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THE COMMON LAW BACKGROUND OF THE RIPARIAN DOCTRINE

T. E. LAUER*

I. INTRODUCTION

The origin of the American riparian doctrine of water use, whereby each owner of land upon the banks of a watercourse has the right to make a reasonable use of the water, is customarily placed shortly after the year 1825. Traditionally, the creation of the riparian doctrine has been ascribed to two of the greatest early American jurists, Joseph Story¹ and James Kent.²

In 1826 there came before Joseph Story, sitting as a judge in the United States Circuit Court for the District of Rhode Island, the case of *Tyler v. Wilkinson*.³ This case, described by Justice Story as "a very important case, complicated in facts and voluminous in testimony," involved the right of certain mill owners to divert water from the Pawtucket River through a trench; the complainants were other mill owners who owned mills on the river, and who challenged this diversion as being

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1. Joseph Story was born in Massachusetts in 1779, graduated from Harvard and was admitted to the bar in 1801. He served several years in the Massachusetts legislature, and was a representative in Congress for a few months in 1808-09. In November 1811, when Story was but thirty-two, he was appointed by President James Madison to the United States Supreme Court, where he remained until his death in 1845. During his nearly thirty-four years on the Court, Story played a great part in developing the scope and power of the federal judiciary. In addition to his judicial activities, Story was from 1829-45 a law professor at Harvard, and wrote many articles and valuable treatises, including landmark works on the Constitution, conflict of laws, equity and agency.

2. James Kent was born in New York in 1763, graduated from Yale and began the practice of law in 1785. He served as a law professor at Columbia College from 1793-98, and again after 1822. He served on New York's highest court from 1798-1814, the last ten years as chief justice. In 1814 Kent was appointed Chancellor of New York, a position he held until 1823, when he resigned and returned to his position as a law professor at Columbia. His chancery decisions were highly regarded, and contributed greatly to the development of American equity law. Certainly his outstanding contribution, however, was his *Commentaries*. Kent died in New York in 1847.

3. 24 Fed. Cas. 472 (No. 14,312) (C.C.D.R.I. 1827).

injurious to their mills. Justice Story wrote an elaborate opinion, in which he discussed at length the rights of riparian owners, the effect of prior use of the water, and the acquisition of prescriptive rights through exclusive uninterrupted use for more than twenty years. He rejected the notion that simple prior use alone gives any right to the water, holding that each riparian owner has a right to a reasonable use of the water, provided such use is not "positively and sensibly injurious" to the rights of other riparian owners. The case was ultimately decided on the basis that the diverting mill owners had a prescriptive right to their diversion, and further that the whole matter had been settled and compromised through a written agreement executed by the parties' predecessors. But the underlying legal principle was clear: each riparian had a right to a reasonable use of the water.

The *Tyler* opinion was handed down in 1827. The following year, James Kent published the third volume of the first edition of his *Commentaries on American Law*, in which he cited *Tyler v. Wilkinson* in his discussion of water rights, and stated the rule to be that:

All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect the application of the water by the proprietors below on the stream.⁴

Kent's *Commentaries* became an American counterpart of Blackstone, and over the succeeding years of the century passed through more than a dozen editions.⁵ Particularly in the area of property law, this treatise had a substantial effect upon the development of American law throughout the nineteenth century. The principle of reasonable use was again set forth in 1838 by Story in *Webb v. Portland Manufacturing Co.*,⁶ and thereafter was adopted by the courts of the eastern states.

Taken together, then, Story's opinion and Kent's treatise mark the inception of the "reasonable use" doctrine of riparian rights in American law. This doctrine represents a substantial advance over earlier American and English law, and viewed in any dimension is a remarkable achievement. But the doctrine did not spring full-blown from the minds of Story

4. 3 KENT, COMMENTARIES 354 (1st ed. 1828).

5. Perhaps the most notable of the later editions is the twelfth, published in 1873 and edited by a young Boston attorney, O. W. Holmes, Jr., who later achieved a certain prominence as a judge and scholar.

6. 29 Fed. Cas. 506 (No. 17,322) (C.C.D.Me. 1838).

and Kent; it was merely a blending, a culmination of their learning, which in turn derived from generations of legal experience, partly in America, but for the most part upon the European continent.

Both Story and Kent drew heavily upon the civil law in promulgating the reasonable use doctrine. Kent cites in his *Commentaries* the Code Napoleon, which had become the law of France in 1804; and although Story's opinion cites no civil law source directly, it is strongly flavored with the approach suggested by the Code Napoleon. The provisions of the Code Napoleon (also known as the Code Civil) do not spell out the concept of reasonable use, but do reach the threshold of the doctrine by indicating that disputes between riparians should be determined upon the particular merits of each individual case, according to a general standard.⁷ Yet the Code Napoleon was itself not a radical departure from earlier French law, but largely a reflection of civil law thought dating back at least as far as the Code and Institutes of Justinian, published in 533-34 A.D.

But it was not the civil law alone which provided the elements of the reasonable use doctrine. In addition to their knowledge of the civil law, Story and Kent drew heavily upon centuries of common law experience and development. It must, of course, be kept in mind that these American jurists did not simply adopt an English common law doctrine. The reasonable use test was decidedly not English in its origin. Indeed, it was 1851 before the Court of Exchequer⁸ adopted the riparian doctrine, and in so doing it cited both Kent and Story as authority. On the other hand, equal care must be taken to avoid the unfortunate conclusion that the common law background had little or nothing to do with the American adoption of the riparian doctrine.⁹

English water use law prior to 1825 demonstrates to a substantial degree how English courts and legal writers groped and struggled across the centuries in an effort to reconcile the conflicting interests of various classes of persons in the use of the rivers and streams of their land. As new problems developed due to the growth of population, commerce and

7. See, e.g., CODE NAPOLEON art 645, Code Civil art. 645 (Daloz 1955).

8. *Embrey v. Owen*, 6 Exch. 353, 155 Eng. Rep. 579 (Exch. ch. 1851).

9. After the Revolution, and particularly after the war of 1812, there existed in the United States a high degree of antipathy to all things British. It cannot be denied that American legislation and judicial decisions were often strongly affected by this popular feeling. Yet it is surely an overstatement to assert that Americans were not acutely aware of, and often favorably influenced by, the actions of Parliament and the English courts.

manufacturing, English jurists worked within the framework of the existing legal system—a system which gave high status to property rights—in an effort to develop water use doctrines consistent with the general fabric of English law. In this, they displayed a considerable amount of ingenuity and achieved a fair measure of success. The law which they declared contained many of the elements of the riparian doctrine, but in an embryonic state. The great contribution of Story and Kent was to tie together the loose ends of the existing common law by means of the reasonable use test derived in large part from the Code Napoleon and its forerunners.

II. EARLIEST TIMES

English law relating to the use of the water of rivers and lakes is fairly uncertain prior to the time of the Norman conquest. It is true that for a period at the beginning of the Christian era the British Isles were under Roman domination and experienced the tenets of Roman law; but very little is known of English water use law of this period, and in any case the early Roman law had little effect upon the law of later centuries. Nor does much remain from the early Anglo-Saxon period, with the exception of scattered references in laws or charters of the kings. There is merely enough to indicate that the value of watercourses for navigation and for powering mills was recognized, and that one holding land upon which a watercourse flowed had a right, apparently, not to have the watercourse diverted.¹⁰ Other than this and an occasional reference to "water dues,"¹¹ which probably referred to a toll for navigation rather than for consumptive use of water, there is little to indicate what water use law existed in England prior to 1066.

This apparent lack of comprehensive legal regulation of the use of watercourses is doubtless due to the nature of pre-conquest English civilization. Society was extremely decentralized, consisting of a number of virtually autonomous principalities each governed by its local lord. The king had but a small measure of control over these lords, who in most cases supported him only when it was clearly in their personal interest to

10. A decree of King Edgar, about 970 A.D., relating to the adjustment of boundaries between certain monasteries in Winchester, assigned two mills to Abbess Eadgifu in exchange for allowing a watercourse to be diverted. ROBERTSON, *ANGLO-SAXON CHARTERS* 103-05 (2d ed. 1956).

11. See ROBERTSON, *op. cit. supra* note 10, at 159, 175-77, for examples of eleventh century charters which grant or affirm water dues. That the term probably pertained to navigation is indicated by the fact that it was used in close association with "shore dues" given for the privilege of landing ships.

do so. There was no centralized system of courts, and the king was unable to legislate for the nation. Laws were for the most part locally created and locally enforced.

