *Owing to the partition of joint property, A becomes the owner of an upper room in a building, and B becomes the owner of the portion of the building immediately beneath it. A is entitled to such amount of vertical support from B's portion as is essential for the safety of the upper room.*[1]

(n) *A lets a house and grounds to B for a particular business. B has no access to them other than by crossing A's land. B is entitled to a right of way over that land suitable to the business to be carried on by B in the house and grounds.*[2]

Direction of way of necessity.

14. When[3] [a right] to a way of necessity is created under section thirteen the transferor, the legal representative of the testator, or the owner of the share over which the right is exercised, as the case may be, is entitled to set out the way; but it must be reasonably convenient for the dominant owner.[4]

When the person so entitled to set out the way refuses or neglects to do so, the dominant owner may set it out.[5]

Acquisition by prescription.

15. [6]Where the access and use of light or air[7] to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for twenty years,

and where support from one person's land, or things affixed thereto, has been peaceably received by another person's land subjected to artificial pleasure, or by things affixed thereto, as an easement, without interruption, and for twenty years,

and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right[8] without interruption, and for twenty years,

the right to such access and use of light or air, support or other easement, shall be absolute.

Each of the said periods of twenty years shall be taken to be a period, ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.[9]

Explanation I.—Nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement, or if granted as an easement, that it has been granted for a limited period, or subject to a condition on the fulfilment of which it is to cease.[10]

Explanation II.—Nothing is an interruption within the meaning of this section, unless where there is an actual cessation of the enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the

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[1] *Supra*, p. 298.

[2] *Supra*, p. 25.

[3] The words "a right" were substituted for the word "right" by the Repealing and Amending Act, 1891 (XII of 1891), Sch. II, Part I, General Acts, Vol. VI, Ed. 1898, p. 32.

[4] *Supra*, p. 423.

[5] *Ibid.*

[6] *Supra*, pp. 402, 514.

[7] *Supra*, pp. 388, 490

[8] *Supra*, p. 205.

[9] *Supra*, pp. 395, 403.

[10] *Supra*, pp. 402, 534.

claimant has notice thereof and of the person making or authorizing the same to be made.

Explanation III.—Suspension of enjoyment in pursuance of a contract between the dominant and servient owners is not an interruption within the meaning of this section.

Explanation IV.—In the case of an easement to pollute water, the said period of twenty years begins when the pollution first prejudices perceptibly the servient heritage.[1]

When the property over which a right is claimed under this section belongs to Government, this section shall be read as if for the worde "twenty years," the words "sixty years" were substituted.[2]

Illustrations.

(*a*) *A suit is brought in* 1883 *for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from first January,* 1862, *to* 1*st January,* 1882. *The plaintiff is entitled to judgment.*

(*b*) *In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that for a year of that time the plaintiff was entitled to possession of the servient heritage as lessee thereof and enjoyed the right as such lessee. The suit shall be dismissed, for the right of way has not been enjoyed "as an easement" for twenty years.*

(*c*) *In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had admitted that the user was not of right and asked his leave to enjoy the right. The suit shall be dismissed, for the right of way has not been enjoyed "as of right" for twenty years.*

Exclusion in favour of reversioner of servient heritage.

16.[3] Provided that, when any land upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land.[4]

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C had a life-interest in the land; that on C's death B became entitled to the land; and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Rights which cannot be acquired by prescription.

17. Easements acquired under section fifteen are said to be acquired by prescription, and are called prescriptive rights.

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[1] *Supra*, pp. 116, 403.

[2] *Supra*, pp. 399, 403.

[3] *Supra*, p. 402.

[4] *Supra*, p. 378.

None of the following rights can be so acquired :—

(a) a right which would tend to the total destruction of the subject of the right, or the property on which, if the acquisition were made, liability would be imposed ;[1]

(b) a right to the free passage of light or air to an open space of ground ;[2]

(c) a right to surface-water, not flowing in a stream and not permanently collected in a pool, tank or otherwise ;[3]

(d) a right to underground water not passing in a defined channel.[4]

Customary easements.

18. An easement may be acquired in virtue of a local custom.[5] Such easements are called customary easements.[6]

Illustrations.

(a) *By the custom of a certain village every cultivator of village land is entitled, as such, to graze his cattle on the common pasture. A having become the tenant of a plot of uncultivated land in the village breaks up and cultivates that plot. He thereby acquires an easement to graze his cattle in accordance with the custom.*[7]

(b) *By the custom of a certain town no owner or occupier of a house can open a new window therein so as substantially to invade his neighbour's privacy. A builds a house in the town near B's house. A thereupon acquires an easement that B shall not open new windows in his house so as to command a view of the portions of A's house which are ordinarily excluded from observation, and B acquires a like easement with respect to A's house.*[8]

Transfer of dominant heritage passes easement.

19. Where the dominant heritage is transferred or devolves, by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.[9]

Illustration.

A has certain land to which a right of way is annexed. A lets the land to B for twenty years. The right of way vests in B and his legal representative so long as the lease continues.

Chapter III.—The Incidents of Easements.

Rules controlled by contract or title.

20. The rules contained in this chapter are controlled by any contract between the dominant and servient owners relating to the servient heritage, and by the provisions of the instrument or decree, if any, by which the easement referred to was imposed.

Incidents of customary easements.

And when any incident of any customary easement is inconsistent with such rules, nothing in this chapter shall affect such incident.

Bar to use unconnected with enjoyment.

21. An easement must not be used for any purpose not connected with the enjoyment of the dominant heritage.[10]

Illustrations.

(a) *A, as owner of a farm Y, has a right of way over B's land to Y. Lying beyond Y, A has another farm Z, the beneficial enjoyment of which is not*

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1 *Supra*, p. 177.
2 *Supra*, p. 74.
3 *Supra*, pp 103, 104.
4 *Supra*, pp. 105, et seq.
5 *Supra*, pp. 33, 35, 178.
6 *Supra*, pp. 33, 179.
7 *Supra*, pp. 178, 179.
8 *Supra*, pp. 35, 179.
9 *Supra*, p. 254.
10 *Supra*, pp. 57 *et seq.*, 406.

necessary for the beneficial enjoyment of Y. He must not use the easement for the purpose of passing to and from Z.[1]

(*b*) *A, as owner of a certain house, has a right of way to and from it. For the purpose of passing to and from the house, the right may be used, not only by A, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers; for this is a purpose connected with the enjoyment of the dominant heritage. So, if A lets the house, he may use the right of way for the purpose of collecting the rent and seeing that the house is kept in repair.*

Exercise of easement.

Confinement of exercise of easement.

22. The dominant owner must exercise his right in the mode which is least onerous to the servient owner;[2] and when the exercise of an easement can without detriment to the dominant owner be confined to a determinate part of the servient heritage, such exercise shall, at the request of the servient owner, be so confined.

Illustrations.

(a) *A has a right of way over B's fields. A must enter the way at either end, and not at any intermediate point.*

(b) *A has a right annexed to his house to cut thatching-grass in B's swamp. A, when exercising his easement, must cut the grass so that the plants may not be destroyed.*

Right to alter mode of enjoyment.

23. Subject to the provisions of section twenty-two, the dominant owner may, from time to time, alter the mode and place of enjoying the easement, provided that he does not thereby impose any additional burden on the servient heritage.[3]

Exception—The dominant owner of a right of way cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.[4]

Illustrations.

