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## NOTES.

### COMPENSATION TO THE ABUTTER FOR A NEW USE MADE OF THE HIGHWAY.

In deciding whether an abutting property owner is entitled to compensation when a new use is made of the street or highway by the public, or under public authority, it is repeatedly stated that it is immaterial whether the fee is in the abutter or the public.[1] Under the modern decisions the extent of the rights of each in either case is about the same. Yet it is cer-

[1]Dillon on Municipal Corporations (4th Ed.), Sec. 704.

tainly true that the character of the rights in each case is different and requires the application of entirely different principles.

When the fee is in the public, the only particular property which the abutter owns, in addition to that which he enjoys as a member of the public, is the easement of access, light and air, appurtenant to his particular lot. It is an incorporeal right. Whether any new use of the street or highway entitles him to compensation, depends entirely upon whether this easement is obstructed. An elevated structure does impair this easement,[2] and the running of steam cars on the surface does not, *per se*.[3] Horse and electric cars require no compensation to the owner, neither do electric light or trolley poles, and therefore telephone and telegraph poles should not.[4] Obviously, a subway or any structure under the surface of the street cannot obstruct this easement. Whether there has been an exclusive and permanent appropriation of any part of the fee; whether the use is consistent with the purpose of the highway; whether it is in the country or the city; whether it is to supply a service to the locality or only to a distant place; are questions which are not involved.

But if the abutter owns the fee, his rights are corporeal, and the right of access, light and air belong to him as part of his enjoyment of that fee. The public has only an easement. Any exclusive appropriation of the soil is a trespass, unless it is within or incident to that easement. A use which improves the street as a place for travel, as, for example, facilities for lighting, draining, etc., is considered to be incident to the easement. The authorities also agree that the same facility may be used for local domestic or municipal needs without compensation to the abutter, on the ground that the accruing benefits fully compensate him. And it is only necessary that the facility be available for a street use, though not actually used at the time.[5] If the construction is to supply distant places only, it is an additional servitude, because there is no local benefit.[6]

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[2] *Story* v. *N. Y. Elevated Ry.*, 90 N. Y., 122.

[3] *Williams* v. *City Electric Street Ry. Co.*, 41 Fed., 556; *Reining* v. *N. Y., Lack. & W. R. R.*, 128 N. Y., 157 (1891); *Fobes* v. *R. R. Co.*, 121 N. Y., 505 (1890).

[4] *Gay* v. *Mutual Union Tel. Co.*, 12 Mo. Ap., 485; *Board of Trade Tel. Co.* v. *Burnet*, 107 Ill., 507 (1883).

[5] *Wilcher* v. *Holland Water Co.*, 66 Hun, 619 (1893), 142 N. Y., 626 (1894).

[6] Sterling's Appeal, 111 Pa., 35 (1885); *Van Brunt* v. *Town of Flatbush*, 128 N. Y., 50 (1891); *Palmer* v. *Larchmont Electric Co.*, 158 N. Y., 231 (1899).

But even if a construction does supply a local domestic or municipal purpose, it is an additional servitude, if it does not at the same time supply a street use, but instead is independent of such a use. A telephone is said to be within that rule; *Osborne* v. *The Auburn Telephone Co.*, 109 N. Y. 393, 1907. But a telephone, in supplying a ready means for notifying the proper authorities of defects, etc., does make possible a speedier repair when needed; and therefore a contrary decision might have been reached. The same jurisdiction has consistently held that street passenger railways are not incident or within the public easement, whether steam,[7] electric,[8] or horse.[9] The change of motive power is not material, or automobiles would raise the question. The weight of authority holds that such do facilitate travel along the highway, and therefore are incident and within the public easement,[10] unless the particular kind of railway is inconsistent with the purpose of the highway for local traffic. Accordingly a steam railroad, because of the speed and infrequency of the stops, is held to be an additional burden.[11] But these jurisdictions are in accord with the principal case as to telephones.[12] Some jurisdictions have gone further and held that the public easement not only includes all modes of transportation, but also all modes of inter-communication; and therefore allow no compensation for a telephone.[13]

The correctness of the above decisions depends upon whether the extent of the public easement is determined by the extent of the terms of the original grant, or by reasoning as to what it should be. If the right of the public was obtained under eminent domain proceedings, the statute should control the extent of the right acquired; and since it is taken in derogation of private right, it must be construed strictly.[14] A use for a different purpose imposes an additional burden.[15] However, if the right was dedicated to the public by the owner, there is no necessary reason for a strict construction.[16] It was a willing act.

