THE

AMERICAN LAW REGISTER.

JULY, 1863.

THE LOSS OF SERVITUDES BY ABANDONMENT.

It is undoubtedly true that as the right of property may be acquired in certain cases by occupation, so the right may in all cases be lost by abandonment. There are certain rights the existence and continuance of which depend upon occupation. Such is the right to the enjoyment of the elements of air and water, which are common to all. So far as the exclusive right to any portion of running waters, which are *publici juris*, depends upon occupation, that must be continued; and when the occupation ceases, it returns to its former state, and again becomes common to all. The right of the occupant is at an end, except so far as it is preserved upon a declared or a presumed intention by operation of law.

It was upon this principle that the decision was founded in a case decided by the Court of Common Pleas: *Liggins* vs. *Inge*, 7 Bingh. R. 682. Mr. Chief Justice TINDAL said, in that case, that there was nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose, he says, 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 millowner should afterwards change his determination and wish to rebuild his own? The learned Judge considered the question of abandonment as one of fact for the jury, and was of opinion that an open and express declaration of the intention of abandonment would be sufficient protection to a new occupant, who had erected a mill in reliance upon the extinction of the former right. The right supposed to be relinquished is not acquired by grant or prescription from the other proprietors of the stream, and when it is shown that it is absolutely abandoned in any mode, the occupation which is necessary to the maintenance of the right ceases; then, there is nothing to prevent a new and distinct right from being acquired by occupation.

In *Lawrence* vs. *Obee*, 3 Campb. 514, and in *Thomas* vs. *Hill*, 31 Maine 152, a prescriptive right was gained by an adverse party after the supposed abandonment. And when, as in *Drewett* vs. *Sheard*, 7 Car. & P. 465, a party had acquired a right to use a larger wheel and a greater flow of water, and afterwards discontinued the larger wheel, and resumed the smaller wheel to which he was before entitled, he was held to have abandoned the right to the use of the larger wheel. This case may perhaps be justified on the ground that an adverse right was acquired by occupancy.

And if, in a case where the abandonment may not be shown to have been made with the intention to relinquish the right, the former owner, after notice, permits a new occupant to proceed in expensive works, in reliance upon the fact of abandonment, certainly he would have no claim to favor, from a court either of law or equity.

In the case of *Stokoe* vs. *Singers*, 8 Ellis & Bl. 31, the doctrine was asserted that a party entitled to the easement of lights, who, after having disused his right for a length of time, has given occasion to a neighboring proprietor to make expensive improvements, with a view to such supposed abandonment, was precluded from resuming the exercise of his easement. Lord CAMPBELL said that the case of *Regina* vs. *Chorley*, 12 Q. B. 515 (post, p. 518),

was an authority that "an abandonment is effectual, if communicated and acted upon. It goes no further."

In *Crum* vs. *Fox*, 16 Barb. 184, where one had a right of way to a house across another's land, and after twelve years enclosed the way and cultivated it, the way was held to be abandoned; but as no equitable right had sprung up, and no adverse right exercised, there would seem to have been no abandonment.

The doctrine that a right which is acquired by occupation may be lost by abandonment, was applied, in another case, to the servitude of lights, upon a principle much less satisfactory. It was held in the King's Bench (*Moore* vs. *Rawson*, 3 B. & C. 332), that a right to lights might be lost by a disuser for a time less than twenty years, under circumstances which showed the intent of abandonment, as where a party had the enjoyment of light and air by means of certain windows in the wall of his house, and upon the site of the wall he built a blank wall without any windows. Things continued in this state for seventeen years. The defendant, in the mean time, erected a building opposite the plaintiff's blank wall, and then the plaintiff opened a window in that, which had continued for so long a period a blank wall without windows, and thereafter brought his action for the darkening of his windows by the buildings which the defendant had so erected. The Court were of opinion if a person entitled to ancient lights builds a blank wall in their place, and suffers it to remain for a considerable period of time, that an abandonment of the right is to be presumed, and that if a temporary disuse alone was intended, he was bound to show that the abandonment was not perpetual; and the Court relied much, as a reason for this rule, upon the consideration that the building of the blank wall might have induced another person to become the purchaser of the adjoining ground for building, and that it would be unjust to prevent him from carrying that purpose into effect. It must be confessed that this is a very unsatisfactory reason for the general doctrine, however proper it might be that it should influence the decision of a court of equity in the case of a purchase of land for the purpose of building, without notice of an existing servitude. One of the Judges, Mr. Jus-