(*a*) *A, the owner of a saw-mill, has a right to a flow of water sufficient to work the mill. He may convert the saw-mill into a corn-mill, provided that it can be worked by the same amount of water.*

(*b*) *A has a right to discharge on B's land the rain-water from the eaves of A's house. This does not entitle A to advance his eaves if, by so doing, he imposes a greater burden on B's land.*

(*c*) *A, as the owner of a paper-mill, acquires a right to pollute a stream by pouring in the refuse-liquor produced by making in the mill paper from rags. He may pollute the stream by pouring in similar liquor produced by making in the mill paper by a new process from bamboos, provided that he does not substantially increase the amount, or injuriously change the nature, of the pollution.*

(*d*) *A, riparian owner, acquires as against the lower riparian owners, a prescriptive right to pollute a stream by throwing sawdust into it. This does not entitle A to pollute the stream by discharging into it poisonous liquor.*

Right to do acts to secure enjoyment.

24. The dominant owner is entitled, as against the servient owner, to do all acts necessary to secure the full enjoyment of the easement[5]; but such acts must be done at such time and in such manner as, without detriment to the

[1] *Supra*, p. 406.
[2] *Supra*, p. 407.
[3] *Supra*, p. 408.
[4] *Supra*, p. 444.
[5] *Supra*, p. 446.

dominant owner, to cause the servient owner as little inconvenience as possible[1]; and the dominant owner must repair, as far as practicable, the damage (if any) caused by the act to the servient heritage.[2]

Accessory rights.

Rights to do acts necessary to secure the full enjoyment of an easement are called accessory rights.[3]

Illustrations.

(*a*) *A has an easement to lay pipes in B's land to convey water to A's cistern. A may enter and dig the land in order to mend the pipes, but he must restore the surface to its original state.*[4]

(*b*) *A has an easement of a drain through B's land. The sewer with which the drain communicates is altered. A may enter upon B's land and alter the drain, to adapt it to the new sewer, provided that he does not thereby impose any additional burden on B's land.*[5]

(*c*) *A, as owner of a certain house, has a right of way over B's land. The way is out of repair, or a tree is blown down and falls across it. A may enter on B's land and repair the way or remove the tree from it.*[6]

(*d*) *A, as owner of a certain field, has a right of way over B's land. B renders the way impassable. A may deviate from the way and pass over the adjoining land of B, provided that the deviation is reasonable.*[7]

(*e*) *A, as owner of a certain house, has a right of way over B's field. A may remove rocks to make the way.*[8]

(*f*) *A has an easement of support from B's wall. The wall gives way. A may enter upon B's land and repair the wall.*[9]

(*g*) *A has an easement to have his land flooded by means of a dam in B's stream. The dam is half swept away by an inundation. A may enter upon B's land and repair the dam.*

Liability for expenses necessary for preservation of easement.

25. The expenses incurred in constructing works, or making repairs, or doing any other act necessary for the use or preservation of an easement, must be defrayed by the dominant owner.[10]

Liability for damage from want of repair.

26. Where an easement is enjoyed by means of an artificial work, the dominant owner is liable to make compensation for any damage to the servient heritage arising from the want of repair of such work.[11]

Servient owner not bound to do anything.

27. The servient owner is not bound to do anything for the benefit of the dominant heritage,[12] and he is entitled, as against the dominant owner, to use the servient heritage in any way consistent with the enjoyment of the easement[13]; but he must not do any act tending to restrict the easement or to render its exercise less convenient.[14]

Illustrations.

(*a*) *A, as owner of a house, has a right to lead water and send sewage through B's land. B is not bound as servient owner to clear the watercourse or scour the sewer.*

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1 *Supra*, p. 448.
2 *Ibid.*
3 *Supra*, p. 446.
4 *Ibid.*
5 *Supra*, p. 447.
6 See *supra*, p. 446
7 *Supra*, p. 444.
8 *Supra*, p. 448.
9 *Supra*, p. 447.
10 *Supra*, p. 449.
11 *Supra*, p. 450.
12 *Supra*, 449.
13 *Supra*, pp. 21, 451, 454, 508.
14 *Supra*, p. 451, 508.

(b) A grants a right of way through his land to B as owner of a field. A may feed his cattle on grass growing on the way, provided that B's right of way is not thereby obstructed ; but he must not build a wall at the end of his land so as to prevent B from going beyond it, nor must he narrow the way so as to render the exercise of the right less easy than it was at the date of the grant.

(c) A, in respect of his house, is entitled to an easement of support from B's wall. B is not bound as servient owner to keep the wall standing and in repair. But he must not pull down or weaken the wall so as to make it incapable of rendering the necessary support.

(d) A, in respect of his mill, is entitled to a watercourse through B's land. B must not drive stakes so as to obstruct the watercourse.

(e) A, in respect of his house, is entitled to a certain quantity of light passing over B's land. B must not plant trees so as to obstruct the passage to A's windows of that quantity of light.

28. With respect to the extent of easements and the mode of their enjoyment, the following provisions shall take effect :— Extent of easements.

An easement of necessity is co-extensive with the necessity as it existed when the easement was imposed.[1] Easement of necessity.

The extent of any other easement and the mode of its enjoyment must be fixed with reference to the probable intention of the parties, and the purpose for which the right was imposed or acquired.[2] Other easements.

In the absence of evidence as to such intention and purpose—

(*a*) a right of way of any one kind does not include a right of way of any other kind :[3] Right of way.

(*b*) the extent of a right to the passage of light or air to a certain window, door or other opening, imposed by a testamentary or non-testamentary instrument, is the quantity of light or air that entered the opening at the time the testator died or the non-testamentary instrument was made : Right to light or air acquired by grant.

(*c*) the extent of a prescriptive right to the passage of light or air to a certain window, door or other opening is that quantity of light or air which has been accustomed to enter that opening during the whole of the prescriptive period irrespectively of the purposes for which it has been used :[4] Prescriptive right to light or air.

(*d*) the extent of a prescriptive right to pollute air or water is the extent of the pollution at the commencement of the period of user on completion of which the right arose : and[5] Prescriptive right to pollute air and water.

(*e*) the extent of every other prescriptive right and the mode of its enjoyment must be determined by the accustomed user of the right.[6] Other prescriptive rights.

29. The dominant owner cannot, by merely altering or adding to the dominant heritage, substantially increase an easement.[7] Increase of easement.

Where an easement has been granted or bequeathed so that its extent shall be proportionate to the extent of the dominant heritage, if the dominant heritage is increased by alluvion, the easement is proportionately increased, and if the dominant heritage is diminished by diluvion, the easement is proportionately diminished.[8]

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1 *Supra*, pp. 421, 422, 423.
2 *Supra*, pp 419, 420, 426 *et seq.*
3 *Supra*, p. 435.
4 *Supra*, pp. 78, 79, 81, 388, 411.
5 *Supra*, pp. 425, 426.
6 *Supra*, p. 424.
7 *Supra*, p. 408.
8 *Supra*, p. 416.

Save as aforesaid, no easement is affected by any change in the extent of the dominant or the servient heritage.

Illustrations.

