THE

AMERICAN LAW REGISTER.

NOVEMBER, 1856.

THE RIGHT OF EMINENT DOMAIN.[1]

No. II.

We have thus far endeavored to show eminent domain to be a right, the quantity of that estate which the sovereign holds in the property of the subject, and its constitutional modifications in this country, if any such exist. We are next to consider with whom this power resides.

Eminent domain is said to be

"*A Right* WHICH BELONGS TO THE SOCIETY OR SOVEREIGN."

In communities which have not irrevocably yielded all the powers of the State to princes or hereditary rulers, this power will be found subsisting in its natural state, in the people at large. Its exertion and all the concurring incidents of its exercise are to be measured and restrained by their discretion only. But as no community can long exist without recognizing some fundamental principles of self-control, which shall regulate the otherwise impulsive manifestations of popular will, it naturally follows, that even in the

[1] Continued from vol. IV., p. 641.

most ultra democracies, restraints and safeguards are involuntarily thrown around the exercise of this right, which of all powers may be made most intolerable to the governed, to prevent its oppression of the subject. In our own country, the people in their original omnipotent power, have wisely imposed on themselves the observance of those fundamental rules, which to them seem the most likely to insure the true end of government. They have endeavored to fetter the attributes of sovereignty, so far only, as may prevent their abuse and confine them within the limits of justice. They have erected the departments of government by which the process of enacting, expounding, and enforcing the laws shall be carried on, and as a necessary consequence, the powers without which it would be impossible to effect the object the people had in view in establishing the government, are retained by and become part of the power of that department, which, by its functions, is entitled to their exercise; and though the people may modify or amend their constitutional restrictions, enlarging or diminishing the authority of their instruments of government, yet whatever the functions retained by those departments, if to any of them eminent domain is an essential, a proportionate amount or extent will attach to and become a part of those powers.

Previous to the formation of the constitution of the United States and those of the several States, this, together with the other attributes of sovereignty vested in the people at large;[1] but under our present form of government, the eminent domain, within constitutional restrictions, rests with the legislatures of each State,[2] and, so far as the functions of the general government may require it, with Congress also. As it rests with these bodies, they of course must be the judges of the proper occasion for its exercise, and it must be entrusted to their wisdom to determine when public uses or necessities require the assumption of private property.[3] As these bodies most immediately emanate from, and are nearest to, the general private interest, it is a wise distribution of the functions of gov-

[1] 4 Wheat. 651; 8 Wheat. 584; 2 Peters' S. C. 656.

[2] 7 West. L. J. 260; 3 Paige, 74; 9 Barb. Sup. C. 350.

[3] 5 Hayw. 97; 18 Pick. 501.

ernment, that a power so dangerous and easy of abuse, should be reposed in those who from interest will jealously repel such abuse; but if they should either wantonly, or in a mistaken view of their own powers seize the goods of a citizen, it would be an assumption of power the courts would not hesitate to pronounce unconstitutional and void.[1]

It is said this right rests as a general rule with the legislatures of the States,[2] or the general government; the exceptions are not such strictly, but refer more particularly to those cases where the legislative body, from an inability to determine accurately what the public interest certainly requires, have transferred their discretion to subdivisions of the State authority, as to the collectors of taxes; or to private enterprise, as private companies for public improvements. Either of these latter, then, to an extent, exercises not only the power of taking, but also of determining to a certain extent, what is required. It may correctly be said that it is a parceling out to sub-agents, a delegated authority.

Although the word sovereign is correctly applicable to a people acting from the dictates of their own supreme will and accountable to no one, yet we think Vattel had in view, in this use of it, a contradistinctive signification to the sense of the word "society," and intended to designate those forms of government which are entirely independent of popular will; or at most, remotely or indirectly influenced by it; as in the limited monarchy of Great Britain, in which the king and parliament are the supreme power of the land, and necessarily with them in general rest the attribute, and exercise of the right of eminent domain.[3] Yet it would seem for some purposes, this power is among the rights of prerogative. The king has the right without consulting parliament, to erect franchises which in their nature must interfere with the claims of private persons, and this upon the writ of *ad quod damnum*, the name of which

[1] 2 Kent, 339.

[2] 2 Kent, 338–40; 7 Greenl. 292; 2 Porter, 296; 3 Paige, 45; 18 Wend. 9; Rice, 383.