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[7] *Williams* v. *N. Y. Central R. R.*, 16 N. Y., 97 (1857).

[8] *Peck* v. *Schenectady Ry. Co.*, 170 N. Y., 298 (1902); *Paige* v. *Schenectady Ry. Co.*, 178 N. Y., 102 (1904).

[9] *Craig* v. *Rochester City R. R. Co.*, 39 N. Y., 404 (1868).

[10] *Halsey* v. *Rapid Transit Street Ry. Co.*, 47 N. J. Eq. 380 (1890).

[11] *Taggart* v. *Newport Street Ry. Co.*, 19 Atl. (R. I.), 326 (1890).

[12] *Nicoll* v. *N. Y. & N. J. Tel. Co.*, 42 Atl. (N. J.), 583 (1894); *Postal Tel. Co.* v. *Eaton*, 170 Ill., 513 (1897).

[13] *Pierce* v. *Drew*, 126 Mass., 75 (1883).

[14] Lance's Appeal, 55 Pa., 16 (1867).

[15] *State* v. *Laverack*, 34 N. J. L., 201 (1870).

The same applies to a limited extent to an easement obtained by prescription. It is certainly desirable that the public easement should be as broad as possible. Streets and highways are the natural places for the constructions required by the various public utilities. Private rights are least interfered with, because the streets are already surrendered to public uses. For that reason, damages are generally nominal, when an additional servitude is held to be imposed.[17] Condemnation proceedings are expensive and seem to be unnecessary. Yet, a decision which upholds the rights of private property, even for purely technical reasons, is not to be condemned. The remedy lies with the legislature. Statutes should provide for the taking of the fee, whenever land is taken for street or highway.

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## The Constitutionality of a State Appropriation to a Private Association.

The decision of the supreme court of Michigan in the case of *Michigan Corn Improvement Association* v. *Auditor General,* 113 N. W. 582, presents in a new form the question of the constitutional limitation on legislatures in the matter of granting bounties to associations representing particular industries. The statute to be decided upon was one appropriating five hundred dollars a year, for the years of 1907 and 1908, "for the use of the Michigan Corn Improvement Association in the prosecution of its work of creating a deeper interest in and a better knowledge of the culture and improvement of corn;" the sums to be expended "under the direction of the board of directors of said association in such way as in its judgment will most effectually attain the ends sought." The beneficiary is a voluntary, unincorporated association, whose membership is limited to "persons actively interested in the improvement of corn and residents of the State of Michigan," and whose objects are: (1) "To stimulate effort to improve the quality of the corn crop and increase the yield of both grain and fodder; (2) to develop better methods of culture and disseminate the knowledge of the same; (3) by meetings and discussions to arouse a deeper interest and develop a more thorough unity of effort in corn production; and (4) to establish ideals for both ear and plant for the different varieties and breeds." At its annual meeting is held a corn

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[16]Dillon on Municipal Corporations (4th Ed.), Sec. 722.

[17]*Eels* v. *A. T. & T. Co.,* 143 N. Y., 133 (1894).

exhibit, at which prizes are offered, to its members only, for the best exhibit of corn.

The court held the act unconstitutional, as discriminating in favor of one industry; "the only persons," it said, "who will be directly benefited by the proposed appropriation are those 'actively interested in the improvement of corn.'" This is practically all that the court says of its own motion, the case being ruled directly, in its judgment, by the leading decision in the state on the subject of bounties, the *People* v. *Salem*, 20 Michigan, 452 (1870). In the latter case the court, in a vigorous opinion delivered by Judge Cooley, refused to recognize the constitutionality of an act authorizing certain counties to levy a tax to aid in the construction of a railroad. In the course of the opinion, Judge Cooley announced the principle that the state has no power to grant bounties, such as "to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it." It was after quoting this decision that the present court decided the corn case.

The principle has long been recognized that neither taxation nor appropriation by the legislature is valid if made for any save a directly public purpose. "Because," says the United States Supreme Court,[1] "such a tax would, if collected, be the transfer of the property of individuals to aid in the projects of gain and profit of others," and hence a taking of property without just compensation. But the determination in each particular instance of the true question as to what is and what is not a "public purpose," is ordinarily one of legislative discretion, unhampered by judicial interference. "The tax must be considered valid, unless it is for a purpose in which the community taxed has palpably no interest; where it is apparent that a burden is imposed for the benefit of others, and where it would be so pronounced at first blush."[2] Hence the tendency of the courts is to sustain the legislation whenever possible, and we have a large number of reported cases in which they have refused to hold the statute invalid, because it did not appear to be a gross abuse of discretion.

