Public Easements

Newton Josiah Commings

Cornell University School of Law

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PUBLIC EASEMENTS.

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by

Newton Josiah Commings, L.L.B.

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The theme of this discussion is public easements. Before discoursing with any degree of particularity upon this special phase of the subject, it might be well and not inappropriate to view the entire field for an idea of the underlying principles that govern all classes of easements.

The law on this important branch of jurisprudence may be traced to the ancient civil law, down through the different stages of the common law, to the present time.

Its scope is broad, affecting rich, landed interests which are frequent subjects of litigation, and belongs to that broad field known as real property, as incorporeal hereditaments.

Civil commentators called it a praedial right, and defined it as "a privilege that one neighbor hath of another, by writing or prescription without profit, as a way or sink through his land, or such like." (1)

This was in early days, the accepted definition, but

(1) Termes de la Ley, p. 284.
has since received the severest criticism and been abridged and modified in many ways.

The statement that a praedial right, in modern law termed an easement, is a "privilege given in writing by one neighbor to another" is manifestly incorrect, for at the present time such an instrument would create only a simple license. In order to be valid as an easement, it must be under seal. An easement is an interest in realty, and no such interest can at present be disposed of but by a sealed instrument. It is true that these rights are frequently acquired by prescription, but in every such instance a grant is presumed. Goddard says:—"An easement is a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former." (1)

In legal contemplation the right of making use of the land of others, whether it be that of the public or of individuals, for a precise and definite purpose not inconsistent with a general right of property in the owner, especially

(1) Goddard on Easements, p. 2.
where it is for a public use, is an easement. After a careful sifting of definitions and cases, the essential requisites of an easement are these:

First, They are incorporeal.

Second, They are imposed on corporeal property.

Thirdly, They confer no right to a participation in the profits arising from such property.

Fourthly, They are imposed for the benefit of corporeal property.

Fifthly, There must be two distinct tenements, the dominant to which the right belongs, and the servient upon which the obligation rests.

An easement is a mere privilege to do a certain thing, no privilege can be corporeal, therefore an easement must be incorporeal. It must of necessity be a burden upon something tangible or the right itself could not exist.

No profit can be derived thencefrom, the idea of an easement being the acquisition of a privilege either for convenience or from necessity, and not for the sake of personal gain; such would be termed a right of common.

Easements are not, except as to those in gross which are infrequent, mere personal rights, but rights that attach themselves to, and are a burden upon, the property itself, which would not be the case unless they were for
the benefit of the corporeal estate. Two distinct tenements must exist or there would be no foundation for the right.

As distinguished from a license it may be said that the latter is an authority to do a particular act or service of acts upon another's land, without possessing any estate therein, while a claim for an easement must be founded upon prescription or a grant by deed, for it is a permanent interest in another's land. Licenses may be created by parol, and are strictly confined to the original parties, and can neither operate for nor against third persons, while all these attributes are untrue as to easements.

In addition to easements proper, there are certain rights known as quasi easements, for instance, the owner of land has constructed a way or drain over one portion of it for the benefit of another portion, there having never been a separate ownership of either tenement. It is often a serious question as to whether such servitudes are easements at all, and if so, what the test really is. The courts have worked the solution of the problem on the basis of whether or not the right so instituted is continuous or non-continuous. If continuous, as a general proposition, it will pass with a deed of the land, visa versa with the latter,
which requires words of sufficient import to create a new tenement. (1)

Easements in gross are of frequent occurrence in England but rarely found in this country. They are rights attached to the realty but which can be enjoyed by the party possessing such right. They are created by deed, and are so strictly personal that they do not pass by descent, and cannot be assigned or the interest shared in any way. If an easement is created by deed the servitude is never presumed to be personal or in gross, if, by any reasonable construction, it can be held appurtenant to some other estate. So decided where property was sold fronting on a river and the right was to use such premises for the construction of a warehouse by the grantor, his heirs or assigns, was reserved and such use by the grantee, his heirs or assigns was prohibited. This right was construed as appurtenant to the land itself, and binding upon subsequent purchasers with notice. (2)

As a rule, where the dominant and servient tenements are separate and distinct estates, the term "appurtenances" in

(1) Fetters v. Humphreys, ( 79 N. J. Eq. 471.)

Parson's v. Johnson, (68 N. Y. 62.)

(2) Mc Mahon v. Williams, (79 Ala. 288.)