[3] 4 Inst. 36; 1 Black. Com. 51.

would tend to confirm the opinion; which writs running in the name of the king were to inquire, "If it be to the damage or prejudice of us or others; then to what damage and what prejudice of others."[1] The same writ has also been made use of in this country.[2] The crown might of its own motion, on such writ, so determining the damages which would accrue to itself or others, establish a ferry, market or license the cutting of a canal through the lands of another, or the taking of such species of property as may be necessary to the defence of the realm.[3] It has been usual however, in England, for this right to be exercised under the sanction of an act of parliament, particularly in the case of some new application of private property to public uses, as in the early experiments and adoption of the railroad system in that country; but when experience has demonstrated that the public interest can be subserved in an eminent degree by such new application of private property, general acts have been passed under which private capital and enterprise has been encouraged into investments beneficial to the public. Such is the Land Clauses Consolidation Act of 8 Vict. c. 18, which provides that lands may be taken under certain conditions and restrictions, and comprises in one general act sundry provisions usually introduced into acts of parliament relative to the acquisition of lands required for undertakings of a public nature, for the purpose of avoiding repeated legislation on similar subjects:[4] most of the United States have general enactments for the same purpose.[5]

We have now said all we propose to do as to the particular departments of government in which this power resides, and we come to an important division of our subject, if one part can be said to be more so than another.

We have found the eminent domain of a State to consist in a right which belongs to the society or the sovereign; we are now to consider the manner in which that right may be properly mani-

[1] 2 F. N. B. Ad quod Dam. 221. [2] 9 Dana, 114.

[3] 2 Vin. Abr. 126; 10 Coke's R. 142: Cro. Chas. 266; 1 Black. Com., Chitty's Ed. 139 n.

[4] 2 Chitty's Col. Stat. 807. [5] 11 New Hamp. 19.

fested; and this we deem finds an appropriate place under that phrase of our definition which terms it

"*A Right of* DISPOSING."[1]

When it is determined that the welfare of the public for any purpose whatever requires any property in the possession of the subject to be surrendered to or disposed of by the State, there are certain means by which the public good can be best subserved, and conditions upon which only can the right be exerted.

As the State in its national capacity cannot itself immediately apply the thing taken to the intended use, it is necessary in this as it is in all other manifestations of national will, that the purposes of the sovereign be reached or effected through the instrumentality of agents.[2] These may be either such as by their official connection with the State are entitled to exercise a species of this right, as the collector of the revenue or rates, or corporations of individual enterprise, by which latter it is supposed objects of improvement would be accomplished with more economy and less danger to the community than if retained in the hands of the State.[3] The object in delegating the power is the public benefit to be derived from some contemplated undertaking, and the State in consideration of this, delegates its right to take, as regards a particular property, sufficient to attain the desired improvement.[4] All such persons, therefore, enjoying or exercising any part of the right of eminent domain so far represent, and are trustees for the public.[5] Such are ferry, bridge, canal and railroad corporations, all of which, though private corporations, are a public use.

The grants of this power are either express or implied.[6] Of the first, an example is the charter to a bridge or railroad company wherein the legislature or power authorized to confer this right, at length set forth the causes which have moved them to the delegation of authority to take property. The second is of an extraordinary

[1] John. Dic., *To dispose of;* Web., *Ibid.*

[2] 8 Dana, 296; 3 Paige, 45; 9 Barb. Sup. C., 555.

[3] 3 Hill. S. Car. R., 105. [4] 3 Paige, 74. [5] 25 Wend., 174.

[6] 7 West. L. J., 260; 11 N. H, 25; 18 Pick., 501.

nature, and springs out of the immediate exigencies of particular circumstances, as the right of the public to pass over adjoining lands in avoiding a founderous highway, or destroying a less valuable property to preserve that of greater value, or to preserve life. In these latter cases, the maxim "*Salus populi, suprema est lex,*" has a most forcible application.

Of the construction of express grants, it will be impossible to say more than we can do in a few lines, however much we might wish to examine and profit by the able and elaborate discussions which the subject has provoked. It has been among the most perplexing questions ever brought into our courts,[1] though now it would seem to be settled. Some courts have held, and with great show of plausible reasoning, that the grants of the public should receive the same construction as the grants of individuals; while others have as strenuously held, on the principle that if either party should be benefited from the ambiguity of a contract or allowed an advantage from any uncertainty in it, it should rather be the public than the individual, that public grants should be construed strictly. The question has been decided variously in different courts, but the settled principle of law is in favor of a strict construction.[2]

Such is the rule adopted by the Supreme Court of the United States.