tice LITTLEDALE, was of opinion that if a party who had acquired a right to ancient lights by grant, ceases for a long period of time to make use of the privilege so granted to him, it may then be presumed that he has released the right. In answer to the argument, that, as he could only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period; and that, as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a similar non-user to raise a presumption of a release; he said that reasoning might apply, perhaps, to a right of common or of way, but that there was a material distinction between the mode of acquiring such rights and a right to light and air; that the latter was acquired by mere occupancy, the former only by user accompanied by the consent of the owner of the land. This, which is the principal ground for the decision, is extremely unsatisfactory; for though there is a material difference between the circumstances under which a right to unobstructed lights and a right of way or of common is acquired, they are each founded on a grant express or presumed. The right to unobstructed lights is not in any sense acquired by occupancy, but, when not arising from an express covenant, depends altogether upon the presumption of a grant resulting from length of time. It is wrong to say that even the right of the owner to place lights in his wall is gained by occupancy, like the use of water in certain cases: it is a right incident to property, which an owner may exercise or not, at his pleasure. The right to prevent the owner of adjoining land from enjoying fully his proprietary right of building to any height on his own land is different, and it is this which is acquired by a covenant or grant express or presumed. The negative servitude which has once vested on the presumption resulting from long user is of the same character as if created by express grant. It is not at all like a right in running water, which depends upon a continued occupancy. It can only be released by a deed *inter partes*, or by matter *in pais*, such as shows the intent to abandon the right. No disposition of property which causes a cesser of the use of a right which is incident to it, can produce that effect, unless the intention

to abandon the right is shown. It would seem that on principle the servitude in question was an absolute right of property, which could no more be lost by disuser than any other proprietary right, unless continued so long as to raise the presumption of a grant or release. It is even a question under the civil law, whether the right can be lost by mere length of time, without some act on the part of the owner of the servient tenement contrary to the servitude itself. The effect of the decision in this case would seem to be (so far, at least, as it regards the law of England) to establish, in respect to the servitude of ancient lights, the anomalous rule that it may be lost by non-user; for any "considerable time," in the words of ABBOTT, C. J., and that in order to prevent this result, it would be necessary for the owner of the lights to show that he intended to resume the enjoyment of them within a "reasonable time." What such considerable time on the one hand, or reasonable time on the other, shall be, does not appear; nor by what evidence it shall be shown that the party intends to resume the enjoyment; whether possession must be maintained by vestiges, as in certain cases under the French law, or whether it will be sufficient if the owner of the dominant tenement declares his intention not to abandon the right, but to resume its exercise at some future time.

In the case of *Lowell* vs. *Smith*, 3 C. B. N. S. 120, the plaintiff, having a right of way by prescription more than thirty years before the action, agreed with the owner and occupier of the servient tenement, that the use of a portion of that way should be discontinued, and a new one equally convenient to him should be substituted for it. The agreement for a substitution failed by reason of the infancy and coverture of a party whose consent was necessary thereto. The plaintiff therefore fell back upon his original right. The Court were of opinion that there was nothing from which an abandonment could be inferred, except the exercise of the right over the new way, and that was clearly not sufficient. WILLES, J., said: "I do not think that this Court means to lay down that there can be an abandonment of a prescriptive easement like this without a deed or evidence from which a jury can presume

a release of it: but the facts show no intention to abandon legally or popularly." There was clearly no abandonment, but rather an unexecuted agreement for a substitution.

The question, what acts constitute the abandonment of a servitude, is one of fact for the triers. Every species of incorporeal right may be abandoned, but a mere disuser can have that effect only where the right depends upon occupation. The right of way may be abandoned when it is shown that the intention to abandon the way accompanies the disuser. In a case where a party entitled to a private right of way had permitted the public to use the way in a manner inconsistent with the private right (*The Queen* vs. *Chorley*, 12 Q. B. Rep. 515), the Court held that as an express release of the easement would destroy it at 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; that the period of time was only material as one element from which the party's intention to retain or abandon his easement might be inferred against him; and that what period might be sufficient in any particular case must depend on all the accompanying circumstances. There are certain cases where it may be uncertain whether a party who makes such a disposition of his property as renders an easement unnecessary or useless to him, intends absolutely to abandon the right or to relinquish the privilege during its temporary disuse. It would seem that ordinarily when the works which prevent the beneficial enjoyment of an easement are removed, the possession would be restored, the right not being abandoned, but the possession suspended by such works. In the case mentioned by writers on the Civil Law,[1] where the owner of a house has secured his light from being obstructed, by a covenant from a neighboring proprietor not to raise his house to a greater height, the former, by the erection of a building between the two houses, renders the negative servitude *altius non tollendi* ineffectual against his neighbor, and his remedy is gone; but if the intermediate house is destroyed by fire or taken down, the servitude revives, and a right

[1] Domat, Tome 1, Tit. 12, Sect. 6, Art. 4. La Laure, Tr. des Servitut, L. 1, Ch. 8

of action will exist for the breach of the covenant. In such a case there exists, as a necessary effect, a suspension of the servitude, but not an abandonment. Something more is necessary to show the intention of abandonment.