Moreover, the use of watercourses in Anglo-Saxon times was not great, and the uses which did exist, such as mills and navigation, for the most part used the water as it was found and did not affect its quantity or quality. Further, only a small amount of water was consumed for domestic or livestock purposes. There was enough water for all, and few controversies arose over water use.

When William the Conqueror added England to his Norman domain, there was no immediate change in the water law of the nation. However, William succeeded in giving England a more centralized form of government, and unquestionably the Norman and continental influence upon the shaping of English law thereafter was great.

III. THE EARLY TREATISES: GEANVILLE, BRACON AND BRITTON

Only after the Norman conquest did England develop a regular system of courts and lawyers. This development took place gradually over several centuries, during which there was still a considerable diversity between the local law and the law of the king's courts. Also, during this time confusion between secular and religious functions and powers complicated the administration of the law. Our chief sources of legal knowledge during these centuries are several treatises written by persons who were closely associated with the courts and administration of the law.

One of the earliest references to the law of watercourses in post-conquest times is found in those writings which have been denoted *Glanville*, and which date from about 1187.¹² As with many other early works of English law, *Glanville* was principally concerned with the procedural aspects of the law, and about one-third of its contents consists of writs issued by the king's court. Further, the work itself provided an incomplete picture of English law during the twelfth century, since it dealt only with the law of the king's courts, and ignored altogether the

12. Spelled variously *Glanville*, *Glanvill* or *Glanvil*. Although this work was for many centuries attributed to Ranulph de *Glanville*, who was Chief Justiciar of England under Henry II, its actual author remains unknown. The work was written in the time of *Glanville*, however, and has long been known by his name. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 256-57 (5th ed. 1956) [hereafter cited as PLUCKNETT]; 1 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 162-67 (2d ed. 1898) [hereafter cited as POLLOCK & MAITLAND].

mass of local law and custom which then prevailed.¹³ Among the purpresures, or encroachments upon the public or royal domain, detailed by *Glanville* is that of "turning public waters from their right course," which might involve as a penalty the loss by the offender of his tenement.¹⁴ Unfortunately, *Glanville* did not spell out which rivers or streams were "public." However, this reference does indicate that some general interest in watercourses was recognized and protected in the twelfth century.

A broader view of English law was taken by Henry of Bratton, or Bracton as he is popularly known,¹⁵ when at about mid-thirteenth century he wrote *De Legibus et Consuetudinibus Angliae*.¹⁶ In addition to a wide use of English law in this treatise, Bracton also relied heavily upon the Roman law.¹⁷ This work is remarkable not only for the picture of the thirteenth century English legal scene which it imparts, but also because it introduced to the common law two of the principal features of common law jurisprudence. First, Bracton employed broad legal principles in his writing; he was concerned not only with English law as it then was, but also with what he thought the law ought to be, in the light of universal legal maxims derived from Roman and natural law tradition and elsewhere. According to Pollock and Maitland, without this approach a treatise the quality of Bracton's would have been impossible; "some beggardly collection of annotated writs would have been the best that we should have had from him."¹⁸ Secondly, Bracton brought to legal writing what has since been the most distinguishing feature of the common law: the use of judicial decisions as authority for the statement of legal principles. Bracton made

13. PLUCKNETT 256-57; 1 POLLOCK & MAITLAND 162-67.

14. GLANVILLE 9.11-13 (Beames transl. 1900).

15. See KANTOROWICZ, BRACONIAN PROBLEMS 14-16 (1941).

16. In this study I have used BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE (Twiss ed. 1878-83) [hereafter cited as BRACON]. Citations are given in the sequence of book, treatise (where applicable), chapter and section, as found in the Twiss edition. Thus a citation to BRACON 1.12.5 means book one, chapter twelve, section five; BRACON 4.1.37.1 means book four, treatise one, chapter thirty-seven, section one.

17. Sir Henry Maine accused Bracton of appropriating from the Corpus Juris of the Roman law "the entire form and a third of the contents" of his treatise. MAINE, ACIENT LAW 79 (Beacon ed. 1963). This is probably something of an overstatement. Nevertheless, the influence of the Roman law upon Bracton must be acknowledged. See e.g., 2 HOLDSWORTH, A HISTORY OF ENGLISH LAW 212-32 (1909) [hereafter cited as HOLDSWORTH]; 1 MAITLAND, BRACON'S NOTE BOOK 9-10 (1887); PLUCKNETT 261-62. Bracton was apparently influenced strongly by the writings of Azo, a professor of civil law at the University of Bologna, who died in 1230. See MAITLAND, BRACON AND AZO (Selden Society 1895).

18. 1 POLLOCK & MAITLAND 208.

repeated reference to contemporary cases, some five hundred in all.¹⁹ This use of case law marks an important event in the development of the common law.²⁰

Bracton followed closely the Roman law in his discussion of public and private rights in watercourses. Like the *Institutes* of Justinian, he held that flowing water is common property by "natural right."²¹ Similarly, he wrote that all rivers and ports are public, and that the right of fishing in these waters is common to all persons.²² Persons using a river also have a right to the use of the banks, regardless of whether the real property constituting the banks is privately owned.²³ Bracton distinguished between a river, which is perennial, and a stream, which was said to be temporary in nature and which might be the subject of private property.²⁴ In describing rivers and their waters, Bracton used both the term "public" and the term "common," but it is difficult to perceive what difference, if any, is meant between the two.²⁵ Bracton's reliance to a great degree upon Roman law would tend to indicate that English law at mid-thirteenth century had not become so sophisticated as to sustain nice distinctions between public and private rights to the use of watercourses. English law, still deeply within the shadow of the feudal age when public and private rights were merged in lord and overlord, was unable yet to separate a so-called "public" right from its private holder.

19. 1 *Id.* at 209. In addition to the cases cited in his treatise, Bracton copied from the plea rolls of his day and annotated some two thousand cases whose result apparently met with his approval. These labors were discovered only in 1884 by Sir Paul Vinogradoff, and can have had no influence upon the development of the earlier English law. See MAILLAND, BRACTON'S NOTE BOOK (1887). Bracton's *De Legibus* did have a profound effect upon later English jurists, and clearly helped shape the subsequent development of the common law.

20. GRAY, *THE NATURE AND SOURCES OF THE LAW* 212-15 (2d ed. 1921), indicates that for centuries after Bracton, very little reference to prior judicial decisions was made by either the English legal writers or the courts. This, however, does not detract from the importance of Bracton's use of decided cases as authority.

21. BRACTON 1.12.5.

22. BRACTON 1.12.6

23. *Ibid.*

24. *Ibid.*

25. *Ibid.* Bracton did seek to distinguish in this section between things "public" and things "common," but in the Twiss edition of his work the distinction is quite vague:

Note this difference between what is public and what is common. Those things are reckoned as public, which are enjoyable by all persons, that is, which regard the use of human beings alone. But things may be sometimes termed common, which are enjoyable by all animals.

In a separate portion of his treatise, in connection with his discussion of the assize of novel disseisin, Bracton set forth much of the English water use law of the period. In so doing, however, Bracton neglected altogether his earlier differentiation between public and private watercourses.

The assize of novel disseisin originated in 1166 at the Council of Clarendon, under Henry II,²⁶ and provided a rapid means in the king's court whereby a person dispossessed of his free tenement might, by use of the royal writ and a jury of twelve, be restored quickly to his premises by establishing (1) that he had been seized of the premises, and (2) that he had been dispossessed of them.²⁷

For a person to take advantage of the assize of novel disseisin, it was not necessary for him to have been driven completely from the land; it was sufficient that he had been dispossessed of a part of it, either through the direct occupancy of another or by action of some agency under the control of, or attributable to, another. It is generally in this last sense that Bracton incorporated much of the early English water law into his discussion of this assize. Bracton also discussed rights in watercourses in connection with the assize of nuisance, which provided relief against acts which were wrongful, but which in themselves amounted to less than a trespass or an act of disseisin.²⁸

Bracton discussed two kinds of rights relating to watercourses and their use: rights naturally incident to the ownership of land, and servitudes created consensually by private persons. Interferences with these rights fell within the scope of the assize of novel disseisin or its supplement, the assize of nuisance.

Turning first to those rights naturally incident to the ownership of the land, Bracton laid down the very basic maxim that "no one may do in his own estate any thing whereby damage or nuisance may happen to his neighbour."²⁹ This fundamental legal principle supplies not only the

26. 1 POLLOCK & MAITLAND 145.

