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Note and Comment

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NOTE AND COMMENT.

THE PASSING OF STATE CONTROL OVER RAILWAY RATES.—Congress has exclusive power to regulate interstate commerce, so far as it admits of a uniform system of regulation, and a failure on its part to regulate in a given case is tantamount to a declaration that such commerce shall remain free and unrestricted. *Brown* v. *Houston,* 114 U. S. 622; *Leisy* v. *Hardin,* 135 U. S. 100. The states are, in all such cases, without jurisdiction to regulate, irrespective of what Congress has or has not done.

Nor is this prohibition against state action limited to those matters which constitute a direct regulation of interstate commerce. If state legislation, in effect, exerts a substantial, controlling influence over inte state business, even though its operation is indirect, such legislation comes under the ban of the federal constitution. And in seeking to determine whether a given state law offends against this rule, the Supreme Court "will look for a practical rather than logical or philosophical distinction," and will hold the state legislation unconstitutional "if it bears upon commerce among the states so directly as to amount to a regulation in a *relatively immediate way,*" without regard to name or form. *Galveston, Harrisburg, etc. Ry. Co.* v. *Texas,* 210 U. S. 217.

In 1906 and 1907 the Minnesota Railway and Warehouse Commission ordered sweeping reductions in railway fares and rates throughout the state. These orders, by their terms, related solely to business local to the state, and not to interstate business.

As a matter of fact, however, the companies operating in Minnesota at once reduced their interstate rates to a parity with the intrastate rates ordered by the Commission. This they contended they were practically forced to do, because it was impossible to carry on the business of a common carrier of both local and interstate freight unless the corresponding rates on both classes of traffic were the same.

A bill was soon filed by stockholders of certain of these railroad companies, in the United States Circuit Court sitting in Minnesota, to restrain the companies from maintaining the rates on local traffic prescribed by the State Commission, on the ground that the orders of the Commission, while in terms limited to local business, were in fact a regulation of interstate commerce. *Shepard* v. *Northern Pacific Ry. Co.* (April 8, 1911) 184 Fed. 765.

Judge SANBORN held that the orders of the State Commission were a regulation of interstate commerce, and in the course of a long and elaborate opinion he demonstrated the proposition as follows:—

First Demonstration. Duluth, Minn., and Superior, Wis., are situated side by side at the western extremity of Lake Superior. Each is a distributing point for Minnesota interior towns. If Duluth were given rates into this territory lower than the rates given to Superior, the latter would have its Minnesota business destroyed at once. By reducing intrastate rates for the benefit of Duluth, the Commission in effect excluded Superior from carrying on interstate business with Minnesota interior points. To preserve Superior's interstate commerce thus threatened with destruction, the railroads serving it were obliged by the action of the Minnesota Commission to reduce corresponding interstate rates to the same level. On the western border of Minnesota are several other similar pairs of cities, namely, Grand Forks, N. D., and East Grand Forks, Minn.; Fargo, N. D., and Moorhead, Minn.; Wahpeton, N. D., and Breckenridge, Minn. All of them do a distributing business eastward into Minnesota. By parity of reasoning, both cities in each pair necessarily required equal rates into their common territory, and a reduction in intrastate rates as to one immediately made it imperative that corresponding interstate rates be reduced as to the other.

Second Demontsration. Moorhead, Minn., and Fargo, N. D., are jobbing centers for territory extending toward the west. Prior to 1906 both these cities had equal rates from eastern terminals, and were therefore enabled to compete in this territory which was common to both. Much of the freight distributed from these cities came from Duluth, St. Paul and Minneapolis. Now suppose the rates from the last named cities to Moorhead were lower than the rates to Fargo. Fargo could no longer compete with Moorhead in common territory in North Dakota. Hence Fargo would have to be protected against Moorhead by a reduction of interstate rates. But Bismark, N. D., is also a jobbing center, and part of its territory it holds in common with Fargo. If Fargo is protected against Moorhead by lower freight rates,

Bismark must be protected against Fargo in the same way, and interstate rates from Duluth, St. Paul and Minneapolis to Bismark must come down. Again, Billings, Mont., is a jobbing center, and part of its territory is served also by Bismark. If Bismark is protected against Fargo, Billings must be protected against Bismark. Similarly, Butte, Mont., is a jobbing center, and its territory overlaps that of Billings. If Billings is protected against Bismark by lower rates, Butte must be protected against Billings in the same way. And so on, from jobbing center to jobbing center, *ad infinitum*. Accordingly, the whole fabric of interstate rates is practically destroyed by a general reduction in rates local to a single state.

