new legal relations to exist while other persons cannot. It is of these permissions, commands, powers, and immunities that "title" or ownership" consists. The owner may consume or use or carry away his goods, without societal penalty; these are valuable privileges. The owner will receive societal assistance in preventing other persons from consuming, using, or carrying away; these are valuable rights. The owner can confer ownership, in part or in whole, upon others; these are valuable powers. The owner's rights, privileges, and powers cannot be extinguished by others; these are valuable immunities.

If this is what having title means, it can be seen that one may have part title and not the whole.[2] So it was with the banks; they had large and valuable powers, that usually pertain to an owner. In complete ownership, however, these powers are exclusive and they are accompanied by exclusive rights and privileges. It does not appear whether or not after the agreement of 1913 the old voting trustees had any rights, powers, or privileges left. In all probability they had some of these left; but they had no immunities with respect to the banks, for the banks had power to divest them of every element of title. The banks in fact exercised this power eventually and caused title to pass to new trustees. It is important for us to know just what elements of title remained in the old trustees while the banks were enjoying such extensive powers; but this is left to surmise. The existence of the powers in the banks, at any rate, did not constitute the whole of title and did not bring them within the meaning of the tax law.

There is no question that the court was correct in holding that the exercise of the banks' power did not constitute two transfers. Far from being a transfer to the banks, it was a transfer from them. It was one transfer of the two parts of title—of such part as still remained in the old trustees and also of the part held by the banks themselves. The extensive powers of the banks were no doubt extinguished by their action; and thereafter if such powers existed at all, they were in the new trustees.

Title is not a physical quantity, and on its transfer we cannot see it jump. It is neither a button nor a bit of sealing wax nor a scrap of paper. But by not having it the banks saved a pretty penny in stamps.

A. L. C.

DUE PROCESS AND INJURIES FROM TERMINATION OF FRANCHISE

The decision in *Johnson v. Lake Drummond Canal and Water Company* (1919, Va.) 99 S. E. 771, seems both unjust and unnecessary. It appears that in 1787 the Virginia legislature incorporated a canal

[2] For another recent case involving a tax on the "transfer of property," where part but not all of the title had passed, see RECENT CASE NOTES, *sub tit.* TAXATION.

company to erect a canal which should "forever after" be a public highway, free for transportation of goods and for travel on payment of the tolls imposed by the act of incorporation. In 1839 another act was passed authorizing the same company to construct an outlet from its canal to the Elizabeth river and granting it the power of eminent domain, provided, however, that the proprietors of abutting land should have free passage through the outlet.[1] Prior to the construction of the outlet these lands either bordered on or were intersected by navigable creeks or streams reaching deep water and thus giving deep water access. The building of the outlet or canal completely destroyed these creeks or streams and the proviso of the Act of 1839 was inserted in order to give abutting proprietors deep water access through the canal in place of the access which was being destroyed. Soon thereafter the outlet was completed and the privilege of passage has been used by abutting proprietors, deep water access adding greatly to the value of the lands. In 1851 a railroad was given permission by the legislature to erect drawbridges across the outlet, but so as not to hinder, obstruct or delay passage of any craft on the canal; and if any such inconvenience resulted from the construction of the road, it was to be declared a nuisance and abated by the circuit court. In 1916 the latter portion of this Act was repealed and defendant canal company, who had succeeded the original canal company, was authorized by the legislature to abandon maintenance and operation of this portion of the canal or of so much of it as it deemed desirable. The defendant canal company has now sold to the defendant railroad the privilege of crossing the outlet by a permanent fill, bridge or obstruction and the railroad proposes to cross the outlet in this manner, so as completely to shut off all passage through it at the point of crossing. The plaintiffs, abutting landowners, bring this bill for an injunction which the court dismisses on the defendants' demurrer.

After some hesitation the court admits that each landowner's right and privilege of passage constituted an easement and thus property, but it avoids constitutional objections by the argument that such right and privilege exist only so long as does the canal franchise, and that the latter may be terminated at any time by act of the legislature which originally granted it. It is also admitted that this easement was

[1] "Provided, however, that the outlet and lock, or locks, which the said company may cause to be constructed under this act, shall be free for all vessels, boats, lighters and rafts of timber the proprietors of which, reside, or own lands, upon said outlet, or Deep creek, to pass and repass, free of any charge of toll or tonnage, at all times, when it can be safe to open said lock or locks; and, if any such vessels, boats, lighters or rafts of timber, shall be detained or hindered in passing the same, through any fault or neglect of said company, their agents or servants, the said company shall be liable for all injury or damage sustained thereby, to be recovered by warrant, petition or action at law, according to the extent of damage sustained as the case may be."

undoubtedly a factor in the computation of damages in the original eminent domain proceedings; but it is said that the deduction made from the amount of damages awarded because of this easement must be taken to have been ascertained on the theory that the easement would cease with abandonment of the franchise by consent of the legislature. Obviously this is but the arbitrary rule which would follow the court's decision on the main point and is not based upon what actually may have happened. In fact it would appear to be pretty surely contrary to the view of the parties at the time of the condemnation. They must have expected the easement to be unlimited in point of time, in view of the fact that it was not in terms limited, that it was in substitution for unlimited privileges of deep water access, and that the canal itself was in terms to last forever. The court's point of view is shown in its contention that to decide for the plaintiff is to hold that the franchise cannot be relinquished even with legislative consent.

