APPENDIX.

THE following are some of the modern authorities illustrating and enforcing the principle that rights of user and rights to produce are always in their nature *limited* rights, and cannot extend to *destroy* the servient estate, or render its proper working and management and its profitable use impossible to the owner.

The German writers are particularly clear on the subject. The first passage I shall quote is somewhat long; but it expresses the whole argument so forcibly, and yet so justly, and in a manner so suitable to Indian circumstances, that I cannot curtail it.

"Exactly," says Dr. Pfeil,[1] "on the same principle that the owner of any property is obliged to use the same in such a way as not to injure his neighbours or endanger the welfare of the whole community,[2] must forest rights be exercised within certain limits. The State, then, is entitled, without paying any compensation, to reduce forest rights to such an extent, but to such an extent only, as the public welfare demands. Many—indeed most—forest rights originated at a time when either little value was attached to the forest, or when such small demands were made on it, that it would always supply the produce, however little care was bestowed on its management. The slender population found wood for its wants in superabundance, and nature unaided, readily replaced the small quantities of produce removed. The very few cattle that grazed over a vast extent of forest offered no material hindrance to the growth of the young trees; if dead leaves were removed for litter, it was in too small a quantity to do any perceptible damage. But soon all this was changed. When population increased, cattle multiplied, cultivation extended, and new industries were called into existence; and this resulted not only in diminishing the area under forest, but in taxing more severely the productive power of the area that remained. The pressure on a forest, which is used by all the inhabitants of a certain place or district, increases enormously when the population grows to three or four times its original figure. The forest is then called on to supply an amount of wood and other produce that would

[1] Pfeil, § 2, p. 4.

[2] The allusion is to the well-known legal maxim "*sic utere tuo, ut alienum non lædas*"—so use your own right as not to injure another man's.

exceed its possible yield even under the most careful management. It is hence unreasonable that the rights of outsiders should be exercised to such an extent as to make the maintenance of the forest and the reproduction of the trees impossible.

"When the increased population require wood and grazing for their very existence, it is the duty of the governing power to remove all obstacles to the cultivation of the soil, so that these necessaries may be produced in adequate quantity. Just as the State is required to obviate everything that is opposed to the most effective employment of labour, so that every inhabitant of the country, who can and will work, may be able to support himself, so must it secure freedom to every owner of land to employ that land in the manner most advantageous to himself and to the commonwealth.

"Accordingly, every one who exercises a right in another's forest must submit, without any claim to compensation, to such reasonable limitation as will enable the forest to be maintained as such.

"The devastation of a forest should, indeed, be preventible by any owner of his own free right; how much more so when such devastation is detrimental to the interests of the State at large.

"In mountainous countries avalanches and landslips may be caused by such devastation. Soil may be washed away by the force of water running off denuded areas; the lower lying estates may be covered with detritus, and dangerous floods may be caused by the sudden rising of mountain torrents. In sandy districts, forest destruction may not only produce dangerous sand-drifts, but may cause deterioration, to an enormous extent, of the culturable soil in the vicinity. Springs dry up; the climate becomes more rigorous in winter, and hotter in summer; there is no protection against storms (and forest is often in this respect an indispensable protection to agriculture): in short, forests provide the most necessary requisites of life, so that without wood, even the most fruitful country (how much more so in an inhospitable climate) would become uninhabitable.

"On the same principle, even an absolute proprietor of a forest must submit, in the public interest, to have the utilisation of his forest circumscribed so far as is necessary to maintain its existence: and if this is so, *à fortiori*, the person who has only a right of user in the woods, can be treated in the same manner. For there are many rights which, exercised without restraint and to the greatest possible extent, would be so destructive that no forest could survive them. Where numerous herds of all kinds of cattle roam through the whole forest, no young trees can grow up, nor can the material cut out be ever replaced. Where the removal of *humus* or surface soil is so extensive that even places full of seedlings are cleared of

dead leaves, pine-needles, &c., the ground will at last lose its power of nourishment, and, especially if it is by nature poor, nothing more in the way of useful wood can be grown on it.

"When trees, however young, are tapped for resin, they can no longer be got to grow up into timber of useful size. Consequently, it is not only the right, but the duty, of Government, to limit the exercise of forest rights to such an extent as the maintenance of the forest demands; and for this, as I have said, the right-holder has no claim to any compensation.

"This principle is undeniable, and is admitted on all hands. Every civilised Government has made it applicable to the protection of its forests."

So Eding:[1] "Just as it is true on the one hand that the owner of the forest must so direct its management that the right-holder may always have a forest in existence wherein to exercise his right, so it is true, on the other, that the right-holder has a corresponding obligation not to exercise his right in such a manner that the forest (which is the *perpetua causa* of his right) would be destroyed and the estate itself, in substance, injured.[2] He must, just as much as an usufructuary,[3] exercise his right *salvâ re substantiâ*; that is, without injury to the permanent yield-capability of the forest (*nachhaltigen Ertragsfähigkeit*).

"You cannot naturally expect an individual right-holder to impose this restraint on himself, and against his own interest; the injury caused by excess may be such as does not become fully manifest in the lifetime of one man; to know how and when to restrain the exercise of a right, requires an amount of professional training, not to speak of foresight and self-denial, which it is impossible to expect to find in the right-holder himself.

