LECTURE VI.

(C.) RIGHTS BELONGING TO ONE PARTY EXISTING OVER THE PROPERTY OF ANOTHER.

(I.) *General nature of such rights.*

We have already taken notice of the fact that though the right of ownership in itself has a distinct legal existence, the owner naturally possesses a combination of powers over his estate and has various rights of enjoyment and use of it; so that it is possible to separate some one or more of those rights and let it (or them) be enjoyed by another person; the ownership remaining all the while,—restricted as to its accessories, but unchanged in character. This substantive right of ownership over the whole property may subsist, even though *all* the practical and present enjoyment of it is vested in some other person. In the "99 years' lease" so common in England, for that long period, the lessee has the use and enjoyment and profit of the land, can build on it, &c., and has only to pay a ground-rent; but still, he is not owner of the land, and therefore he may not *destroy* it. Of this we shall speak hereafter. At present we confine attention to the fact that there are numerous cases where the ownership right over the "thing" resides in one person, and certain rights over the same "thing" reside in another.

Special rights—Lease—Mortgage—Pre-emption.

Such rights may be of several kinds. Under this class we might include all rights over things which are transferred by a contract or agreement with the owner; as in the case of a lease of land to a tenant, whereby the owner *agrees* to part with the use and enjoyment of the land for a term, on a certain consideration: or where (as so often in India) a tenant right exists, which owes its origin, not to agreement with the land-owner, but to custom, to circumstances, and to legal enactment; and which is consequently a right in perpetuity. Another familiar example is where an owner *mortgages* his land, *i.e.*, gives his

land as *security* to his creditor.[1] With regard to *mortgage*, I may just mention that there are two principal kinds: in one the owner retains the land (or house) in his own possession (simple mortgage or hypothecation); but under the liability to have it sold by the creditor (mortgagee) if the money is not paid by a certain date. In the other, the owner gives over the possession and enjoyment to the mortgagee (usufructuary mortgage); in the latter case the profits of the land are (usually) taken by the mortgagee in lieu of interest on the money due.[2] A pawn or pledge conveys rights of a similar kind, only that we apply this term in the case of moveable property. "Mortgage" always refers to land or other immoveable property.

Sometimes there are special rights like "*emphyteusis*," and the "usufruct," where the owner gives over permanently, or for a long time, *everything* except the bare right of ownership and the reversion to his family if the right becomes extinguished; and (usually) there is some fixed annual rent-payment.

"Pre-emption" is also a special right existing in some countries, whereby, in the event of the owner selling the property, a neighbour (or some other person as defined by law or custom) has a right to buy it in preference to any other purchaser. Such a right arises only when the owner sells (and in rarer cases, by custom, when he makes a mortgage with possession).[3]

I do not propose to say anything more about these special rights as they rarely (in practice) concern a forest officer's duty.

[1] For example, Dr. Olshausen, having regard both to moveable and immoveable things, treats under this head:—
Mortgage (*Pfandrecht*).
Pledge (*Faustpfand*, "*pignus*").
Hypothecation (*Hypothek*).
Special mortgages to Lending Associations (*Kredit Anstalt*).
Right of retention (*e.g.*, right of an artificer to keep an article till he is paid for the labour bestowed in making or repairing it, &c.).
Pre-emption (*Vorkaufsrecht*).
Usufruct (*Nicssbrauch*) (including use of official dwellings and lands allowed to be cultivated by public servants as part of their remuneration (*Dienst-Landereien*)).
Loan and hire, lease, &c. (*Sachmiethe, Pacht, &c.*).

[2] Sometimes an account has to be kept of all receipts (the lekhá-mukhí mortgage of India), so that after satisfying the interest (at an agreed rate) on the debt, any surplus goes to reduce the principal debt itself.

