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## Taxation of Easements

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# MICHIGAN

# LAW REVIEW

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## TAXATION OF EASEMENTS.

**I**N THE case of *Lever v. Grant*,<sup>1</sup> the supreme court passed incidentally upon the effect of a tax deed on an easement appurtenant to the estate on which the delinquent taxes had been levied. From the facts in that case it appears that in 1884 the owner of a parcel of land in the city of Detroit, bounded on the west by Woodward avenue, platted the same. The plat shows a street on the north side extending from Woodward avenue east thirty feet wide, one-half the width of an ordinary street. This street was named Custer Avenue. The next year, 1885, other owners platted a parcel of land adjoining Custer avenue on the north. Upon this plat appears a strip of land the same width as Custer avenue and bordering it on the north marked "Private way." In the dedication of this plat, the owners, after dedicating to the public the streets and alleys appearing thereon, add: "excepting the north 30 feet of Custer avenue, which we reserve as a private right of way." North of Custer avenue and parallel therewith is Bethune avenue. The land between the "private way" and Bethune avenue was divided into lots, three of which front Woodward avenue and extend east and west and the others extend north and south from the "private way" to Bethune avenue. Grant, the defendant, purchased the lot fronting Woodward avenue and adjoining the "private way." In 1890, this private way was assessed for city taxes, and Grant upon the sale therefor, obtained a lease from the city of Detroit for 99 years. In 1894 the defendant obtained from the owners, the proprietors of the plat, the fee of so much of the private way as extended along the side of his lot, and he enclosed the same.

Prior to 1890 the plaintiff purchased from the owners lot 300,

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<sup>1</sup> 139 Mich. 273.

the first lot east of defendant's lot, and when the defendant enclosed the private way he filed a bill to compel him to remove his fence. The first question presented by these facts is this; the complainant having purchased from the proprietors his lot, what easement if any has that lot in the private way upon which it abuts? It was contended on his part that there was appurtenant to that lot a right of way over the strip to Custer avenue and also along the way to Woodward avenue. The defendant contended that this strip having been excepted in the dedication, the fee was retained by the proprietors and that the parties to whom lots were conveyed acquired no right of way over or along the strip. The court commenting upon these adverse claims say: "It is a reasonable supposition that there was an intention to keep this strip of land with a view to its ultimate condemnation for widening Custer avenue. If this is so, it is reasonable to say that they undertook to reserve this title to themselves, so that they would receive the compensation when it should be condemned. If it was intended to convey the fee to the prospective purchasers of the lots, the proprietors might as well have dedicated the street to the public, for it is improbable that they reserved a right of way for themselves merely, when a public street would do as well, or that they intended to convey a fee to subsequent purchasers as a gratuity. We are therefore of the opinion that this plat indicates a reservation of the title in fee to the makers of the plat, and that it was the intention of the owners to give the lot owners access to Custer avenue over this land. It may be that its effect was to give all purchasers of lots a right of way over the entire strip. That, however, is not an important question here, for it cannot affect the result. The strip being reserved in fee by the owners of the land, it was subject to taxation like other land. The plat shows that it was not a part of the respective lots. At the most it was an easement appurtenant to them. If it be said that such appurtenance was included in the assessment of a lot, it still left the fee to be assessed to the true owner and this was presumably done. Being sold for taxes to the defendant, he acquired all of the estate that was assessed, if the proceedings were regular. They are not before us, and we do not pass upon the effect of this tax deed, it being unnecessary to a disposition of the cause."