Kuecken v. Voltz, (110 111. 264.)
a deed of conveyance will pass an easement. (1)

An existing easement as a matter of legal right, passes with the thing granted, whether the words "with appurtenances" are used in the conveyance or not; but the use of the words will not transfer to the grantee an apparent easement over lands belonging to another, not necessarily attached as an appurtenance to the lands conveyed, and to which the grantor has no title or right. This doctrine is clearly enunciated in Green v. Collins, (86 N. Y. 246.)

An easement will sometimes be inferred from the nature of the grant itself, and pass with the conveyance. Where A resided on one tract of land and rented another to B who was permitted to run a drain through A's portion into a common sewer. Under this statement of facts it was held that, where A subsequently sells both tracts to different persons on the same day, that the right to continue the use of the drain ceases, if, by reasonable expense and labor, a new one can be constructed without crossing that land. (2)

In deciding the Burn's case the court said, "It is only

(1) Parson's v. Johnson, (68 N. Y. 62, 65.)

(2) Burns v. Gallagher, (62 Md. 462.)

v.----, (112 Mass. 224.)
in cases of strictest necessity, and where it would not be reasonable to suppose that the parties intended the contrary, that the principle of implied reservation can be invoked."

In Lampman v. Mulks, (21 N. Y. 505.), the New Yorks court violently assailed this doctrine. In the opinion it was said, "when the owner of two tenements sells one of them, the purchaser takes the tenement or portion sold with all the burdens and benefits which appear, at the time of the sale, to belong to it, as between it and the property retained by the vendor."

This latter view is more practical for no man will purchase property until he has carefully examined it, nor will a grantor dispose of property, if he be a careful business man, unless he reserves to himself all apparent rights and privileges, which he does not intend to convey. Some courts criticise this view because of its alleged broadness and liberality of construction in behalf of the grantee, while easements of absolute necessity only are to be reserved to the grantor. This view is evidently severely strained, for the burden of the easement is equally as liable to fall upon the estate of the grantee as upon that of the grantor, neither party having any material advantage.

Where the easement is not created by some form of di-
rect grant either express or implied, it may in rare cases be obtained by necessity, as where a circle of lots surrounds certain other property so completely that no mode of ingress and egress can conveniently be had. In such cases the outer tenements will be burdened by an easement for a reasonable passageway in favor of the surrounded estate.

Another class of easements not acquired by direct grant are those obtained by prescription; the open, notorious, peaceful and adverse occupation of the premised under claim of right for a period of years being the essential requisites. (1) And in this connection it may be said that no easement by the public can be acquired by this means, for a prescriptive right presupposes a grant, and the case of the public there can be no grantee. (2)

Some jurisdictions assert nevertheless that the public may acquire such prescriptive rights, the theory of a "presupposed grant" being purely fictional. These courts maintain that the public have an easement by estoppel. This view is ably set forth in Committee v. Case, (26 Pa. St.117 and other cases. (3)

(2) Pearsall v. Post 20 Wend. (N.Y.) 121.
(3) Martin v. People, 23 Ill. 395.
The case of Odiorne v. Wade (5 Pick. 421), was an action for trespass, quare clausum fregit, the defendant having put in a plea of common highway from time immemorial, and proved the existence of the way for more than sixty years, there being no evidence showing its commencement, the court held the duration of the way was sufficient to support the plea of prescription, and in Reed v. Northfield, 13 Pick. 94, Chief Justice Shaw said, "We think it clear upon principle that public easements, as well as others, may be shown by long and uninterrupted use and enjoyment, upon the exclusive legal presumption from such enjoyment, that they were, at some anterior period, laid out and established by competent authority." (1)

But the very able argument of Senator Furman in Pearsall v. Post makes the other, and probably the better view, of this subject, plain. Speaking of the law on New York he says, " and as it has in substance existed ever since the formation of our Constitution, the only way that an individual can acquire a right in real estate is by grant, or by an adverse

Hart v. Trustees, 15 Ind. 226,
Odiorne v. Wade, 5 Pick. 421.

(1) Brownell v. Palmer, 22 Conn. 107,
State v. Green, 41 Iowa 693.
possession of twenty years under a claim of title, in which case the law presumes a grant; and as to the public, the only way in which they can at common law acquire an easement in the land of another is by dedication."