27. PLUCKNETT 358-60; 1 POLLOCK & MAITLAND 146. Prior to the creation of the assize of novel disseisin, the only remedy possessed by a disseised person was to prove in lengthy proceedings before a feudal court that his title was valid as against that of his disseisor. *Ibid.*

28. 2 POLLOCK & MAITLAND 53, 534. See BRACTON 4.1.45.10 for a discussion of the choice in a given case between an assize of novel disseisin and an assize of nuisance.

29. BRACTON 4.1.37.1. The nuisance to which he referred is an "injurious nuisance," as distinguished from a "just nuisance," for which there is no remedy. Bracton distinguished between "damage" and "injury," the first concerning the effect upon the victim, and the second referring to a legal wrong. Thus, there can

foundation of the law of nuisance, but also the basis for the reasonable use test of the riparian doctrine. Bracton's age, however, was not so much concerned with conflict over apportionment of the water of streams for large consumptive purposes as it was with use of the water in place for navigation, powering of mills, and the abstraction of relatively small quantities to meet human and animal need. These latter uses removed little water from rivers and streams, and thereby gave scant cause for complaint of diminution. It follows that Bracton was mainly concerned with abuses relating to the use of watercourses *in situ*. Thus he set forth that a landowner might not create or heighten a pond so as to flood the lands of his neighbors.³⁰ Likewise, it was improper to construct a foss or ditch which diverted a watercourse in whole or in part, thereby depriving one's neighbors of water.³¹ One might, however, divert a stream in any manner desired for use on his own premises, so long as after use the water was returned to its "ancient bed" before it reached the lands of another.³² Apparently some diversion of watercourses was not uncommon, for Bracton also specifically mentioned that it is wrongful for one having no right in a watercourse to hinder its modification by others.³³

Another concern of the thirteenth century was the "cleansing" of watercourses to keep them in their channels and flowing normally. Although Bracton made no mention of any positive duty on the part of a landowner to remove silt or debris from a river or stream, he did indicate that it was wrongful for a landowner to interfere with the cleansing of a watercourse by others.³⁴ Some cleansing of channels was of benefit to all persons, but too much cleansing could result in the modification of the flow of the watercourse. Overzealousness in this matter was therefore wrongful, in the same fashion as other modification or diversion, and the watercourse could be returned to its "pristine state" by an assize.³⁵

be, according to the ancient maxim, *damnum asque injuria*—damage without injury. Bracton illustrated this by an example of a person constructing on his land a mill, whereby he acquires customers who had formerly patronized the mills of his neighbors. The new mill is certainly a nuisance to the neighbors, and damages their business, but because it is not injurious—*i.e.*, not prohibited by law—the neighbors can gain no judicial relief. *Ibid.*

30. BRACTON 4.1.37.1, 4.1.44.1, 4.1.45.10.

31. *Id.* at 4.1.37.1, 4.1.45.9.

32. *Id.* at 4.1.37.1. It is interesting that Bracton spoke of watercourses as flowing in their "ancient bed," rather than describing them as following their "natural" course or channel, as a modern writer would tend to do. It is doubtful, however, whether there is any difference in the meaning of the two terms.

33. BRACTON 4.1.45.9.

34. *Id.* at 4.1.37.1.

35. *Id.* at 4.1.45.9.

Bracton further recognized a public interest in watercourses, and that this public interest is entitled to protection by the courts. Accordingly, Bracton stated that where one upon his own land erects structures which interfere with the flow of a watercourse or the passage of fish therein, and in so doing does not inflict actionable injury upon his neighbors, but does affect a common public interest, he will be required to remove the structures, because the public interest is preferred to the private interest.³⁶

In addition to rights naturally incident to the ownership of land, Bracton recognized that certain servitudes regarding watercourses may be created by consensual agreement or by prolonged use over a period of time. The right to an entire watercourse might be granted,³⁷ or there might be created a servitude in the nature of an easement to divert water across the lands of others to one's own tenement for irrigation or "to serve some other convenience."³⁸ The right to drink and draw water from a watercourse carried with it a right of free ingress and egress upon the premises where the source of the water was located.³⁹ Further, the right to draw water included the right to cleanse the watercourse from which it was taken.⁴⁰ Interference with these servitudes and their appurtenant rights was wrongful, and the assize of novel disseisin or nuisance could be used to terminate such interference.⁴¹

The light shed on thirteenth century water law by Bracton's treatise discloses a predominantly rural society in which watercourses were employed to fill the needs of agriculture and domestic life. Rivers and streams were used for the most part in their natural location, with occasional diversions for water power or other purposes. Property rights undoubtedly existed in watercourses, as one upon whose land a river or stream anciently flowed had a right to have its water continue to come to his premises for use. On the whole, there was probably more than enough water to meet the needs of those upon whose lands the rivers flowed, because rights to use or partially divert watercourses could be granted freely to other persons.

Although local controversies between water users no doubt arose, Bracton gave no indication as to how they were to be reconciled in instances where all were making a use of the water which inflicted no positive

36. *Id.* at 4.1.44.1.

37. *Id.* at 4.1.37.1, 4.1.43.1.

38. *Id.* at 4.1.42.

39. *Id.* at 4.1.43.1.

40. *Id.* at 4.1.44.1.

41. *Id.* at 4.1.37.1, 4.1.42.

harm upon the others. The treatise is silent as to whether a rule giving preference to ancient or prior use was followed, or whether a variation of the principle mentioned earlier, by which no man should act upon his land to the injury of a neighbor, was employed as a guide for determination. In short, the water law of Bracton's day, although perhaps adequate for thirteenth century England, was far less developed than the riparian doctrine of the nineteenth century.

About thirty-five years after Bracton's treatise there appeared two other works, both based upon Bracton, which referred to the water use law of the period. One of these works, known as *Fleta*, is of obscure authorship; written in Latin, it probably was never widely known in medieval times and was brought to public attention only in 1647, when it was printed by Selden.⁴² According to *Fleta*, the air, the sea, and the shores of the sea are common, while rivers and harbors and the right of fishing therein are public.⁴³ A distinction is drawn between things common and things public by specifying that the benefits of common property extend only to persons affected thereby, while the benefits of public property may be enjoyed by everyone.⁴⁴ It was further stipulated in *Fleta* that it constituted an invasion of the king's peace to construct in the sea or in fresh waters purprestures which adversely affected the interests of the king, whether such interests belonged to the king alone or existed in conjunction with the interests of private persons.⁴⁵

The second thirteenth century treatise patterned after Bracton's *De Legibus* is known as *Britton*. *Britton's* authorship is as obscure as that of *Fleta*,⁴⁶ but because it was written in the commonly used French language, rather than Latin, it became at once a highly popular treatise, and was perhaps more widely read than either Bracton or *Fleta*. *Britton* was written in the form of a code, ostensibly issuing from the sovereign; the reasons for this novel manner of presentation are unknown.⁴⁷ Generally, *Britton* followed Bracton in detailing the law applicable to watercourses. Under the heading of tortious nuisances, the treatise described as wrongful

42. PLUCKNETT 265.

43. FLETA 3.1.4 (1685 ed.)

44. *Id.* at 3.1.5

45. FLETA 1.20 at 47 (Richardson transl., Selden Society Vol. 72 (1953)).

46. Baldwin, *Introduction*, BRITTON viii-xi (Nichols transl. 1901).

47. PLUCKNETT 265-66. Perhaps the author of BRITTON, who was unquestionably familiar with the Roman law, was influenced by the Institutes of Justinian.

the raising of a pond so as to flood a neighbor's tenement;⁴⁸ interfering with the common right of a neighbor to gain access to a source of water, or to water his cattle or draw water therefrom;⁴⁹ or preventing the cleansing or repairing of a watercourse which furnished power to a mill.⁵⁰ Likewise, it was a tortious nuisance amounting to a disseisin to divert or obstruct a watercourse so as to deprive neighbors of its flow.⁵¹

Britton detailed some of the procedure by which wrongs to watercourses were remedied. At the sheriff's tourn, held in every hundred twice each year—the hundred being one of the smaller units of medieval governmental organization in England, originally composed of ten groups of ten families of freeholders⁵²—twelve jurors were selected to make inquiry of breaches of the peace, including instances of any watercourses “stopped or narrowed or turned from their course.”⁵³ If such an interference were found, it was to be remedied immediately, either by the wrongdoer, or, if he refused or could not be found, then by the jury itself.⁵⁴ With regard to servitudes concerning watercourses, created consensually or by ancient use, *Britton* followed Bracton, stating that a watercourse might be granted to a person or to a tenement. In the case of a grant to a person it was for his lifetime only, but if made to a particular tenement it was perpetual and an assize of nuisance or novel disseisin would lie for its interference.⁵⁵ Rights might also be created to divert the water of streams and to convey it across intervening lands to a place of intended use.⁵⁶

As to the rights of the public in waters, *Britton* had little to say. Apparently some rivers were common, but one must gather this largely from implication. On the other hand, the air, the sea, the seashore, and fishing rights in the sea and rivers were expressly said to be common.⁵⁷ *Britton* avoided the dual classification of things as “public” and “common” which proved troublesome to Bracton, and which probably had no foundation in English law, having been abstracted from Roman sources.