We understand from this language that the court found as a matter of law that the several lot owners under this dedication acquired no right of way over this strip. It is true that the court say "If it was intended to convey the *fee* to the intended purchasers." The word "fee" must be due to a slip of the pen. What is meant was, "if it was intended to convey a *right of way*, etc." since there

could be no contention that the fee to any portion of this strip passed to the lot owners. This finding of fact and law disposed of the rights of the complainant. The court however adds, that it was the "intention of the proprietors to give the lot owners access to Custer avenue over this land" and perhaps to give all lot owners a right of way over the entire strip. We assume that this is a hypothetical finding, since it is wholly inconsistent with the previous finding. It is to be read as saying that "if it was the intention to give lot owners access over this strip to Custer avenue, etc., the matter is not important and cannot affect the result in this case," since the fee was reserved and consequently assessable to the true owner and "being sold for taxes to the defendant he acquired all the *estate that was assessed*, if the proceedings were regular. They are not before us and we do not pass upon the effect of this tax deed." It will be noticed that what the court decided was that the fee, whether subject to an easement or not, was assessable to the owner, and when sold for taxes gave the purchaser title to the *estate assessed*, and the court did not decide that in such a case that the estate assessed was an estate in fee simple absolute and that the purchaser under the tax sale took it relieved of the servitude, if one existed.

The first opinion dismisses the bill on the ground that before the complainant had acquired title to lot 300 the owner in fee of the private way had conveyed to the defendant that portion which he had enclosed. This decision was based upon an error of fact and by stipulation of the parties it was admitted that the conveyance to the defendant of a portion of the private way was subsequent to the conveyance of lot 300 to complainant. Upon a motion for a rehearing the court say: "It now becomes necessary to pass upon the effect of the tax deed. The deed is *prima facie* evidence of the regularity of all the proceedings and we must therefore hold that the complainant is not entitled to the relief asked in his bill."

We are with much reluctance compelled to conclude that the case of *Lever v. Grant* is authority for the doctrine that where the servient estate is assessed to the owner of the fee, that upon the sale of the lands for taxes the purchaser takes a title in fee simple absolute, free from all servitudes whatever, at least all servitudes appurtenant to private estates. It is however a conclusion merely, drawn from what the court says and from what it omitted to say. There is no discussion and no direct decision of the question and the original finding of law and fact made the decision of that question unnecessary.

Assuming that the court in *Lever v. Grant* decided that under the facts in that case the proprietor of the lands platted, excepted from

the dedication of the streets and alleys, the fee of the strip marked "private way" but that the purchaser of a lot described with reference to the plat acquired a right of way appurtenant to such lot over and along that "private way"; and that the court also decided that since the fee to the private way was excepted, it was assessable and taxable to the owners, and if sold for delinquent taxes so levied, the purchaser would obtain an estate in fee simple relieved of the burden of the servitude of such right of way, we propose to consider the correctness of the conclusion at which the court arrived.

We think the court was in error for three reasons:

1. Upon principle, easements are appurtenant to the dominant estate, belong to the dominant estate, are a part of that estate, and must for purposes of taxation be so considered and treated.
2. By the great weight of authority all rights appurtenant to land are taxable as a part of the land to which they are appurtenant.
3. Under the statutes of this state, for purposes of taxation, easements are declared to be a part of the dominant estate.

Let us consider the the first proposition, the character and nature of a true easement. We omit all consideration of easements in gross. An easement is a right without profit, created by grant, prescription, custom or law, appurtenant to an estate in one parcel of land called the dominant estate which gives the owner of that estate the power to exercise some dominion over another parcel of land called the servient estate.<sup>2</sup> It is designated an easement considered with reference to the dominant estate and a servitude as to the servient estate. The character of the right is clearly indicated by the names given the two estates, the master, the slave; the dominant, the servient estate. It is a right always imposed upon realty, never upon personality or upon a person or individual. It is always appurtenant to realty and never belongs to an individual as such. The owner or occupant of the dominant estate, because he is the owner or occupant and as incident to such ownership or occupancy, may exercise the appurtenant right in connection with the use and enjoyment of the dominant estate and not otherwise.<sup>3</sup>

The easement is a part of the dominant estate and must, so long as it exists, remain a part of that estate. It can be released to the servient estate but it cannot be transferred to another estate, or to