(*a*) *A, the owner of a mill, has acquired a prescriptive right to divert to his mill part of the water of a stream. A alters the machinery of his mill. He cannot thereby increase his right to divert water.*

(*b*) *A has acquired an easement to pollute a stream by carrying on a manufacture on its banks by which a certain quantity of foul matter is discharged into it. A extends his works and thereby increases the quantity discharged. He is responsible to the lower riparian owners for injury done by such increase.*

(*c*) *A, as the owner of a farm, has a right to take, for the purpose of manuring his farm, leaves which have fallen from the trees on B's land. A buys a field and unites it to his farm. A is not thereby entitled to take leaves to manure this field.*

Partition of dominant heritage.

30. Where a dominant heritage is divided between two or more persons, the easement becomes annexed to each of the shares, but not so as to increase substantially the burden of the servient heritage ;[1] provided that such annexation is consistent with the terms of the instrument, decree or revenue-proceeding (if any) under which the division was made, and in the case of prescriptive rights, with the user during the prescriptive period.

Illustrations.

(*a*) *A house to which a right of way by a particular path is annexed is divided into two parts, one of which is granted to A, the other to B. Each is entitled, in respect of his part, to a right of way by the same path.*

(*b*) *A house to which is annexed the right of drawing water from a well to the extent of fifty buckets a day is divided into two distinct heritages, one of which is granted to A, the other to B. A and B are each entitled, in respect of his heritage, to draw from the well fifty buckets a day ; but the amount drawn by both must not exceed fifty buckets a day.*

(*c*) *A, having in respect of his house an easement of light, divides the house into three distinct heritages. Each of these continues to have the right to have its windows unobstructed.*

Obstruction in case of excessive user.

31. In the case of excessive user of an easement the servient owner may, without prejudice to any other remedies to which he may be entitled, obstruct the user, but only on the servient heritage ; [2] provided that such user cannot be obstructed when the obstruction would interfere with the lawful enjoyment of the easement.[3]

Illustration.

A, having a right to the free passage over B's land of light to four windows six feet by four, increases their size and number. It is impossible to obstruct the passage of light to the new windows without also obstructing the passage of light to the ancient windows. B cannot obstruct the excessive user.[4]

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[1] *Supra* pp. 417—419

[2] *Supra*, pp. 411.

[3] *Supra*, pp. 412—414

[4] *Ibid.*

Chapter IV.—The Disturbance of Easements.

Right to enjoyment without disturbance.

32. The owner or occupier of the dominant heritage is entitled to enjoy the easement without disturbance by any other person.[1]

Illustration.

A, as owner of a house, has a right of way over B's land, C unlawfully enters on B's land, and obstructs A in his right of way. A may sue C for compensation, not for the entry, but for the obstruction.

Suit for disturbance of easement.

33. The owner of any interest in the dominant heritage, or the occupier of such heritage, may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto : provided that the disturbance has actually caused substantial damage to the plaintiff.[2]

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by materially diminishing the value of the dominant heritage, is substantial damage within the meaning of this section and section thirty-four.[3]

Explanation II.—Where the easement disturbed is a right to the free passage of light passing to the openings in a house, no damage is substantial within the meaning of this section, unless it falls within the first Explanation, or interferes materially with the physical comfort of the plaintiff, or prevents him from carrying on his accustomed business in the dominant heritage as beneficially as he had done previous to instituting the suit.[4]

Explanation III.—Where the easement disturbed is a right to the free passage of air to the openings, in a house, damage is substantial within the meaning of this section if it interferes materially with the physical comfort of the plaintiff, though it is not injurious to his health.[5]

Illustrations.

(*a*) *A place a permanent obstruction in a path over which B, as tenant of C's house, has a right of way. This is substantial damage to C, for it may affect the evidence of his reversionary right to the easement.*

(*b*) *A, as owner of a house, has a right to walk along one side of B's house. B builds a verandah overhanging the way about ten feet from the ground, and so as not to occasion any inconvenience to foot-passengers using the way. This is not substantial damage to A.*

When cause of action arises for removal of support.

34. The removal of the means of support to which a dominant owner is entitled does not give rise to a right to recover compensation, unless and until substantial damage[6] is actually sustained.[7]

Injunction to restrain disturbance.

35. Subject to the provisions of the Specific Relief Act, 1877, sections 52 to 57 (both inclusive), an injunction may be granted to restrain the disturbance of an easement[8]—

(*a*) if the easement is actually disturbed,—when compensation for such disturbance might be recovered under this chapter.[9]

(*b*) if the disturbance is only threatened or intended,—when the act threatened or intended must necessarily, if performed, disturb the easement.[10]

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[1] *Supra*, p. 506.

[2] *Supra*, pp. 503, 517, 529, 534.

[3] *Supra*, p. 502.

[4] *Supra*, p. 84.

[5] *Supra*, p. 84.

[6] As to meaning of "substantial damage," *see* s. 33, Expl. I, *supra*.

[7] *Supra*, pp. 247.

[8] *Supra*, p. 517, 535.

[9] Ss. 33, 34.

[10] *Supra*, p. 528.

Abatement of obstruction of easement.

36. Notwithstanding the provisions of section twenty-four, the dominant owner cannot himself abate a wrongful obstruction of an easement.[1]

Chapter V.—The Extinction, Suspension and Revival of Easements.

Extinction by dissolution of right of servient owner.

37. When, from a cause which preceded the imposition of an easement the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.[2]

Exception.—Nothing in this section applies to an easement lawfully imposed by a mortgagor in accordance with section ten.[3]

Illustrations.

(*a*) *A transfers Sultánpur to B on condition that he does not marry C. B imposes an easement on Sultánpur. Then B marries C. B's interest in Sultánpur ends, and with it the easement is extinguished.*

(*b*) *A, in 1860, let Sultánpur to B for thirty years from the date of the lease. B, in 1861, imposes an easement on the land in favour of C, who enjoys the easement peaceably and openly as an easement without interruption for twenty-nine years. B's interest in Sultánpur then ends, and with it C's easement.*

(*c*) *A and B, tenants of C, have permanent transferable interests in their respective holdings. A imposes on his holding an easement to draw water from a tank for the purpose of irrigating B's land. B enjoys the easement for twenty years. Then A's rent falls into arrear and his interest is sold. B's easement is extinguished.*

(*d*) *A mortgages Sultánpur to B, and lawfully imposes an easement on the land in favour of C in accordance with the provisions of section ten. The land is sold to D in satisfaction of the mortgage-debt. The easement is not thereby extinguished.*

Extinction by release.

38. An easement is extinguished when the dominant owner releases it expressly or impliedly to the servient owner.[4]

Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage.[5]

An easement may be released as to part only of the servient heritage.[6]

Explanation I.—An easement is impliedly released—

(*a*) where the dominant owner expressly authorizes an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority ;[7]

(*b*) where any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future.[8]

Explanation II.—Mere non-user of an easement is not an implied release within the meaning of this section.[9]

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1 *Supra*, p. 505.
2 *Supra*, p. 494.
3 *Supra*, p. 495.
4 *Supra*, p. 456.
5 *Supra*, p. 457.
6 *Ibid.*
7 *Supra*, p. 462.
8 *Supra*, pp. 463, 473
9 *Supra*, p. 472.

Illustrations.

(a) A, B and C are co-owners of a house to which an easement isannexed. A, without the consent of B and C, releases the easement. This release is effectual only as against A and his legal representative.