Of course this case is subject to reversal by the Supreme Court when that tribunal passes upon it, as it is quite certain to do in the course of time. But Judge Sanborn's opinion is exhaustive and painstaking, and presents arguments from which it seems difficult to escape. The case is somewhat similar in principle to that of *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, where the court said: "We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business. It is of the last importance that the freedom of interstate commerce should not be trammelled or burdened by local regulations which, under the guise of regulating local affairs, really burden rights secured by the Constitution and laws of the United States." If the principle announced by Judge Sanborn is approved by the Supreme Court, effective general control of intrastate railroad rates will be absolutely denied to the states, and the powers heretofore claimed by state railroad commissions will become largely merged in the vast jurisdiction of the Interstate Commerce Commission.

E. R. S.

CONSTITUTIONALITY OF THE NEW YORK WORKMEN'S COMPENSATION ACT.—In holding the New York Workmen's Compensation Act unconstitutional, the New York Court of Appeals has effectively put a large obstacle in the way of such legislation, not only in New York, but throughout the country. Perhaps no decision in recent months has been commented upon so much and has received so little support as this recent opinion by New York's highest court. *Ives* v. *South Buffalo Ry. Co.* (1911),—N. Y.—, 94 N. E. 431. The act presented a new question. There were no decisions bearing directly upon it. Hence, one may expect to find a long discussion of such general principles of constitutional law as are applicable to the case. And mixed with these principles there is much said on the theoretical and economic questions involved. For the economic phase of the case, see the article on *"The New York Employers' Liability Act,"* by Andrew Alexander Bruce, 9 MICH. L. REV. 684. See also the notes to that article for an extensive statement of the statute.

This statute (Article 14 a. of the N. Y. labor law) enumerates certain lines of work "each of which is determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work

therein, extraordinary risks to the life and limb of workmen engaged therein, are inherent, necessary or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen." Among these lines are the erection and demolition of bridges, operation of elevators and derricks, work on scaffolds, electrical work of certain kinds, blasting, railroad work, construction of tunnels, and work carried on under compressed air. Then in effect it goes on to say that if a workman is injured in any of these lines of work, the injury not being caused in whole or in part by the serious and willful misconduct of the workman, the employer shall be liable to pay compensation at the rates set out therein.

The plaintiff in this case was a switchman on defendant's steam railroad, and while thus engaged, was injured solely by reason of the necessary risk or danger of his employment. He brought an action under the statute to recover compensation for some five weeks during which he was incapacitated. On demurrer to the answer setting up the unconstitutionality of the statute, the Special Term and the Appellate Division sustained the act, but the Court of Appeals held it unconstitutional as depriving the employer of his property without due process of law, and as not sustainable as a proper exercise of the state's police power.

In disposing of the case many questions were necesssarily involved, some of which the court passed upon, and some it did not. Nevertheless the discussion is valuable to show where the court stands upon the different matters that will no doubt be considered in the forming and passing of a new or modified statute. The main topics discussed are: the abrogation of the fellow-servant doctrine, the contributory negligence rule, assumption of risk, limitation of the number of employments covered, liability of present chartered corporations under the act, cutting off trial by jury guaranteed by the state constitution, taking of life, liberty or property without due process of law, and police power. Upon the last two of these the decision is based.

What is the meaning of "Due Process of Law?" "Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him this is not due process of law." *Zeigler* v. *S. & N. Ala. R. R. Co.*, 58 Ala. 594. Certainly the industries and occupations enumerated in the statute are lawful, and certainly when one so engaged is held liable for damages without fault or negligence on his part, there is a taking of property; and so the court held it was without due process of law, and on it decided the case. But under the police power there is often a taking of property, justified on the ground that one of the necessary attributes of a civilized government is to be able to secure the general comfort, health, and prosperity of the state, even at the expense of subjecting persons and property to all kinds of burdens and restraints. If it were not for the police power, therefore, there is no

doubt that this act would be unconstitutional. Here is where the court and the supporters of the compensation act differ mainly.