48. BRITTON 2.30.3 at 317 (Nichols transl. 1901) [hereafter cited as BRITTON]. The citations are as follows: Book, chapter, section. The volume number of the Nichols translation has been disregarded.

49. *Id.* 2.30.1 at 316; 2.30.4 at 317.

50. *Ibid.* This is described as equivalent to a direct interference with the operation of the mill itself.

51. BRITTON 2.30.1 at 316.

52. 1 BLACKSTONE, COMMENTARIES 113-16.

53. BRITTON 1.30.2, 1.30.3 at 146.

54. *Id.* 1.30.8 at 151.

55. *Id.* 2.30.5 at 318.

56. *Id.* 2.30.1 at 316.

57. *Id.* 2.2.1 at 175.

The similarities between Bracton and *Britton* are manifest; both dealt primarily with the rural aspects of water use in a time when there was apparently very little water shortage, other than that caused by an outright diversion or obstruction of a stream. Neither was forced to consider the problems of water law created by a more complex society, such as limited rights of use, restrictions on situs of use, and the matter of "property rights" in the water itself. In a static world where "progress" was an unknown concept, the principles of ancient custom and use sufficed; *Britton* specifically mentioned ancient usage and grant as being the twin bases upon which rights in watercourses were founded.⁵⁸

IV. OTHER MEDIEVAL SOURCES

Other sources disclose that in the medieval centuries the watercourses of England were of concern in three principal respects: navigation, fishing, and the negative interest in flood prevention.⁵⁹ The chief interest of the law, therefore, lay in the larger rivers and streams, although the problems of drainage of fields through small streams—called "sewers" in this early age—were not neglected. Clearly the main problem with regard to rivers and streams was to keep them unobstructed, both for the passage of vessels and the flow of water. Navigation was often impeded or rendered impossible by the great variety of objects and structures for catching fish that were put into the watercourses by owners of the adjoining land.⁶⁰ Ecclesiastical and other landowners so narrowed navigable channels with kiddles, weirs, and other devices that large rivers were reduced to passageways as small as twelve and eighteen feet, and ships could not pass.⁶¹ The existing records testify to the fact that greed in England was not born of the Reformation; the hale landlords, lay and spiritual, of the preceding centuries were absolutely ruthless in their abuse of public and private right. Chapter XXXIII of *Magna Carta* directed that "All kydells for the future shall be removed altogether from Thames and Medway, and throughout all England, except upon the sea shore."⁶² But even this served to ameliorate

58. *Id.* 2.30.3 at 317.

59. On the subject of medieval law and problems relating to watercourses, reference has been principally made to PUBLIC WORKS IN MEDIEVAL LAW (Flower ed., 1915, 1923) (Vols. 32, 40 Selden Society) [hereafter cited by its title]. Also of considerable aid has been Murphy, *English Water Law Doctrines Before 1400*, 1 AM. J. LEG. HIST. 103 (1957).

60. 2 PUBLIC WORKS IN MEDIEVAL LAW xxiii-xxvi.

61. 1 PUBLIC WORKS IN MEDIEVAL LAW 155; 2 *id.* at xxiv.

62. McKECHNIE, *MAGNA CARTA* 343 (2d ed. 1914). The term "kydells" covered dams, weirs or other barriers in watercourses, which were equipped with

the problem for only a short time. Later statutes also dealt with the obstruction of watercourses by fishing devices, both as a hindrance to navigation⁶³ and as an injury to the fishing industry generally through interference with the spawning of the fish.⁶⁴

In addition to this type of obstruction, there existed other obstructions to the flow of water, which caused flooding of adjoining lands as well as the hindrance of navigation.⁶⁵ Some of these obstructions were natural, and remained and grew worse because of the refusal of the owners of the adjoining land to cleanse the watercourses.⁶⁶ Others were intentional, some for the purpose of diverting a river to a new channel,⁶⁷ and some simply the natural consequence of filling river beds with fish traps, pilings, and other structures.⁶⁸

In areas predominantly low meadow or marsh, adequate drainage was a necessity. For this purpose, trenches and ditches were dug, and the small existing streams enlarged to bear the additional burdens of agricultural drainage. As early as the reign of Henry I (1100-1135), statutes regarding drainage were promulgated, and thereafter royal commissions were from time to time appointed to deal with local drainage matters.⁶⁹ The problems here were much the same as with larger watercourses. Obstructions resulted both from neglect of landowners to cleanse the channels and from intentional acts designed to impede the flow of water.⁷⁰ In urban places the ditches were obstructed by sewage, garbage, and other filth.⁷¹ All this of course resulted in the flooding of meadows and other lands, to the damage of landowners and tenants. From time to time there seem to have been suggestions by juries that ditches or sewers be improved or modified, as

nets and other devices to catch fish. Originally the complaint against kiddles was that they interfered with navigation; in later centuries it was also seen that they injured the fishing industry. *Id.* at 344-45.

63. 25 Edw. 3, c. 4 (1350).

64. 12 Edw. 4, c. 7 (1472).

65. On occasion, roads as well as fields were flooded; this was of particular interest to the king. Murphy, *supra* note 59, at 112-13.

66. 1 PUBLIC WORKS IN MEDIEVAL LAW 77-79

67. 2 *id.* at 106; Murphy, *supra* note 59, at 113.

68. 2 PUBLIC WORKS IN MEDIEVAL LAW 12-13.

69. 2 *id.* xxvii, xxviii.

70. 1 *id.* at 218, 269-70, 284-85; 2 *id.* at 55-56.

71. 2 *id.* at 32-33. Although the obstruction of the urban Fleet Ditch by "dung and other filth" was of some concern, lest it endanger the health of the inmates of Fleet Prison "by reason of the infection of the air and abominable stenches," nevertheless the chief complaint was that the congestion interfered with navigation, encroached upon the king's soil, and made an escape from the prison more likely than if the ditch had been filled with water.

by relocation,⁷² but for the most part the concern over drains was merely in maintaining the status quo through compelling regular cleansing of channels⁷³ and preventing or removing obstructions.

Other problems arose when millponds occasionally caused flooding of surrounding lands,⁷⁴ and there are recorded several instances of improper diversion of water from the king's millponds for use elsewhere.⁷⁵

During the waning medieval years in England, there is little record of any modification in the law relating to watercourses. Apparently the law remained much as Bracton and *Britton* had pictured it: almost wholly unconcerned with the consumptive use of water, but highly interested in the use of rivers and streams for navigation, drainage, fishing, and powering mills.

V. THE SEVENTEENTH CENTURY WRITERS

By the opening of the seventeenth century, considerable attention began to be devoted to rivers and their waters. Population had increased substantially, navigation had become the mainstay of England, and the character of the English economy had begun to assume an urban, manufacturing atmosphere, departing from the agricultural isolation of the earlier age.

New interest in the law relating to the use of rivers, however, did not develop overnight. For example, one of the most famous English legal figures of the first half of the seventeenth century, Sir Edward Coke, made scant mention of watercourses in his *Institutes*. Coke referred to water primarily in relation to the ownership of land, to which he applied the maxim *cujus est solum, ejus est usque ad coelum*—he who owns the soil owns to the sky.⁷⁶ Thus the ownership of land comprehended the ownership of all water found upon the land⁷⁷ and applied to running water⁷⁸ as well as to ponds.⁷⁹

72. 1 *id.* at 247.

73. According to Murphy, "[This] was an onerous burden to impose upon the individual landholder." *Supra* note 59, at 115.

74. 1 PUBLIC WORKS IN MEDIEVAL LAW 28.

75. 2 *id.* at 117-18.