Now if it were necessary to accept the dilemma as offered by the court and hold that under the circumstances the franchise could not be abandoned without infringing the plaintiff's rights, that result would nevertheless seem much fairer than the one reached in the case. And although the court states that the case is a novel one, there would not seem to be wanting cases fairly analogous, such as those where damages are claimed and, under the better rule at least, are awarded for destruction of an abutting owner's privilege of access when a highway is abandoned.[2] The cases cited by the court[3] state only the obvious rule that a franchise may be abandoned with legislative consent without infringement of rights of members of the public in general. It is, of course, clear that the operation of a franchise may give individuals at large certain privileges, e. g. of transportation, and incidental rights, e. g. against discrimination, although such individuals would not thereby obtain rights that the franchise should not be abandoned.

[2] See cases collected and considered in RECENT CASE NOTES (1919) 28 YALE LAW JOURNAL, 606, 607, to *Morris v. Covington County* (1919, Miss.) 80 So. 337 (damages awarded for destruction of means of access by abandonment of a highway). As to the awarding of damages only, the court in the principal case at the plaintiffs' request dismisses the bill without prejudice to any possible action at law, though it expressly states that it does not believe there is any remedy at law. It would seem, moreover, that injunction and not damages is the remedy and that the canal company, having taken part of the plaintiffs' property by eminent domain, should, if it desires to destroy the remnant, be relegated to the same method.

[3] *Vought v. Columbus, etc., Ry.* (1898) 58 Oh. St. 123, 50 N. E. 442; (1900) 176 U. S. 481, 20 Sup. Ct. 398, 44 L. ed. 554; *Walsh v. Columbus, Hocking & A. R. R.* (1900) 176 U. S. 469, 20 Sup. Ct. 393, 44 L. ed. 549; *Chase v. Sutton Mfg. Co.* (1849, Mass.) 4 Cush. 152; *Fredericks v. Penn Canal Co.* (1885) 109 Pa. 50, 2 Atl. 48; *Saylor v. Penn Canal Co.* (1897) 183 Pa. 167, 38 Atl. 598, 63 Am. St. Rep. 749. As to a change of use, see note 7, *infra*.

The situation would be vastly otherwise, however, in the case of obligations assumed by the franchise owner in favor of certain definite individuals.[4] Would the Virginia court say that a street railway company, for example, might repudiate its debts upon obtaining consent to abandon its franchise? If so, there may still be a ray of hope for trolley investors. Surely a disinclination to hold the canal company responsible for the maintenance of the canal is too small a basis upon which to find a limitation of the plaintiffs' rights.

But the case does not call for a decision on this point. It does not deal with a claimed duty upon the part of the canal company to continue the canal, but with the canal company's claimed power to sell out to the railroad a privilege of active obstruction. The plaintiffs are not asking for affirmative action from the defendants, but only that the defendants' affirmative acts of obstruction be enjoined. Although the plaintiffs' petition clearly points this out,[5] the court utterly fails to observe the distinction. It is submitted that a judgment for the plaintiffs would follow a recognition of this distinction through the application of either one of two well settled legal principles: (1) that one who has an easement may sue for its obstruction, though in the absence of agreement he himself must keep in repair the physical objects necessary to its exercise;[6] and (2) that where originally only an easement in land is condemned for public purposes, the owner upon the abandonment of the public use holds the land as before the condemnation.[7] The court adverts to neither of these principles, but does state that the servient tenement to the easement of each landowner is the

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[4] Cases which seem more apposite than those cited by the court are those of leases of the surplus water not needed for canal purposes, where it is held that the implied covenant to the lessee of quiet enjoyment does not prevent an abandonment of the franchise with legislative consent. *Hoagland v. New York, etc., R. R.* (1887) 111 Ind. 443, 12 N. E. 83, 13 N. E. 572; *Fox v. Cincinnati* (1881) 104 U. S. 783. But the analogy is only apparent. It does not seem improper to draw the inference, where the parties are freely contracting with each other, that they contemplate the lease to end with the franchise. Moreover, the lessee cannot be so very greatly harmed since his obligation to pay rent must cease at the same time.

[5] Par. 18 of the petition to the effect that even if the canal company might be permitted to suspend operation of the canal, it "had no right . . . to authorize said N. & W. Ry. Company to destroy the navigation of the same by your orators."

[6] This principle is so obvious that cases are not cited. That the owner of the easement must make his own repairs has long been settled. See *Taylor v. Whitehead* (1781, K. B.) 2 Doug. 745.