What may be done under the police power? Railway companies may be forced to fence their tracks, with liability for failure to do so. *Quackenbush* v. *Wis. Ry. Co.*, 62 Wis. 411; *Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26. The legislature may regulate hours of labor, payment of cash at specified periods, protection of employes in erection of buildings, the guarding of dangerous and exposed machinery, may modify the fellow-servant doctrine, law of contributory negligence, and assumption of risk. It may do many things to conserve the health, safety, or morals of employes which increase the duties and responsibilities of the employer. *New York Cen.* v. *Williams*, — N. Y. —, 92 N. E. 404, 9 MICH. L. REV. 142; *Holden* v. *Hardy*, 169 U. S. 366; *Mo. Pac. Ry.* v. *Mackey*, 127 U. S. 205. Railway companies may be held liable for damage by fire caused directly or indirectly by engines. *St. Louis & S. F. Ry. Co.* v. *Mathews*, 165 U. S. 1; *Grissell* v. *H. R. R. Co.*, 54 Conn. 447; *Ingersoll & Quigley* v. *S. & P. Ry. Co.*, 8 Allen 438. Parties may be prohibited from receiving deposits without first obtaining a license. *Engel* v. *O'Malley*, 219 U. S. 128; *Musco* v. *United Surety Co.*, 196 N. Y. 459. And a state may regulate banking by assessing banks on the average daily deposits to create a depositor's fund. *Noble State Bank* v. *Haskell*, 219 U. S. 104, 31 Sup. Ct. 186. Said the court in that case, "It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *U. S.*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."

What cannot be done under this power? A railroad company was held not liable under a statute which provided that "every railroad company running cars within this state shall be liable for all expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision or other accident occurring to such cars, or otherwise." It was a taking without due process of law. *Ohio & Miss. Ry. Co.* v. *Lackey*, 78 Ill. 55. So also a statute which imposes absolute liability for killing or injuring stock on the railroad right of way is void as it is a taking without due process of law. *Jensen* v. *U. P. R. Co.*, 6 Utah 253; *Zeigler* v. *S. & N. A. R. Co.*, 58 Ala. 594; *Bielenberg* v. *Mont. U. Ry. Co.*, 8 Mont. 271; *Schenck* v. *U. P. R. Co.*, 5 Wyo. 430; *Cateril* v. *U. P. R. Co.*, 2 Idaho 540. An act making it a misdemeanor to manufacture cigars in certain tenements was held void. In *Matter of Jacobs*, 98 N. Y. 98. An act prohibiting the manufacture of oleomargarine was condemned because it interfered with a lawful industry, not injurious to the public and not fraudulently conducted. *People* v. *Marx*, 99 N. Y. 377. But if fraud is involved, the statute may be upheld. *People* v. *Arensberg*, 105 N. Y. 123. Similar statutes which in effect protect only private rights, or invade private rights that are lawful, are held void because not designed for the protection of public health, welfare,

morals, or comfort. *People* v *.Gillson,* 109 N. Y. 389; *Colon* v. *Lisk,* 153 N. Y. 188; *People* v. *Hawkins,* 157 N. Y. 1; *People* v. *O. C. Road Con. Co.,* 175 N. Y. 84.

Innumerable examples might be given. The vital question always is, Is it a reasonable exercise of the power? In the principal case, the question is, Is the act a reasonable regulation of the status of employment? The New York Court holds it is not, because it creates a liability when the party has omitted no legal duty, and has committed no wrong, and because it is not a reasonable exercise of the police power in order to secure general comfort, health, and prosperity of the state. The court refused to allow the Supreme Court decision in the Noble Bank case to determine their interpretation of their own constitution, even though it clearly requires bankers to give over property without having done wrong or omitted a legal duty. It would seem that the United States Supreme Court would have sustained the act.