<sup>2</sup> Washburn, *Ease.* 2; Goddard, *Ease.* 2; 3 *Kent. Com.* 452; *Nellis v. Munson*, 108 N. Y. 453; *Ritger v. Parker*, 8 *Cush.* 147; *Momson v. Marquardt*, 24 *Iowa* 35; *Prince v. Keatie*, 70 N. Y. 419; *Hills v. Miller*, 8 *Paige* 254; *Big Mountain etc. Appeal*, 54 *Pa. St.* 361; *Hewlins v. Shippam*, 5 *Ban. & C.* 221; *Rowbotham v. Wilson*, 8 *Ellis & B.* 123.

<sup>3</sup> *Ackroyd v. Smith*, 10 *C. B.* 164.

an individual. It passes with the dominant estate under the statute of descent, or by devise or by grant. But the dominant estate cannot be devised or granted and the easement excepted and if an effort is made to except it, and force and effect are given to the exception it is regarded and treated as in effect a release to the servient estate.

A recent decision of the supreme court of Michigan sheds light upon the nature of an easement.<sup>4</sup> The complainant filed a bill praying that the defendant be enjoined from passing over complainant's lands to the highway. It appeared that both parcels, that held by defendant and that held by complainant, were purchased from the government and conveyed in the same patent to the common grantor of both parties. That the person who entered the lands conveyed to complainant or his grantors his parcel and afterwards to the defendant or his grantors, his parcel: that defendant's parcel was landlocked and that there was no means of ingress or egress to the highway from the parcel retained by the common grantor, except over the parcel granted to defendant, at the time of the grant and that such condition had continued ever since. The supreme court held that the grantor reserved by implication a way of necessity appurtenant to the lands retained. In other words, that there did not pass to the grantee, an estate in fee simple absolute in the lands conveyed, with an unlimited right of user, but a fee simple, the use of which, was limited by the reserved right of the grantor to pass over such land for the use and benefit of lands retained, and that the servitude so impressed upon one estate and the easement made appurtenant to the other, passed to the grantees of such estates, without being mentioned or described in the deeds conveying said lands. We do not quote the language of the decision, but state in our own words the principle of law enunciated by the court. It seems to us that it would follow, that the dominant estate for purposes of taxation, possessed an easement which is a part of such estate, and that the servient estate is burdened with a servitude and that it is the fee so burdened that is taxed and passes upon a sale and that such tax deed would not destroy the easement, a way of necessity, over the servient estate, appurtenant to the dominant estate. To hold that it would destroy the easement, would in effect deprive the owner of the dominant estate of his property without due process of law.

An easement is an interest in land. A perpetual easement appurtenant to an estate in fee is a freehold estate.<sup>5</sup> Courts will enforce

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<sup>4</sup> Moore v. White, 16 D. L. N., 955 decided Dec. 31, 1909.

<sup>5</sup> Tinker v. Forbes, 136 Ill. 221.

a parol contract to convey an easement and decree specific performance when, under like circumstances, they would decree specific performance of the contract, if it had been for the conveyance of the land itself.<sup>9</sup>

We are not aware that the courts have ever made any distinction between an easement created by grant and one created by law. For instance the upper riparian owner has a right of drainage through a natural water course over a lower tenement. But if there is no natural water course and the owner of the lower tenement by grant gives the upper tenement a right of drainage through an artificial water course to the same extent as though it were a natural water course, the acquired right of drainage is precisely the same as though it were naturally incident to the dominant estate. Incidentally we might suggest that we have never discovered any intimation made by a member of any court or bar, that the sale of a lower tenement for taxes would deprive the owner of an upper tenement of the right of drainage through a natural water course. Or, indeed, that if an upper riparian owner had acquired, by grant, or prescription, the right to pollute the waters of a natural stream, that the sale for taxes of a lower parcel through which such stream flowed would have the effect to destroy that right.