The doctrine stated in the Commentaries of Mr. Chancellor Kent, Vol. 3, page 449, is not inconsistent with this principle. If the act, it is said, which prevents the servitude, be incompatible with the nature or exercise of it, and be by the party to whom the servitude is due, it is sufficient to extinguish it, and if it be extinguished for a moment it is gone for ever. In the case above supposed, the act of the party to whom the servitude is due is not incompatible with the right. It merely suspends the cause of action during the existence of the intermediate building. The case cited by the author of the Commentaries as authority for the doctrine, is very questionable: *Taylor* vs. *Hampton*, 4 McCord Rep. 96. The defendant Hampton had purchased of Pinckney, in 1807, one hundred and fifteen acres of land, with a mill-pond, dam, and mill in full operation, which continued till 1814. The pond flowed the land of the plaintiff, and the defendant had a right to this flow as a servitude by prescription. In 1814, a new mill was erected by the defendant, above the place where the old mill stood, upon which the water of the old mill flowed; and therefore the lower dam was cut, the water let off, and its use as a mill abandoned by its owner. This dam was, however, immediately repaired, and the water raised occasionally for the purpose of flowing rice; but in general the plaintiff's land was relieved from the former flow, from 1814 to 1823, when the upper mill was burnt, and the old mill was rebuilt in the former place, the water being again permanently raised, and the flow resumed over the plaintiff's land. An action was brought for that injury, and the verdict being for the plaintiff, on a motion for a new trial, NOTT, J., delivered the opinion of the Court. The question presented was, whether the erection of the upper mill, the existence and enjoyment of that being incompatible with the use of the other mill by means of this pond, did not extinguish the right of flow formerly enjoyed by the defendant. The Court came to the con-

clusion that an extinguishment of the servitude was effected by this act. The ground upon which the Court proceeded was, that the erection of the upper mill operated as an extinguishment of the right, because, during its existence, it was incompatible with the exercise of the servitude in question. But the statement of the case shows that the exercise of the right only was suspended, and that its disuse was only temporary. So far as the intention was to be inferred from the buildings which were incompatible with the right, the intention to suspend the exercise of the servitude only was shown. Some further evidence was required to prove the abandonment. The Code of Louisiana, Art. 246, which declares the principle of the civil law on the subject, and which was relied upon in this case, as in conformity with the rule of the common law, says "that servitudes are extinguished when things are in such a situation that they can no longer be used, and when they remain perpetually in that situation. But if things are re-established in such a manner that they may be used, the servitude will only be suspended." By a temporary disuser the possession is suspended, but the right is not abandoned; and the suspension is made to depend upon the continuance of the state of things which is inconsistent with its exercise. It may depend upon the intention of the party whether an abandonment is effected by a disuser, but the intention must be shown as a fact by other circumstances than such as are for a time only incompatible with the exercise of the right. In this very case, the result showed that the use merely was suspended. If the owner of the dominant tenement had declared that on the erection of the new mill he abandoned the servitude, that might have extinguished the right, so that when the mill was afterwards burnt, the proprietor would have been precluded from his right to flow the land; but there was no such communication between the parties, nothing which could operate as a release, and the natural effect of the new disposition of the property was merely to suspend possession.

A case was stated by the Court from Jacobs L. D. 448, tit. *Extinguishment*, Vol. 1: A. has a stream of water which runs through a leaden pipe; if B. purchases the land and destroys the

pipe, the watercourse is extinct, because by this he declares his intent and purpose that he will not enjoy them together. The intent in such a case would have been a question of fact for the jury. But if other works established by B. had, during their existence, rendered the flow of the water impossible, the non-user of the right would have operated only as a temporary suspension, if, in the event, the works which caused the obstruction were removed. Even if the pipes by which the water was conducted were destroyed, there would be nothing in such an act *in pais*, to prevent the resumption of possession, unless the intention to abandon appeared: *cessante causa cessat effectus*. A very different question would be presented by a case in which the owner of the servient tenement, in reliance upon a presumed abandonment, had acquired rights inconsistent with a resumption of the servitude. It might have been otherwise, also, if there had been a claim of a reciprocal servitude.[1]

The only inquiry in this case was, whether the party, by the erection of works which might have been and were designed to be

[1] "Suppose a person," said Mr. Justice NOTT, "to be the owner of a house with ancient lights, which no person has a right to obstruct. If he erects a house or puts up a wall directly covering his window, has he not extinguished his light himself as effectually as if he had blowed out his candle? Surely then it would amount to the same thing, to put up a similar building on his adjoining lot. Suppose A. to have a right of way over the land of B. If he erects a house on his own land, in such a manner as to obstruct the passage into the lands of B., does he not effectually destroy his right of way? Can he claim a right, the enjoyment of which he has rendered impossible by his own act? Suppose, in the case before us, the defendant, instead of purchasing a mill-pond, with the right of flowing the plaintiff's land, had purchased arable land, with a right of way to haul away his crop. If he had erected the mill which he now has, and thrown the whole of his land under water, by converting it into a pond, would he not have destroyed his right of way? Must Mr. Pinckney have kept open a road which terminated at an impassable lake, a way which the owner himself had voluntarily destroyed? The defendant has, by his own free will and accord, abandoned the privilege to which he was entitled. He has cut away his dam, drawn off the water, and turned his pond into an arable field; he has obstructed the natural current of the creek, and turned it into other channels: he has built a permanent valuable mill on the land before overflowed by the pond: he has thus relinquished the privileges to which he was entitled, for others which are admitted to be incompatible with the former state of things."