[3] In those parts of India where there are "village communities," this right is a matter of custom, and is regulated in some detail. Its object originally was to keep strangers out of the circle of the community. A similar right often exists in towns to secure the privacy of family dwellings, &c. When once the *sale* has been announced, the vendor has no right to defeat the pre-emptor by saying, 'Well, then, I will not sell at all."

Rights of user—Easements—Servitudes.

There is, however, another group of rights belonging to the same class, which it is essential for us to understand; I refer to those *permanent* rights by which *some specific use or some enjoyment of produce of an estate is broken off (so to speak) from the ownership, and comes into the hands of another party:* sometimes it is a matter of some mere abstention on the part of the owner, which may be advantageous (or even indispensable) to the other party. The English law divides such rights into two classes: (1) "easements," always existing for the advantage of (or in favour of) some *specific property or estate* (house or land) over *another* property or estate: and the theory is, that what is strictly an easement, is a "privilege without profit," *i.e.*, it takes nothing in the way of produce or substance. Such "easements" are, for example, the right not to have your light obstructed;[1] not to have your flow of water obstructed; or to have the support of the neighbouring soil or walls; or to have your house-beams resting on your neighbour's wall (so that he could never pull down the wall); or to have the dripping from your roof received by your neighbour; or to let your drainage water flow into his gutter, &c. (2) Where the right consists in *getting something*, as a right to pasture, to cut grass, to feed pigs on acorns, to cut turf, or dig for sand, gravel, &c., that right is called a "*profit à prendre*" (or "right of common"). The distinction is not however in practice logically or perfectly carried out.[2] In the elaborate Indian "Easements" Code passed (but not applied to all provinces) in 1882, the distinction was abandoned, as it already had been in the Limitation Act (XV. of 1877), which is of general application. "Easement" is defined to include both

[1] It is this right that is claimed when you see (in street improvements, for instance) notices stuck up that certain windows are "ancient lights;" that means that the windows have been so long in existence that the owner has (or claims) a prescriptive right or easement to have the light free, and that the builder will not be able to erect any new buildings that would darken or interfere with the windows—at any rate, without paying a round sum in compensation.

[2] In English law, for instance, a right to get coal from a pit is a right of common, but to get water from a neighbour's well is an easement. It is not clear why this should be, unless water is regarded as the air and light, not as a vendible product. In this law there is some further distinction between easement and common-rights, as to their origin, and as to their legal inherence in certain persons or tenures. This I do not go into.

classes of rights; and *I propose so to use the term* it is in general equivalent to the Latin *servitus*, the French *droit d'usage*, or the German *Grundgerechtigkeit*.

It is well however to bear in mind that there is a *natural* division of these rights into two classes. For example, one class is indispensable to the proper use or enjoyment of another property: the other class is concerned, indeed, with the benefit of another *property* (or sometimes another *person*), but is not so connected as to be necessary to the very existence or use of the property.[1] Obviously if I have a house, and cannot get a *right of way* so as to approach it either on foot or horseback, or by a carriage or cart drive (as the case may be); if my neighbour is allowed to dig on his land, so that my walls cannot be kept from falling down; if I cannot get the drainage water from the roof or from the soil away from my premises; if I cannot get light and air from my windows;—my house would become practically useless to me; its very existence as a house would be endangered. Rights of this nature are therefore naturally distinguishable, and are often spoken of as "easements of necessity." On the other hand it may be a great advantage to my house (or to me as a person) that I have a right to obtain firewood in the neighbouring forest, or to graze my cows in it, or to dig turf, loam, or sand; but however beneficial and even necessary, these things may be, it cannot be said that my house or my farm could not exist *as* a house or *as* a farm, without them, as was the case in the former class. This practical distinction we shall find to be of use when we come to consider the manner in which rights of both classes are dealt with where they affect forest-estates. It is also to some extent a natural division to distinguish easements which *take nothing* from the estate, and those which *take something* in the way of produce. The German writers[2] distinguish these by the terms *Gebrauchsrechte* (*uti*) and *Nutzungsrechte* (*frui*).