Perhaps we have made it sufficiently clear that an easement is a part of the dominant estate to which it is appurtenant. If so we beg pardon for prolonging this part of the discussion. Assume that A is the owner of adjoining lots 1 and 2, each 66 x 132, and extending east and west. A conveys to B the north lot, No. 2 and six feet off the north part of lot 1, by metes and bounds, a strip of land 72 x 132. It goes without saying that if B records his deed, A must be assessed upon a lot 60 x 132 and B upon one 72 x 132 and that if B was properly assessed and A was assessed for all of lot one and it was sold for taxes so assessed, the purchaser would acquire no title to the north six feet belonging to B and assessed to him. Suppose in the case we have assumed A conveys to B, lot 2 and also a right of way in fee for all purposes over the north six feet of lot 1, making the way appurtenant to lot 2 and that such deed is recorded. It is the duty of the assessor to assess each lot with reference to its value. The right of way has increased the value of lot 2 and diminished the value of lot 1. In the absence of proof the court must assume that the assessor has performed his duty. By what process of reasoning can it be maintained that if A fails to pay the taxes assessed upon lot one the tax purchaser will have acquired a title free from

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<sup>9</sup> *Wynn v. Garland*, 19 Ark. 23; *Parker v. Nightengale*, 6 Allen 341.

the right of way? Again suppose in the case assumed A conveys to B lot 2, and by proper words of reservation and grant the south six feet of lot 2 and the north six feet of lot 1 constitute an alley in fee for the perpetual use of lots 1 and 2. Now each lot is, as to the other, both a dominant and a servient estate, since each has a right of way over six feet of the other lot and has given the other lot a right of way over a like strip. Both lots are assessed and taxed. The taxes on one are paid. The other is sold for taxes. What are the rights of the tax purchaser as to the owner of the other lot? Can he maintain that by virtue of his tax deed he has acquired the right to use as an alley six feet on the other lot and at the same time insist that by virtue of the same deed he can prevent the other lot owner from using as an alley six feet on the lot sold for taxes? Suppose in the case assumed, that both lots are of like value, that the improvements on each are the same, that the alley is of the same advantage to each, it follows that the same amount of tax will be levied upon each. Let us assume that one owner, in the performance of the duty he owes the state, pays the taxes levied upon his lot and the other shirks his public obligations and his lot is sold for the taxes he should have paid. By what process of reasoning can it be made to appear that the just citizen has lost a valuable right appurtenant to his lot and the unjust citizen through his default has given another a greater estate in his lot than he himself possessed?

There is another course of reasoning which brings us to the same conclusion. No man can be deprived of his property without due process of law: and while the distinction in some cases between taxation and confiscation is of no practical advantage to the victim, it is always of tremendous theoretical importance to the community of sufferers. The right of the state to levy taxes and the right of the citizen to pay the taxes so levied are reciprocal. The citizen by submitting to the burden imposed can save his property. He also has the right to protect an interest which he may have in the property of another which has been taxed, by himself paying the taxes. In such a case if the interest is in the nature of a lien, he is permitted to add the amount paid to the lien and thus recover it back from the land. Payment of taxes by a mortgagee is a familiar illustration of this principle. If the owner of a separate interest in land finds that such interest has been taxed in connection with other interests he may as a rule pay his proportion of the tax and thus protect his interest. When that cannot be done, a court of equity will ascertain the amount which he ought to pay and protect him if he has been compelled to pay a greater sum. Bearing these general principles in mind, how is the owner of the dominant estate to protect the ease-