Land, it is generally conceded, must be conveyed by some form of grant, that grant must ordinarily be in writing and under seal, from a definite grantor to a definite grantee. As a matter of fact now, in this case, can such a sealed instrument even be implied for the public is but an indefinite, fictitious term applied to the body politic who are thus incapable of receiving it? The remedy should be by statute, making all highways &c. that have been open to the public for a certain period vest an easement in the public by dedication. Such is the present policy in New York. (1)

In various other States similar statutes have since been enacted.

A word may now be said as to the subject of party walls, and the right to lateral and subjacent support of land. The former are supposed usually to be of common benefit to both estates in the construction of buildings thereon, but they are not of necessity estates in common. If they are built by agreement for their common use, or have been used

(1) 1 N. Y. Rev. Stats. 521, Sec. 100, (3rd.Ed. 636 Sec. 120.)
jointly for twenty years, they become such an estate, which cannot be removed or impaired by one to the detriment of the other. But such walls are frequently owned in severalty by the parties on whose lands it stands. Either may use the wall for all purposes not inconsistent with the rights of the other. (1)

The right to subjacent support of land is a subject that applies with equal force to both public and private easements. The public in working the streets and private individuals in improving their premises cannot deprive an adjacent owner of the natural support of the land to his detriment. (2)

But only reasonable precautions need be taken, and if the injured party has inadvertently built too close to the line, he cannot recover damages in case of loss, to an extent greater than those sustained as the natural and probable consequence of the act. (3)

(1) Brooks v. Curtiss, 50 N. Y. 639.

5 Taunton 20.

(2) Beard v. Murphy, 37 Vt. 104.

Milburn v. Fowler, 27 Jun (N. Y.) 568.

(3) Charles v. Rankin, 22 Mo. 556.

This same right is extended to canals and railroads, and the owner adjoining must not dig so as to injure them. (1)

Lateral support of houses is strictly an artificial easement, and can be created only by grant or prescription. The term of the grant must be strictly complied with, and the adjacent structures reasonably protected. (2)

Having given a brief sketch of the underlying principles of the entire subject, it will now be possible to better comprehend the scope and meaning of the term public easements.

As the name implies they are rights held by the entire body politic in contravention to those claimed by private individuals. It is possible for a private individual and the public to have distinct easements in the same thing, as where A has a right by deed to lay pipes underneath property which has since been dedicated to a city for a public park.

Public rights are always paramount, it being considered wise at all times to sacrifice private good for the general welfare. It may be said that public easements are all the rights in property held by the governing body, in trust,

(1) Midland R. R. v. Checkley, L. R. 4 Eq. 20.

(2) Charles v. Rankin, 22 Mo. 556.
in such a way that the public shall derive the greatest benefit therefrom, so long as the foresight of that governing body shall deem such possession necessary for the fullest realization of the object originally contemplated. The main objects of such easements are ways, water courses and the incidents thereto. The public may acquire an interest in land by dedication; in some States by prescription; and in all States by the exercise of the right of eminent domain.

Dedication may be either by statute or in pais. As to just what the requisites of a dedication are the States are in conflict. Some are very liberal on the question and require only an intent to dedicate, and a public use to which it may be applied. The dedication is oftentimes implied from the nature of the act. It may be in writing or verbal; express or implied; a single act or a series of acts clearly manifesting the owner's intent. (1) But the offer must be accepted and in most of the States, it must be formally done by some public official, or person with authority to act, and will not usually be implied. In Texas and Alabama, an acceptance may be shown by some positive conduct

(1) 9 New York 256.

4 Southern ( Ala. ) 153.
of public officials evincing their consent in behalf of the public, or inferred from official acts of implied recognition on their part, or by any public use, or from the beneficial nature of the dedication. (1)

In the State of Michigan the dedicatory instrument must be under seal, must definitely describe the property, its measurements and bounds, and be duly acknowledged or it will fail. In New York the easement theory of dedication prevails. (2)

By this theory the State may use property, unmolested, for twenty years and by statute it will be then be held to have been dedicated to its use. But mere failure to assert the title is not a dedication. (3)

At common law the intent to dedicate was the essential feature, under this system the legal title remained in the grantor, yet he was estopped from setting it up against those who were using it in compliance with the dedicatory agreement. (4)

(1) 4 Southern ( Ala. 415.

6 Southern Western, (Texas.) 860.

(2) 9 New York 258.