It has been suggested that there is no difference between the abrogation of the fellow-servant doctrine and the liability of the employer for an accident which is due to the risk inherent to the trade, for where the employer has used all possible care in selecting and supervising his servant, the negligence of that servant resulting in an injury to another servant, is, as far as the employer is concerned, as much an accident as any other accident resulting from imperfections in his machinery or plant which the employer can by no possible care avoid. Conceding that the legislature may abrogate the defense both of common employment and of contributory negligence, it is an inconsistency to hold that the legislature cannot create the liability which was proposed to be created by the act. W. W. M.

MUST A PASSENGER GO ON THE SAME TRAIN WITH HIS BAGGAGE?—Does a carrier assume the liability of an insurer with the excepted risks, as to baggage which a passenger checks but does not intend to accompany on the same train? The older authorities are to the effect that it does not. The contrary view is taken by a recent New Jersey case, the facts of which are briefly as follows:

P. bought a ticket between two points on D.'s line about noon on a certain day and checked at once her suit case containing personal apparel. However, she did not commence her journey until that evening and her baggage preceded her on another train. The suit case disappeared and she sued for its value. The railroad company defends upon the ground that the plaintiff did not accompany her baggage on the same train. *Held,* the liability of a railway company as a carrier of baggage is not affected by the fact of the passenger going on a later train than that carrying the baggage. *Larned* v. *Central R. Co.* (1911), — N. J. L. —, 79 Atl. 289.

In deciding the above case, the court said: "We are unable to accede to the view that, because the plaintiff did not accompany her baggage, the relation was not originally that of carrier and passenger, so to charge the company as a carrier of baggage. It is true that many of the older authorities so hold, but the methods of railroad companies in the transportation of

baggage, have changed greatly of recent years, even to the extent of running trains exclusively for baggage; and it is notorious in many cases, especially at certain seasons, that the passenger has no assurance whatever that his baggage will go on the same train with him, even when checked in due season for that purpose."

The authorities are not very numerous upon this particular question. The writer has been able to find one only other case that has adopted the view of the principal case. *McKibbin* v. *Wisconsin, etc., Ry. Co.,* 100 Minn. 270, 110 N. W. 964, 8 L. R. A. (N. S.) 489. decided in 1907. In that case the court said: "The defendant's contention is that the passenger must go on the same train with his baggage; otherwise, the carrier is only a gratuitous bailee of the baggage. The claim has the support of some respectable authorities. * * * In view of the modern methods of checking baggage and the custom of regularly checking it on the presentation of a ticket at stations, general ticket offices and the homes of passengers, we are of the opinion that there is now no good reason for the rule claimed, if ever there was, and hold that a railway carrier is not, as a matter of law, liable only as a gratuitous bailee of baggage which it has regularly checked if the passenger does not go on the same train with it."

It seems to be the general consensus of opinion that the carriage of baggage is incident to the carriage of the passenger in that the same consideration that supports the contract of carriage is sufficient to support the former. *Isaacson* v. *N. Y. Cent., etc., R. Co.,* 94 N. Y. 278, 46 Am. Rep. 142; *Miss. Cent. R. Co.* v. *Kennedy,* 41 Miss. 671; *Smith* v. *Boston, etc., R. Co.,* 44 N. H. 325.

The older holdings are to the effect that when a passenger checks his baggage after purchasing a ticket, it is implied under the contract that he will accompany the baggage on the same train. *Wilson* v. *Grand Trunk Ry. Co.,* 56 Me. 60, 96 Am. Dec. 435; *Wood* v. *Maine Central R. Co.,* 98 Me. 98 99 Am. St. Rep. 339; *Marshall* v. *Pontiac, etc., Ry. Co.,* 126 Mich. 45, 55 L. R. A. 650; HUTCHINSON, CARRIER Ed. 3, § 1275. The exceptions to this rule are that if the carrier agrees to carry the baggage by a later train or does it for its own convenience or through its own fault, its liability is the same as though the passenger and his baggage went together. *Toledo, etc., R. Co.* v. *Tapp.,* 6 Ind. App. 304; *Warner* v. *Burlington, etc., R. Co.,* 22 Iowa 166, 92 Am. Dec. 389.