Thus the general rule as to legislation in aid of railroads is different from that laid down in Michigan.[3] While acts have

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[1] *Loan Association* v. *Topeka*, 20 Wallace, 655 (1874).

[2] *Sharpless* v. *Mayor of Philadelphia*, 21 Pa., 168 (1853).

[3] *Taylor* v. *Ypsilanti*, U. S., 60 (1881); Cooley on Constitutional Limitations, 676 note; *Stockton R. R.* v. *Stockton*, 41 Cal., 147 (1871).

been held valid which granted bounties to public grist-mills [4] (though these are now mostly obsolete [5]); to volunteers in time of war;[6] and to various local industries, such as the culture of silk;[7] wherever, in short, any direct public benefit could be discerned as accruing from the legislation. On the other hand, in the absence of such direct benefit, however great may be the incidental advantage to the public, the statute is ordinarily held unconstitutional.[8] But it is to be noted that these cases all deal with legislation whose avowed object is to assist some private *commercial* enterprise, and as such the Michigan court seems to have viewed the act in question. Should it affect the decision in any way, if it be considered that the purpose of the association which was being benefited was at least as much educational as commercial? That it was "to disseminate knowledge" and "to establish ideals," as well as "to stimulate effort?"

Bounties to agricultural societies have been held valid,[9] where they have been incorporated, and one of the terms of the charter is the holding of an annual fair, the theory being that it is of great benefit to the entire commonwealth that progressive interest in farming be stimulated. Moreover, this is in no sense a single industry, but rather a phase of national life. Educational institutions, also, are the lawful recipients of state funds, but only where they are under the control of the state or municipality.[10] Whenever they partake of the nature of private foundations, they come within the constitutional prohibition. Thus, in *Curtis* v. *Whipple,* an act authorizing a bonus to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise; the court distinguishing direct public benefits, such as might accrue were the school under direct municipal control and subject to public requirements as to who should and who should not be admitted, from those incidentally due to the existence of an institution of learning in the community. And in *Jenkins* v. *Anderson,* the aid was

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[4] *Burlington Township* v. *Beasley,* 94 U. S., 310 (1876).

[5] Gray—Limitations of the Taxing Power, 135, 191 (1906).

[6] *Booth* v. *Woodbury,* 32 Com., 118 (1864); *Brodhead* v. *Milwaukee,* 19 Wis., 624 (1865).

[7] *Stockton R. R.* v. *Stockton,* 41 Cal., 147 (1871).

[8] *Deering* v. *Peterson,* 77 N. W. (Minn.), 568 (1898); *Michigan Sugar Co.* v. *Auditor General,* 124 Mich., 674 (1900); *Loan Association* v. *Topeka, supra.*

[9] *Hixon* v. *Eagle River,* 91 Wis., 649.

[10] *Curtis* v. *Whipple,* 24 Wis., 350 (1869); *Jenkins* v. *Anderson,* 103 Mass., 74.

denied to a school established by funds provided by the will of a citizen, because the governing board consisted of trustees appointed by the will.

Thus the distinction is one in kind, and not in degree; the public benefit must be clear, direct and unmistakable; no amount of incidental advantage to the community will avail. It would seem, therefore, that even viewing this as an association largely educational in its nature, and approaching the criticism of the statute on general principles of common law, thus laying aside the anomalous ruling of *The People* v. *Salem,* its constitutionality could not be sustained. It is most obviously special legislation in favor of a limited group of individuals, and although the group is capable of enlargement, the object to be attained is not. "The right to tax depends on the ultimate use, purpose and object for which the fund is raised, and not on the nature or character of the person or corporation whose intermediate agency is to be used in applying it." [11]

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## Doctrine of Price *v.* Neal; Effect of Indorsement by Holder.

The doctrine of *Price* v. *Neal* [1] to the effect that the drawee of a bill of exchange or check of which the drawer's signature is forged cannot recover the money paid by him to the holder is well established. To this doctrine, however, there are exceptions, which unfortunately stand on more precarious footing, and are more uncertain in their applications. In general, these exceptions arise out of negligence or bad faith on the part of the holder. Thus, where by custom a duty of precaution is thrown upon a collecting bank which it neglects,[2] or where the circumstances are such as to put the holder on suspicion and he fails to exercise due diligence,[3] the case is taken outside the general rule. It has been held that a further exception exists where the instrument is endorsed by the holder, on the ground that the signature amounts to a guaranty of genuineness.