(b) A grants B an easement over A's land for the beneficial enjoyment of his house. B assigns the house to C. B then purports to release the easement. The release is ineffectual.

(c) A, having the right to discharge his eavesdroppings into B's yard, expressly authorizes B to build over this yard to a height which will interfere with the discharge. B builds accordingly. A's easement is extinguished to the extent of the interference.

(d) A, having an easement of light to a window, builds up that window with bricks and mortar so as to manifest an intention to abandon the easement permanently. The easement is impliedly released.

(e) A, having a projecting roof by means of which he enjoys an easement to discharge eavesdroppings on B's land permanently alters the roof, so as to direct the rain-water into a different channel and discharge it on C's land. The easement is impliedly released.

Extinction by revocation.

39. An easement is extinguished when the servient owner, in exercise of a power reserved in this behalf, revokes the easement.[1]

Extinction on expiration of limited period or happening of dissolving condition.

40. An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires or the condition is fulfilled.[2]

Extinction on termination of necessity.

41. An easement of necessity is extinguished when the necessity comes to an end.[3]

Illustration.

A grants B a field inaccessible except by passing over A's adjoining land. B afterwards purchases a part of that land over which he can pass to his field. The right of way over A's land which B had acquired is extinguished.

Extinction of useless easement.

42. An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.[4]

Extinction by permanent change in dominant heritage.

43. Where, by any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished,[5] unless—

(a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used ;[6] or

(b) the injury caused to the servient owner by the change is so slight that no reasonable person would complain of it ;[7] or

(c) the easement is an easement of necessity.[8]

Nothing in this section shall be deemed to apply to an easement entitling the dominant owner to support of the dominant heritage.[9]

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[1] *Supra*, p. 495.
[2] *Ibid.*
[3] *Supra*, pp. 495, 496.
[4] *Supra*, p. 496.
[5] *Supra*, pp. 480-492.
[6] *Ibid.*
[7] *Supra*, p. 491.
[8] *Supra*, p. 495.
[9] *Supra*, p. 493.

Extinction on permanent alteration of servient heritage by superior force.

44. An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner cannot longer enjoy such easement :[1]

Provided that, where a way of necessity is destroyed by superior force, the dominant owner has a right to another way over the servient heritage ; and the provisions of section fourteen apply to such way.[2]

Illustrations.

(*a*) *A grants to B, as the owner of a certain house, a right to fish in a river running through A's land. The river changes its course permanently and runs through C's land. B's easement is extinguished.*

(*b*) *Access to a path over which A has a right of way is permanently cut off by an earthquake. A's right is extinguished.*

Extinction by destruction of either heritage.

45. An easement is extinguished when either the dominant or the servient heritage is completely destroyed.[3]

Illustration.

A has a right of way over a road running along the foot of a sea-cliff. The road is washed away by a permanent encroachment of the sea. A's easement is extinguished.

Extinction by unity of ownership.

46. An easement is extinguished when the same person becomes entitled to the absolute ownership of the whole of the dominant and servient heritages.[4]

Illustrations.

(*a*) *A, as the owner of a house, has right of way over B's field. A mortgages his house, and B mortgages his field to C. Then C forecloses both mortgages and becomes thereby absolute owner of both house and field. The right of way is extinguished.*

(*b*) *The dominant owner acquires only part of the servient heritage : the easement is not extinguished, except in the case illustrated in section forty-one.*

(*c*) *The servient owner acquires the dominant heritage in connection with a third person : the easement is not extinguished.*

(*d*) *The separate owners of two separate dominant heritages jointly acquire the heritage which is servient to the two separate heritages : the easements are not extinguished.*

(*e*) *The joint owners of the dominant heritage jointly acquire the servient heritage : the easement is extinguished.*

(*f*) *A single right of way exists over two servient heritages for the beneficial enjoyment of a single dominant heritage. The dominant owner acquires one only of the servient heritages. The easement is not extinguished.*

(*g*) *A has a right of way over B's road. B dedicates the road to the public. A's right of way is not extinguished.*

Extinction by non-enjoyment.

47. A continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years.[5]

A discontinuous easement is extinguished when for a like period, it has not been enjoyed as such.[6]

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[1] *Supra*, p. 496.

[2] *Ibid.*

[3] *Ibid.*

[4] *Supra*, p. 453 *et seq.*

[5] *Supra*, pp. 462, 463, 472.

[6] *Supra*, pp. 462, 463, 477, 478.

Such period, shall be reckoned, in the case of a continuous easement, from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner; and, in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner.

Provided that if, in the case of a discontinuous easement, the dominant owner, within such period, registers, under the Indian Registration Act, 1877,[1] a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.[2]

Where an easement can be legally enjoyed only at a certain place, or at certain times, or between certain hours, or for a particular purpose, its enjoyment during the said period at another place, or at other times, or between other hours, or for another purpose, does not prevent its extinction under his section.[3]

The circumstance that, during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence, or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.[4]

An easement is not extinguished under this section[5]—

(*a*) where the cessation is in pursuance of a contract between the dominant and servient owners;

(*b*) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period; or

(*c*) where the easement is a necessary easement.

Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, such rights shall, for the purposes of this section, be deemed to be a single easement.[6]

Illustration.

A has, as annexed to his house, rights of way from the high road thither over the heritages X and Z and the intervening heritage Y. Before the twenty years expire, A exercises his right of way over X. His rights of way over Y and Z are not extinguished.

Extinction of accessory rights.

48. When an easement is extinguished, the rights (if any) accessory thereto are also extinguished.[7]

Illustration.

A has an easement to draw water from B's well. As accessory thereto he has a right of way over B's land to and from the well. The easement to draw water is extinguished under section forty-seven. The right of way is also extinguished.

Suspension of easement.

49. An easement is suspended when the dominant owner becomes entitled to possession of the servient heritage for a limited interest therein, or when the servient owner becomes entitled to possession of the dominant heritage for a limited interest therein.[8]

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1 For Act III of 1877, *see* General Acts, Vol. iii, Ed. 1898, p. 41.

2 *Supra*, p. 478.

Ibid.

Ibid.

5 *Ibid.*

6 *Ibid.*

7 *Supra*, p. 497.

8 *Supra*, pp. 459, 497.

Servient owner not entitled to require continuance.

50. The servient owner has no right to require that an easement be continued; and, notwithstanding the provisions of section twenty-six, he is not entitled to compensation for damage caused to the servient heritage in consequence of the extinguishment or suspension of the easement, if the dominant owner has given to the servient owner such notice as will enable him, without unreasonable expense, to protect the servient heritage from such damage.[1]

Compensation for damage caused by extinguishment.

Where such notice has not been given, the servient owner is entitled to compensation for damage caused to the servient heritage in consequence such extinguishment or suspension.[2]

Illustration.

A, in exercise of an easement, diverts to hisc anal the water of B's stream. The diversion continues for many years, and during that time the bed of the stream partly fills up. A then abandons his easement, and restores the stream to its ancient course. B's land is consequently flooded. B sues A for compensation for the damage caused by the flooding. It is proved that A gave B a month's notice of his intention to abandon the easement, and that such notice was sufficient to enable B, without unreasonable expense, to have prevented the damage. The suit must be dismissed.

Revival of easements.