76. COKE, FIRST INSTITUTE 4a, at 198 (Thomas ed. 1818).

77. *Ibid.*

78. *Id.* 5b, at 213.

79. *Id.* 4b, at 199-200. In addition, Coke in his *Third Institute*, which described the criminal law of England, stated it to be a felony to cut through or break certain dikes, whose destruction might cause the flooding of lands occupied by numerous persons. COKE, THIRD INSTITUTE, c. XLV (1797 ed.).

Coke's failure to deal more thoroughly with the law of watercourses is understandable if his position in the seventeenth century legal world is comprehended. As Plucknett says, Coke's "attitude towards English law was largely medieval"⁸⁰—in writing of the law he was looking primarily at the bygone past, limiting his subject matter to time-honored legal usage and form. This, however, is attributable to his defense of Parliament and the common law against the assertions of James I that law was derived solely from the monarch, who ruled by divine right. Coke sought to prove the contrary, that the existence of the law preceded the existence of the king, and therefore the position of the monarch and his powers were derived from the law, which stood above the king.⁸¹ To do this, he sought to demonstrate that the common law was based upon custom and reason, and antedated not only the kingship in England, but also both the memory of man and any historical records that might exist.⁸²

Coke's concept of private ownership of waters was not too far out of keeping with other seventeenth century writers. Sir Matthew Hale, for instance, in *De Jure Maris*, written about 1670, contended that "Fresh rivers, of what kind soever do of common right belong to the owners of the soil adjacent."⁸³ His position was that streams were for the most part private, except for public and royal rights of navigation and fishing.⁸⁴ In this, Hale's viewpoint was roughly similar to that of Coke, retaining the medieval concept of a river as part of the land through which it flowed, belonging as private property to the owner of that land with only a highly limited sovereign or public interest attaching therein. However, there exists

80. PLUCKNETT 282.

81. See POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (1957), especially c. 2.

82. By placing its foundations upon reason and custom, it was possible to argue that the common law had experienced little or no change since time immemorial. Coke and his allies and their successors ultimately succeeded in establishing parliamentary supremacy over the monarch before the close of the seventeenth century; but one can only wonder what was the total effect of their doctrinal teachings upon the common law—whether by demonstrating the immutability of the English constitution based upon the common law, they did not also retard the growth and development of the great institutions of the common law, particularly that of real property. For the career of Sir Edward Coke and a description of the legal setting of the conflict between the king and the common law, see 5 HOLDSWORTH 423-93. A more recent treatment of the same subject is BOWEN, *THE LION AND THE THRONE* (1956).

83. HALE, *DE JURE MARIS ET BRACHIORUM EJUSDEM* 5 (Hargrave's Law Tracts 1787). This work was written about 1670 and constituted the first part of a three-part treatise dealing principally with navigation and shipping.

84. *Id.* at 6-10.

between the theories of Hale and Coke a distinction whose implications should not be overlooked. Whereas Coke considered that all of the water within the bounds of one's tenement comprised a part of the land, and was therefore the private property of the owner of the land itself, Hale did not go so far, stating only that rivers were subject to private ownership. The difference lies in separating the concept of property in a river—an entity consisting of a stream of constantly replenished running water flowing in a designated bed—from that of property in the water which makes up the substance of the river. Whether Coke or Hale would have subscribed to such a differentiation is of course problematical. The distinction may be explained by the fact that Coke was largely concerned with the ownership of real property and the incidents thereof, while Hale dealt principally with navigation and shipping and was therefore more interested in the right of passage than the ownership of the soil or the water.⁸⁵

Not all English legal writers of the seventeenth century were in accord with Coke. In August 1622 Robert Callis delivered before Gray's Inn a reading on the Statute of Sewers,⁸⁶ which had been enacted nearly a century before, during the reign of Henry VIII.⁸⁷ The Statute of Sewers provided for the appointment of commissions to investigate drainage in various parts of the kingdom, and where obstructions or other injurious conditions existed to take the steps necessary to obviate them. These commissions originally were appointed for periods of three years, but under Elizabeth

85. This is a distinction largely ignored by later writers, who have cited Hale as authority for the common law rule as to rights in watercourses. Hale's treatise dealt with navigation, shipping and fishing, primarily in relation to ports and harbors, as well as to the sea. Watercourses were considered only insofar as they were useful for navigation and fishing, with passing reference being made to problems of accretion and reliction as it affected the ownership of the bed. Hale refrained completely from commenting upon other uses of water and watercourses; uses for power or domestic or manufacturing consumption are not within the scope of his work. Therefore, it would not seem unreasonable to conclude that Hale's comments were made from a particular frame of reference: that of a navigator. This would mean that it is neither altogether proper nor accurate to cite Hale as authority with reference to other uses of watercourses. In short, although Hale wrote in general terms, his remarks must be strictly limited to their context, and we should not attribute to Hale any wider scope than that, as far as *navigation* is concerned, rivers "do of common right belong to the owners of the soil adjacent."

86. CALLIS, READING UPON THE STATUTE OF SEWERS (1647) [hereafter cited as CALLIS].

87. 23 Hen. 8, c. 5, entitled "A general Act concerning Commissions of Sewers to be directed in all parts within this Realm." The original statute was to be in force for only twenty years, but subsequently by the act of 3 and 4 Edw. 6, c. 8, it was made perpetual, "to be observed and kept for ever."

I this term was increased to ten years.⁸⁸ Each commission had power to make necessary inquiries, to fine and otherwise punish wrongdoers, to levy assessments, to enact local statutes and ordinances, to exercise the sixteenth and seventeenth century equivalent of eminent domain, and to compel general obedience to its orders. These commissions were not, however, originated by the statute of Henry VIII, for this statute merely served as a kind of general enabling act for the appointment of commissions throughout the realm; it had for centuries been a practice for the king to appoint individual commissions when conditions in various parts of the kingdom warranted. Thus the statute of Henry VIII merely served to expedite the appointment of commissions, although the fact that it was enacted indicates that drainage problems in England were on the increase in the sixteenth century.

Callis spoke from experience, for he had been a member of various sewer commissions. His remarks dealt primarily with problems of jurisdiction and procedure under the statute, which were so complex as to be described as "dark and intricate."⁸⁹ However, in the course of his commentary there is much which relates to the status of rights in rivers in the early years of the seventeenth century.

Callis shrank from Coke's insistence that the person upon whose land water was situated owned the water as a part of the land; instead, he believed that there could be no property fixed in running water.⁹⁰ However, Callis did not mean that no one had any interest in flowing waters, for he went on to say:

And therefore I am of opinion, that taking this word *Aqua* for the bare running water, there can be no property therein, but as the same is incident to the soil, taking them two for one, it is drawn with the property thereof. . . .⁹¹

Thus Callis approached very near the modern position that no man has

88. The term was first enlarged to five years by the act of 3 and 4 Edw. 6, c. 8, and subsequently was lengthened to ten years by 13 Eliz. 1, c. 9, which further provided that if upon the expiration of a commission no new commission had been appointed, the justices of the peace of the shires in which the commission had jurisdiction might extend the term for a period of one year. This would seem to indicate that these commissions assumed a perpetual nature in many parts of England, and so great was the need for them that any gap in time without the existence of a commission was to be avoided.

89. CALLIS 8.

90. *Id.* at 56.

91. *Ibid.*

a property in the flowing waters themselves, but simply a usufructuary interest in them as they pass over his land.⁹²

Callis divided rivers into two general categories, but not without some confusion. He was certain, in view of the then recent *Case of the Royal Fishery of the Banne*,⁹³ that navigable rivers, as far as the ebb and flow of the tides extended, were royal, and that their soil was held by the king,⁹⁴ who also had various other rights in these rivers, including the right of fishery.⁹⁵ On the other hand, Callis made two assertions as to rivers not navigable, *viz.*, those above the influence of the tides. On the one hand he called them *common*,⁹⁶ a term upon which he did elucidate; on the other he intimated that they were *private*.⁹⁷ In these rivers, by whichever name Callis described them, the soil beneath the water was said to be owned by the one holding the adjoining lands.⁹⁸ The banks of both royal and other rivers were privately owned,⁹⁹ but banks of navigable rivers were subject to common use by all men in the incidents of navigation.¹⁰⁰

Turning to Callis' interpretation of the Statute of Sewers, it is noteworthy that the power of the sewer commissioners was not limited to the royal waters, but extended to all waters, whether royal or private, whose drainage it was in the public interest to regulate. Thus, although there were some small watercourses normally not within the jurisdiction of the commissioners,¹⁰¹ and generally the commissioners had no power to invade private lands to cut new rivers and drains,¹⁰² nevertheless the commissioners did have the requisite power to act "upon urgent necessity in defence of the country, or for the safety thereof, so that the commonwealth be therein deeply interested and engaged," for the reason that "things which concern the commonwealth are of greater account in the law, than the interest of private persons."¹⁰³ Callis further declared that the law of sewers was of "great and urgent necessity and use for the good of the whole

92. See, *e.g.*, 1 WIEL, WATER RIGHTS IN THE WESTERN STATES § 15 (3d ed. 1911).

93. Dav. 55, 80 Eng. Rep. 540 (1611), discussed in text accompanying note 144 *infra*.

94. CALLIS 55-56.

95. *Ibid.*

96. *Id.* at 222.

