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### Natural Easements

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## NATURAL EASEMENTS.<sup>1</sup>

BY HARRY A. BIGELOW<sup>2</sup>

There is, in the law of real property, a certain group of rights frequently referred to as natural rights, less frequently as natural easements. Just how broad are these natural rights or easements is a matter upon which the states vary in certain details. In all states except those in which the appropriation theory of water rights prevails, the right to the flow of a stream not unreasonably diminished or polluted is said to be a natural right: the right of support for land in its natural condition by adjacent and subjacent land; the right to have the air not unreasonably deteriorated by odors, noises, etc., are almost universally recognized as natural rights. The same view is taken in many states as to the right to discharge surface water on adjacent land to which it would naturally drain. No attempt is made to state the scope of these rights with exactness but merely to indicate in a general way what they are. There is another group of what may be called true easement rights. Such are rights of way, rights of drainage, rights of support for buildings and many others. The question that I wish to consider is this: just what difference, if any, is there fundamentally between these two groups of rights, not merely as a matter of names, but as a matter of analysis of the jural relations involved in the two conceptions?

Perhaps the difference between the two groups of rights that most readily suggests itself is that the natural right or natural easement merely restricts the owner of the quasi-servient estate in acts upon his own land, while the true easement gives to the owner of the dominant estate a privilege of action upon the servient estate. But this latter proposition is not true of the negative easements of lights and adjacent support, and, on the other hand, the natural easement of drainage of surface water, if it does not give a privilege to act upon the land of another at least gives a privilege to produce consequences upon that land. Furthermore, such a criterion would have to ignore the easement of fencing and of payment of money<sup>3</sup> and the cognate rights that are the subject matter of covenants running with the land.

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1. A paper read before the Legal Club of Chicago.

2. Professor of Law, University of Chicago Law School.

3. *Whittenton Manufacturing Co. v. Staples*, 164 Mass. 319, 41 N. E. 441 (1895). Compare *Packenhams Case*, Y. B. 42 Ed. III, 3, pl. 14 (1368).

Far more important is the distinction that is made by Professor Terry in his learned and valuable treatise on the Principles of Anglo-American Law. Speaking of the natural easement with respect to stream water he says:<sup>4</sup>

"The right to have water flow to land in a natural watercourse is said not to be an easement, but a 'natural right, a mere portion of the ordinary right of property.' ut this refers to the manner in which the right is acquired, not to its nature. It means simply that the proprietor of land to which a stream flows is not obliged to resort to any prescription, grant or other special title separate from his title to his land to support his right to the flow of water, nor is he compelled to show that he has ever appropriated the water by making any use of it."

Again, speaking of the natural rights of lateral support for land, he says:<sup>5</sup>

"The right of support for land in its natural condition is a 'natural right' forming a part of the ordinary right of property, and not an easement to be specially acquired, in which it resembles the last described right. The contrary is true of the right of support for land artificially burdened. But these are only differences in the dispositive facts. The nature of the two rights when once acquired is the same. \* \* \* This being so, the question arises: Which land is the subject of the right? Is it to be regarded as a right in the servient tenement or as merely an element of or addition to the right in the dominant tenement? The question is not one of much, if any, practical importance, but would need to be decided in order to fix the position of this right in a systematically arranged *corpus juris* and to determine the form in which the corresponding duties should be stated. \* \* \* The owner of a servient tenement can grant such a right of support and the grant will be good against his successors in title and also, I suppose, will convey a right on which an action can be maintained against a stranger who violates it. Now, as such owner by mere covenant could not bind strangers, however it might be as to his successors in title, it seems that his grant must be effective to convey a right *in rem*, which of course would be a right in the servient tenement, that being the only thing in which he could convey such a right."

The same idea seems to underlie the language of the court in *Manneville Co. v. Worcester*.<sup>6</sup> The defendant in Massachusetts diverted the waters of a stream that furnished power to the plaintiff's mill in Rhode Island so that the plaintiff could not continue to operate the mill. He brought action for this diversion. Holmes, J., in speaking of the nature of the rights involved used this language:

"The defendant's counsel contended, in the first place, that such rights as the plaintiff claims cannot extend beyond the Rhode Island line, and went the length of maintaining that a servitude cannot be created in one state in favor of lands in another. We are unable to agree to this proposition upon either principle or authority. \* \* \*

"We think that the cases which recognize civil \* \* \* liability for flowing land in one state by means of a dam in another, are hardly less pertinent. \* \* \* The defendant admits these cases to be law and tries to distinguish them. But we cannot assent to the distinction between discharging and withdrawing water. The consequence in one case is positive, in the other negative; but in each it is the consequence of an act done outside the jurisdiction where the harm occurs, and the consequence is as direct in the latter case as in the former. The right infringed in the former case is called absolute ownership; in the latter easement. \* \* \*

4. P. 382.

5. *Ibid.*

6. 138 Mass. 89 (1884).