(3) 18 North Eastern ( Ill.) 298.

(4) 41 North Western (Minn.) 1045.
The States holding that the public may acquire prescriptive rights, are not numerous, Illinois, Massachusetts, Connecticut and Delaware being the leading exponents of this theory.

The next and probably the most important method of all is the exercise of the right of eminent domain. This right is said by some authors to exist in the nature of power reserved by the State to use whatever property it may subsequently deem necessary for the convenience of the public. By others it is said to be, not a reservation at all, but purely and simply a matter of right. As to which view is correct, is, so far as this discussion is concerned, of little consequence, so long as both parties concede, as a major proposition that the right itself exists. The legislature is primarily vested with the exercise of this important function, but may and frequently does delegate its authority to municipalities, and local governments. The right may be exercised in all cases in which the public as a whole are directly or indirectly benefitted. And the fact that its effect in a particular case is mainly local, will make no difference, if the general public are effected favorably in any way.

In Talbot v. Hudson, (16 Gray 424.), the court said, "It has never been deemed essential that the entire community,
or any considerable portion thereof should directly enjoy
or participate in an improvement or enterprise in order to
constitute a public use within the true meaning of these
words as used in the Constitution. In a broad and compre-
prehensive view such as has heretofore been taken of the Dec-
laration of Rights, every thing which tends to enlarge the
resources, increase the industrial energies and promote the
productive power of any considerable number of the inhabi-
tants of a section of the State or which leads to the growth of
towns and the creation of new sources of employment of
private capital and labor, indirectly contributes to the gener-
al welfare and to the prosperity of the whole community."

When public interests cannot be conveniently subserved
without the use of private property, it may be condemned and
taken for such use. And, not only may the land itself be
acquired where the necessity exists, but, as in cases of
railroads, all materials needed for its construction may be
taken, if such condemnation is deemed essential to the en-
joyment of the former right. (1)

In connection with the right of eminent domain and ded-
ication the subjects most directly affected, and in which the
public have more vital interests than in all others combined,

(1) L Hun (n. Y.) 496.
are those of lands and water-ways.

That people must have means of intercourse without assuming the position of trespassers is clearly apparent, nor can this vital question be left for individuals to determine at their option. Communication between individuals, and States, and between the nations of the world demands, for its quiet and peaceful enjoyment, that certain prescribed ways shall be laid out and vest in the people as common property. So far as water courses of the country are concerned, it is the rule that if non-navigable, the riparian owner possesses the fee to the center of the stream, and has the right to its natural flow unadulterated. But if for any reason the public will be materially benefitted by its use, it may be condemned for that purpose. But the use must be public in its nature. The leading case in which the authority of the State was overreached is Smith v. The City of Rochester. In this case the city was by State permit allowed to draw water for city use from Mablock lake, which so diminished the flow of its outlet that a mill owner situated thereon was seriously damaged. The city was held in damages to the extent of the loss. (1)

The stream may be used by riparian owners in any way

(1) Smith v. The City of Rochester, 92 N. Y. 463.
not inconsistent with the interests of those above or below them. One cannot erect a dam which will cause the water to set back upon his neighbor, nor can he erect such dam and divert the water into other channels for purposes of irrigation. Unless, the stream be returned to its original channel, before leaving the premises, materially undiminished. (1)

Nor can the water be applied to a use which will so pollute it as to render it unfit for common use. (2)

But it is in the larger, navigable waterways that the public are more deeply interested and in which the separation of public from private rights is difficult to determine.

The public has dominion over such streams to the high water mark, and possesses the fee to the soil underlying. (3)

If the public interferes with the rights of owners of private streams, or takes property for the purpose of improving navigation in public waters, it is a taking for a public use and must be compensated for. (4)

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(2) Ferguson v. Firmenich Mfg. Co. 77 Iowa 576.
But as to when private property has been taken is the knotty problem, for some States accord to adjoining owners greater privileges and property rights than others, which has given rise to this difficulty. In the following cases it was held that the riparian owners on navigable streams could obtain compensation for any individual act which materially injured a legitimate use to which they were putting the stream. (1)

In the Missouri case Meyers was a riparian proprietor on a navigable stream, and used that part of it which adjoined his premises for boating and shipping purposes. The City of St. Louis ran a dike out into the river just

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(1) Smith v. The City of Rochester, 92 N. Y. 463,
125 New York, 164,
Meyers v. The City of St. Louis, 8 Mo. App. 510 Wall 47,
31 Minn. 297,
Stearns v. Patterson & Newark R. R. Co., 34 N.J.L. 532
22 West Virginia 52,
contra:-
91 Illinois 508, 29 Miss. 21,
112 Massachusetts 334.
above him, which caused sand and mud to collect in large quantities in front of his land to his detriment.