51. An easement extinguished under section forty-five revives (*a*) when the destroyed heritage is, before twenty years have expired, restored by the deposit of alluvion; (*b*) when the destroyed heritage is a servient building and before twenty years have expired such building is rebuilt upon the same site; and (*c*) when the destroyed heritage is a dominant building and before twenty years have expired such building is rebuilt upon the same site and in such a manner as not to impose a greater burden on the servient heritage.[3]

An easement extinguished under section forty-six revives when the grant or bequest by which the unity of ownership was produced is set aside by the decree of a competent Court.[4] A necessary easement extinguished under the same section revives when the unity of ownership ceases from any other cause.[5]

A suspended easement revives if the cause of suspension is removed before the right is extinguished under section forty-seven.[6]

Illustration.

A, as the absolute owner of field Y, has a right of way thither over B's field Z. A obtains from B a lease of Z for twenty years. The easement is suspended so long as A remains lessee of Z. But when A assigns the lease to C, or surrenders it to B, the right of way revives.

"License" defined.

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.[7]

Who may grant license.

53. A license may be granted by any one in the circumstances and to the extent in and to which he may transfer his interests in the property affected by the license.[8]

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[1] *Supra*, p. 493.
[2] *Ibid.*
[3] *Supra*, p. 497.
[4] *Supra*, p. 498.
[5] *Supra*, pp. 497, 498.
[6] *Supra*, p. 498.
[7] *Supra*, pp. 30, 543.
[8] *Supra*, p 552.

54. The grant of a license may be express or implied from the conduct of the grantor, and an agreement which purports to create an easement, but is ineffectual for that purpose, may operate to create a license.[1]

Grant may be express or implied.

55. All licenses necessary for the enjoyment of any interest, or the exercise of any right, are implied in the constitution of such interest, or right. Such licenses are called accessory licenses.[2]

Accessory licenses annexed by law.

Illustration.

A sells the trees growing on his land to B. B is entitled to go on the land and take away the trees.

56. Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee;[3] but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.[4]

License when transferable.

Illustrations.

(*a*) *A grants B a right to walk over A's field whenever he pleases. The right is not annexed to any immoveable property of B. The right cannot be transferred.*

(*b*) *The Government grant B a license to erect and use temporary grain-sheds on Government land. In the absence of express provision to the contrary, B's servants may enter on the land for the purpose of erecting sheds, erect the same, deposit grain therein and remove grain therefrom.*

57. The grantor of a license is bound to disclose to the licensee any defect in the property affected by the license, likely to be dangerous to the person or property of the licensee, of which the grantor is, and the licensee is not, aware.[5]

Grantor's duty to disclose defects.

58. The grantor of a license is bound not to do anything likely to render the property affected by the license dangerous to the person or property of the licensee.[6]

Grantor's duty not to render property unsafe.

59. When the grantor of the license transfers the property affected thereby, the transferee is not as such bound by the license.[7]

Grantor's transferee not bound by license.

60. A license may be revoked by the grantor unless.[8]

License when revocable.

(*a*) it is coupled with a transfer of property and such transfer is in force :[9]

(*b*) the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution.[10]

61. The revocation of a license may be express or implied.[11]

Revocation express or implied.

Illustrations.

(*a*) *A, the owner of a field, grants a license to B to use a path across it. A, with intent to revoke the license, locks a gate across the path, the license is revoked.*[12]

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1 *Supra*, pp. 552, 553.
2 *Supra*, pp. 31, 554.
3 *Supra*, pp. 31, 556.
4 *Supra*, pp. 30, 555.
5 *Supra*, p. 556.
6 *Supra*, p. 557.
7 *Supra*, pp. 30, 550, 557.
8 *Supra*, pp. 31, 543, 558 *et seq.*
9 *Supra*, pp. 31, 558.
10 *Supra*, pp. 553, 562.
11 *Supra*, p. 563.
12 *Ibid.*

(*b*) *A, the owner of a field, grants a license to B to stack hay on the field. A lets or sells the field to C. The license is revoked.*[1]

License when deemed revoked

62. A license is deemed to be revoked—

(*a*) when, from a cause preceding the grant of it, the grantor ceases to have any interest in the property affected by the license :

(*b*) when the licensee releases it, expressly or impliedly, to the grantor or his representative :

(*c*) where it has been granted for a limited period, or acquired on condition that it shall become void on the performance or non-performance of a specified act, and the period expires, or the condition is fulfilled :

(*d*) where the property affected by the license is destroyed or by superior force so permanently altered that the licensee can no longer exercise his right :

(*e*) where the licensee becomes entitled to the absolute ownership of the property affected by the license :

(*f*) where the license is granted for a specified purpose and the purpose is attained, or abandoned, or becomes impracticable :

(*g*) where the license is granted to the licensee as holding a particular office, employment or character, and such office, employment or character ceases to exist :

(*h*) where the license totally ceases to be used as such for an unbroken period of twenty years, and such cessation is not in pursuance of a contract between the grantor and the licensee :[2]

(*i*) in the case of an accessory license, when the interest or right to which it is accessory ceases to exist.

Licensee's rights on revocation.

63. Where a license is revoked, the licensee is entitled to a reasonable time to leave the property affected thereby and to remove any goods which he has been allowed to place on such property.[3]

Licensee's rights on eviction.

64. Where a license has been granted for a consideration, and the licensee, without any fault of his own, is evicted by the grantor before he has fully enjoyed, under the license, the right for which he contracted, he is entitled to recover compensation from the grantor.[4]

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[1] *Ibid.*

[2] *Supra*, pp. 564, 565.

[3] *Supra*, p. 564.

[4] *Supra*, p. 565.

APPENDIX VIII.

The History of Indian Easements Act V of 1882.

The history of the Indian Easements Act appears to be briefly as follows :—For some time prior to the drafting of the original Easements Bill, there had been a growing conviction amongst the Judges in India that the law on the subject of easements should be codified, which law was then (to use the words of Sir Michael Westropp, Chief Justice of Bombay) "for the most part to be found only in treatises and reports practically inaccessible to a large proportion of the legal professions in the mofussil and to the Subordinate Judges." It had been asserted by a Judge of the Punjab Court that the great litigation in the case of urban easements was largely due to the fact that neither the people themselves nor the majority of the Courts understood the principles upon which such disputes should be determined.[1]

On the 20th January 1876, Lord Salisbury addressed a despatch to the Government of India in which, after reciting the various steps taken to reform the Indian laws, he stated that the completion of a code of law was an accepted policy which could not be abandoned without detriment to the people and discredit to the Government, and requested the Governor-General in Council to state the order in which the remaining branches of law should be taken up. In reply to this despatch the Government of India, on the 10th May 1877, after disclaiming any intention of abandoning the codification of the law, proposed that six branches of substantive law should be codified amongst which should be included the subject of easements, and that the codification of Indian law should be carried out in India rather than in England.

To this the Secretary of State replied on the 9th August 1877, sanctioning the course suggested by the Governor-General in Council.[2]

Mr. Whitley Stokes, then Legal Member of Council, thereupon proceeded to draw, amongst others, an Easements Bill, a rough draft whereof was circulated in February 1878 to the Local Governments for opinion and excited much criticism.[3]

The Bill was then revised, and on the 11th February 1879 was submitted to the Indian Law Commissioners, consisting of Sir Charles Turner, Mr. Justice West and Mr. Whitley Stokes, who in their report, after noticing the objections taken to the Bill that it would, by informing people of their

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[1] See *Gazette of India*, July to December 1880, Part V, p. 476.