The measures necessary to transfer private property from the individual to the public use, are matters of discretion with the legislature, and are provided for in the special act or by some general law;[3] this, however, will more aptly be considered under the head of compensation. We may say, in concluding this part of our subject, that it is difficult to lay down any general rule that would precisely define the power of government in the exercise of the acknowledged right of eminent domain. It must be large and liberal, so as to meet the public exigencies; and it must be so limited and restrained as to secure effectually the rights of the citizen. It must depend in some measure upon the exigencies as they arise and the circumstances of particular cases.[4]

[1] 9 Geo., 524.
[2] 7 Pick., 434–8; 11 Peters' S. C., 420; 6 How., 796.
[3] 11 N. H., 19.
[4] 23 Pick., 394.

There are, however, two essential conditions or limitations to the exercise of this right. One is the *public welfare*, which requires the interest of the individual to yield to its paramount claims. The other is the *right to compensation* which accrues to him from whom the property is taken when transferred to the State.[1] A provision for the latter is a necessary attendant on the due and constitutional exercise of the lawgiver to deprive an individual of his property without his consent, and is laid down by jurists as an acknowledged principle of universal law.[2]

The right which belongs to the State, of seizing private property, is, in definitions of it, placed upon the stringency of public necessity. It would seem, in such definition, as if the right of the State only was in view, as in terms it has but the limitation of necessity, yet all jurists acknowledge the moral obligation incurred by the State to make compensation.

That princes did frequently seize the property of their subjects under pretexts of public uses, history abundantly testifies. It was in protection of the English people that the clause of the 29th chapter of Magna Charta of Henry III declared "That no man's lands or goods should be seized into the king's hands against the great charter and the law of the land."[3] Magna Charta and its confirmatory statutes are regarded as the basis of the English constitution, and into them has been incorporated and from time to time re-enacted and confirmed by her different sovereigns this provision, making it a fundamental principle of the government; yet the avarice of her rulers have been such that at different times the safety and continuance of her constitution has been sadly endangered. One of the principal causes of complaint so late as the third parliament of Charles I, was the exaction of money in the form of forced loans and benevolences, which resulted in the petition of right; but a repetition of which acts of tyranny cost him both his throne and life.

So far as this extends, it serves to restrain oppressive exactions by one department of the government, and to assure to the subject

[1] 2 Par. Cont., 524; Grot., B. 3, ch. 19, § 7; Puff., B. 8, ch. 5, § 3, 7.

[2] 2 Kent., 339.

[3] 2 Inst., 45; 1 Blac. Com., 39.

the right of being deprived of his property by due course of law; but whenever the parliament of England by their statute seize upon any private property to public uses, there is nothing more binding upon them to compensate the owner than the moral obligation of natural justice. They are so transcendent and absolute, that their authority cannot be confined either for causes or persons within any bounds;[1] but the natural equity of indemnity does in almost every case prevail, and parliament rarely, if ever, and never willingly, by this means inflicts an act of injustice, so much weight has the principle of universal justice.[2]

In this country the rights of private property are guarded in the securest manner. Our agents to whom are entrusted the exercise of this power, are prohibited by provisions in the Constitution of the United States which applies to all acts of the general government,[3] and by provisions in almost all of the State constitutions, from taking private property for public use without compensation.[4]

Public necessity and compensation are indeed the vital principles of this right, commensurate and co-existent with each other; and there must be a conjunction of both to authorize its legitimate exercise; and although some authorities seem to sanction the principle that the right of eminent domain may be exercised independent of any provision for compensation, unless there is some other than the mere moral obligation operating upon the State,[5] yet the better opinion and weight of authority undoubtedly is, that even where there are no constitutional restrictions to conditions of compensation, they are nevertheless as binding upon the State as though they were declared by her constitution.[6] Indeed, viewing the matter in the light of obvious justice, it is strange that it should ever have been doubted, or that courts of *justice* should have promulgated a doctrine of such flagrant wrong—we had almost said iniquity. Its practical results would almost incline one to doubt the boasted unity of law and reason. The doctrine must have originated in despotic governments, and in the infancy of those of more liberal principles, has