Rights of user are often "easements of necessity" in the legal

[1] This is made very clear in sections 13, 14 of the Ind. Easements Act, 1882.

[2] As it is neatly expressed by Danckelmann, "Der blosse *Gebrauch* schliesst die Aneignung von Bestandtheilen oder Erzeugnissen aus; die *Nutzung* schliesst dieselbe ein" (Vol. I., p. 3). (A right of *use* excludes any appropriation of parts or products of the estate, a produce-right *includes* it.)

sense. Produce-rights never are; although they may be practically indispensable under particular local circumstances.

The rights we are considering have already been stated to be portions, or subordinate elements, of the enjoyment of any property, which have become detached from the main right,—from the *body of the ownership* right, and are vested in persons other than the owner. Thus in their nature they are always limited rights; and for this there is also another reason which will presently appear.

As the existence of such a right is (to whatever extent) something that is a burden, or that diminishes the value or the unrestricted enjoyment of the property over which it extends, the Roman lawyers called such rights "*servitutes*" (anglicised into "*servitudes*") because, so to speak, the property was made to "serve" the purposes of someone other than the owner: and so also, the estate which bore the burden, was called the "*servient*" estate. This phrase is convenient and must be remembered—the property which has to *bear the right* (whatever its nature) is the "servient" property.

The obligation or duty of the "servient" estate is always passive, *i.e.*, the estate has to *submit* to something, never actively to do anything for the other party. But regarded from the point of view of that other party—the right-holder, the easement may be either *negative* or *positive*. The easement may consist in a right to have free passage for drainage water over a neighbour's land (*i.e.*, the servient estate must *not* obstruct the flow); in having the servient house *not* built up so as to shut out light and air; or the servient land *not* dug away so as to cause the right-holder's walls, &c., to fall down: these are *passive* or *negative* rights. Or it may be *active* or *positive*; as where the right-holder is entitled to go on to the servient land (which has to *submit* to those acts) and drive his carts, or cattle over it, or *take some produce*, as cutting wood, grazing cattle, digging gravel, &c., all of which are enjoyments implying some action on his part.

The servitude may also be "real" or "personal." The right may be enjoyed by a *neighbouring estate* or *property, i.e.*, may be exercised by whoever is, for the time being, the owner of that property, and *as* such owner. In that case the lawyers call

it a "real servitude:" and the estate which holds the right is the "dominant" estate, as the other which bears or suffers it is the "servient" estate.

The dominant estate may be a house, farm, hospital, church-building: or it may be an "institution," such as a school, an University, or a Commune; and the right is exercised by the owners of that estate for the time being, as such. If the right is held by an individual (or a corporation) as such, and *independently* of that individual or corporation being owner of any estate, then it is called a "personal" servitude.

Some rights are necessarily or in their nature, "real" rights: for instance, a right not to have windows obstructed or darkened, *can* only exist in favour of an estate—a house which has windows: a right of way implies an estate of some kind to which the way leads.[1] In some systems of law—and this should be noted—*forest rights, i.e.*, easements of grazing and wood-cutting, &c., are *always* real rights: they never exist merely in favour of persons as such, but for the benefit of particular houses, farms, work-shops, or some hospital, college, or other institution. In German text-books they will be found so defined.[2]

But in India, and I daresay it will be the same in some colonies, we are unable to draw the line so. We have indeed cases where there is an *estate* which is "dominant," or holds the right: in Burma, Buddhist monasteries as such (and independent of the particular persons residing in them for the time) sometimes have rights to bamboos, to grazing, &c. And in India it is often the case that a certain "village" (*i.e.*, in the Indian sense—a group of landholders forming in some sense or other, a community) claims a right of grazing, &c. Here it is

[1] I have heard of a right of an individual to cross a certain field giving him a short cut to the parish church; this he might have independently of his having any property adjoining. But in this case the church stands (at least by analogy) in the place of the "estate" which had to be reached by the pathway.