The recent case of *Williamsburgh Trust Co.* v. *Tum Suden,* 120 N. Y. App. Div. 518, sanctions this view. The idea that the

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[11] *Sharpless* v. *Mayor of Philadelphia,* 21 Pa., 168 (1853).

[1] 3 Burr, 1354.

[2] *Ellis* v. *Ohio Ins. Co.,* 4 Ohio, 628.

[3] *Nat. Bank of N. America* v. *Bangs,* 106 Mass., 441; *Rouvant* v. *San Antonio Nat. Bank,* 63 Tex., 612.

signature of the holder is a warranty of the genuineness of the note seems to arise from a misunderstanding of the purpose of the signature. Manifestly it is not an indorsement in any proper sense, for that term applies only to an instrument which has not yet come to maturity.[4] Nor can it be a guaranty, for to hold so is to disregard the common understanding of the effect of the signature, which is that it is a receipt.[5] "One of the best receipts is the placing on the back of the bill the name of the person who has received payment of it."[6] An illustration will serve to refute the idea that the signature is anything but a receipt; surely it would not be contended that a drawee who had paid out funds to a greater amount than the drawee's account, could recover the money on the ground that the payee's signature amounted to a guaranty that the drawer was in funds. Moreover, if the signature be an indorsement, then because by custom the holder places his signature upon the check, the doctrine of *Price* v. *Neal* is virtually "excepted out of existence."

While the view that the signature is a guaranty is not without judicial sanction,[7] it is submitted that almost without exception the cases usually cited by text-writers do not really substantiate this proposition. There are generally in these cases either negligence on the part of the holder at the time of taking the instrument,[8] or knowledge of suspicious facts at the time of receiving the money.[9] Moreover, if the opinions in these cases are read as a whole they will be found not to support the doctrine that the signature *per se* enables the drawee to recover, but merely that the signature "is a fact that tends to show that the appellee (the drawee) was guilty of no negligence in paying the check,"[10] and thus is important only "where the indorsement is made under circumstances which establish or impute negligence to the indorser."[11]

It is submitted further that the force of the recent case is

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[4]Daniel on Negot. Ins., (5th Ed.), 666.

[5]Story on Prom. Notes, (7th Ed.), 526, note 5; Chitty on Bills (1st Ed.), 157 (1799).

[6]*Keene* v. *Beard*, 8 C. B. N. S. 372, 382.

[7]*First Nat. Bank* v. *First Nat. Bank*, 4 Ind. App., 355.

[8]*Nat. Bank* v. *Bangs* (*supra*); *Danvers* v. *Salem Bank*, 151 Mass., 280, at 283.

[9]*Rouvant* v. *Bank* (*supra*).

[10]*First Nat. Bank of Quincy* v. *Ricker*, 71 Ill., 439; *Nat. Bank* v. *Bangs* (*supra*), at 445, intimating that had the holder been without fault, recovery would have been refused.

[11]*People's Nat. Bank* v. *Franklin Bank*, 88 Tenn., 299, at 306.

weakened by the fact that the court seems in part to have rested its decision on the fact that the holder was also the payee. Even this ground, however, seems questionable, for while in many instances the equity of the payee-holder may be inferior to that of the holder who is not a payee, this cannot be stated as an inflexible legal principle. Thus, while it is true that where the check is negotiated to the payee by a stranger, there is something suspicious in the very nature of the transaction,[12] there would be nothing to put the payee on guard where the check was presented by an agent of the drawer and paid to the drawer's use.

The case is also of interest to the student of the doctrine of *Price* v. *Neal* in that it suggests that where the holder has customarily cashed checks for the drawer, he is held to a knowledge of the drawer's signature and cannot shift that duty to the drawee.

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## The Liability of a Charity for the Negligence of its Servants.

In the case of *Tozeland* v. *Guardians of the Poor of the West Ham Union,*[1] the question of the liability of a charity for the negligence of its servants came before the Court of King's Bench on appeal. The facts were as follows: The plaintiff, an inmate of a workhouse and recipient of poor law relief, was directed to assist at the installation of electric lights in the infirmary under the management of one Byers, the resident electrician. By the English poor law paupers who refused to work when assigned to a job could be brought before a magistrate and committed to jail. At the direction of Byers the plaintiff mounted a scaffold which, being insecurely constructed through the negligence of the electrician, collapsed, injuring the plaintiff, who then sued the guardians of the local union for damages. On appeal, a verdict in favor of the plaintiff was reversed on the ground that the plaintiff in entering the workhouse as an inmate assumed the risk of negligence on the part of the guardians and their employees, or, at least, that the union owed no duty of care to him and hence he could not recover.