[1] 4 Inst. 36.
[2] 2 Dall. 310; 7 Pet. 243; 8 Wend. 85.
[3] 7 Peters, 243.
[4] 14 Conn. 146; 8 Wend. 100.
[5] 3 Dall. 245; Ib. 283.
[6] 2 Kent, 339, n.; 1 Maryland Ch., 252.

been adopted into and become a part of their polity; but this, like other abuses of the law, founded in error and referred to as precedent, is now exploded, and it may be safely asserted that the universal principle acted upon by the courts of this country is, that compensation attaches to this right and is co-extensive with it, and that even where there is no constitutional restriction of the right to this condition, the principles of obvious justice would not permit the subject to be deprived of his property without securing to him a partial equivalent, for it must often happen that the possessions of an individual may have to him a value entirely beyond its current worth, as did the garden of Naboth, the "inheritance of his fathers."

We have been curious to trace the origin in our own courts of a so manifestly erroneous doctrine, for in those of England the principle neither has, nor we will venture to say never will appear, and we have found that the seizure of private property under such circumstances has been confined to that of but trivial value; and in the early establishment and declaration of the laws of such States as have not constitutionally declared the principle of compensation.

In the early settlement of South Carolina, while the whole country was as yet a wilderness, and roads and bridges were objects of the greatest importance and eagerly desired by the citizens of every part of the State, they were only too willing to have highways constructed over their lands to facilitate mutual intercourse: the materials too, which were commonly required for such purposes were abundant and comparatively worthless, and it so happened that no person ever required compensation, because every one was glad to have a road run through his particular lands.[1] It had thus so grown into a custom to require no compensation, that when the custom was resisted and compensation claimed, the courts seemed to have mistaken it for a true principle of law and to have strengthened it by their confirmation, creating precedents by which subsequent cases were decided.[2]

But even while the courts acknowledged the obligation of pre-

[1] 3 Hill South Car. 115.

[2] 1 Nott & M'Cord, 5, 387; 2 Ib. 526; 4 Ib. 125; 3 Hill South Car. 107; 4 M'Cord, 541.

cedent decisions, some of its members did not hesitate to question the soundness of the principle, and declared that if such were the rule of law in that State, it should be restricted to special cases, and that the legislature could not delegate, by a general law, its power of eminent domain, or taking property without compensation.[1]

It could not, however, be expected that in an enlightened age, much as precedent might be deferred to, that a rule of such manifest injustice should continue to be recognized; the doctrine was accordingly violently questioned in a most elaborate and learned opinion by one of the justices of that State, the effect of which so awakened public consideration to the subject that the legislature by a subsequent general act required compensation for any property taken for public purposes. "A fine instance," say the court, "of the advancement of moral influences."

Such is a brief history of a most novel and extraordinary doctrine —one which is in its nature so inconsistent with our notions of republican principles, where the rights of all are equally secured, that it excites our surprise that it should ever have obtained judicial countenance in this country.

Property is most usually taken under special statutes, and our constitutions recognize the right of eminent domain on which these statutes are founded, but they intend to protect carefully individual property, and their language is generally, that private property shall not be taken for public use, without "*just* compensation."

The theory being that the individual from whom property is taken, is entitled to just compensation therefor, and this term being incorporated into most of our State Constitutions, in express terms, it becomes an interesting inquiry to ascertain what the phrase, "just compensation," may comprehend.

Acting upon the principle that a spirit of justice and equity required that an individual shall not receive a benefit without incurring a commensurate obligation to those from whom it is obtained, some courts have held that in the estimate of damages or compensation, whatever benefits have accrued to the owner of property in the enhancement of his remaining property by the disposition of a

[1] 3 Hill South Car. 109.

part of it to public purposes, such benefits should be made to offset the claim to compensation,[1] and it was ironically remarked by a certain judge that "it was a remarkable feature of such estimates, that the measure of the increased value of the enhanced property is the exact measure of the cost of the property taken."