Under the older rulings, the quaere arises as to what liability the carrier assumes. In *Marshall* v. *Railroad,* supra, in which P. had purchased a ticket for the sole purpose of checking his baggage and had intended and did go to his destination in a private conveyance, and did not use the ticket until four months later, the carrier was held bound only as a gratuitous bailee and only liable for gross negligence. The court qualifies its ruling here by way of dictum, as follows: "We must not be understood as holding that it is absolutely necessary for the passenger to go upon the same train with his baggage in order to entitle him to have his baggage taken care of at his destination by the railroad company as a warehouseman. Where the passenger purchased his ticket with the bona fide intention to use it, but without fault

upon his part, did not accompany it, but went upon a following train, a different case is presented." *Wood* v. *The Railroad Co.*, supra, to the same effect. These two cases were decided on the ground that since the carrier had no knowledge that the baggage was unaccompanied by the passenger, there was no compensation or consideration when it was carried alone upon which to base the extraordinary liability.

In the event that there has been no concealment of the fact of the passenger taking a different train from that carrying the baggage and the carrier through its agents had knowledge of the fact, the law will imply an obligation on the part of the passenger owning the baggage to pay the freight rate that would be due for carrying it as such, and a lien on the goods as security for its payment, and the carrier will be held liable as a common carrier of merchandise. *The Elvira Harbeck*, 2 Blatchf. 336; *Wilson* v. *Grand Trunk, etc., Ry. Co.*, 57 Me. 138, 2 Am. Rep. 26.

It seems to be held generally that in case the passenger gives the carrier's agent sufficient time, it is the duty of the railroad company to ship the baggage on the same train with the passenger, and it will be liable for the loss or destruction of the baggage, in case it does not do so. *Toledo, etc., R. Co.* v. *Tapp*, supra; *Wald* v. *Pittsburg, etc., R. Co.*, 162 Ill. 545, 53 Am. St. Rep. 332; *Coward* v. *East Tenn., etc., Ry. Co.*, 16 Lea 225, 57 Am. Rep. 226. To the effect that the baggage need not necessarily be shipped on the same train but in a reasonable time, see *St. Louis, etc., Ry. Co.* v. *Ray*, 13 Tex. Civ. App. 628.

However, it would seem that regardless of whether the carrier had or did not have knowledge of the fact that the passenger was not going on the same train with his baggage, under the modern methods of handling the transients' belongings, whereby the railroad companies exercise absolute supervision over them, and the passenger does not know where or how his baggage is being transported until he arrives at his destination, the holding in the principal case is undoubtedly the better doctrine. As was stated in an extensive note in 55 L. R. A. 650, to the case of *Marshall* v. *The Railroad*, supra, and which note was cited with approval in *McKibbin* v. *Wisconsin, etc., Ry. Co.*, supra, the passenger cannot be of any protection to the baggage by being present on the same train with it since he does not exercise any control over it, and hence can be of no value or benefit to the carrier by being there. There seems to be no reason under modern conditions for not holding the carrier liable as an insurer whether the passenger is on the same train with his baggage or not. It is certainly just to the passenger and there seems to be nothing unjust to the carrier in so holding. H. S. McC.

IMPLIED RESERVATION OF EASEMENTS.—On the severance of two tenements, what rights pass with the granted premises, in addition to those expressly granted, and what burdens upon the part granted remain in favor of the ungranted portion, in addition to the words of the express grant?

The earlier cases dealing with the subject of implied grants and implied reservations, both in England and in the United States, were liberal in allow-

ing grants and reservations by implication, and quite generally applied the same tests and requirements in the case of each. The presence of necessity gave additional weight to the implication, but the easement could well exist without the necessity. The leading case in support of the doctrine of the implied reservation of easements is *Pyer* v. *Carter,* 1 H. & N. 916, 922. That case held a grant to be given subject to all the apparent signs of servitude which existed, and "by apparent signs must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject."

Many of the earlier American cases show a similar liberality in the allowance of implied grants and reservations. *Lampman* v. *Milks,* 21 N. Y. 505, 507, states this common law rule thus: "If a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." The earlier cases in many of the American states show a similar liberality. *Morrison* v. *King,* 62 Ill. 30; *Dunklee* v. *Wilton Ry. Co.,* 24 N. H. 489; *Kelly,* v. *Dunning,* 43 N. J. Eq. 62, 10 Atl. 276; *Harwood* v. *Benton,* 32 Vt. 724.