"The law has therefore stepped in and secured the existence of the forest by prescribing the regulation of the exercise of rights.

"The limitations imposed by law are mainly directed to this object, namely, that the forest-owner may be able to work his forest by regular progressive cuttings, and to close a certain extent of the area cut over, with a view to reproduction. In such areas the forest-owner may preclude the exercise of rights of user, until the trees have grown up to such a height that they are out of danger."

And Dr. Roth:[4] "A right to wood can only extend to the regular yield of a forest in its original or normal condition. To demand

[1] Eding, pp. 76, 77.
[2] See also the Prussian *Allgemeine Landrecht*, Tit. 22, Theil I, § 80.
[3] See p. 287, where I explained this.
[4] Roth, § 257, p. 263.

more would be to attack the capital or estate itself, and so contradict the essential idea of a 'servitude.' Rights to other produce must also be exercised within such limits that the 'substance'—the forest soil and growth—be not injured." [1]

The French authorities are no less clear. The Code (Art. 65) lays it down distinctly that rights can only be exercised to the extent which the state of the forest and its normal yield-power justify. *L'exercis des droits pourra toujours être reduit par l'administration, suivant l'état et la possibilité des forêts.*[2]

Grazing rights can only be exercised in parts of the forest declared "*défensable*," that is, of such an age that the trees will not be injured (Code For., Art. 67).

M. Dalloz [3] says the same thing: "Consequently, forest rights can only be demanded within reasonable limits, such as a proprietor himself would submit to, when managing his estate as a good '*paterfamilias*.' No right-holder can ask the proprietor to let him have material in ruinous quantities which would compromise the future of the forest. And hence the law lays down (Art. 65 above quoted) that the exercise of rights must be according to the state and normal yield power of the forest.

"These are the limits of the obligation of the proprietor, as the personal wants of the right-holder are the limits of his right."

The author goes on to quote with approbation a passage from the famous jurist Merlin (Répertoire *s. v.* Pâturage, § 1, No. 17), who says: "It has been admitted by the legislation of centuries that such restriction shall be placed upon rights of user in forests, granted in general terms (or at a time when the value of land was not appreciated

[1] The Saxon law requires that all such rights should be exercised "with the least loss to the proprietor" (*Bürgerlicher Gesetzbuch*, § 524), and by the "Mandat" (concerning forest rights) of 1813, in the same kingdom (see Qvenzel, p. 201), rights are subject to "such limitations that the property is not destroyed." Grazing rights are limited as described above in the extract from Dr. Roth's work (Mandat, §§ 7–8). The Bavarian law is practically the same (Law of 1852, Art. 23). Dr. Roth, commenting on this law, says: "the existence of an *unlimited* right is inconceivable, for that would be to make the right-holder the same as a proprietor." The Austrian *Forstgesetz* has similar provisions (§§ 8–9; Grabner, p. 201, &c.). Nor are rights to be restricted only to such an extent that the forest "*is barely kept alive*" it must be so that the forest can be managed in a reasonable manner. See also, generally, on this subject, von Berg, p. 179, and authorities there quoted.

[2] *Possibilité* is the quantity of material which can be taken annually from the forest consistently with maintaining it in a healthy condition of permanently sustained yielding-power. Nor was this a novelty in the Code. An old Ordonnance of A.D. 1376 (Meaume, § 271) had nearly the same provision, which is repeated in laws of the 15th and 16th centuries, and in the celebrated Ordonnance of 1669 (although Proudhon, contrary to all the later jurists, attempted to give a different sense to the term "possibilité").

[3] Répertoire de Législation, Vol. 25 (Paris, 1849), Article "Forêts" (Cap. 15, Sec. 1, No. 1403).

as it since has been) as the conservation of these important public and private properties requires."

Meaume[1] has taken this principle for granted, and contents himself with showing its antiquity, and arguing that the limit is the state of the forest and its yield-power (*possibilité*), as judged of professionally.

The Italian law of 1877 (Art. 29) declares that no right in a forest subject to Forest law, can exceed the limits of a right of user as defined in the Italian Civil Code; and that is, that the right can only extend to the actual personal wants of the right-holder and his family;[2] and in Art. 34 it concludes by saying that where rights are exercised in the forest, they are to be subject to "regulation."

The English law, as might be expected, does not furnish us with authorities quite so distinct, because the State forests have not been the subject of direct legislation. Nevertheless, there is enough to show that the same principles are fully recognised. Thus Cooke,[3] speaking of grazing rights, says: "Rules for the protection *and limitation* of the right are among the earliest provisions of the Common Law;" and again: "It is contrary to the very essence of a right to turn out such an unlimited number of cattle by which the whole of the herbage might be consumed. * * * Such a user the law considers not as a right, but a wrong." "You could no more," the author goes on to say, "acquire by prescription such an unlimited right, than you could acquire a right to clip the Queen's coin."[4]

[1] § 271 *et seq.*
[2] Codice Civ., § 521.
[3] Cooke, p. 4.
[4] Cooke, p. 25. Williams does not expressly mention the subject, but he quotes several cases which show that claims to indefinitely extensive rights of common are bad at law. See the case *Lord Rivers* v. *Adams*, Law Reports III., Exch. 361; and see also an Indian case in the *Indian Law Reports* (Calcutta Series), Vol. IX., p. 698.