The Court accorded damages on the theory that he had a vested property right in the stream which could not be destroyed without compensation. In its opinion the court said, "The right of the owner of a lot in town to the use of the adjoining street is declared to be as much property as the lot itself, and it is immaterial whether he owns to the middle of the street or not. So, the right of a riparian proprietor to the flow of the water in front of his lot is as much property as the lot itself, and it is immaterial that he does not own to the middle of the stream. It is impossible to see why the property can be taken in one case and not in the other." By a public use of waterways is not meant that exercise by State authority alone, the rule being firmly established that the Federal Government as well may use such courses in any manner that will best conform to the Nation's good, without fear of molestation or interference on the part of the State. (1)

(1) Miss. R. Bridge Co. v Lonergan, 91 Ill. 508.
Gilman v Philadelphia, 70 U. S. (3 Wall) 713.
Stockton v Baltimore R. R. Co. 1 Interstate Commerce Rep. 411.
And it is well understood that the right of the State and National governments to keep navigable waters open is not the full extent of their power. They may erect and maintain suitable light-houses; docks and wharves; and other conveniences that tend to facilitate navigation and commerce. Co-extensive with this right reposed in the State to maintain its navigable waterways, is the right to establish and maintain ways upon land for the convenience of the public. Without such thoroughfares intercommunication could not be, for public interests would be made subservient to individual rights. In this, as in all other cases in which public and private interests are intermingled, the dividing line is uncertain and difficult to establish.

In some instances private individuals, whose property abuts upon a way, retain the fee to the road bed, granting the state only an easement, the property being held in trust for the public who must use it for the purposes of a highway only.

In other cases the fee is in the State, the adjoining owner retaining the easement right, under which he may insist that it shall be used only for the purposes originally intended in the dedicatory agreement. As to what constitutes a proper use of a highway is a mooted question. Some jurisdictions hold that all modern contrivances and inventions being
great facilitators of commerce and travel, come properly within this grant, while others say they are an extra burden upon the fee, not within the contemplation of the parties when the original agreement was made. Litigation over such additional uses are of frequent occurrence, arising over steam, electric and elevated railways; electric light and gas plants; telegraphs and telephones; sewers, water-mains, and similar purposes to which public thoroughfares are put. First, as to those cases in which the fee to the street or way is in the adjoining owner, it may be said that all are, generally speaking considered an additional burden upon the fee. They are all in their nature more or less permanent, and the State having only a right of way vested in itself, cannot force the fee-holder to submit to permanent burdens not provided for, without the payment of a fair compensation. (1)

In speaking of the use of steam railroads in such thoroughfares, the court in Williams v N. Y. C. R. R. Co. said:—

"The right of the public in a highway is an easement and one that is vested in the whole public. Is not the right of the railroad company to build its tracks on the highway also an easement?"

This cannot be denied, not that the latter easement is enjoyed not by the public but by a corporation; because it will not be pretended that every man would have the right to go and lay down his timbers and his iron rails, and make a railroad upon a highway. Here there are two easements: one vested in the public and the other in the railroad company. These easements are property and that of the railroad company is valueable. How was it acquired? It cost the company nothing. The theory must be that it was carved out of a part of the public easement, and is therefore a gift of the public. This would do if it were given solely at the expense of the public. But it is manifest that it is the joint expense of the public and the owner of the fee. Ought not the latter, then, to have been consulted? But if public passage and re-passage is not hindered or impeded, it has been held that the use of a street for railroad purposes is not a perversion of the original idea of a street. (1)

And even where it has been interfered with, some States refuse damages on the ground that it is not a new or different use of the streets, but merely a new use of the easement already granted. (2)

(1) 10 Barbour (N.Y.) 360.
It has also been decided that a railroad company with a permit to use the streets cannot monopolize them to the exclusion of the public or private uses to which they are being applied. (1)

And if the adjoining owner can show special damages not suffered in common with others, as obstructions affecting access to premises, he may recover them regardless of the ownership of the fee. This doctrine is fundamental in all States. Enunciated in the following cases. (2)

The rights of individuals in streets of which they are the fee owners are evidently, and of right ought to be, much greater than those in which the fee is vested in the public, for in one case the original owner has received a fair remuneration at the outset, and injuries, subsequently sustained, might be considered consequential, or an incident to the grant, while in the other, the fee has been retained under individual control, in every way not inconsistent with the right vested in the public. In case the fee has been disposed of, does such disposition divest the grantor of all rights whatsoever in the property, particularly when the fee is in the public, and when private rights retained are to be injured by some use to which the public interest is to be put? This question was ably discussed in (51 N. Y. 504.)