97. *Id.* at 54-57.

98. *Id.* at 87-88.

99. *Ibid.*

100. *Id.* at 51-53.

101. *Id.* at 54.

102. *Id.* at 67-73.

103. *Id.* at 78.

Commonwealth of the Realm."¹⁰⁴ Such statements disclose that the concepts of common need and public purpose were given high priority in English law at an early date.

The sewer commissions seem to have had much in common with the administrative agencies of the present day, although in the exercise of certain powers the commissions were virtually autonomous bodies, since there was no judicial or executive review of their actions. The courts, however, could and did grant relief when the commissions had clearly exceeded their statutory powers. Thus the commissions, while having power to remove wrongful obstructions to navigation, had no power to remove obstructions which, because they had existed since "time out of memory," had become rightful by the common law, ancient use giving a right by prescription.¹⁰⁵ Further, one might obtain judicial relief against a decree of the commissioners which commanded the removal or partial abatement of an ancient and therefore rightful dam, weir, or kiddle.¹⁰⁶

The jurisdiction of the sewer commissions extended only to problems of drainage and navigation; they had no power over water supply. As Callis put it, if there were a drought in the town of *A* while in the adjoining town of *B* there existed plenty of water, the commissioners could not divert water from *B* to *A* for the "use of their cattel, or for other household affairs, as for brewing, washing and such like," although in a similar situation they might divert water from *B* to *A* to aid navigation at *A*.¹⁰⁷

The sewer commissions were not the only governmental organs engaged in water problems in the Stuart period. Turning to a modern account of the business of the courts leet—local manorial courts under the jurisdiction of the lords—we find that there were occasional difficulties relating to diversion or deprivation of water supply, or to instances of flooding or drowning of lands.¹⁰⁸ Complaints of pollution were apparently rare, the public not yet being aware of the danger to health from drinking or otherwise using foul water, but some were made, especially when the polluting matter choked the watercourse.¹⁰⁹

104. *Id.* at 71.

105. *Id.* at 206.

106. *Id.* at 208-09.

107. *Id.* at 61-62.

108. 1 GARNIER, HISTORY OF THE ENGLISH LANDED INTEREST 374-75 (1908). Callis' only reference to diversion pertained to a case where the lands of the person complaining of the diversion had been flooded. CALLIS 215.

109. 1 GARNIER, *op. cit.*, *supra* note 108, at 375.

VI. THE REPORTERS

In the late sixteenth century there began to appear upon the common law scene a new source of authority, in addition to treatises and statutes. This was the age of the reporters, in which written reports of legal decisions began to be compiled and circulated.¹¹⁰ It is true that prior to this time there had existed the Year Books—beginning in the reign of Edward I (1283) and terminating in that of Henry VIII (1535)¹¹¹—in which were reported from time to time cases dealing with various water problems, and that many early treatise writers referred to the Year Books as their source of information concerning medieval English water law. However, there did not exist before the sixteenth century any consistently accurate or definitive medium for reporting the decisions of the courts.¹¹²

The rise of the reporters coincided generally with the growth of the principle of precedent, or *stare decisis*, in the common law. This development, of course, depended in large measure upon an accurate system of reporting court decisions. The earliest law reports did not completely satisfy this need, since during much of the period before 1750 the reports were confused, cryptic and incomplete, with the exception of the years from 1537 to 1616 when Dyer, Plowden and Coke were reporting court decisions.

The publication of the law reports also marked a period when England was experiencing vast commercial and mercantile development. This in turn gave rise to new problems in the use of water and watercourses.

Viewed chronologically, nearly all English water decisions contained in the law reports prior to 1825 fall into one of three widely separated periods: 1580 to 1640; 1675 to 1710; and 1785 to 1825. In each of these periods there was a sizable development of legal theory, built upon doctrines developed earlier, but with a considerable interpolation of new ideas. In the intervals between these periods, there are very few reported water law cases. The historical reasons for this spasmodical development—or even for the spasmodical fashion in which controversies arose to give a foundation for judicial development—are not entirely clear. The seventeenth century hiatus could be attributed to the civil war; but in spite of the political difficulties of the age there was no breakdown of the judicial system. Indeed, some of the most important cases of the old common law were decided during the height of this conflict. On the other hand, the

110. 5 HOLDSWORTH 355-78.

111. PLUCKNETT 268-73.

112. *Id.* at 348-50.

unsatisfactory reporting of decisions after the time of Coke, lasting until after 1750, may be responsible in part for the absence of reported water law decisions between those years. Another possible explanation lies in the history of the economic development of England, particularly with reference to water resources. It is not unreasonable to surmise that the cases arose due to conflicts caused by economic development—by the growth of factories and mills, by the additional domestic consumption due to increased population and to enlarged per capita consumption, and by the intensified agricultural practices necessitated by the growth in population. Especially would this be true of the increase in litigation at the beginning of the nineteenth century, which came at a period of great industrial expansion.¹¹³ Whatever the reason, the fact remains that in the three centuries prior to 1825, the common law doctrine of water rights underwent substantial growth during three principal periods. The development during each of these periods is traced below.

VII. REPORTED DECISIONS: 1580 to 1640

Although there is little record of important water law decisions in the first half-century after the termination of the Year Books, several cases decided during this period did contain reference to the law of watercourses. Collectively, they furnish some insight into sixteenth century English thought on this subject. The 1555 case of *Throckmerton v. Tracy*,¹¹⁴ although it involved a taking of cattle, afforded the court an opportunity to observe that a grant of a *stagnum*, or pond, carried with it by implication the land underlying the pond and also a right of piscary in the pond; likewise a grant of water—presumably a watercourse—included a right

113. On the other hand, there may be some doubt whether the amount and nature of litigation provides an accurate barometer of economic and social change. Where an expanding economy exists, and large profits can be made in a relatively short time by the erection of new facilities, there might seem to be less, rather than more, litigation. Rather than be caught up in the coils of the judicial constrictor for many years over questions of water rights, the enterprising capitalist might well pay "market value" to buy up rights or asserted rights whose value before an appellate court might be questionable, in order to be able to proceed with construction of new facilities and production of goods free of the shadow of impending actions at law. By this theory, it would be in more settled periods, when time is worth less in terms of dollars and cents, that litigation would arise most frequently over rights in natural resources, such as water. But even this approach, if correct, would not completely eliminate litigation in time of "booms," for there will always arise instances when parties come to an absolute deadlock.

114. 1 Plow. 145, 75 Eng. Rep. 222 (C.P. 1555).

of piscary. This, of course, is but an illustration of the principle that the greater includes the lesser, but it does serve to indicate that in the sixteenth century the legal mind envisioned a pond or a watercourse as property which could be conveyed in the same manner as other real property.

The common law of the sixteenth century was fully bound up with questions of proper pleading of causes. A limited number of actions existed, and the plaintiff had to fit his complaint within one of them. The reluctance of the common law system to break away from its highly formalized pleading caused the law itself to ossify; the law became certain, but had little or nothing to do with the justice of individual cases. The chief issues in dispute, at least insofar as the reported cases indicate, were matters of pleading, which grew highly abstruse and technical.