ment appurtenant to that estate? Let us assume that the owner of a mill site has acquired by deed valuable rights of flowage which have increased the value of his water power \$10,000 and he has been assessed properly for that sum. Let us assume that among others who have granted this right of flowage is A who owns 160 acres of land and that he has granted the right to flow forty acres of it. A is assessed for 160 acres, does not pay his taxes and the mill owner goes to the tax collector and offers to pay his proportion of the taxes, the amount levied upon his right of flowage. What reply would he receive? At least this, "I have no means of knowing what your proportion is; if you wish to pay the entire tax, I will receive it and give you the proper receipt." But as a matter of fact no part of the tax is levied upon the easement, the right of flowage, appurtenant to the dominant estate. If in fixing the value of the servient estate, the servitude it bears is taken into account, its value is diminished. If it is not taken into account and the tax is levied upon the value of the fee simple, without reference to the interest which is appurtenant to the dominant estate, the owner of the servient estate is taxed upon an illegal basis of valuation. The right of flowage which he has conveyed in fee to the mill owner has diminished the value of his estate in fee in the lands flowed. If the value of this right of flowage has been taxed to the mill owner whose property has been enhanced in value by such appurtenant right he may not be required, lawfully or equitably to pay a second tax, covering the same interest, through the fault of the assessor in determining the value of the servient estate.

It would seem therefore upon principle that since an easement is an incorporeal hereditament appurtenant to the dominant estate which increases the value of the dominant estate, it must be taxed as a part of the dominant estate: that the servient estate must be taxed as being subject to a servitude which diminishes its value and consequently that when the servient estate is sold for taxes, the estate taxed passes to the purchaser, which is the fee subject to a servitude.

When we come to consider our second proposition, we find few adjudicated cases and many of them turn upon the construction of local statutes. We shall not consider any except those which treat the question under the common law.

The city of Fall River levied a tax upon the Watuppa Reservoir Company, which the county commissioners set aside, and thereupon the city petitioned the court for a writ of certiorari to quash the abatement proceedings. Justice Ames, who heard the petition, reserved the case for the supreme court and the decision of that court is reported in 125 Mass. 567. It appears that the Reservoir Company

did not own the dam or any of the land covered by their pond. The only interest the company had in any land was a right of flowage. The court say that that right is merely an easement in land which *cannot be taxed independently*. It forms part of the water power which is taxed in connection with the mills as enhancing their value. We have no clear statement of the facts. How the "mills" were connected with the Reservoir Company is not stated. It appears however that in some way the easement of flowage was for their benefit and therefore the easement must be taxed in connection with the mills, as constituting a part of the dominant estate.

The supreme court of Iowa holds that the lands of a water company shall include buildings, engines, pumps, mains, pipes, reservoirs, and that the same shall be assessed as an entirety.<sup>7</sup>

There is a class of easements the beneficial use and enjoyment of which require in the first instance an expenditure of labor and material. For example the easement that a gas or water company has to use the servient estate for the transmission of gas or water cannot be enjoyed until proper pipes are laid. The company must in the first instance expend very considerable sums before the easement can be beneficially enjoyed. The value of the gas plant or water works is made up very largely of the cost of laying pipes and making connections with the residences of consumers. The question has been frequently before the courts in regard to the nature of this property. It is not free from difficulty. The easement gives the owner of the dominant estate no interest in the corpus of the servient estate. It is merely an incorporeal right to use the servient estate for a certain purpose. That right of use, in any case, may require the expenditure of labor and material. A right of way may necessitate the construction of a road and bridges. In such a case the grant of the way carries with it the right to construct and maintain a roadway. But since the easement gave the owner of the dominant estate no right to any portion of the servient estate, it is difficult to conceive how by doing simply what the circumstances require to be done to enjoy the grant, he can acquire any such interest. A gas company for instance is given an easement in streets, alleys and private lands to conduct gas from its works to the consumer: in other words to lay gas mains and pipes. It has no interest in the soil in which they are placed. They are placed in the ground for the sole purpose of enabling the company to use and enjoy its easement. They are valuable for that purpose and in that connection and for no other purpose and in no other connection. If the use of gas should be

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<sup>7</sup> Oskaloosa Water Co. v. Board etc. 84 Iowa 407, 15 L. R. A. 296, note.