"Of course the laws of Rhode Island cannot subject Massachusetts land to a servitude, and \* \* \* Massachusetts might prohibit the creation of such servitudes. So it might authorize any acts to be done within its limits, however injurious to land or persons outside them. But it does not do either. It has no more objection to a citizen of Rhode Island owning an easement, as incident to his ownership of land in that state, than it has to his owning it in gross, or to his purchasing lands here in fee. \* \* \* So far as their creation is concerned, the law of Massachusetts governs, whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two estates."

It is submitted, with all deference, that while the difference in the origin of true easements and natural easements, as stated in these two extracts, is fundamental, the implications from that difference in origin do not seem to be completely developed. In order to consider to the full the effect upon the nature of these two groups of rights that is traceable to their different origin it will be advisable to make an examination of some of the elements comprised in the aggregate of rights that an owner of land has with respect thereto.<sup>7</sup> First he has what are ordinarily called privileges or permissive rights with respect to the land, i. e., he may use it as he sees fit; he may dig in it; erect buildings on it, cultivate it, or he may let it lie idle and do nothing with it: in fact the privileges of user of an owner of land are so varied that it is useless to attempt to enumerate them. It will be noticed that there are no duties on the part of other members of society correlative to these privileges, the relation of any such other member is purely negative. All that can be said is that no right of his is violated by the landowner's exercising any of these privileges.

In addition to these privileges of user any given landowner has certain rights in the narrow sense, i. e., legal relations that imply correlative duties on the part of other members of society. Thus a landowner has the right against every other such member that the latter shall not walk on the land, or erect structures on it or otherwise occupy or use it. More than this, each landowner has the right against the other members of society that they shall not interfere with him in the exercise of any of the privileges above referred to. This same relation, instead of being expressed in terms of the privileges and rights of the owner of the land, may be expressed from the point of view of the other members of society by saying that they have no right that the owner of the land shall not engage in the various courses of action that he is privileged to engage in, and further that they are under a duty not to go on his land or to interfere with him in the exercise thereon of his privileges. This repre-

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7. See Terry, *Principles of Anglo-American Law*, pp. 84-101, ch. 12; Salmond, *Jurisprudence* 2 ed., chs. 10, 11, 12.

sents the norm of rights so far as they need be considered here, which every owner of real property has.

Now suppose that A, as the owner of land, grants B a right of way across it. How does this affect the legal relation of the parties? A's legal position has been changed in these regards. First, he has given up certain rights against B. Whereas formerly he had the right against B that the latter should not come on his land, there are now circumstances under which he does not have the right to have B not come on his land. Second, he has lost certain privileges that he formerly had. He may not build on his land or dig in it or otherwise use it in such a manner as to interfere with B's uses as defined by the instrument creating the easement. The change in legal relations from B's point of view may be stated thus: first, he has acquired against A the right that A shall not exercise his normal privileges so far as they produce the results last above mentioned; second, he has acquired those privileges of action on A's land that are ordinarily defined in the instrument creating the easement. The analysis thus outlined is applicable to the greater part of the easements that are recognized by the common law. At the same time as has been already pointed out<sup>8</sup> the existence of the easements of light and lateral support show that it is not always true that B as dominant gets a privilege of action upon the servient estate. Again the easement of fencing and those covenants that run with the land vary from both the two preceding groups in that they impose affirmative duties upon A. The common and fundamental characteristic of all these relations, however, is the fact that they all represent a departure from the norm of property rights; an acquisition of property rights by B in the servient piece either in an actual increase of privileges with respect thereto or in the giving up of privileges with respect thereto by A.<sup>9</sup> That this latter jural relation should properly be classified as a property right by B in A's piece is clear from the latter part of the extract from Professor Terry quoted earlier in this discussion.<sup>10</sup>

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8. *Ante*.

