THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Edited by members of the Department of Law of the University of Pennsylvania under the supervision of the Faculty, and published monthly for the Department by ERNEST LEROY GREEN, Business Manager, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the BUSINESS MANAGER.

THE EXTENT OF THE SERVITUDE LAID ON A HIGHWAY UNDER CONDEMNATION PROCEEDINGS.—What are the respective rights of the state and the individual abutting owner in a public highway?

The latest answer to this question comes from the Supreme Court of Michigan in the case of *Austin* v. *Detroit, etc., Rwy. Co.*,[1] decided July 14, 1903.

The answer is important because of the principle which it involves, and the principle is important because of the erroneous value of the opposing interests. It is, of course, true that the individual sustains a twofold capacity, in one of which (that of a member of the state) his interests are identical with those of the state, in the other of which (that of exclusive proprietorship) his interests sometimes suffer as a result of the paramount right of the state.

[1] 96 N. W. 35.

Our constitution provides "that private property shall not be taken for public use without just compensation." When the state, therefore, takes private property for a highway, it must pay the private owners just compensation. This is very simple in itself, but it has been the subject of much litigation to determine just what is public use, and, the highway once established, to what uses it may be put without additional compensation to the abutting owners.

As indicating the growing importance of the subject, and the changes yet going on concerning it, we make mention of the work of Lewis on "Eminent Domain." In his preface to the second edition (1900) he says, "In the twelve years which have elapsed since the publication of the first edition (1888) more decisions have been handed down on the subject of eminent domain than in all the previous history of the country."

In his first edition he cites (with a view of making a complete, inclusive compendium on the subject) over six thousand cases; twelve years later his citations number 12,822.

In whatever state society has been, there has always been travel. When men set up homes for themselves and settled into communities, they naturally had certain ways of reaching each other, and we may suppose that what was once trackless country came to have paths: in time, some sovereign or controlling power took charge and laid them out into roads.

Thus we see that very early in Roman history there existed the office of Pontifex Maximus, whose duty it was to keep in repair the bridges and the roads. Possibly his office arose through the necessity (or at least from the Roman seemingly inborn warlike instinct) of keeping at all times those splendid facilities of offence and defence in good repair. So highly did the Romans regard this office, that it was not until after the passage of the Licinian Laws (about 300 B.C.) that the plebeians gained admission to it.

Although at the evacuation of Britain by the Romans (A.D. 410) almost all traces of their occupation disappeared, yet their roads remain to-day in a remarkable state of preservation.

Although the power of eminent domain was exercised in England for a long time previous, it was not until 1625 that the term was used, and then it comes from Grotius.[2]

It is defined as "the power of the state to apply private prop-

[2] De Jure Belli et Pacis, lib. 1, ch. 1 (1625).

erty to public purposes on payment of just compensation to the owner." [3]

The rule itself receives support from all authorities as being founded on public necessity, and as existing as a sovereign power, independent of the courts or the legislature.[4]

Chancellor Kent has this to say regarding private right of property: "This inviolability of private property . . . has excited so much interest, and has been deemed of so much importance, that it has frequently been made the subject of an express and fundamental article of right in the constitution of government. Such an article is to be seen in the bill of rights annexed to the constitutions of Pennsylvania, Delaware, and Ohio; and it has been incorporated into some of the written constitutions adopted in Europe.[5] But what is of more importance . . . it is made a part of the Constitution of the United States . . ." [6]

The right of the state to take the property is not disputed, but it must be condemned and paid for before it can be lawfully used for its highways. The question still remains, what rights have the individual and the state respectively, after the highway has been acquired under process of eminent domain?

Angel on Highways [7] has the following to advance: "The more ancient decisions limited the rights of the public to that of passage and repassage, and treated any interference with the soil other than was necessary to the enjoyment of this right as a trespass. But the modern decisions have very much extended the public right, and, particularly in the streets of populous cities, have reduced the interests of the owner of the soil to a mere naked fee of only a nominal value."