But it has been replied that the constitutional obligation to make compensation, did not contemplate the equities of the transaction as regarded benefits, but regarded absolute compensation, and that when property of a particular value is taken from the owner, nothing but that value in money can satisfy constitutional obligations, for if he from whom part of his property is taken, is remunerated in part or in whole, so also is the property of others enhanced in value, perhaps as much or more than his own, and it would be unfair to require him to pay for an advantage towards which they contributed nothing.[2]

The latter seems to be the general rule, and we understand the term, just compensation to signify the dry claim to the value, in money, of the thing taken, at the time of the taking, irrespective of any speculative advantages or disadvantages whatever.[3]

Although the principle that when property is taken for the public use, compensation must be made, it is often a most difficult practical question to determine when there has been such a divestiture of property as demands compensation. The different degrees in which property may be affected, to the owner's disadvantage, and by means, more or less indirect, are almost infinite, and it becomes almost impossible to lay down any general rule applicable to the facts of every case; some have contended that the taking or appropriation measuring the compensation to be made, is to be confined only to the actual value of the property taken, and whatever might be the injury indirectly resulting to the owner from a disposal of it to the use of the public, that he has no claim to consequential injuries, unless some special provision is made in his favor, and the authori-

[1] 23 Vt. 361; 3 Watts. 295; 5 Blackf. 384; 8 Wend. 101; 9 Leigh, 325; 14 Ohio, 541; 16 Penn. S. R. 191.

[2] 2 Kent, 340, *n.*; 5 Dana, 28: 9 Geo. 364; 7 Dana, 86; 9 Dana, 114; 6 Barb. S. C. 216; S. C. 9 Barb. S. C. 535.

[3] Sedgwick Meas. Dam. 566.

ties for this view of the question are formidable;[1] but the more equitable rule and the one certainly maintainable upon principle is, that consequential as well as direct injuries, should be included in the estimate, and that it must be left in a great measure to the integrity and sense of justice of those to whom is confided the consideration of the rights of both parties, in other words, to juries or commissioners.[2]

This rule will, we think, commend itself to the understanding of all. Legislative acts may be procured affecting and interfering more or less directly with vested rights: as for instance, one corporation may be chartered with powers that infringe privileges already conferred on a preceding corporation. If there is nothing in the charter of the first inhibiting legislative interference with its privileges in an indirect or consequential manner, it is clear the franchise of the first may be destroyed without compensation, for it is a legal *damnun absque injuria*;[3] but if such provisions exist, or if the rights under the first be directly infringed, the amount of damages must correspond to, and be measured by the extent of the injury, either direct or consequential. Thus in the Charles River and Warren Bridge case, there were no expressed terms of exclusive limits, or stipulation not to charter a second company with powers to interfere with those of the first, and the court in effect, held this to be a loss without injury; but had exclusive limits been assigned, there would have been no question as to the measure of compensation being the value of the franchise possessed by the Charles River Bridge Company, at the time of its seizure.[4] In every case, we think the principle may be maintained, that it is for the tribunal put in possession of the facts of each particular case, to determine the extent of the injury and corresponding damage; they must be the judges, and determine for themselves their own application of the maxim *causa proxima, non remota spectatur.* If a franchise or privilege may continue to exist, having been shorn of only an

[1] 1 Dall. 357; 7 Greenl. 273; 4 Dana, 154; 6 Whar. 25; 6 W. & S. 101; 8 W. & S. 85; 6 Penn. S. R. 379; 6 Barb. S. C. 209.

[2] 2 John. Ch. 162; 2 Kent, 340, *n.*; 11 Peters, 638; 4 Comst. 195.

[3] 11 Peters, 420; Story, J., dissentient, 638; 21 Vermont, 590.

[4] 6 Amer. Law Mag. 307; 3 Hill N. Y. 170.

incident of its being, or if there has been no substantial interference with its rights, but only a seizure of some part of its property, the loss of which will not essentially interfere with the purposes of its existence; for such loss it can only claim a money value, and will not be allowed to force attention to its so claimed impaired privileges when such privileges remain entire;[1] but if in giving effect to the legislative intention, the consequences of which a jury or those designated by the State to adjust the rights of the respective parties, shall determine to be a practical destruction of a previously conferred franchise, there can be no doubt of the obligation to make compensation to the extent of the full value of such franchise so seized.[2]

There are, indeed, many cases of this description where consequential damages are to be taken into consideration: as if the injury result from the creation of a new and rival franchise in a case required by public necessity.[3]

Much discussion also has arisen as to whether the compensation in these cases is to be made concurrently with taking property, or what results are to follow where a concurrent remedy is not provided in the act authorizing property to be taken.[4]

In regard to the constitutional provision securing trial by jury, it has been decided, in New York, that a legislative enactment for the ascertainment of damages by a committee is not unconstitutional.[5] So in regard to the final decision of the County Court in Vermont.[6]