The reason for this liberal allowance of reservations is the intended permanence of the arrangements as to the land between grantor and grantee. This is especially true in the older communities, and was more applicable during the early parts of the nineteenth century than it has been since that time. In the present age of large centers of capital and population, where conditions are changing and have lost stable characteristics of the prior period, the earlier doctrine has little room. Permanence is not expected. Whole districts change in a generation, and the appurtenances of a former occupation must give way without reservation, to modern business.

The change has taken place in England, and quite generally in the United States. *Pyer* v. *Carter,* supra, is now overruled. The recent English cases distinguish between the case of an implied grant and that of an implied reservation, and maintain that in the case of a grant, continuous and apparent easements may be implied, together with such easements as are necessary to the reasonable enjoyment of the property conveyed; but with certain exceptions such as easements of necessity and reciprocal easements, a similar reservation cannot be implied in favor of the grantor of land. *Union Lighterage Co.* v. *London Graving Dock Co.,* L. R. [1902], 2 Ch. 557; *Wheeldon* v. *Burrows,* L. R. 12 Ch. Div. 31; *Suffield* v. *Brown,* 4 D. J. & S. 185; *Crossley & Sons* v. *Lightowler,* L. R. 2 Ch. 478.

These English cases define the exception, easement of necessity, to mean an easement without which the property retained cannot be used at all, and not one merely reasonably necessary to the enjoyment of the property. In England, in order to create an easement by way of implied reservation, it is not sufficient that the easement be merely continuous and apparent. The degree of necessity above defined is absolutely requisite.

While the modern English cases are in harmony on the subject, the American states hold a variety of views.

In Pennsylvania the cases uniformly hold that to create an implied reservation, the easement need be merely continuous and apparent. *Manbeck* v. *Jones* 190 Pa. 171; *Geible* v. *Smith,* 146 Pa. 276; *Pierce* v. *Cleland,* 133 Pa. 189; *Cannon* v. *Boyd,* 73 Pa. 179.

Most of the states, however, have departed from the old rule, and now maintain that in order to create an implied easement, there must be some degree of necessity. On the matter of degree, the states differ. New Jersey places grants and reservations in the same class, subject to the same requirements, and holds that in either case, easements will only arise when they are apparent, continuous, and reasonably necessary to the beneficial enjoyment of the property conveyed or reserved. *Toothe* v. *Bryce,* 50 N. J. Eq. 589; *Greer* v. *Van Meter,* 54 N. J. Eq. 270; *Taylor* v. *Wright,* (1909), 76 N. J. Eq. 121, 79 Atl. 433. The New Jersey cases, especially *Greer* v. *Van Meter,* use interchangeably the terms reasonable necessity and reasonable convenience, the test being whether it is reasonable to assume that its continued presence was in the minds of the parties at the time of the sale.

The Wisconsin court, in the case of *Galloway* v. *Bonesteel,* 65 Wis. 79, adhered to the reasonable necessity rule, but distinguished reasonable necessity from mere convenience, defining reasonable necessity to be such as could only be avoided at great expense.

The reasonable necessity rule is quite unsatisfactory. What constitutes the reasonable necessity is always a question of doubt, rendering it uncertain in a given case whether the necessity was reasonable or not. The parties should be able to know, without resort to the interpretation by the courts, just what passes with the grant, and what is reserved. New Jersey has gone on the liberal side of the reasonable necessity rule, and practically agrees with Pennsylvania, that the sole requirements are that the easement shall be continuous and apparent, adding reasonable convenience, which would be present in practically every case. The Wisconsin court, in the case of *Miller* v. *Hoeschler,* 126 Wis. 263, has departed from the reasonable necessity doctrine, and may be said to require a strict necessity. The court in that case says: "Even if in some extreme cases there must be any easement other than right of way implied from necessity, that necessity must be so clear and absolute that without the easement the grantee cannot in any reasonable sense be said to have acquired that which is expressly granted; such indeed as to render it inconceivable that the parties could have dealt in the matter without both intending that the easement be conferred. * * * Such strict limitation we believe to be essential to easy and rapid development at least of our municipalities."