[2] See Preface to the six codifying Bills laid before the Indian Law Commission, 1879.

[3] See *Gazette of India*, July to December 1880, Part V, p. 480.

rights, provoke litigation and abolish, or otherwise interfere with, easements recognised only by local usage, replied thereto with the argument that it was a matter of ordinary experience that people were more prone to bring or resist claims to doubtful than to certain rights, and that by its explicit declarations of the law on points now held doubtful by the people, the Bar and the Judges of the Subordinate Courts, the Bill appeared likely to check rather than increase litigation, and that as to the latter objection that the Bill would interfere with local usages, they had been unable to find in the papers submitted to them a single instance of a right in the nature of an easement that would have been affected *in malam partem* by the Bill.[1]

The Bill, as revised by the Law Commission, extended to the whole of British India, except to the Scheduled Districts mentioned in Act XIV of 1874, but as there were some parts of the country, *e.g.*, Assam and British Burma, where the rights with which it dealt were said to be practically unknown, the expediency was suggested of extending it to towns, leaving the rural districts entirely to their local usages, and of inviting the Local Governments to state whether the extension of the proposed law should be made permissive.[2]

As a result of the labours of the Law Commission, a revised Bill based mainly on the law of England and reproducing with a few amendments and alterations, the draft, as settled by the Law Commission, was, with an accompanying Statement of Objects and Reasons, placed before Council on the 6th November 1880, and circulated to the Local Governments for their opinions.[3]

On the 15th June 1881, Mr. Whitley Stokes placed before Council the opinions of the several Local Governments.[4]

The Bengal Government thought there was no pressing necessity for any legislation on the subject.

The Madras Government while expressing no opinion on the Bill sent six opinions of local officers, five of which were on the whole in favour of the Bill.

The Bombay Government had no objection to offer to the details of the Bill in its then existing form, but strongly deprecated its indiscriminate extension to the mofussil, and, therefore, deisred that the law should be permissive.

The Chief Commissioner of British Burma was of opinion that an enactment of the kind comprised in the Bill was not at present required in that Province, and would not be understood either by the Burmese people or the Burmese Judges.

The Chief Commissioner of Coorg offered no opinion, but forwarded a favourable opinion from the Superintendent.

The Chief Commissioner of Ajmere and Merwara thought that the provisions of the Bill were neither suitable for, nor required in that district.

The Chief Commissioner of Assam was disposed to think that it would be expedient in the first place to extend the Bill only to towns, leaving the rural population entirely to their local usages.

As a result of these opinions, Mr. Whitley Stokes proposed that the Bill in its then existing form, might, with the concurrence of all the Local Governments, be extended to Madras, Coorg and the Central Provinces, and be made

[1] See *Gazette of India*, July to December 1880, Part V, p. 480.

[2] See *Gazette of India*, July to December 1880, Part V, p. 480.

[3] Abstract of Proceedings of the Council of the Governor-General in India, Vols. XX—XXI, 1881—1882, Part I, p. 150.

[4] *Ibid*, p. 154.

extendible to the other parts of British India at the option of the Local Governments.

The Bill was then referred to a Select Committee for settlement.

On the 16th February 1882, Mr. Whitley Stokes introduced the Bill as amended by the Select Committee, and moved that the Act should come into force on the 1st of July 1882, instead of the 1st March 1882, as originally provided in the first section of the Bill, the object being to give time for making careful translations of the Bill into the various vernaculars of the Provinces to which it would apply, and for gaining the necessary familiarity with the provisions of the law. The motion was put and agreed to.[1]

The Bill, as amended, and as applying only to the Presidency of Madras and the Chief Commissionerships of the Central Provinces and Coorg, was then passed into law, but did not actually come into force until the 1st of July 1882.[2]

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[1] Abstract of Proceedings of the Council of the Governor-General in India, Vols. XX—XXI, 1881-1882, Part II, pp. 100, 101.

[2] *Ibid*, pp. 101—110.

APPENDIX IX.

Criminal Procedure Code, Act X of 1882, Section 147 (Amended by Act V of 1898)

Disputes concerning easements, etc.

147. Whenever any such Magistrate is satisfied as aforesaid that a dispute likely to cause a breach of the peace exists concerning the right *to do or prevent the doing of anything in or upon any tangible immoveable property*[1] *situate*[2] within the local limits of his jurisdiction, he may inquire into the matter[3]; and may, if it appears to him that such right exists, make an order permitting such thing to be done, or directing that such thing shall not be done, as the case may be, until the person objecting to such thing being done or claiming that such thing may be done, obtains the decision of a competent Civil Court adjudging him to be entitled to prevent the doing of, or to do, such thing as the case may be:

Provided that no order shall be passed under this section permitting the doing of anything where the right to do such thing is exerciseable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry; or, where the right is exerciseable only at particular seasons,[4] unless the right has been exercised during *the season next before such institution*[5].

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[1] Rights of fishery *in alieno solo* and other profits *a prendre* fall within the scope of these words, see *Dukhi Mullah* v. *Halway* (1895), I. L. R., 23 Cal., 55; *Kali Kissen Tagore* v. *Anund Chunder Roy* (1896), I L. R., 23 Cal., 557. *See* this section referred to, *supra* at pp. 49, 50, 51, 52, 53, 55.

[2] In the place of these words in italics, s. 147 of the amending Criminal Procedure Code Act V of 1898, has the following words: "Of use of any land or water (including any right of way or other easement over the same)." "For the purposes of this section the expression 'land or water' includes buildings, markets, fisheries, crops or other produce of land, and the rents and profits of any such property," *see* the definition in the section.

[3] After this word in s. 147 of the amending Act, the following words are inserted: "In manner provided by s. 145."

[4] After this word s. 147 of the amending Act inserts the words, "or on particular occasions."

[5] Instead of these words s. 147 of the amending Act has the words: "the last of such seasons or occasions before such institution."

APPENDIX X.

Civil Procedure, Act XIV of 1882, Sections 492-497.[1]

Of Temporary Injunctions and Interlocutory Orders.

A.—Temporary Injunctions.

492. If in any suit it is proved by affidavit or otherwise—

(*a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree, or

Cases in which temporary injunction may be granted.

(*b*) that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors,

the Court may, by order, grant a temporary injunction to restrain such act, or give such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property, as the Court thinks fit, or refuse such injunction or other order.

493. In any suit for restraining the defendant from committing a breach of contract or other injury, whether compensation be claimed in the suit or not, the plaintiff may at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

Injunction to restrain repetition or continuance of breach.

The Court may, by order, grant such injunction on such terms as to the duration of the injunction, keeping an account, give security, or otherwise as the Court thinks fit, or refuse the same.[2]

In case of disobedience, an injunction granted under this section or section 492 may be enforced by the imprisonment of the defendant for a term not exceeding six months, or the attachment of his property, or both.

No attachment under this section shall remain in force for more than one year, at the end of which time, if the defendant has not obeyed the injunction, the property attached may be sold and out of the proceeds, the Court may award to the plaintiff such compensation as it thinks fit, and may pay the balance, if any, to the defendant.