9. It would seem that further than this there is no characteristic common to all easements: the difference between the affirmative easements such as way and the negative easements such as light have already been pointed out. But the characteristics common to them, viz., loss of privilege by the servient tenement, is not true of an easement to commit a nuisance such as sending odors over the servient land; there is in this case the loss of right by the servient and increase of privilege by the dominant true of the easement of way, but there is no loss of privilege on the part of the servient, although the enjoyment of some privileges may be made practically impossible by the exercise of the easement.

10. *Ante*, p. 3.

Let us now turn from the true easement to the so-called natural easements. Mention has already been made of some of the various rights in a general sense, that normally the owner of land has as such. What this norm of rights or duties is may vary under different systems of law or under the same system at different times. But the norm is capable of approximately exact determination at any given time. Thus in our law as it is now constituted B has a right against A that the latter shall not dump his rubbish on B's land, and that he shall not break B's windows by throwing stones through them. These are both courses of action that must originate near or on B's land. Suppose that A stands on his own adjacent land when he dumps the rubbish on B's land or breaks his windows. Does the fact that this constitutes a violation of B's rights against A justify us in saying that B has certain rights in A's land or in A's rubbish or in the stone which A throws? Clearly not. What we are dealing with is not B's rights in A's property but his rights in his own property. The fact that the course of action that caused these violations originated on A's land is immaterial. The violation of B's right would be just the same if the act had been done by a trespasser on A's land. Nor would B's right be any different if A owned all the land adjacent to B's so that in order to commit this tort the course of action must have originated on A's land. The conception is not that A has lost certain interests in his own land that he at one time possessed and that B has acquired them. A has all the rights of ownership in his land or his rubbish or his stone that any one can have. All that has been done is to state with a certain exactitude just what is the norm of B's rights in particular regards with respect to his property and the norm of A's duties with respect to his. It would seem that on principle this is all that the so-called natural easements amount to. Just as A is under a duty not to break B's windows, so he is under a duty not to make B's land subside; just as he is under a duty not to dump rubbish on B's land, so he is under a duty not to pollute the air over B's land or the stream that flows by B's land; and the same thing is true of his duty not to diminish the stream unreasonably. But just as with the torts previously referred to, so the statement of the violation of these natural rights does not carry the implication that B has certain property rights in A's land that limit what would otherwise be A's normal freedom of action with respect thereto. It is merely a statement of what the normal duties of landowners (among other persons) are to other landowners. It is perfectly conceivable that the norm of property rights in our law might have developed other-

wise. A system of law might take the shape of allowing persons to go over the land of another as they saw fit. Or the law might have taken the shape of refusing to give damages when one land owner by excavating caused the land of another to subside. If the law had so developed in these regards, the norm of rights then would have been somewhat different from what it in reality is. The important fact is that these so-called natural easements seem to be nothing but an emphasizing in a somewhat misleading way of certain aspects of the norm of property rights in our law as it has actually developed. Indeed it is possible to pick out other aspects of our law of property as it stands that might just as properly be placed in the category of natural easements: the rights in California and some other states to underground waters;<sup>11</sup> and the doctrine embodied in *Rylands v. Fletcher*<sup>12</sup> are indistinguishable in principle from the rights usually classed as natural easements, and the latter right is appropriately classified by Mr. Tiffany in his work on Real property<sup>13</sup> with the other natural rights.

There are, of course, certain differences between the torts first mentioned and those mentioned as being breaches of natural rights. The first are violations of the possession of the plaintiff and are usually the subject of an action of trespass; the second are violations of rights that the plaintiff has by virtue of his possession but they would not perhaps be classified as violations of his possession within what seems to be the ordinary meaning of that term; they would normally be redressed at common law by an action on the case. While these differences must be admitted, it is submitted that they do not affect the ultimate difference between natural easements and true easements. These differences may, by way of recapitulation be stated thus: the so-called natural easements give one landowner neither rights nor privileges in the land of another; they are merely a statement of rights against the world at large that every landowner has as such not to have certain consequences produced upon or with respect to his land: the fundamental characteristics of a true easement is that it is a lessening of the normal rights of the owner in a given piece of land and a transferring of those rights to some third person, ordinarily the owner of another piece of land.

There are several situations in which the theoretical difference as thus worked out between natural and true easements would seem to be of practical importance.

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11. *Katz v. Walkinshaw*, 141 Cal. 116, 64 L. R. A. 236 (1903).