[2] *E.g.*, in Danckelmann's work, a forest right is defined to be "a real right attaching to a specific estate (*einem bestimmten Grundstücke*) to some beneficial user of a forest belonging to another owner, which owner has the obligation to submit to something, or to abstain from doing something, for the benefit of the dominant estate, which something, he would otherwise, in virtue of his ownership, be free not to submit to, or not to abstain from" (but see Danckelmann, Vol. I., p. 8 at the bottom). It will be remembered that where the members of a Commune, &c., enjoy the use of their own communal forest, this is not a case of easement at all; the members are enjoying a share of their own jointly owned property. But a Commune may have rights over a forest belonging to the State, &c.; then it is a dominant estate.

more questionable whether the village is a "dominant" estate. Possibly it is so if the entire area is owned by a co-sharing body, and is regarded as a unit (of tenure) for revenue purposes; but not otherwise. We do not, however, refuse (in principle) to recognise *personal* forest-rights or easements.

In English law, the *personal* "easement" (or right of common as it would be called) is recognised as a "right in gross," and it cannot exist by local custom: this distinction is not however important to us.[1] Where a right or easement is "real" it is said to be "appendant" or "appurtenant"[2] to a certain (dominant) estate.

It will be observed that some, at any rate, of these separate rights or easements, are valuable "things;" they are in fact reckoned among "incorporeal" things. And they may be "in possession" at any rate by a fair analogical extension of terms. For their "possession" is governed by the same principles as those we have stated (p. 58 ff). It is not any mere physical act, as such, that constitutes possession of an easement. I may walk down A.'s garden a dozen times, without the physical act constituting in any sense a possession of a right of way: but if A. writes me a document informing me that he grants me and my heirs for ever, a right of way over a certain field, and he removes a padlock or hands me the key, I am in (constructive) possession of the right of way, as effectually as if I walked over the path. So if without any traceable permission or grant, the inhabitants of house X. have for generations past, used a certain way, openly, peaceably, and as of right, they may be in possession of a right of way, though they do not actually pass over the land for some weeks together.

Some rights are in their nature what we call "discontinuous."[3] I may have a right to let my drainage water flow over A.'s field: but in a dry year, for months together not a drop of water may actually flow. I may have a right to cut firewood, but I do not keep cutting it every day and every hour of the day. Here it

[1] Williams (Rights of Common), p. 194.

[2] The Indian Act has adopted the term "appendant." There is historically a technical distinction between these two terms: but this we need not go into (Williams, p. 31). Those who are interested in the history of the technical distinction between "appendant" and "appurtenant" may be referred to Professor Vinogradoff's "Villeinage in England" (Oxford, 1892, p. 265).

[3] See note on p. 85.

is not so easy to say whether such a right has been kept "in possession:" the test is, has the physical possibility of enjoying the right and the intention to enjoy it, for itself, remained in the dominant, and been submitted to by the servient, estate? The nature of the right, and all the circumstances of the case, must be looked to. Generally speaking the matter is expressly provided for by law, *e.g.*, under the Indian Limitation Act of 1877, if all exercise of a right has been *intermitted* for *two years* before suit, the easement may be lost. Or if an *interruption* (*i.e.*, an act from the other side,—the servient owner resisting) is known to the right-holder and submitted to for *one year*, the right may be lost (p. 62).