494. The Court shall, in all cases except where it appears that the object of granting the injunction would be defeated by the delay, before granting an

Before granting injunction Court to direct notice to opposite party.

[1] *Supra*, pp 50, 51, 52, 53, 54, 55, 168, 517. [2] *Supra*, p. 519.

injunction, direct notice of the application for the same to be given to the opposite party.[1]

Injunction to Corporation binding on its members and officers.

495. An injunction directed to a Corporation or public Company is binding not only on the Corporation or Company itself, but also on all members and officers of the Corporation or Company whose personal action it seeks to restrain.[2]

Order for injunction may be discharged, varied, or set aside.

496. Any order for an injunction may be discharged or varied or set aside by the Court on application made thereto by any party dissatisfied with such order.[3]

Compensation to defendant for issue of injunction on insufficient grounds.

497. If it appears to the Court that an injunction which it has granted was applied for on insufficient grounds or if after the issue of the injunction, the suit is dismissed or judgment is given against the plaintiff by default or otherwise, and it appears to the Court that there was no probable ground for instituting the suit, the Court may, on the application of the defendant, award against the plaintiff in its decree such sum not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him by the issue of the injunction :

Proviso.

Provided that the Court shall not award under this section a larger amount than it might decree in a suit for compensation.

An award under this section shall bar any suit for compensation in respect of the issue of the injunction.

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[1] *Supra*, p. 520. [2] *Supra*, p. 521. [3] *Supra*, p. 521.

APPENDIX XI.

Act VIII of 1891.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL
(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL
ON THE 6TH MARCH 1891).

An Act to extend the Indian Easements Act, 1882, *to certain areas in which that Act is not in force.*

Whereas it is expedient to extend the Indian Easements Act, 1882, to certain areas in which that Act is not in force;

It is hereby enacted as follows:—

Extension of Act V, 1882, to Bombay and the N. W. Provinces and Oudh.

1. The Indian Easements Act, 1882, is hereby extended to the territories respectively administered by the Governor of Bombay in Council and the Lieutenant-Governor of the North-Western Provinces and Chief Commissioner of Oudh.[1]

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[1] *Supra*, p. 50.

APPENDIX XII.

Recent Rulings.

Chap. III.—Part I—Easements of Light and Air.

Case No. (1) A.

A. "The so-called potentiality of the acquisition of the easement within less than twenty years is not an interest in land or easement known to the law. It is a mere question of the doctrine of chances; and assuming the owner of the adjoining land to be alive to his own interests, the chances are far greater that he will block the lights in the second than in the first half of the period."[1]

Case No. (2) B.

B. The observations of the author at pages 85-87 of the text[2] on the cases of *Lanfranchi* v. *Mackenzie*[3], and *Dickinson* v. *Harbottle*[4], and on the case of *Warren* v. *Brown*[5] have been borne out by the recent decisions of the Appeal Court in *Warren* v. *Brown*[6] (reversing Wright, J., and overruling *Lanfranchi* v. *Mackenzie* and *Dickinson* v. *Harbottle*) and in *Home and Colonial Stores Ld.* v. *Colls.*[7]

In delivering the judgment of the Appeal Court in *Warren* v. *Brown* Romer, L. J., after treating as settled law the rule that there must be substantial diminution of the light and substantial damage caused thereby to the owner or tenant of the dominant tenement in order to entitle him to relief, proceeds to lay down the manner in which the question of what would be substantial diminution and substantial damage must be considered, both generally, and with reference to the particular point arising in the case. He says :—

"And in considering what would be a substantial diminution and substantial damage, it is held that the proper point of view is to pay regard, no to what some person having fantastic or peculiar views might choose to regard as a substantial diminution or as substantial damage, but to the views of persons of ordinary sense and judgment. And, in particular, in considering whether a house has been substantially injured, it is proper to have regard to the ordinary uses by way of habitation or business to which it has been put, or might reasonably be supposed to be capable of being put ....

With regard to the exact point arising in this case, we think that since the case of *Kelk* v. *Pearson* it is impossible to hold properly that the statutory light is not interfered with merely because after the interference the house

[1] *Greenhalgh* v. *Brindley* (1901) 2 Ch. 324.

[2] *See* further in this connection, pages 80, 81 of the text.

[3] 1867) L. R., 4 Eq., 421.

[4] (1873) 28 L. T., N S., 186.

[5] (1900) 2 Q. B., 722.

[6] (1902) 1 K. B., 15.

[7] (1902) 1 Ch., 302.

may still come up to some supposed standard as to what a house ordinarily requires by way of light for purposes of inhabitancy or business. Some houses, owing to their having numerous or particularly advantageous ancient lights, are extremely valuable for purposes of habitation or business. In these cases the owner of the servient tenement cannot justify a substantial interference with the lights, or (it may be) a complete stoppage of some of them causing great damage to the house, on the ground that other houses in the neighbourhood, or even the majority of the houses, or some imaginary standard house, are or is not better lighted than the injured house after the injury."

It is important to notice the further point elucidated in the case that the fact of other businesses not requiring much light being carried on after the interference, ought not to prejudice the right to relief in respect of an interference with the greater light required by certain special businesses which owing to the house being very well lighted are being or can be carried on at the time of interference.

Before concluding, Romer, L. J., referred, with approval, to the statement of law in *Kelk* v. *Pearson*[1] as to the right to relief for substantial interference with ancient lights, and adopted the view of Mellish, L. J., expressed in the following words : [2] " I cannot think that it is possible for the law to say that there is a certain quantity of light which a man is entitled to, and which is sufficient for him, and that the question is, whether he has been deprived of that quantity of light. It appears to me that it is utterly impossible to make any rule or adopt any measure of that kind. It is essentially a question of comparison whether by reason of deprivation of light the house is substantially less comfortable than it was before."

All expressions of opinion used, by judges in other cases conflicting with the above were dissented from, and in particular the opposing views of Malins, *V. C.* in *Lanfranchi* v. *Mackenzie* and *Dickinson* v. *Harbottle* were declared unsound.

C. In *Home and Colonial Stores, Ld.* v. *Colls*,[3] the Appeal Court further emphasises the opinion accepted in *Warren* v. *Brown*, that there is no standard or fixed amount of light to which alone a person is entitled, and that fanciful or fastidious views of what is substantial interference are not to be taken into account.[3]

Case No. (3) C.

Chap. III—Part III B.—Easements relating to flow of water in artificial watercourses.

D. (1) Inasmuch as the rights to the flow of water in an artificial watercourse must be founded on an agreement, either expressed or presumed from user, with the owners of the land through which the stream runs, it follows that the circumstances in any case may be such as to warrant the inference than when the watercourse was originally constructed it was agreed that each of the riparian proprietors should have the same rights as the riparian proprietors upon a natural stream.[4]

Case No. (4) D.

But even when this is the case it is not impossible that the general rights of the riparian proprietors may be subject to some special or larger right

[1] (1871) L. R., 6 Ch. App., 809.
[2] *Ibid* at p. 814.
[3] (1902) 1 Ch., 302.
[4] *Bailey & Co.* v. *Clark, Son and Morland* (1902), 1 Ch., 649.

acquired by one of themselves either by the original grant or by subsequent user.[1]

In considering a claim to the exclusive use of water flowing along an artificial channel the Court should take into account first the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created ; and thirdly, the mode in which it has been in fact used and enjoyed.[2]

Chap. IV—Part II A.—Disturbance of Public Rights.