12. L. R. 3 H. L. 330 (1868).

13. Vol. I, ch. 11.

The first situation is this. Where a license is given by A to B for the latter to do an act of such a character that if the license were held irrevocable after being acted upon the result would be to create an easement other than by an instrument under seal, the courts have almost uniformly held that such license is revocable even though acted upon. Thus a license to build an aqueduct, or to lay pipes or to build a way over the licensor's land may be revoked by the licensor even after it has been acted upon by the licensee. Courts of equity have in several states sometimes held the license to be irrevocable if acted on; their decision being rested upon the grounds of an implied contract to give an easement, or of fraud or estoppel. Where, on the other hand, the license is to do an act in derogation of an easement right of the licensor and the license is acted upon, it is held to be irrevocable and a subsequent attempt by the licensor to recall the license and re-assert his easement is ineffective.<sup>14</sup>

Taking the distinction above outlined, suppose that B, a lower riparian proprietor, authorizes A, an upper riparian, to erect a dam and divert an unreasonably large amount of water from the stream, and A does so. May B subsequently revoke his license and thereafter sue A for violation of his right to have the water come down not unreasonably diminished. Since B's right is not an easement that restricts A in the use of his own land but one of the incidents of B's ownership of his own piece it would seem, on the principles above stated, that the license should be held revocable. In the leading case in the subject, *Liggins v. Inge*,<sup>15</sup> the license was held revocable. The case went upon the appropriation theory of water rights, not upon the present common law rule, and this of course seriously affects the value of the case as a precedent. In *Addison v. Hack*<sup>16</sup> it was held on the same facts that the license could not be revoked without offering to put the license *in statu quo*. On the other hand a license to pollute a stream has been held revocable by the licensee,<sup>17</sup> and a license to violate the natural right to quiet has been held revocable by a successor of the original licensor.<sup>18</sup> In both these latter cases the license had to a degree been acted upon by the

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14. Collections of cases upon these points will be found in the L. R. A. notes to *Pifer v. Brown*, 43 W. Va. 412, 49 L. R. A. 497 (1897), and *Yeager v. Tuning*, 79 Oh. St. 121, 19 L. R. A. (N. S.) 700 (1908).

15. 7 Bing. 682 (1831).

16. 2 Gill (Md.) 221 (1844). Compare *Jensen v. Hunter* (Cal.) 41 Pac. 14 (1895).

17. *Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218 (1894).

18. *Panama Realty Co. v. City of New York*, 158 N. Y. App. Div. 726, 143 N. Y. Supp. 893 (1913).

licensee, in both the decisions were rested upon the ground that to hold the license irrevocable would be in substance to create an easement in a method unknown to the common law; in other words, that the licensing of an act in derogation of a "natural easement" is not in truth the relinquishment but the creation of an easement.

A more important question is as to jurisdiction in eminent domain. Suppose B has a farm in Illinois, immediately adjoining a farm of A's in Wisconsin, the state line being the dividing line between the farms. Now suppose first that B has a right of way over the Wisconsin farm. May Wisconsin condemn that right of way? Clearly so. Since it has control over the land it has complete jurisdiction over all rights and privileges that centre in that land, that go to make its complete title. Normally they would all be in A; in this case part of them are in B but however divided the ownership of the privileges and rights in that land they are Wisconsin rights, and within its control. Suppose that there is also a brook that flows from the Wisconsin farm to the Illinois farm; and suppose that Wisconsin acquires by condemnation the complete title to the Wisconsin land; may it thereafter dam the brook so as to prevent any of the water reaching B, or to take another case, may it so excavate in its own side of the line as to cause B's land to subside? Or, again, may it erect a garbage plant on the land and send the odors over B's land? If the conception of the natural rights involved in these questions is that they are limiting interests in the Wisconsin land they are just as much under the control of Wisconsin as the right of way; if they are merely a statement of the right of B to be free from certain damages to his land, just as he has the right to be free from damages to his person, Wisconsin would have no such right.

So far as the decisions go, the most common case is where the act in the first state produces an actual trespass in the second state, as where a lower riparian state condemns land for a dam which backs up into the upper state. That the condemnation proceedings in the lower state cannot prejudice the rights of the upper owners seems well settled.<sup>19</sup> The case of *Missouri v. Illinois*<sup>20</sup> was an action for the pollution of the Mississippi river by the discharge from the Chicago drainage canal. The court held that in fact no actionable pollution by Illinois was shown. It seems clear, however, that had

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19. *U. S. v. Ames*, 1 Woodbury & Minot, 76 (1845); *Rutz v. St. Louis*, 7 Fed. 438 (1881); *Holyoke Power Co. v. Conn. River Co.*, 52 Conn. 570 (1884).