A typical example of the English decision of this period is found in *Sly and Mordant's Case*, decided in 1579. The entire report of this case is as follows:

In an Action upon the Case the Plaintiff declared, that whereas he was seised of certain Lands, the Defendant had stopped a Watercourse, by which his land was drowned, and found for the Plaintiff. It was moved in arrest of Judgment, that it appeareth upon the Plaintiff's own shewing, that the Plaintiff hath the Free-hold, and therefore he ought to have an Assize, but the same was not allowed, and therefore the Plaintiff had Judgment.¹¹⁵

The parties apparently agreed that to stop a watercourse, thereby causing it to flood the lands of another, was wrongful; the only issue was whether the plaintiff had brought a proper action. Was an action on the case proper here, or should plaintiff have brought an assize of nuisance (or perhaps novel disseisin)?¹¹⁶ Problems of this nature recur repeatedly throughout the English cases prior to about mid-eighteenth century. Thus, in *Wikes v. Searle*,¹¹⁷ an assize of nuisance brought for diverting most of a watercourse¹¹⁸ was found to be proper pleading, and a judgment for the plaintiff

115. 1 Leon. 247, 74 Eng. Rep. 225 (K.B. 1579).

116. It would at first appear that the defendant was arguing for the applicability of an assize of nuisance, which lay for nuisances caused to a freehold; but upon reflection it is not certain that defendant did not have in mind an assize of novel disseisin on the basis that the invasion of the water had disseised the plaintiff. Such an approach is not quite so far-fetched as it may at first blush appear; Sir Edward Coke, writing a few decades later, observed that "He makes disseisin enough who does not permit the possessor to enjoy, or makes his enjoyment less beneficial, although he does not expell him altogether." Co. Litt. 331.

117. Reported in *Luttrel's Case*, 4 Coke 86b, 89a, 76 Eng. Rep. 1063, 1065 (K.B. 1600).

118. "[P]ro diversione majoris partis cursus aquae. . ."

was affirmed. Again, there was no question but that such a diversion was wrongful. Similarly in *Gile's Case*,¹¹⁹ decided in 1586, the issue was whether the writ in an action based upon the raising of a pond so as to flood plaintiff's lands should have been *quare exaltavit stagnum* or *quare levavit stagnum*—both meaning roughly “wherefore he raised (or heightened) the pond.”¹²⁰

Turning to the substantive aspects of English water law about 1600, the problem most often litigated dealt with the diversion of watercourses, especially away from millsites. Between 1600 and 1639 there was considerable legal development in this area. Although the cases often pertained to artificial watercourses rather than natural rivers and streams, the courts did not generally differentiate between the two types.¹²¹

In 1600, *Luttrell's Case*¹²² came before the Court of King's Bench, involving an action on the case for diverting the water supply of plaintiff's mills. The plaintiff had owned two fulling mills, which had stood from “time whereof memory”; these mills having become “old and ruinous,” the plaintiff tore them down and replaced them by two corn mills, whereupon the defendant diverted the water supply. The defendant argued that the plaintiff's right to the water depended upon prescription, and that this prescription had been destroyed when the old mills were torn down. The plaintiff replied that the prescriptive right was to have the watercourse flow in its ancient course, and that the use of the water by the mills was only incidental thereto. The court, affirming a verdict for the plaintiff, held that it was sufficient for the plaintiff to allege that the watercourse ran anciently to his mills, without specifying the kind of mills, and that a prescriptive right to such a watercourse was not destroyed by the rebuilding of the mills. In arguing the case, both plaintiff and defendant were apparently in agreement that the legal basis for a right to the flow of a watercourse was ancient use, by which a prescriptive right was acquired. Under this view, if the plaintiff had not possessed

119. Godb. 58, 78 Eng. Rep. 36 (K.B. 1586).

120. See also *Westbury v. Powel*, referred to in *Fineux v. Hovenden*, Cro. Eliz. 664, 78 Eng. Rep. 902 (1599), where it was held that an action on the case lay where “the inhabitants of Southwark had a common watering-place, and the defendant had stopped it.” In *Aldred's Case*, 9 Coke 57b, 77 Eng. Rep. 816 (1610), it was said by way of dictum that an action on the case would lie for pollution of a household water supply. See also *Biccot v. Ward*, Hob. 193, 80 Eng. Rep. 340 (circa 1620).

121. Cf. *Luttrell's Case*, 4 Coke 86b (K.B. 1600).

122. *Ibid.*

an ancient use in the watercourse, he would not have had a cause for complaint.¹²³

This approach was entirely consistent with the 1583 decision in *Russell v. Handford*,¹²⁴ an action on the case for obstructing the flow of a stream upon which plaintiff's mill was situated; the obstruction was caused when defendant built a new mill. The plaintiff pleaded that his mill was old, but the defendant answered that *ab antiquo*, the words used in plaintiff's pleading, was not sufficient to allege a prescription. Defendant claimed that plaintiff should have set out that his mill existed *a tempore cujus contrarii memoria nominum non existit*: from a time of which a memory of man to the contrary does not exist. The justices were of the opinion that if the plaintiff had not declared that his mill was ancient, he could not maintain his action. A verdict for the plaintiff was affirmed, however, on the ground that *ab antiquo* imparted an ancient mill.

In 1600, therefore, the English rule was that one acquired rights to the flow of a watercourse only by means of ancient use or prescription—unless, of course, a grant to the flow could be shown. But in the absence of a grant, the fact that a man had built a mill and used water to power its wheel for ten or fifteen years meant nothing; any person might build a mill higher on the stream, and interfere with the flow of water, or any stranger might divert the entire supply, and no relief was available from the courts. This unhappy rule of law discouraged the development and use of water; where watercourses were concerned, unless uses had existed since time out of mind, the rule seemed one of strict anarchy.

This nihilistic view of rights to the flow of water was not destined to be long retained. In 1622 the case of *The Countess of Rutland v. Bowler*¹²⁵ was decided, again involving diversion of a watercourse which supplied a mill. The plaintiff alleged that the watercourse was ancient, but said nothing about the mill. The defendant, after a verdict for the plaintiff, moved in arrest of judgment that plaintiff had failed to plead that the mill was ancient. The motion was denied, the court saying that, so far as a diversion was concerned, one having an ancient watercourse running upon his land did not have to justify its continued flow by pointing to an ancient use. Here, said the court, a new mill would have been protected in the

123. Cf. *Moore v. Browne*, 3 Dyer 319b, 73 Eng. Rep. 723 (1572), which involved the tapping of a conduit supplying water for household use; here, too, ancient use was the criterion of a right.

124. 1 Leon. 273, 74 Eng. Rep. 248 (K.B. 1583).

125. *La Countess de Rutland v. Bowler*, Palm. 290, 81 Eng. Rep. 1087 (1622).

same manner as an old one, since the water was following its ancient course.

The *Countess of Rutland* case, therefore, marked a slight turn away from the older rule: it was now necessary only to show an ancient watercourse and a use of the water in order to prevail in an action against a diverter. But even in this instance it was problematical whether the court would have protected a moderately old, but less than ancient, mill against interference from a new mill, where no diversion of the watercourse was involved. Given such a case, the judges probably would have gone no further than they did in fact go in *Countess of Rutland*. However, one may infer from *Duncombe v. Sir Edward Randall*,¹²⁶ decided some six years later, that the courts were occasionally protecting uses which were less than ancient, although the accuracy of such an inference is not altogether certain. In that decision, involving an action on the case for diverting and stopping a river, it was held that one who had an ancient use of a river could not increase that use so as to prejudice other persons. Unfortunately, the interests of the plaintiff which were invaded do not appear; conceivably they involved uses as ancient as that of the defendant, in which case *Duncombe* adds nothing to the development of the common law as to water use.

A similar course was followed in 1638, in two anonymous diversion cases decided upon the same day.¹²⁷ The first case involved a supply of water to a mill, and the second a supply for household purposes and for cattle. It was held in both cases that as against a diversion by a stranger, an action on the case may be maintained on a plea of water *qui currere consuevisset et debuisset*—which customarily flowed and ought to flow—in a certain course, without any assertion of a prescriptive right to use the water. Apparently, the words *currere consuevisset* were sufficient to establish that the watercourse had flowed for a long time; but whether this meant a period long enough to establish a prescriptive right to the watercourse itself, as distinguished from any use of it, is uncertain. “Customary” things, however, are usually those which have their origin in a time out of mind.