(1) 7 Ind. 479.... (2) Stone v. Fairbury, 63 Ill. 394.

106 Ill. 511.... Jewett v. Union R. Co. 15 St Rep. 818.
The court said: "In a strict legal sense, land is not property. The term property, although in common parlance frequently applied to land or a chattel, in its legal signification means only the rights of the owner in relation to it. If property consists of certain essential rights and a physical interference with land substantially subverts one of those rights, such interference takes pro tanto the owner's property. The right of indefinite user is an essential attribute or quality of absolute property without which absolute property can have no existence. From the very nature of these rights of user and exclusion it is evident that they cannot be materially abridged without ipso facto taking its owners property." This view has since been cited with approval in many jurisdictions, so that the applications of the rule is the objective point in view.

It may safely be said that, the consensus of opinion is that whether the infringement be in the nature of an electric, steam, horse or other railroad, the use of the streets for such purposes is a legitimate one, and is not a further burden on the fee. The main exception to this holding is the State of New York, which holds such use legitimate, if the railroad is constructed upon the surface of the street without change of grade. In such instances it is viewed as an appropriation to a public use which does not
constitute a taking of private property. (1)

It must be understood that when land is laid out for a way, regardless of the ownership of the fee, that it must be used for that specific purpose alone. The State has no authority to condemn the property of one individual for the benefit of another, but in addition thereto a definite public benefit must be shown. But on the other hand the dominant owner must be allowed to enjoy his easement in such a manner as will secure to him all the advantages contemplated by the grant. (2)

That the right to manipulate public streets and highways of large cities and towns for uses like those of the telegraph and telephone, electric plants, and elevated and other railroads is a valuable franchise, cannot be questioned. Such franchises are practically exclusive, and net their proprietors millions of dollars yearly. This immense profit is reaped from the fares charged to abutting owners and to other travelers alike. The State is deriving no special benefit by way of taxes or otherwise, for the money invested would be subject to taxation any way. The

(1) 121 New York, 505.
(2) Noyes v. Le mphill, 58 N. Y. 538.
Shivers v. Shivers, 32 New Jersey Equity, 578.
main good accomplished is that greater conveniences are offered to travelers and business men than could be otherwise attained. But if these additional conveniences are paid for in fares why should not they, i.e. abutting owners be compensated to the extent of their loss resulting from the grant of the franchise? Of course the injury in each case cannot be the same, for a steam or elevated railway in a large city is a much greater burden than a gas or water main could possibly be. But that there is actual damage to a greater or less degree, in each case, can, it seems, be easily maintained. So that as a matter of principle, nominal damages ought to be accorded in every instance, and such further damages as could be proven in each particular case.

The majority of States do not support this theory, but it is the fundamental law of New York and a few other jurisdictions, and is evidently the more equitable policy to pursue.

In harmony with the subject of street railways, comes the subject of elevated roads. These latter are erected at a height of twenty or twenty-five feet above the base of the street, and operations are carried on free from the busy throng below, enabling the city to have rapid transit.

These roads are modern inventions, and being erected
directly in front of the business places and residences of adjoining street owners, necessarily causes the inmates more or less inconvenience from gas, steam, cinders, and the obstruction of light and air. This, coupled with the noise and disturbance occasioned by passing cars is exceedingly annoying. Upon the construction of the roads, abutting owners were not long in recognizing their grievances, and brought action to restrain the companies from further use of the streets, until the damages sustained had been paid. Two classes of actions arose; one, where the fee was in the abutting owner, the other, where it was in the city. Where the abutting owner held it, the road was almost universally considered an additional burden.