There have been very diverse views, as above stated, relative to the *time* when compensation must be made. In New York, it is well settled, that where an act authorizing the taking of private property for public uses provides for just compensation to the owner, it is sufficient that the act makes provision for future compensation.[7]

The assessment and payment of damages need not precede the entry and occupation. The rules, however, are different in different States.[8] Chancellor Kent holds, however, that compensation, or

[1] 23 Pick. 391. [2] 7 New Hamp. 35, 70; 8 *Ib.* 398; 10 *Ib.* 138; 11 *Ib.* 19.
[3] 1 Bald. C. C. 205; 11 Peters, 638; 2 John. Ch. 162; 2 Kent, 199.
[4] Sedg. M. Dam. 556. [5] 3 Paige, 45.
[6] 19 Vt. 479; 8 Humph. 476. [7] 7 Barb. S. C. 416; 1 Penn. 309.
[8] 2 W. & S. 320; 3 How. Miss. 62.

offer of it, must precede or be concurrent with the seizure and entry upon private property under the authority of the State. The settled and fundamental interpretation of the constitutions of some of the States in relation to taking property upon compensation is, that government *has no right* to take private property without just compensation; and it seems to be implied that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and ready for reception concurrently in point of time with the actual exercise of the right of eminent domain.[1]

In England, by the Land Clauses Consolidation Act,[2] compensation is given for any lands, or "any interest therein, which shall have been taken for, or injuriously affected by the execution of the work;" and under this statute, damage done by dirt and dust, and the obstruction of customers, is a subject of remuneration.[3] Under this statute, also, the damages must be paid before entry.[4] Where a dock company authorized to take lands, were to make compensation for the damages occasioned to any such land by the execution of the works, it was held that this language would induce compensation to a land-owner parting with his premises, for loss he would sustain by having to give up his business as a brewer, until he could obtain other suitable premises for carrying it on.[5]

In deficiency of any adjudication, the point as to how far persons are liable as trespassers who act under a statute authorizing the seizure of property to the public use, but which does not provide compensation, Chancellor Kent thinks the more reasonable and practicable construction to be that the statute would be *prima facie* good and binding, and sufficient to justify acts done under it, until a party was restrained by judicial process.[6]

The means by which the compensation for property taken is to be determined are, in England, either by a writ of *ad quod damnum*, or by commissioners appointed by the court for that purpose. The first is, perhaps, peculiar to grants from the crown, though such things as parliamentary writs of *ad quod damnum* are mentioned

[1] 2 Kent, 339, n.; Code Napoleon, Art. 545.
[2] 8 Vic. C. 18.
[3] 15 Jur. 261.
[4] 1 Excheq. 723.
[5] 9 Q. B. 443.
[6] 2 Kent, 339, n.

in some of the books.[1] It is most usual, however, both in England and in this country, to appoint commissioners whose duty it is to determine the injury and assess the damages. Here, the State is bound to provide some tribunal for the assessment of compensation or indemnity, before which both parties may meet and discuss their claims on equal terms.[2] In some of the States the writ of *ad quod damnum* has been used, but it is more usual, as in England, to appoint special commissioners,[3] whose duties are performed when they have examined the quality and value of the property taken, and filed their report.[4]

Having, at as much length as our limits will permit, stated the leading principles of law relative to compensation, we will now briefly consider that class of cases in which private property may be injured by, or taken for the use of the public, in a manner for which there is not, unless the common law has been amended by statute, any compensation allowed. They arise out of the urgent necessity of the occasion, and are unavoidable in their nature, and have obtained on the principle that it is better to suffer a private mischief than a public inconvenience; and this is the law of urgent necessity.

Of this principle there are many striking illustrations. If a road be out of repair, a passenger may lawfully go through a private enclosure.[5] So, if a man is assaulted, he may fly through another's close.[6] In time of war bulwarks may be built on private ground.[7] Thus, also, every man may of common right justify the going of his servants or horses on the banks of navigable rivers for towing barges, &c., to whomsoever the right of soil belongs.[8] The pursuit of foxes through another's ground is allowed, because the destruction of such animals is for the public good.[9] And as the safety of