In its nature, also, the easement must be to do something *lawful*. You could not acquire a right to clip the Queen's coin, no matter how long you had been doing so. You cannot have a right to *destroy* or waste the servient property, *e.g.*, to set fire to a forest.[1] It is for this reason that an *unlimited* right is not recognised. You could not have a right to graze so many cattle that the whole soil would be turned into a desert; nor to cut so many trees, or so much wood, that natural reproduction would be impossible. But the question of *limitation* of rights, with reference to the claims of the *right-holder* on the one side and the *servient-owner's* right of enjoying his estate on the other, is so important, that I must recur to it hereafter in more detail when we come to study the Forest law. Here I will only note the general principle that the right can never (from its nature) be co-extensive with the ownership, and can, therefore, never extend to swallowing up the whole; for that would be, in fact, attacking the substance of the estate itself, and rendering it practically useless to the owner. As no easement (of produce) can be *unlimited*, it may be said that the question of extent or quantity —how much material, what number of cattle, and so forth—is involved in the nature of the easement. This depends on the terms of the grant or other title: and in the large class of cases where

[1] In some forest countries hill tribes are accustomed to cultivate by cutting down the forest vegetation, burning it when dry, and dibbling in seed with the ashes. After a crop or two has been raised, the place is exhausted, and they move off to repeat the process elsewhere. We shall examine this practice under the head of Forest law; here I only note the fact that, while recognising a certain necessity to allow such a practice under local circumstances, in India the Acts refuse to acknowledge any *right* or *easement* as arising from it.

the right is prescriptive, *i.e.*, has long existed openly and peaceably, but without any (traceable) original grant, the law makes express provision for determining these matters, usually on the basis of the actual needs or requirements of the right-holder. It will be more convenient to reserve all details on the subject till we come to study the law regarding forest rights, and the provision made for their definition.

Easements must be the means of some benefit or advantage (even pleasure or convenience may suffice) to the right-holder; "*servitus quia nihil interest non valet*" (a servitude or easement that is of no use to anyone is not recognized).

Once more, the right or easement is always to a continuing benefit.[1] A right (say by purchase of a ticket) to take a load of grass from the forest on a specific occasion, is not a "servitude;" there must be a permanent right which can always be exercised from time to time as required. *Servitutes perpetuas causas debere habent.*

And if the right is perpetual, so the servient estate must be *maintained*, by the avoidance of all destructive and unnecessary acts on the part of the right-holder, and by proper management on the part of the servient estate-holder. This is in fact another ground for the rule that easements must not only be of a lawful and non-destructive nature in themselves, but also that they must be exercised in such a reasonable way as not to destroy the servient property. They must also be so exercised as to spare the estate from any unnecessary loss; obviously there are two parties or interests to be considered; while the easement holder has his reasonable and fair enjoyment, the owner must not be restricted unduly in *his* enjoyment, or prevented from working his estate in a businesslike manner, according to the established principles of management. Here I will only remark, that taking produce which grows again, is not regarded as "attacking the substance" of the servient estate: nor is a

[1] The student will not confuse between "*continuous*" and "*continuing*." All rights (easements) are "continuing," *i.e.*, not mere single acts not to be repeated, but permanent, habitually enjoyed, rights: at the same time, they may be "discontinuous" (pp. 62, 83), *i.e.*, not exercised at every moment of time. A "*continuing*" right to flow of water is not *continuous*, when the weather is dry and no rain falls. And so a right to cut firewood is only exercised from time to time as occasion requires; but unless it is lost by intermission for such a time that the law regards it as at an end, it is a *continuing* right.

moderate taking of sand, gravel, or turf: for though these things are not exactly "reproduced," still, practically, their ordinary removal does no harm.

Easements are not capable of being divided or partitioned; except, indeed, where either the dominant or servient estate is partitioned, and by consent, or by requirement of law, some adjustment is made; but then the partition must be so effected that neither is the burden of the right on the parts of the servient estate increased, nor the right itself increased or multiplied. And where the right is, in its nature, confined to certain parts of the estate, it cannot, by partition, be extended to others.[1] A real easement can never be detached from the dominant estate and separately transferred; but if the dominant estate is itself transferred, the easement may pass with it. Personal easements are never allowed to be transferable, but this is by express provision of law.

Origin of Easements.