It may be said to be the established rule in the majority of the courts of this country that in order to create an easement by way of implied reservation, the easement must be apparent, continuous, and strictly necessary for the enjoyment of the land retained. A grantor cannot derogate from his own grant, and except when the above requirements are present, he can retain a right over a portion of his land conveyed absolutely, only by express

reservation. *Burns* v. *Gallagher,* 62 Md. 462; *Outerbridge* v. *Phelps,* 58 How. Prac. 77; *Wells* v. *Garbutt,* 132 N. Y. 430; *Covell* v. *Bright,* 157 Mich. 419, 122 N. W. 101; JONES ON EASEMENTS, § 136.

The recent case of *Powers* v. *Heffernan,* 233 Ill. 597, inclines toward the position that there is no distinction between the requisites necessary for the creation of an easement of implied grant and of implied reservation. It allowed the implied reservation, under the facts of the case, although there was no *strict* necessity, thus showing a tendency toward liberal rather than strict construction of the doctrine. It does not express itself on the degree of necessity required, leaving the matter more or less open in Illinois.

The Supreme Court of Michigan, in the recent case of *Brown* v. *Fuller,* (1911), — Mich. —, 130 N. W. 621, adheres to the doctrine of strict necessity, in pursuance of the prior decisions of that court. Two justices, however, dissented. They agreed on the strict necessity rule, but differed as to what constituted a strict necessity. In view of the repeated decisions on the subject, it would seem that the dissenting justices are attempting to set up the reasonable necessity rule under another name.

For a discussion of the subject, with special reference to the case of *Powers* v. *Heffernan,* supra, see 3 ILL. L. REV. 187. H. L. B.

EXTENT OF THE CITY'S RIGHT, UNDER THE POWER OF EMINENT DOMAIN, TO EXEMPTION FROM LIABILITY FOR CONSEQUENTIAL DAMAGES UNDER THE RULE OF DAMNUM ABSQUE INJURIA.—The constitution of New York, Art. 1, Sec. 6, prohibits "the taking of private property for public use without just compensation." As originally interpreted, redress under this clause was limited to cases of *actual taking* of property. So that when no property was taken, no matter how much injury was inflicted, there could be no recovery for it. The leading case under the provision as stated, is *Radcliff's Executors* v. *The Mayor,* (1850), 4 N. Y. 195. The court says, "The plaintiff does not allege that any part of her land *was taken* for the street or avenue; but one portion of the complaint is that she was injured by making the street and avenue on land which bounded two sides of her lot." The injury was held to be *consequential* and not direct and so damnum absque injuria. This term consequential has since been applied to damages so excluded. As consequential damages are allowed in tort and contract actions, but are excluded in actions for injuries caused by acts under the power of eminent domain, they must constitute a separate class, and this meaning must be kept in mind in dealing with this class of cases.

A decision recently handed down by the Supreme Court of New York, Appellate Division, found the plaintiff entitled to substantial damages. In this case, *Ogden et al.* v. *City of New York,* (1910), 126 N. Y. Supp. 189, the plaintiff was owner of property abutting on a street in which excavations were made by the city for the purpose of constructing municipal docks. There was no negligence, but the land caved in on the plaintiff's premises 20 to 30 feet, the street was blocked for two years, and a high board fence was built on the plaintiff's premises to protect the public from the excavation.

The prevailing opinion was based entirely on a recent New York decision of the Court of Appeals under the Rapid Transit Acts, L. 1894, ch. 4, and acts amendatory thereof. This case, *Matter of the Board of Rapid Transit R. Com'rs*, 197 N. Y. 81, 90 N. E. 456, held the city liable to abutting property owners for damages to their easement in the street, and for physical injuries to buildings caused by excavations in the street, ruling that the city in building the subway, was not engaged in improving the street for street purposes, but was engaged in railroad business, just as a private concern, with a chance of making or losing money. (See also *Coy* v. *Indianapolis Gas Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535.) They based the right of an adjoining owner to recover, not on his ownership of the fee of the street, but on the fact that he was an "abutting owner." "The mere abutter, by virtue of the Rapid Transit Acts, the situation of his premises (*Kane* v. *N. Y. Elev. R. R. Co.*, 125 N. Y. 164, 180) and proximity to the street (*Bohm* v. *Metr. Elv. Ry. Co.*, 129 N. Y. 576, 587), has easements and rights in the streets which are property entitled to the protection of the law. He is therefore entitled to lateral support and freedom from physical interference with his abutting property." The injuries in this case were such as seriously and permanently to injure the buildings on the adjoining premises, but the commercial character of the work, and the statute, were the basis of the decision. VANN, J., says, "If the use were for a street purpose, the city would not be liable for damages caused by proper construction in a case where it took no land." The Supreme Court likens the docks to the subway. The city is to receive rent or dockage charges, just as it receives rent for other municipal property. That there is no special statutory arrangement for compensation of the abutting owners as in the Rapid Transit cases, is not controverted by the prevailing opinion, but the remainder of VANN, J.'s statement about right of easement, proximity to the street, and situation of premises, is made the basis of the decision.