superseded by the use of electricity, the entire value of the gas mains and under ground pipes would be destroyed. Let us assume that in a given case a gas company has expended \$100,000 in the construction of gas mains and pipes and that the use and enjoyment of the easement, made possible only by such expenditure, is of that value at least: how is the property of the company to be assessed? Is that sum of \$100,000 to be regarded as the value of the easement, or the value of iron pipes in situ? It must be born in mind that the cost of constructing the mains and pipes is made up in part, not an inconsiderable part, by the cost of the labor of placing them in the ground. Is the cost of the labor to be added to the cost of the material in determining their assessable value? If the pipes are to be regarded as property separate and apart from the easement, which gives them their sole value, are they to be regarded as real or personal property?

The case of *The Monroe Water Co. v. The Township of Frenchtown*, 98 Mich. 401, throws some light upon this question. The plaintiff was a corporation, incorporated under the laws of Michigan. Under the statute it had a right to acquire by grant or condemnation, lands to enable it to lay pipes for the purpose of supplying the city and inhabitants of Monroe with water, taken from Lake Erie. It owned one acre of land, in the defendant township, upon which was erected a building, containing an engine, pumps and other suitable machinery. Pipes extended from those works to the lake and to the City of Monroe. The supervisor of the defendant township, assessed the real estate of the corporation at \$8,000. The board of review raised this amount to \$10,000 and they added to the roll the value of the pipes as personalty \$30,000. The plaintiff paid the taxes assessed upon the \$30,000 under protest and this suit was brought to recover the amount so paid.

It appears that there was no evidence that the pipes were not laid in lands belonging to the plaintiff. It is very evident however that they were not. It owned the one acre upon which its works were located and had acquired a right to lay its pipes, in highways, streets and through private grounds in which it had acquired an easement appurtenant to the acre. Commenting upon the contention that the pipes were personal property, the court says: "We think that it cannot be said that, even if these pipes are to be regarded as personalty, they would be assessable as such to the owner outside of his place of residence. We do not place the decision of this case, however, upon the ground that these pipes can in any sense be said to be personalty, but are satisfied that the ground, building and machinery, together with these pipes, which are necessary appurtenances to the building under the showing made, are a part of the realty. It is

admitted by defendant that this might be true if the pipes were laid wholly upon plaintiff's land: but, as we have said, there is no showing that they were laid anywhere else than upon the land of the plaintiff, and lands which the plaintiff has a right to own and control under the statute authorizing its incorporation, and under which water companies are empowered to take lands by purchase or by condemnation. How. Stat. Secs. 3115, 3117." If as the court say the "ground, building and machinery, together with these pipes which are necessary appurtenances to the building, under the showing made, are a part of the realty" they should have been so assessed by the supervisor. It follows, of course, that if the assessment had been so made and some of the lands in which the corporation had acquired a right to lay pipes, an easement appurtenant to their works, had been assessed and sold for delinquent taxes the sale would not have destroyed the easement.

A somewhat similar question was presented in the case of the *Newaygo Cement Co. v. Sheridan Township*.<sup>8</sup> Several riparian owners on Lake Fremont conveyed to the plaintiff all their land covered by the water of the lake. The deeds recited: "It being the intention of the parties of the first part to convey all their rights to the water and the soil under the water in Fremont Lake belonging and appurtenant to said above described premises." It will be observed that the grant conveyed to the grantee all the grantor's water rights and the soil under the water. That and nothing more. The supervisor after these conveyances described the grantors' lands as before, except he added to the description "excepting riparian rights." The grantee's lands were described as "that part of the following described premises lying in Fremont Lake, including all the riparian rights along and appurtenant to said premises." The lands and riparian rights of the plaintiff were valued at \$5,000 upon which the taxes levied were \$77.50. The taxes levied upon the grantor's lands without riparian rights were \$80.73. From this it would appear that the riparian rights constituted before the sale nearly one-half of the value of the grantor's lands. The taxes levied were paid by the corporation under protest and suit was brought to recover them from the township. Plaintiff in error contended that there had been an effort made to sever the riparian rights and convey them as such. The court held that there had been no such effort, but that the soil beneath the waters had been conveyed and that the riparian rights were appurtenant thereto and had been properly assessed.