[7] *Vought v. Columbus, etc., Ry., supra; Whitney v. State* (1881) 96 N. Y. 240, 248. It has been held that by legislative consent one easement of a public nature may be substituted for another, as a railroad may be substituted for a canal, but *only upon paying for the additional damage caused. Hatch v. Cincinnati, etc.* (1868) 18 Oh. St. 92, 122. Even this has been denied. *Pittsburgh, etc., Co. v. Bruce* (1882) 102 Pa. 23, 28. See 9 C. J. 1151.

franchise and also that the canal company obtained the fee of the land through which the canal flowed.

Considering these holdings *seriatim,* while the court cites authority for its holding that a franchise may be the servient tenement to an easement,[8] it would seem that this involves a confusion of thought. For the servient tenement is the *physical object* concerning which the easement owner has *legal relations* with members of the public in general, while a franchise is itself an aggregate of *legal relations* of the same general nature as the easement.[9] But this point may be waived since it is clear that what the court's holding really amounts to is that the easement can last only as long as the franchise. Why this holding? The court's answer is quite involved, but seems to be this. The "right" of passage is created by the commonwealth as an incident to the grant of the franchise. The land itself is acquired in fee by the canal company either through condemnation or purchase and hence is a grant from the individuals, to which the commonwealth is not a party. The right can only be attached to the commonwealth's own creation, viz., to the franchise. Hence it ends with the ending of the franchise. This is a manifest *non sequitur.* The commonwealth has made the building of the canal and the exercise of the power of eminent domain expressly subject to the proviso of giving the right and privilege of passage. The canal company need not have accepted the authorization in view of this proviso. As it did accept, the proviso must necessarily enter into and form a part of the agreement between the company and each landowner whose land was taken under the company's power.[10] And the proviso is more than a mere agreement; it has all the essentials of an easement giving *in rem* rights against people in general.[11] It seems clear that the easement exists inde-

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[8] Washburn, *Easements and Servitudes* (4th ed. 1885) 7, 9, 10, 22, and 2 Minor, *Institutes* (3d ed. 1879) 5 are cited.

[9] For discussion of the nature of a franchise see (1919) 28 YALE LAW JOURNAL, 485; of the nature of an easement, see (1917) 27 *ibid.,* 66, and (1919) 29 *ibid.,* 218. In this case is not the land with the canal running through it the servient tenement?

[10] This would surely follow if the land was acquired by eminent domain, and as the parties undoubtedly contracted in view of the express provisions of the statute, it would seem to follow equally if the land was acquired by grant. The plaintiffs' petition does not disclose which method was ultimately employed.

[11] Even though the term "property" is used in distinction to the term "contract" the interest here created fulfills all the requirements of "property." As the writer has elsewhere suggested (1919) 29 YALE LAW JOURNAL, 94, note 16, this restricted use of the term property is not in accordance with ordinary usage, which would include contract obligations as property. In general terms property means anything which *may have* economic value. *Cf. Slaughterhouse Cases* (1873, U. S.) 16 Wall. 36, 127: "Property is everything which has an exchangeable value." Hence one party to every legal relation would have property. The person having the property would ordinarily be the one who has

pendently of the franchise and that its duration depends on ordinary principles, namely, that the intent of the parties at the time of its creation shall determine its duration. As suggested above, this intent was pretty surely that it should be unlimited, especially in view of the fact that it was substituted for unlimited rights and privileges of deep water access.

On the other point the court merely states that the canal company acquired a fee simple. It is clear in any event that it was not an unencumbered fee simple. Comparing the position of the landowners before and after the acquisition of the property by the canal company, it would appear that *before* such acquisition the landowners possessed the various rights and privileges which go to make up ownership including those of deep water access, while *after* such acquisition though a part of these rights and privileges had ceased there nevertheless existed the rights and privileges of deep water access. True these rights and privileges were not strictly the same as those previously existing, since they were to be exercised in a slightly different manner, but they are sufficiently analogous to make the situation more closely identical with the taking of only a part of one's property in land, than with a taking of the entire property. Hence there would be a situation calling for the application of the rule previously referred to that the property still remaining in the original owners is not destroyed by the abandonment of the public use.

It may therefore be debatable whether under the proviso in question it was intended that the canal company should be under a duty to keep the passageway in repair. But in view of the express wording of the proviso it hardly seems debatable that the company and its grantee are under a duty not to obstruct the passageway or cause it to be obstructed.[12] One may hope, therefore, that the case will reach the United States Supreme Court.

C. E. C.

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the affirmative (right, privilege, power or immunity) end of the legal relation, though liabilities or duties, for example, may sometimes be desirable and hence exchangeable. In this view property would also include rights and privileges ordinarily termed "personal," e. g. the right to personal liberty, the right to personal security. This would seem accurate. What Esau sold Jacob for a mess of pottage—his "birthright"—was something more than a right of inheritance. It seems to have included, among other things, the privilege of sitting first at the table. 43 Genesis, 33. So the spectacle of prize fighters relinquishing the right of personal security for money is common. The result is that property is too general a term for use in careful analysis where avoidable. Hence the ancient dogma criticised in (1920) 29 YALE LAW JOURNAL, 344, that "equity protects only property rights" is, when analyzed, unobjectionable but meaningless.

[12] Note particularly the latter part of the proviso quoted above in note 1, *supra*.