The dissenting opinion is based on precedent as stated in the leading case and followed practically unanimously in the state. The opinion says, "In the present record plaintiff has proved nothing more than consequential damages, the direct and necessary result of the work properly done in furtherance and execution of public improvement." It claims that the case of 197 N. Y. 81 is not applicable on the facts, and the restoration of the street, of the lateral support, and of the premises, all unchanged and without additional burden in the shape of a railroad or other non-street use supports this view. Futhermore the docks, wharves, piers, and bulkheads are declared a part of the public highways and devoted to public use. This view would remand the plaintiff to an action at law for such damages as he could get for the trespass in putting a fence on his land. In *Moore* v. *City of Albany*, 98 N. Y. 396, the court said, "If in excavating with proper care within the street line, the adjoining soil had fallen into the street, its owners would have no legal cause of complaint." This is following the decision of *Wilson* v. *Mayor of New York*, 1 Denio 595, 43 Am. Dec. 719, in which plaintiff's property had caved into an excavation caused by grading a street past it. The court held this was not taking the plaintiff's property for public use within the meaning of the constitution. In *Uppington* v. *City of New York*, 165 N. Y. 222, 59

N. E. 91, 53 L. R. A. 550, the city was not held liable for settling of the ground in the street in front of the plaintiff's premises due to construction of a sewer. *Transportation Co.* v. *Chicago,* 99 U. S. 635, 641, supports the dissenting opinion although decided with a stricter constitutional provision of the state of Illinois taken into consideration. In that case the plaintiff claimed that the defendant city, in building a tunnel, had damaged it by preventing access to its docks from the river, to its buildings from the street, and had injured its buildings by its excavations. Mr. Justice STRONG, delivering the opinion, said, "The remedy, therefore, for a consequential injury resulting from the State's action through its agent's (the city), if there be any remedy, must be that and that only which the legislature shall give. It does not exist at common law. * * * It is immaterial whether the fee in the street is in the State or in the City or in the adjoining lot-owner; if in the latter the State has an easement to repair and improve." He cites the Supreme Court of Illinois in a decision that such an incidental inconvenience was not a taking or damaging of property under the revised constitution of Illinois of 1870, which reads, "private property shall not be taken or damaged for public use" without compensation, etc. *Chicago* v. *Rumsey,* 87 Ill. 348, 10 CHIC. L. N., 333.

The holding in the principal case, to say the least, is against the general trend of decisions in New York, and against the common law rule as ably set forth by Mr. Justice STRONG, supra. The extension of the decision under the Rapid Transit Acts to cover improvement of docks and wharves would not seem to be supported on the mere fact that dockage charges might be levied on users. To grant that the abutting owner, if deprived of access during the improvement of the street, has had his property taken from him under the constitution, will give an action for substantial damages where consequential damages have heretofore been excluded. There is no remedy at common law, yet this decision would remove the necessity for statutory provision. The only argument outside of the portion of the Rapid Transit Case cited, is that wharves and docks are not streets and highways. It would seem that they are in general and that in this case there was an improvement of the street. The Elevated Railway cases in New York gave adjoining property owners easements of light, air, and access, and these may have in some measure influenced the court. But it does not seem that the right to substantial damages can follow from the results of street improvements, merely because there is a combination of easement, situation of premises, and proximity, without statutory provision for compensation. C. E. C.