The holdings of the courts upon this question have not been uni-

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<sup>8</sup> 137 Mich. 475.

form. Rhode Island has decided that gas pipes laid in streets are real estate, while the courts of New York have held that they are not.<sup>9</sup>

Under an Act of Parliament providing for the support of the poor, rates are to be levied upon all occupants of lands. In interpreting and enforcing this statute the English courts hold that a gas or water company whose works are situated in one parish but which by means of mains and pipes supplies water or gas to the inhabitants of several parishes is, for the payment of poor rates, an occupant of the land through which its pipes extend, but that the amount of the tax payable in any particular parish is to be ascertained and apportioned with reference to the profits of its business in that parish.<sup>10</sup>

This rule is adopted evidently to secure a just apportionment of the poor rates among the several parishes, for the court holds that the company's *occupancy* of lands with their mains and pipes does not make them liable for a "land tax" as having "*land or hereditaments.*"<sup>11</sup>

And now we come to a consideration of the Michigan statute upon this subject. The statute which defines real estate for the purposes of taxation, Sec. 3825, C. L. 1897, declares: "For the purpose of taxation, real property shall include all lands within the state, and all buildings and fixtures thereon and *appurtenances thereto*, except such as are expressly exempted by law."

There can be no controversy over the proposition that a true easement is an incorporeal hereditament appurtenant to land and consequently that under this provision of the statute it must be treated, considered, valued and assessed as belonging to the land to which it is appurtenant.

The statute provides that all lands for purposes of taxation shall be assessed at their "cash value" and the statute gives express directions for ascertaining such cash value. Sec. 3850 C. L. 1897 provides: "The words 'cash value' wherever used in this act, shall be held to mean the usual selling price, at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale and not at forced or auction sale. In determining the value the assessor shall also consider the advantages and disadvantages of the location, quality of soil, quantity and value of standing timber, *water power and priv-*

<sup>9</sup> Providence Gas Co. v. Thurber, 2 R. I. 15; People v. Brooklyn Assessors, 39 N. Y. 81.

<sup>10</sup> Rex v. Brighton Gas Co. etc., 5 B. & C. 466; Regina v. Cambridge Gas Co., 3 Ad. & El. 73; Rex v. Rochdale Water Works, 1 Maule & S. 634.

<sup>11</sup> Chelsea Water Works v. Bowley, 17 Q. B. 358; Rex v. Bath, 14 East 609.

*ileges*, mines, minerals, quarries or other valuable deposits, known to be available therein and their value.”

The value of a water power depends primarily upon the head to which the water may rightfully be raised. It is of no consequence in determining that value whether the mill owner is the owner in fee of the land flowed, or is the owner in fee of an easement of flowage. The term “privileges” would include such easement of flowage, but its meaning is far broader than that, and includes any right or power appurtenant to land, such as easements and *profits a prendre* of every name and description.

Courts will presume, in the absence of proof to the contrary, that assessing officers have followed, in making assessments, these plain and explicit provisions of the statute, and must conclude therefore, that taxes levied upon the servient estate are not levied upon an estate in fee simple absolute, but upon the fee burdened with a servitude, and when lands so assessed are sold for delinquent taxes, it is the estate assessed and taxed that passes to the purchaser, the fee burdened with the servitude. It is true that a tax title is a new, original and independent source of title. But the title is confined to the estate taxed and passes no interest in another and greater estate.

We do not think that the courts should hold that at the common law, much less under the Michigan statutes, that where a servient estate is sold for delinquent taxes the effect of such a sale is to deprive a dominant estate of an easement therein.

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