When the fee was in the city, it was asked what right these adjoining owners had to claim damages to property, when they had parted, and been once adequately remunerated for the loss of the fee? Upon this theory the majority of the courts, at first, refused compensation, claiming the

(1) Story v N. Y. Elev. R. Co. 90 N. Y. 122,
Chicago v Elev. R. Co. 75 Ill. 74,
damages were purely consequential. (1)

But, upon due reflection and the addition of special Constitutional provisions in several States, the holding now is, with two or three exceptions, that damages will be accorded in any case where they can be proven.

It is now well settled that abutting owners have property rights in the street, even though they have been stripped of the fee. For, they permitted it to be taken for one specific purpose only, namely, that of a highway. And, if the street be put to uses not strictly such, the easement retained is such a property interest as will, if

(1) City of Reading v Althouse, 93 Pa. St. 400,
Market St. & Co. v C.t.Co. 51 Cal. 503,
People v. Kerr, 27 N. Y. 188,
22 Connecticut 74,
125 Massachusetts 515,
14 Ohio St. 523,
Contra:
74 Indiana 29,
80 Iowa 740,
47 Michigan 393.
lost, entitle them to a compensation. (1)

The adjoining owner on a street has a right to demand the free passage of light and air to his premises. Structures erected in mid-air like elevated railways, telegraphs, telephones &c. are an impairment of this easement. Streets are usually constructed before buildings are erected. So that, from the instant the structure is raised, this easement will immediately attach from the nature of the use. (2)

This is true only as to light and air passing over public thoroughfares, and does not relate to prescriptive rights claimed from long user over the adjacent lots of private individuals. This theory commonly known as the doctrine of "ancient lights", is still in full force in England, but nearly obsolete in this country.

Those States holding that the easement of ancient lights

(1) Abemworth v. Manhattan El. R. Co., 122 N. Y. 1,
Lahr v. Met. El. R. Co., 104 N. Y. 268,
125 New York 164,
29 Minnesota 41.
Am. New Jersey Law 592,
Am. Prim. Met. Soc. v. Brooklyn El. R. Co. 46 Jun 530
(2) 125 New York 164,
104 New York 268.
cannot be prescribed for, are, Alabama, Connecticut, Georgia, Iowa, Indiana, Maine, Maryland, Massachusetts, New York, Ohio, Pennsylvania, South Carolina, Texas, West Virginia and Vermont. Those holding adversely are, Illinois, Louisiana and New Jersey.

Of this doctrine in brief, Judge Bronson says, "There is, I think, no principle upon which modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England, and I see it has recently been sanctioned with some qualifications by an act of Parliament; but it cannot be applied in growing cities and villages in this country, without working the most mischievous consequences."

The decisions on the question of whether the erection of telegraph and telephone poles in a public street or highway is an additional servitude for which the abutting owner ought to be paid, are not unanimous. Massachusetts holds that no additional burden is imposed. (1)

In its opinion the court said, "The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar to, if not identical with, that public use of transmitting information

(1) Pierce v. Dren, 136 Mass. 75.
for which the highway was originally taken, even if the means adopted are quite different from the post-bog or the mail-coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must be deemed to have been paid for when the road was laid out. (1)

In this same case, Pierce v Drew, a strong dissenting element existed, whose sentiments voice those of nearly other State. The following is a concise statement of their opinion: "The use of a highway for telegraphic purpose is not naturally included in the original design, nor naturally incidental to its use for travel. Highways can be and are conviently used without telegraph or telephones. The latter can be established without the use of the highway. It may be convienent in many instancee to use it for electrical lines, but whenever this proves to be the case, there is no hardship, in requiring those who wish to establish such lines to pay for the privilege such damages, if any, as may have been ocassioned by such use. In many instances, no doubt, there will be no damage. But in cases where actual damage is thus caused, there is no good reason why it should

(1) 14 Gray ( Mass.) 540.

not be paid for by those who will derive the benefit. It is more just and reasonable that such payments should be made by an additional use or servitude, than to hold the loss to have been included at the outset, when it was not known whether such use would be required or not." (1)

Among the other uses to which public ways are frequently put are those of sewers, drains, gas and water mains &c. Of these, and similar uses in general it may be said that they differ materially in many respects from railways and telegraphs, in that they are of more direct benefit to the abutting owner.

Gas and other lights are necessary for the facilitation of travel; sewers and drains for maintaining the health of the city; water mains for supplying water for public and private consumption, and in averting conflagrations.