[1] 1 Burrows, 464.
[2] 2 John. Ch. 162; 5 Miller, 416; 1 Bald. 222.
[3] 8 Dana, 298; 3 Paige, 76; 8 Wend. 102; 2 Jour. P. C. 521; 8 Hump. 476.
[4] 1 Penn. S. R. 132.
[5] 2 Black. Com. 36.
[6] 5 Bac. Abr. 173.
[7] Dyer, 8; Brook, Tresp. 213; 5 Bac. Abr. 175.
[8] 1 Ld. Raymond, 725.
[9] 2 Buls. 62; Cro. 1, 321.

the people is a law above all others, it is lawful to part affrayers in the house of another man.[1] Houses may be razed to prevent the spreading of a conflagration, and many other instances might be cited illustrative of the law of necessity.[2]

In the civil law the reason assigned why no compensation was allowed in cases of destruction by public enemies was, that every man might be made more diligently to guard his own.[3]

But, although by the common law there accrues no right of action to the party whose property is injured in the preservation of life or more valuable property, or in cases of injury to property from unavoidable necessity, yet in some of the States, by statute, as before suggested, the loss thus sustained for the good of the community is assessed upon those who have been most immediately benefited by the destruction. Thus, in cases of houses or buildings necessarily torn down, or otherwise destroyed, to prevent the spread of conflagration, it is allowed to assess the loss upon the city;[4] but this does not extend to the case of property destroyed which would have been consumed had it not been so destroyed.[5]

There are also injuries so remote from the act committed, that the law will not allow actual compensation, presuming the injured party is compensated by sharing in the advantages arising from the original act,[6] such as the police regulation of cities for the safety or health of its citizens: the principle being that all property is acquired and held under the tacit consideration that it shall not be so used as to injure the equal rights of others, or destroy or greatly impair the public rights and interests of the community; or, as the maxim expresses it, *sic utere tuo ut alienum non ledas.*[7]

So far, we have discussed the nature of the interest existing in the State, in virtue of the right of eminent domain; considered to

[1] 20 Vin. Abr. f. 407. [2] Puff. b. 2, ch. 6, § 8; 1 Dall. 362.

[3] Grot. B. 3, ch. 20, § 8; 20 Vin. Abr. f. 20.

[4] 25 Wend. 174; 18 Wend. 126.

[5] 2 Denio, 473; 8 Met. 462; 17 Wend. 295.

[6] 13 Barb. S. C. 36; 4 T. R. 494; 2 T. R. 358; 8 Dana, 301.

[7] Puff. b. 8, ch. 5, § 3; Willes, 388; Vattel, b. 1, ch 20, § 246; 7 Cow. 585; 2 Kent, 339, n.

whom it belongs; where it rests; and the manner of its exertion; observing the condition of compensation which has last engaged our attention.

We are now to consider the second indispensable condition, upon which only, can private right be made subservient to the interest of the public, and property be seized to its use; and this, in the words of our definition of eminent domain, is

"IN CASE OF NECESSITY AND FOR THE PUBLIC SAFETY."

The sense in which Vattel here uses the word "necessity," we have supposed to correspond to our idea of the ordinary requirements of a State, in the promotion of trade, commerce and improvements of various kinds, facilitating intercourse among its own citizens, and those of other nations, rather than those extraordinary occasions arising out of an overwhelming necessity, where the safety of an individual, a community, or a nation demand the sacrifice of private property.

We will consider, then, first, that class of cases which may be termed of *ordinary* necessity.

The necessities of the State as used in this sense, are of frequent occurrence, particularly in well-regulated and enterprising communities, where trade and commerce are in the most flourishing condition; railroads, canals and highways of every description, are demanded to facilitate internal communication, private lands may be desirable for the health and recreation of the inhabitants of cities; streets may be found too narrow and confined for public convenience; in a thousand ways can the public be benefited by the assumption of private property, and in such cases it is in conformity with the most rational principles of natural justice that the interest of the individual should yield to the advantage of the many.

As the right rests with the sovereign, so must the sovereign wisdom be the only criterion by which the wants of the public can be measured: and the right is co-extensive with the public wants and

has no other limit ;[1] but as *necessity* is the essence of the claim upon which that right is to be asserted, if the delegated agents of the sovereign, be they legislative bodies or third persons, to whom such bodies have entrusted a special discretion, should in any manner interfere with the security of private property, under a pretext of public use or service, it would be an outrage and violation of private right which the courts of justice would not tolerate.[2] Neither upon full compensation does the right of eminent domain imply an authority to take the property of one citizen and transfer it to another, for the public interest would in no way be benefited or promoted by such transfer.[3] If, however, the public interest can in any manner be encouraged or advanced, it must rest in the wisdom of the legislature to determine whether the proposed benefit to the public is of sufficient importance to warrant an equitable interference with the private rights of the individual.[4] But it is said that it is not the lowest degree of public necessity which will justify the exercise of this right. As to precisely what the public welfare requires, it is often a matter of doubt and controversy among those equally wise in questions of State ; but the question once settled, we know of no limit to the right of eminent domain.