Case No. (5).

The right of abatement of a public nuisance by individuals is not regarded with favour by the law.[3]

The ordinary remedy for a public nuisance is by indictment, but a public nuisance may become a private one to a person who is specially and in some particular way inconvenienced thereby, as in the case of a gate across a high way which prevents a traveller from passing and which he may therefore throw down. But there is a radical difference between public nuisances arising by commission and those arising by omission, since the latter case gives no right of action to the individual, however clear and special may be the damage he has suffered.[4]

And *à fortiori* the right to abate a nuisance to a highway ought not to apply to nuisances arising from the default of the local authority to repair.[5]

The right of abatement is only ancillary to the public right upon a highway which is limited to going and coming and the dedicating owner may complain of any abatement which imposes a greater burthen upon him than this.[6]

Thus where a public right of way existed over a river by means of a footbridge which had been allowed by the local authority to fall into a state of decay, it was held that the right to use the bridge merely as a member of the public did not entitle the defendant to enter upon the *locus in quo* and re-erect the bridge.[7]

Chap. VI—Part IV A.

Case No. (6).

The easement of necessity which is referred to in *Wheeldon* v. *Burrows*[8] as arising on a severance of tenements "means an easement without which the property retained cannot be used at all, and not one merely necessary to the enjoyment of that property."[9]

Case No.(7)

Chap. VI—Part IV B.

The rule that a grantor shall not derogate from his own grant must be taken with the limitation that on a severance of tenements the grantee of the dominant tenement is not entitled to any apparent and continuous easement which would be inconsistent with the intention of the parties to be implied from the circumstances existing at the time of the grant.[10]

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1 *Ibid.*

2 *Ibid*, per Stirling, L. J., at p. 668.

3 *Campbell Davys* v. *Lloyd* (1901), 2 Ch., 518.

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

7 *Ibid.*

8 (1879) L. R., 12 Ch. D. at p. 58.

9 *Per* Stirling, L. J., in *Union Lighterage Co.* v. *London Graving Dock Co.* (1902), 2 Ch. at p. 573.

10 *Godwin* v. *Schweppes. Ld.* (1902), 1 Ch., 26.

An illustration of this exception is to be found in the case of a conveyance of a house with rights to the grantee under an agreement which also provides for the adjoining land being built upon.[1]

Chap. VII—Part 1 B.—"Precario."

"What is precarious? That which depends, not on right, but on the will of another person. As Bracton, 221 *a*, puts it: 'Si antem precaria fuerit et degratia, quæ tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus.' That is to say, if the servient owner can tempestive aut intempestive—whether the dominant owner likes it or not—put a stop to th easement, there is really no easement, because the very idea of right which necessarily underlies an easement is negatived."[2]
Case No. (8).

Chap. XI—Part III (4) (*b*).

Cowper v. *Laidler*[3] is the most recent case in which the jurisdiction of the English Courts to give damages instead of an injunction has been discussed.
Case No. (9).

Buckley, J., says[4]:—"The scope and effect of that Act" (Lord Cairn's Act) have been frequently the subject of judicial comment and decision. The authorities seem to stand as follows:—(1) Where a mandatory injunction is asked the Act gives jurisdiction to substitute damages for injunction, (2) where the injunction asked is one to restrain a continuing nuisance, that is, where the act has been done and there is an intention to continue to do it, then it would seem that there is jurisdiction to award damages instead of granting an injunction. *Shelfer* v. *City of London Electric Lighting Co.*,[5] per A. L. Smith, L. J. But (3) where no wrongful act has been committed, but an injunction is sought to restrain its commission, the Court of Appeal has expressed a clear opinion in *Dreyfus* v. *Peruvian Guano Co.*[6] that Lord Cairn's Act confers no power to give damages in lieu of an injunction. This was the judgment of Bowen, L.J., and Cotton, L. J. In *Martin* v. *Price*[7] (again in the Appeal Court) the question whether the Court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended, was expressed to be by no means free from difficulty, but was not taken as concluded. *Dreyfus* v. *Peruvian Guano Co.*[8] was there referred to as having expressed a clear opinion against the existence of such jurisdiction. In *Martin* v. *Price*[9] the Court did not keep the parties waiting while making up their minds whether the view expressed in *Dreyfus* v. *Peruvian Guano Co.*[10] was to be established by decision, but assuming the jurisdiction to exist, held upon the facts that an injunction ought to go. The only subsequent reference that I find to the point is in *Shelfer* v. *City of London Electric Lighting Co.*[11] In that case it was stated (correctly, so far as I know, although I have not verified it myself), that since Lord Cairn's Act was passed only fourteen cases were to be found in the books in which damages in lieu of an injunction have, against the will of the plaintiff, been awarded, and it was said that all these are cases in which mandatory injunctions were sought. The one case which I have found in which damages were given instead of a

[1] *Godwin* v. *Schweppes, Ld.*

[2] *Per* Farwell, J., in *Burrows* v. *Lang* (1901), 2 Ch. at p. 510.

[3] (1903) 2 Ch., 337.

[4] At p. 339.

[5] (1895) 1 Ch., 287, 319.

[6] (1889) 43 Ch. D., 316, 333, 342.

[7] (1894) 1 Ch., 276.

[8] (1889) 43 Ch. D., 316.

[9] (1894) 1 Ch., 276.

[10] (1889) 43 Ch. D., 316.

[11] (1895) 1 Ch., 287, 315.

prohibitory injunction is *Holland* v. *Worley*,[1] before Pearson, J., a decision which has been doubted.

*   *   *   *   *   *

An easement of light is a legal right. The remedy in equity by way of injunction is a remedy in and of that legal right. The Court has affirmed over and over again that the jurisdiction to give damages where it exists is not so to be used as in fact to enable the defendant to purchase from the plaintiff against his will his legal right to the easement. *Dent* v. *Auction Mart Co.*,[2] *Aynsley* v. *Glover*,[3] *Smith* v. *Simth*,[4] *Green wood* v. *Hornsey*.[5]

"The jurisdiction to award damages instead of an injunction, even though it exists, in cases of continuing actionable nuisances, ought not to be exercised in such cases except under very exceptional circumstances.[6]

"If the injury be trivial and the damages would be measured by a very small sum, say £20,[7] or £5 or £6,[8] the Court may where there is jurisdiction give damages instead of an injunction.

"But except in such cases the owner of the legal right is entitled to the injunction, which is but the equitable remedy to perfect his right."

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[1] (1884) 26 Ch. D., 578. And *see* further *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch. at pp. 311, 315.

[2] (1866) L. R., 2 Eq., 238, 246.

[3] (1874) L. R., 18 Eq., 544, 552.

[4] (1875) L. R., 20 Eq., 500, 505.

[5] (1886) 33 Ch. D., 471, 477.

[6] *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch., 287, 316; *Martin* v. *Price* (1894), 1 Ch., 276, 285; *Home and Colonial Stores* v. *Colls* (1902), 1 Ch., 302, 309.

[7] *Dent* v. *Auction Mart Co.*; *Aynsley* v. *Glover*.

[8] *Home and Colonial Stores* v. *Colls* at p. 306.

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