It is natural that the law should undergo a change, or broaden and develop in this regard, because of the comparatively recent great growth of cities and of transportation facilities. When cities were very small and scattered, and travel was by foot, horseback, in stage-coach, naturally that was the only use to which the highways were

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[3] American and Eng. Enc. Law, 2d ed., vol. 10, p. 1047.

[4] Vattel, Le Droit des Gens, lib. 1, c. 20, sec. 244; *Scudder* v. *Trenton, etc., Falls Co.*, 1 N. J. Eq. 694; *Patton* v. *N. C. R. Co.*, 33 Pa. 426; *U. S.* v. *Jones*, 109 U. S. 518; *Allen* v. *Jones*, 47 Ind. 438.

[5] Constitutional Charter of Louis XVIII and the ephemeral but very elaborately drawn Constitution de la Republique Française of 1795.

[6] *Gardner* v. *Village of Newburgh*, 2 Johns. Ch. 162 (N. Y. 1816).

[7] Section 312.

put. When we consider, however, that in 1800 about 3 per cent. of the population of the United States lived in cities, and that in 1900 the proportion had increased to over 33 per cent., and when we think of the introduction of the horse-car, the cable-car, the steam-car, the electric-car, the underground roads, the telegraph lines, the electric lighting lines, and the telephone lines, and the necessity that they have facilities for operation, we can appreciate the necessity of the law adapting itself to these new conditions.

A very interesting address was recently delivered by John S. Wise before the New York Bar Association,[8] in which the speaker reviewed the process by which the law grew to be in accord with these advances in human achievement:

"Nothing, I venture to say, more aptly illustrates the changing character of the law, or its adaptability to the advancing steps of civilization, than a study of the American decisions upon the uses of public highways. Turning to the decisions of a hundred years ago, and taking them from any state of the American Union, we find the language of the judges substantially identical, to the effect that the primary and dominant object in the dedication of a public highway, whether it was a road in the country or a street in the city, was for travel thereon, and the use thereof by the people, on foot, on horseback, or in wheeled vehicles. At that time the proposition seemed very plain and simple." [9]

First, horse-cars, after a struggle, were admitted to the free use of the highway, and the first permanent rails were laid. Some courts held them to be additional servitudes, requiring extra compensation to be made to the abutting owners; but they soon recognized the practical necessity of their free operation, and held the price originally paid for the land to be adequate compensation for such a use. Then, in about 1838, came the telegraph with its poles and wires, started by Steinheil and Morse. Where, as in New York, the fee of the streets was in the state, there was no trouble, but where the fee resided in individual abutting owners courts have differed on the subject.[10] Massachusetts, "by a curious and singular ratiocination," holds that the transmission of news is "travel," and so is within the purpose for which the highways were condemned. Virginia, on the contrary, scouts this interpretation, and holds that it imposes a new servitude

[8] Reports of the N. Y. Bar Ass., vol. xiv.

[9] Ibid. The remarks succeeding this portion are taken from the same source.

[10] See Am. Law. Reg., 25 N. S., p. 442.

on the roadway such as demands extra compensation. In 1878 the telephones came to be of practical importance, and the decisions have generally treated them as they treated the telegraphs—gave them the free use of the highway. Next, as third and fourth electrical occupants of the highways, came the arc and incandescent lights, with their poles and wires. By this time considerable friction arose between the companies thus favored by reason of the conflict of the currents of electricity. Mr. Wise explains at length the effect of the escaping electricity playing havoc with the telephone wires, and rendering them almost unfit for the transmission of the human voice. All this paved the way for a series of suits instituted by the Bell Telephone Company to rid the highways of their troublesome neighbors, who, nevertheless, at least were there before the telephone. In 1887, in Richmond, Virginia, was built the first electric street railway in America, by Frank J. Sprague. The rapid spread of this system of transportation in three years carried it all over the Union. The institution of the necessary "trolley" wires soon brought matters to a head. The Bell Company's patents would expire in 1893, and new competitors would invade the field. The Bell Company organized a plan of campaign, and proceeded to carry it out in several states consecutively. They attacked the right of the trolley companies to carry exposed wires through the streets, and they attacked the rights of all the other electrical occupants because they interfered with their telephone service. In almost all instances the courts refused to draw any distinction between them, and the result was that all had the use of the highway without paying the abutting owners anything.