20. 200 U. S. 496 (1906).

such pollution been shown no attempt at condemnation by Illinois would have been a defense. The cases of retention of water present a similar problem. The question is suggested by the case of *Kansas v. Colorado*.<sup>21</sup> This was an action brought by the state of Kansas against Colorado, an action for diverting the waters of the Arkansas river to the prejudice of the plaintiff state. As in the preceding case, the Supreme Court found that no unreasonable uses of the stream had been shown to exist. At the same time the court clearly recognized the principle that it was not in the power of Colorado by any kind of proceeding to cut out the rights of Kansas with respect to the river. The same conclusion was reached in an article on *The Power of a State to divert an Interstate River in the Harvard Law Review*.<sup>22</sup>

So far as any attempt by condemnation to deprive immediately adjoining land in another state of its right to pure air on its right to lateral support, an examination has revealed no cases; the impossibility of so doing, however, would seem to be as clear on principle as in the cases already mentioned.

A recent case in the supreme court of the United States makes in another field an application of the distinction under discussion. In the case of *Ladew v. Tennessee Copper Co.*<sup>23</sup> the facts were as follows:—The plaintiffs were citizens of New York, the defendant a New Jersey corporation. The plaintiffs owned extensive tracts of timber land in Georgia; the defendant had a smelter in Tennessee, the fumes and gases from which killed the timber on the plaintiff's land, damaging it to the extent of over \$50,000. The eighth section of the act of 1875, determining the jurisdiction of the circuit courts of the United States provides: "That when in any suit commenced

21. 206 U. S. 46 (1907).

22. 8 Harv. Law Rev. 138. It will be noticed that the foregoing discussion has been based upon this predicate, viz., that by the common law of both states involved there is a right of the kind under discussion, as not to have a stream unreasonably polluted or diminished, not to have land caused to subside, to be free from objectionable odors, and the like; that such being the common law rights an attempt is then made by one state to condemn one of these confessedly existing rights and the question has been whether it was in the power of the state so to do. If by the law of the state where the course of action was set in motion that produced the damage in the second such setting in motion or such production of damage (if the latter had also taken place in the same state) would not be a violation of any right, while by the law of the second state it would be a violation of a right, a question would be presented quite apart from that now under discussion and which, not in the field of easement, natural or otherwise, may be illustrated by this case: If by the law of state X it is not a tort to dump rubbish on the land of a third person, and by the law of state Y it is, and A standing in state X dumps rubbish on the land of B in state Y, is that a tort?

23. 218 U. S. 357 (1910).

in any circuit court of the United States, to enforce any legal or equitable lien or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants shall not be an inhabitant of, or found within such district" the court may order service by publication, after which "it shall be lawful for the court to entertain jurisdiction" but any adjudication shall affect only property, the subject of the suit, and, under the jurisdiction of the court within the district. Action was brought in the United States circuit court for the district wherein the smelters were situated. The plaintiff's complaint alleged, that because of the facts stated above they were possessed of a "right and claim in, to and against the said lands of the defendants *in the nature of an easement*"<sup>24</sup> thereupon that the same shall not be used in a manner to injure or destroy the said lands and forests" of the plaintiffs, and asked for damages and an injunction. The court below dismissed the bill for lack of jurisdiction. On appeal the Supreme Court, in passing on the question raised by the plaintiffs' theory of jurisdiction said:

"In no just sense can their cause of action be said to constitute 'a claim to' real property in the district. They cannot be regarded as having a 'claim to' the leased land or premises on which the alleged nuisance is maintained. It may be that what the defendant is charged with doing creates a nuisance. It may also be that the defendant company wrongfully uses and has used its property in Tennessee in such a way as to seriously injure the property of the plaintiffs \* \* \* and that the plaintiffs are legally entitled by some mode of proceeding in some court to have the alleged nuisance abated and their property in Georgia protected in the manner asked by them. \* \* \* It would be a most violent construction of the eighth section of the act of 1875 to hold that the right to have abated the nuisance in question arising from the use in Tennessee of defendants' property, because of the injurious effects upon plaintiffs' real property in Georgia, creates, in the meaning of the statute, a 'claim to' real property within the district where the suit is brought."

It is submitted that the decision, though couched in terms of statutory construction, is fundamentally a clear and accurate application of the distinction attempted to be set forth in this discussion.

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24. My italics.