Though the rule that one who takes advantage of the benefits offered by a public or private charity cannot recover against it

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[12] *Nat. Bank* v. *Bangs* (*supra*), 445.

[1] L. R. (1907), 1 K. B., 920.

for the negligence of its servants (at least if the latter were properly selected) is now pretty well settled, the courts are by no means agreed upon the reason for the rule. Three grounds have been assigned: (1) It is against public policy, which desires to foster charitable work in every possible way;[2] (2) the funds of a charity are trust funds and may not be diverted from the purpose for which they were appropriated;[3] (3) a person entering a charity in fact assumes the risk of any injury that he may receive through the negligence of the charity's servants.[4] At least one of these reasons seems to be bad in theory. As has been pointed out,[5] a trustee is individually liable for torts committed in the management of trust property, and though the trust fund is protected from immediate levy, he can reimburse himself therefrom unless individually at fault. Hence the mere fact that the charity is supported wholly or in part through trust funds should not in itself be a ground for non-liability. Either under this or the public policy theory the result would be the same, whether the injury was to an outsider or one who has accepted the benefit of the charity, and so it has been held.[6] Under the "risk theory," however—and this is the theory of the English case—the charity should be liable to an outsider, since he, having entered into no relations with the institution in question, cannot have assumed any risk. This, indeed, seems to be the law in England—the court in the main case carefully distinguishing as inapplicable the case of *Mersey Dock Trustees* v. *Gibbs*,[7] where a dock company performing public functions was held liable for the negligence of its servants resulting in injury to an outsider. A similar result is suggested in *Powers* v. *Massachusetts Homoeopathic Hospital*,[8] though in that case the injury was to a hospital patient, and hence the remark is mere dicta. It is, however, interesting to note that the few cases which have held that a charity was liable for the negligence of

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[2] *Fordyce* v. *Woman's Christian Library Association*, 96 S. W. 155 (Arkansas, 1906); *Hearns* v. *Waterbury Hospital*, 66 Conn., 98.

[3] *Parks* v. *N. W. University*, 12 Ill. App., 512; *McDonald* v. *Massachusetts General Hospital*, 120 Mass., 432.

[4] *Powers* v. *Massachusetts Homeopathic Hospital*, 47 C. C. A., 122; *Cumier* v. *Dartmouth College*, 105 Fed., 886.

[5] *Powers* v. *Hospital*, 47 C. C. A., at 129.

[6] *Noble* v. *Hahnemann Hospital*, 98 N. Y. Suppl., 605; *Fordyce* v. *Woman's Christian Library Assoc.*, 96 S. W., 155.

[7] (1866) L. R. H. L., 93.

[8] 47 C. C. A., 132.

its servants are all, except the English case cited,[9] cases of injuries to persons obtaining the benefit of a private charity.[10] In the case of charitable institutions supported wholly or in part by the state or a municipality, the American courts have uniformly denied liability.[11] It would seem, then, that the principal case is in accord with all the authorities in its facts, but becomes an intensely interesting one by reason of its dicta denying the applicability of the rule to the case of injury to an outsider.

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[9]*Mersey Docks Trustees* v. *Gibbs* (1866) L. R. 1, H. L. 93.

[10]*Donaldson* v. *General Public Hospital,* 30 New Brunswick, 279; *Hewett* v. *Woman's Hospital Assoc.,* 73 N. H., 556. The case of *Glavin* v. *Rhode Island Hospital,* 12 R. I., 411, holding that a hospital is liable for negligence of its doctor, resulting in injury to a patient, has been overruled by statute in Rhode Island. The case could hardly be considered as *contra,* however, since the decision is largely based on the fact that due care was not exercised in the selection of the doctor in question. In accordance with this last proposition there is an abundance of dicta: (*Van Tassel* v. *Manhattan Hospital,* 15 N. Y. Supp., 620; *Wilson* v. *Brooklyn Homeopathic Hospital,* 89 N. Y. Supp., 619).

[11]*Penn* v. *House of Refuge,* 63 Md., 20; *Ford* v. *School District,* 121 Pa., 543; *Maia* v. *State Hospital,* 97 Va., 507; *Peasley* v. *Poor District,* 26 Pa. Co., 428; *Corbett* v. *Industrial School,* 177 N. Y., 16; *White* v. *Hospital,* 138 Ala., 479. (The suit in all these cases was, however, by an employee or a person receiving the benefit of the institution.)