In practice, these matters should always be considered with reference to the wants of the public as being of greater or less importance, according to the nature of the property to be taken, as being of greater or less value.

The *extraordinary* necessities of a State, are those to which we have understood Vattel to refer, when he speaks of "public safety," and we shall be doing little more than repeating what we have before said when discussing the subject of compensation.

The necessities for the preservation of its very existence, which a State may be often placed under, give it naturally the very strongest claim to whatever may in the remotest manner be of service to it ; of this class is the right to enter upon the lands of the citizen for the purpose of erecting national defences, the seizing on property, money, or material of whatever kind which may be useful

[1] 7 W. L. J. 258.
[2] 2 Sandf. Sup. C. 98.
[3] 3 Paige, 73.
[4] 2 Kent, 339; Puff. b. 8, ch. 5.

in withstanding or expelling an enemy, the conscription of soldiers or the impressment of sailors. These cases of extreme necessity are, in their imperative nature, similar to that class in which only an individual may be the party to whom accrues the paramount right of unavoidable necessity; indeed, the right is the same whether it be employed for the benefit of an individual or a nation: inexorable necessity is its origin—its measure and limit—and this right must be equal to the exigencies of each particular case.

Having thus far, in the words of our definition of the right of eminent domain, found it to be "*A right which belongs to the society or the sovereign, of disposing, in case of necessity and for the public safety,*"—continuing the words of that definition, our author tells us that it embraces within its comprehensive claims,

"ALL THE WEALTH CONTAINED IN THE STATE."

It is unnecessary for us to say that this part of our definition needs no comment that it has not already received in the preceding pages; the difficulty in a practical application of the principles of eminent domain, lying, not in determining what wealth or property is subjected or exempted from the paramount claim of the State, but in a proper compliance with the legal restrictions and protections under which it may be appropriated to public use.[1]

In taking leave of our subject, the investigation of which has given us a pleasure, while we hope it has not been without a measure of instruction, we cannot close without expressing our admiration for the singular aptness of its rules, for establishing the welfare of society, and promoting the happiness of the subject;—and how, in our own country, the development of its principles, directed by institutions novel in the history of nations, has only tended to confirm the wisdom in which they were conceived, and the caution with which they have been expounded. If the harmo-

[1] 7 West. L. J. 260; 9 Barb. Sup. C. 535; 3 Dall. 245.

nious movement of the British Constitution has justly elicited the admiration of the profoundest minds, at home and abroad, how much more should we, mature in their experience, devoutly desire the perpetuation of our own.

C.

THE EVIDENCE IN PALMER'S CASE.[1]

1. The Queen *vs.* William Palmer. Official report of the minutes of evidence on the trial at the Central Criminal Court, May 14 to May 26, 1856. George Hebert, 88 Cheapside, London.
2. The "Times" report of the trial of William Palmer for the murder of John Parsons Cook, at Rugely. Ward & Lock, 158 Fleet street, 1856.

The trial of William Palmer, indicted for the willful murder of John Parsons Cook, demands some notice in our pages, for other reasons than the enormity of the offence perpetrated, or the extraordinary interest which it has produced throughout every grade of society.

It is difficult accurately to define what should make one trial more than another among the *causes célèbres*. Sometimes the high position or peculiar relationship of the parties concerned,—sometimes the barbarous cruelty employed, or the remarkable agents engaged to effect crime, or the marvelous mode in which detection has ensued, may give an unusual character to a prosecution; at others a romantic tone and conflicting doubts as to the verdict have left the impress of a real or false notoriety upon the proceedings in the Criminal Court. In later times, the trials of Thelwall, Rush, Greenacre, and Courvoisier, in England, of Burke in Scotland, of Kirwan in Ireland, of Madame Laffarge in France, of Webster in America, are all fresh in the memory, from some of the causes we have referred to; and the case of William Palmer, investigated at the Central Criminal Court from May 14th to May 26th, in the

[1] From the London Law Mag. p. 332, Aug. No. 1856.