In summing up the decisions on the subject, Lewis [11] states the law to be that horse-railways are not an additional servitude, nor are cable-cars, nor trolley roads. As to underground railways, there being but few decisions on the subject, he entertains some doubt, but suggests that they should be held an additional servitude. His own opinion is that any permanent rails should be held to create new easements without distinction, as they tend to impede the original free use of the road for travel on horseback or *en voiture*. He seems to lean very strongly to the original theory, but the cases are certainly the other way. Steam railroads, however, are generally excluded, although in one case (which will be found discussed in Lewis's work), where the road made many stops in the city like an

[11] Lewis, Eminent Domain, sections 115c, d, e, f, g, h, i, j.

ordinary street-car, it was held to be such proper "travel" as entitled it to the use of the highway. When the fee is in the city, however (as in New York), steam roads may operate, if they can get proper authority from the municipality.

Very soon after the various car-lines came to occupy the streets they began to change the grades. On this phase of the case there is some difference among the authorities, but most of them hold that it is a proper incident to the successful operation of the road, and suffer abutting owners to go unrecompensed save what they got when the street was laid out.[12] The *ratio decidendi* of these cases is that the original assessment must be held to cover all subsequent damage arising from authorized and lawful use of the highway. Of course, "authorized" here means permission granted by the state, or by a community having the power delegated to it. "Lawful" means any such use that is public and within the purpose for which the land was taken. The litigation has hung mostly on what was the original purpose; but it is, at all events, generally settled that street railways are within that purpose.[13]

In Ohio, as to change of grade, the courts not only give damages for the loss of lateral support to soil, but also for the support of houses thereon.[14] A street railway, furthermore, may not lay its tracks on the highway on a different level from that of the highway.[15] Of course, when a highway is laid out, it cannot be shifted; if the line is changed, there must be additional compensation.[16]

Amidst the onsweeping tide of change there are still to be seen a few posts marking the stand of the older doctrine. The case of *Craig* v. *Rochester,*[17] is one in which it is flatly stated that the laying of tracks is an additional servitude.

The case of *Austin* v. *Detroit, etc., Rwy.* (the case under discussion) adds its decision to an ever-growing number in favor of a broader right of user for the public without additional compensation

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[12] See cases cited in Am. and Eng. Enc. Law, 2d ed., vol. 10, 1128. Leading English case, *British Cast Plate Mfg. Co.* v. *Meredith,* 7 T. R. 794; leading American case, *Collender* v. *Marsh,* 1 Pick. (Mass.) 418. Both hold that the original assessment covers all present and future lawful servitudes. Also accord *O'Connor* v. *Pittsb.,* 18 Pa. 137; *Radcliffe's Exs.* v. *Mayor of Br'kl'n,* 4 Comst. 195; *Atty. of Quincy* v. *Jones,* 76 Ill. 231.

[13] Ibid.; also, Judge Cooley's remarks in *Pontiac* v. *Carter,* 32 Mich. 164.

[14] *City of Cin. v. Penny,* 21 Ohio St. 499.

[15] *Nichols* v. *St. Rwy. Co.,* 87 Mich. 361.

[16] *Kent* v. *Wallingford,* 42 Vt. 651.

[17] 39 Barb. 500 (N. Y. 1863).

to the abutting owners. Some of the states in which this principle has been recognized have enacted statutes permitting the abutting owner to recover for loss of lateral support to soil resulting from a change of grade in the streets.[18]

In the absence of such statutes it will be seen that the law is generally settled that a change of grade is not *damnum absque injuria,* but damage already compensated for.[19] The doctrine could otherwise not be reconciled to the constitution, for lateral support to soil is a natural right, common to all.[20]

E. S. R.

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[18] Connecticut, Georgia, Indiana, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, Pennsylvania, Wisconsin.