It often happens—indeed most commonly in Europe—that the easement originated in some grant or charter, emanating from royal or baronial authority in the days when the forests were in the hands of great lords. In Germany and France, forest rights are closely connected with the historical development of property, and often represent the outcome of arrangements consequent on the dissolution of the feudal system.

But in any country, rights may also have been exercised for generations past—no one can tell exactly how or when the exercise began—but it has always been going on, in a certain uniform and determinable way, and in favour of a certain estate, or the holder of a certain ancient tenement or the inhabitants of a certain village.

[1] Servitudes are in their nature impartible or indivisible because they belong to the dominant estate as a whole, and are over the servient estate as a whole. If either estate (alone) is partitioned, the right in theory remains unaltered. In the one case, the several co-sharers have collectively the same right as before; in the other, the easement still subsists over all the divided parts of the servient estate. In practice and for convenience, some adjustment of the exercise would probably be made, but as far as the theory of legal right is concerned, there is no alteration. With most rights, it is, however, generally held, in case of transfer of the estate, that they pass only to the particular lot which contains the buildings, houses, &c., for which the right exists. But this must be understood within limits, because it might be desirable to apportion the total enjoyment or produce of the right, equitably, to the different parts of the divided (dominant) estate (Danckelmann, Vol. II., pp. 4—5).

In England, very often easements arose simply out of the constitution of the old manorial estates; certain classes of land-holders were understood (as part of the system) to have corresponding "common rights." But speaking generally of acts of user and produce-taking which have been openly and peaceably enjoyed as of right, it is allowed by law, that after a certain number of years, the right becomes fixed by *prescription*, exactly on the same principles as a title to ownership is acquired; and the conditions are the same (see p. 65). The enjoyment must have been open, peaceable, and as of right. In the Indian law (Act XV. of 1877), such enjoyment for twenty years gives a right, and the Easements Act, 1882, is similar. But this is held not to be an exhaustive provision; that is to say, the High Courts hold, that though the law declares rights to be acquired on certain terms, it does not say that they cannot be acquired (or cannot exist) in any other way: and a right (on this principle) would be decreed, when the whole circumstances were such as to make the recognition obviously equitable and in consistence with the fundamental principles of law.

Loss or Extinction of Easements.

As easements may be gained by prescription, they, naturally, may be lost by the same means: they may be lost (as already stated) by the right-holder *submitting* to an interruption for one year, or by his *intermitting* all use and claim for two years. They may be extinguished by voluntary abandonment and release, or where, by law, they are exchanged, commuted, or compensated. They may be extinguished (under the Forest law) when after every effort to find them out, they are not claimed or brought to notice (*i.e.*, in the process of regularly constituting a State Forest).

There is also a possible case of extinction where the right (*e.g.*) of grazing on an estate exposed to river action, is lost, because the land is washed away. In India land may be re-formed on the same spot after a greater or less interval. I do not undertake to determine whether the Courts would hold that in such a case the right revived, or not: if it were a case of temporary submergence, of course there would be no difficulty, because the interruption of the right would be wholly involuntary and beyond control; but where the land entirely disappeared, and a new "accession" was, perhaps long after, formed in the same place, it might be held that the right did not revive.

This brings to a close our first division, the study of some elementary principles of the law (Civil—Private) of Persons and Things. There are, as I have stated, a great many heads of law, and a still greater number of points of detail, of which we have not even made mention. All the law that we have considered, moreover, belongs to what is called the *Substantive* Law. We have not (and that intentionally) said anything about the *Adjective* Law—Procedure, Evidence, etc. In the case of our next part, it will be desirable to notice both the Substantive Law and the Adjective or Procedure Law. This next part deals briefly with the Criminal Law and Procedure. Finally we can go on to the Forest law, which we shall naturally consider in more detail: this last branch of study will involve many matters connected both with the Law of Persons and Things, and also with the Law of Crimes. That is why we end with Forest Law, and begin with the others.

END OF PART I.