These conveniences are oftentimes perfected by the city officials themselves, and if not, are usually subject to their immediate control. The advantage to property owners is

At. & Pac. Tel. Co. v. Chicago L.I. & Pac. R. Co. 6 Bis. 15 107 Ill. 507.
24 New York Sup. 1006.
19 Kansas 517. Board of Works for Wadsworth Dist.
v. United Kingdom Tel Co. Ltd. 51 Law Times Rep. 148.
so apparent, that are oftimes by special statute, taxed for the expense of construction. (1)

But if any abutting owner can show special damage in any of these cases, a reasonable compensation will be allowed. (2)

In case of an infringement upon easement rights two remedies will lie. An action at law for trespass may be invoked, and all damages up to the time of commencing suit assessed. Or, proceedings in equity may be instituted, for an injunction to restrain the trespassers from committing further injury, and for a judgment for the injuries already inflicted, or liable to be sustained. This equitable remedy is the more frequently invoked, for by it prospective damages, or damages in futuro may be awarded, and a multiplicity of suits avoided. At law damages are confined strictly to those suffered previous to the institution of the suit. In assessing damages in cases where the act has resulted injuriously in certain ways and beneficially in others, the courts

(1) 128 New York, 55.
Pierce v. Riew, 136 Mass. 87.
2 Dillon on Mun. Corps. 688.

(2) In Re Bloomfield & R. Kat. Gaslight Co. v. Calkins
62 N. Y. 386.
Stearling's App. 111 Pa. St. 35.
have allowed such injuries and benefits to be balanced against each other in determining the final result. But it is held, even though the plaintiff has suffered no injury whatever, that he may recover nominal damages for the loss or impairment of his easement. This condition of affairs was prominent in the Elevated R. R. Cases, in which the value of private property had oftimes become enhanced by the construction of the road. The measure of damages used in these instances, as a result of the impairment of the easement of light, air and access was the "value of the property without the road and with it." (1)

This same rule applies to telegraphs, telephones and surface railways as well as elevated roads.

As a fitting attribute to these remarks, one more subject must be briefly outlined, viz: - The mode of destroying or extinguishing easements. The characteristics and incidents of the right; the method of creating or acquiring it; the rights and liabilities attending it; the extent and mode of use having each in turn been discussed. Certain general rules govern the loss of these rights, whether vested

(1) Bonn v Met. El. R. Co., 20 N. E. 802,
Newman v. Met El. R. Co. 118 N. Y. 618,
in private individuals or in the public, which are embraced in three propositions. The first is by a release from the owner of the dominant estate, and may be either by deed or parol, but if by the latter the statements made must be clearly indicative of an intent to terminate the right. (1)

The second method is by a merger of the two estates under the same title; as in case of a private individual, if A has an easement over the land of B and subsequently purchases the servient estate, the easement right will merge in the fee. (2) But in order to make the merger complete the title to each estate must be co-extensive. (3)

Thirdly by abandonment, which will be presumed if the dominant owner permits the servient owner to do acts inconsistent with his use of the privilege. (4)

(1) Ballard v Butler, 30 Maine. 94.
    Pope v O'Hara, 48 N. Y. 446.
    Hamilton v Foster, 128 Mass. 492.
(2) Warren v Blake, 54 Me. 276.
    20 Penn'a St. 433.
    76 North Carolina 57.
(3) Kitger v Parker, 8 Cus. (Mass.) 145.
(4) T. v Hampton, 4 McClord (S. C.) 61.
    53 New York 822.
It will always be presumed from non-user for a period sufficient to create the right by prescription, where such right was originally created in any way but by deed. (1) The cessation of travel on a highway, for six years, if voluntary, will amount to an abandonment. (2)

It has been the aim of this discourse to give a perspective view of the entire subject of easements, laying special stress upon those of a public nature. The New York law has been chosen as authority whenever equally applicable. But in cases of a divergence in opinion, conflicting views have frequently been stated. Hoping by this means to give a concise treatise, which shall embrace principles sustained by decisions covering, at least the more important fields of the law.

Newton J. Cummings, L L. B.
C. U. L. S. 1895.
East Clarence, N. Y.

(1) Jewett v. Jewett, 16 Barb. (N. Y.) 150,
  Day v. Walden, 40 Mich. 575,
  Eddy v. Chase, 140 Mass. 471.

(2) 1 N. Y. R. S. 520, sec. 99.