[19] England, *British Cast Plate Mfg. Co.* v. *Meredith,* 4 T. R. 794; *Boulton* v. *Crowther,* 2 B. and C. 703; *Sutton* v. *Clarke,* 6 Taunt. 29. United States, *Northern Transp. Co.* v. *Chicago,* 99 U. S. 635; California, *Shaw* v. *Crocker,* 42 Cal. 435; Connecticut, *Fellowes* v. *New Haven,* 44 Conn. 240, 36 Am. Rep. 447; Florida, *Dorman* v. *Jacksonville,* 13 Fla. 538, 7 Am. Rep. 253; Georgia, *Fuller* v. *Atlanta,* 66 Ga. 80; Illinois, *Quincy* v. *Jones,* 76 Ill. 231, 20 Am. Rep. 243; Indiana, *Rensslaer* v. *Leopold,* 106 Ind. 29; Iowa, *Hendershatt* v. *Ottumwa,* 46 Iowa, 658, 26 Am. Rep. 182; Kentucky, *Newport, etc., Bridge Co.* v. *Foote,* 9 Bush. (Ky.) 264; Louisiana, *Reynolds* v. *Shreveport,* 13 La. Ann. 426; Maine, *Hovey* v. *Mayo,* 43 Me. 322; Massachusetts, *Burr* v. *Leicester,* 121 Mass. 241; Michigan, *Pontiac* v. *Carter,* 32 Mich. 164; Minnesota, *Alden* v. *Minneapolis,* 24 Minn. 254; Mississippi, *White* v. *Yazoo City,* 27 Miss. 357; Missouri, *Thomson* v. *Boonville,* 61 Mo. 282; Nebraska, *Nebraska City* v. *Lampkin,* 6 Neb. 27; New Hampshire, *Eaton* v. *Boston, etc., R. Co.,* 51 N. H. 504, 12 Am. Rep. 147; New Jersey, *Trenton Water Power Co.* v. *Raff,* 36 N. J. L. 335; New York, *People* v. *Green,* 64 N. Y. 606; Pennsylvania, *Pusey* v. *Alleghany,* 98 Pa. 522; *Carr* v. *Northern Liberties,* 35 Pa. 324, 78 Am. Dec. 342; *In re Ridge St.,* 29 Pa. 491; *O'Connor* v. *Pittsburgh,* 18 Pa. 187; *Charlton* v. *Alleghany City,* 1 Grant's Cas. (Pa.) 208; *Green* v. *Reading,* 9 Watts (Pa.) 382; *Henry* v. *Pittsburgh, etc., Bridge Co.,* 8 W. and S. (Pa.) 85; Rhode Island, *Simmons* v. *Providence,* 12 R. I. 8; Tennessee, *Humes* v. *Knoxville,* 1 Humph. (Tenn.) 403; Wisconsin, *Owens* v. *Milwaukee,* 47 Wis. 461.

[20] Newell Real Prop., ed. 1902, s. 430; Lead Cas. Am. Law Real Prop. with notes by Sharswood and Budd, p. 266 *et seq.;* Pepper and Lewis Dig. Pa. Dec., vol. xvii, col. 30,000; *Tunstall* v. *Christian,* 80 Va. 1; *Humphries* v. *Brogden,* 12 Q. B. 739; *Lasala* v. *Holbrook,* 4 Paige, 172; *McMaugh* v. *Burke,* 12 R. I. 499; Bispham Eq., s. 443: Washb. Eas., and a long line of cases the decision of which is in accord with the principle announced in Rolle's Abr. 565. A thorough review of the subject may be seen in Washb. Eas., s. 431.

EDITOR'S NOTE.

The Article on "THE RESPONSIVE ANSWER IN EQUITY CONSIDERED AS EVIDENCE FOR THE DEFENDANT," by *John Marshall Gest, Esq.,* which appeared in the September (1904) number of the AMERICAN LAW REGISTER, was used with the permission of the PENNSYLVANIA BAR ASSOCIATION, and was read by Mr. Gest before the association at its recent annual meeting.