The following year *Sands v. Trefuses*¹²⁸ was decided, and enlarged substantially upon the concepts of the earlier cases. *Sands* involved an action

126. Het. 32, 124 Eng. Rep. 320 (circa 1628).

127. Anonymous, Cro. Car. (3 Cro.) 499, 500, 79 Eng. Rep. 1031 (1638).

128. Cro. Car. (3 Cro.) 575, 79 Eng. Rep. 1094 (1639).

on the case for stopping a watercourse which flowed to plaintiff's mill, yet there was neither an allegation of an ancient mill nor of an ancient watercourse. After a verdict for plaintiff, the defendant moved in arrest of judgment, arguing that the failure to plead a prescriptive right was fatal to plaintiff's action. The court, however, in what seems to be an unprecedented move, held plaintiff's pleading "to be well enough, and may well maintain his action upon the case, being lawfully in possession, and the stopping of the water is tortious, and a damage to his mill."¹²⁹ In effect, the court here held that one using a watercourse had a right not to have the watercourse diverted, without regard to whether the use was ancient or the watercourse was alleged to have existed since time out of mind, at least where the diverter could show no right to do so.¹³⁰

During this same period of time, the English courts decided several other water law cases which served as a basis for future decisions. In *Challoner v. Thomas*,¹³¹ the Court of King's Bench was presented with the question of the nature of running water. In the lower court, plaintiff had brought an action of ejectment *de aquae cursu*—of running water—to recover possession of the water in a small stream of which plaintiff was the lessee. Upon a judgment for the plaintiff, defendant brought a writ of error, questioning the propriety of plaintiff's action. The judges determined, in a highly instructive opinion, that ejectment would not lie for running water, "for non moratur¹³² but is ever flowing."¹³³ One could not be put in possession of running water because it is not constant; nor could livery of seisin be made of it. In short, running water is not land, but is strictly *sui generis*. The proper action for the plaintiff to have brought was ejectment "for so many Acres of Land *aqua cooperta*"¹³⁴—land covered by water—provided, of course, that plaintiff had a possessory interest in the land underlying the running water. If he had no interest in this land, but only a right to the watercourse itself, the proper remedy for disturbance of the flow was an action on the case. On the other hand, the court

129. *Ibid.*

130. The act of the defendant in this case was having "stopped" the watercourse. While this could mean that the watercourse was obstructed, as by means of an upper mill dam, and the flow of water thereby hindered, it seems more likely that "stopped" was used in a more absolute sense: an obstruction which forced the watercourse to find a wholly new channel.

131. 1 Brownl. & Gold. 142, 123 Eng. Rep. 718 (1608).

132. "It does not delay."

133. From the report of *Challoner v. Thomas*, Yelv. 143, 80 Eng. Rep. 96 (K.B. 1608).

134. *Ibid.*

noted, "Ejectment well lies of a Gorce or Pool, for a *Praecipe* lies for them, and a Wife shall be endow'd of the Third Part of a Gorce."¹³⁵ In other words, while a pond took the nature of land, no distinction being drawn in the law because it consisted of water, a watercourse could not be treated under the same heading because it was a wandering, transitory thing lacking the situational stability of a tract of land.¹³⁶

The legal nature of a watercourse was further developed in *Shury v. Piggot*,¹³⁷ decided in 1625, involving an action on the case for stopping a watercourse which supplied the plaintiff's domestic uses.¹³⁸ The defendant, in an ingenious and diabolical argument before the Court of King's Bench, contended that since the right to the flow of a watercourse was in the nature of an easement or way, the right would be extinguished by unity of possession; and because plaintiff's predecessor had owned both the land across which the water flowed and the land upon which it was used, it was asserted that such a unity had existed, extinguishing the prescription upon which the plaintiff's right to the continued flow of the water depended.¹³⁹ The position taken by the defendant must have troubled the courts; the case was argued before the Court of King's Bench on three separate occasions. Although it was apparently felt from the beginning that the defendant's argument could not be sustained, a reason for rejecting it was hard to find. After the case had been argued for the second time, Justice Dodderidge ventured to explain why the plaintiff must prevail, but found himself able to state only that an uninterrupted flow was a "matter of necessity."¹⁴⁰ At Michaelmas Term in 1625, the case was argued before all four justices of King's Bench, who then gave judgment for the plaintiff, distinguishing between a way, which is actually a part of the land, being created and existing only in the law, and a watercourse, which "doth not begin by prescription,

135. *Ibid.*

136. Cf. *Throckmerton v. Tracy*, Plow. 145, 75 Eng. Rep. 222 (1555), discussed in text accompanying note 114 *supra*.

137. 3 Buls. 339, 81 Eng. Rep. 280 (1625). This case is also reported in Latch. 153, Noy 84, Palm. 444, and Poph. 169.

138. The watercourse in this case was probably artificial; however, the court did not draw any distinction upon this ground and presumably would have decided in like fashion a similar case involving a natural watercourse.

139. At the present day, defendant's argument with regard to an artificial watercourse would probably be valid since such a watercourse would be thought of in terms of an easement to convey water. As is pointed out in the text, *infra*, however, at the time when *Shury v. Piggot* was decided the law did not recognize any difference of an essential character between natural and artificial watercourses, both being controlled by the rule of prescription.

140. 3 Buls. at 340, 81 Eng. Rep. at 281.

nor yet by assent, but the same doth begin *ex jure naturae*, having taken this course naturally, and cannot be averted."¹⁴¹ Dodderidge retained his argument of "necessity," on the ground that plaintiff needed the water for his "cattel," but went on to point out that there was an essential difference between a way and a watercourse.¹⁴² The two other justices were in agreement that a watercourse could not be extinguished by unity of possession.

Given the early seventeenth century legal outlook upon watercourses, the result reached by the Court of King's Bench in *Shury v. Piggot* is wholly imperative. Since in 1625 the courts viewed all watercourses under a single heading and held that, in the absence of express grant, rights to the continued flow of watercourses depended upon ancient use, which gave rise to prescriptive rights, the adoption of the defendant's argument in this case would have subjected all watercourses to the rule of extinguishment by unity of possession. The result of such an application would have been that if *A* owned a tract of land over which a stream flowed and he conveyed the upstream half to *B*, *A* would thereafter have no right against *B* to the continued flow of the water; unless *A* specifically reserved such a right in the conveyance, *B* could divert the stream to whatever uses he wished, without interference from the courts on *A*'s behalf.¹⁴³ The remarkable thing about this case is that it presented the judges with a legal dilemma, which they found themselves hard put to resolve without doing violence to legal tradition and reason. Their answer, based as it was upon a distinction between a way as a thing existing only in the law and a watercourse as a thing existing in reality, was not at all satisfactory. So long as it was insisted that rights to the flow of water were acquired only through the operation of certain legal mechanisms—*i.e.*, by grant or prescription—and that these rights were created by the acts of men, it could be argued in reply that what was being extinguished was not the watercourse, but simply the abstract right to the continued flow of the water. Similarly, when a way was extinguished, the law purported to affect only abstract

141. *Ibid.*, per Whitlock, J.

142. After pointing out that a way of necessity was not extinguished by unity of possession, Dodderidge said: "Another Reason may be drawn from the nature of Water, the which will naturally descend, and will make a way, for its passage, if stopped; it is not possible to have such to be extinct by a unity of possession." *Id.* at 340, 81 Eng. Rep. at 282.

143. Conceivably, through an extension of this doctrine, the result would have been as drastic to other persons upon whose land the stream flowed, although in all probability other holders of prescriptive rights would have had a right that the water continue to flow to their lands, unaffected by the extinguishment of another person's prescriptive right.

legal rights and said nothing about extinguishing the flagstones which may have paved the way. Nor was the argument that a watercourse was a way of necessity wholly acceptable; the natural extension of such a holding might well have allowed every landowner to plead necessity as a justification for digging a ditch over his neighbor's ground to the nearest watercourse. These problems undoubtedly were substantially responsible for the subsequent rejection by the Court of King's Bench of the rule that rights to the continued flow of a watercourse must originate by grant or prescription. For, as detailed earlier, in 1639 in *Sands v. Trefuses* the common law abandoned the doctrine of ancient use in diversion cases, adopting the rule that possession and use at the time of the diversion were sufficient to ground an action.

Other cases of the period 1580-1640 dealt with important collateral aspects, primarily navigation. The leading decision of this nature was *The Case of the Royal Fishery of the Banne*,¹⁴⁴ handed down in 1611, which involved the construction of a royal grant of land adjoining the Banne, a navigable river. The grantee contended that the right of fishery in the river had passed by virtue of the grant of adjoining land. The court noted that a man might have a several interest in a river or in a fishery, and that such interest could pass by grant. Apparently the parties were agreed that a non-navigable river—one in which the tide did not flow and ebb—belonged to the owners of the land where the river flowed, and that where it flowed between two estates each owner held a moiety, both of the river itself and of the fishery in it. But because the Banne was a navigable river at the point in controversy, it was a royal river, in which the king held a sole interest in the bed and in the right of fishery. The king's interest arose for the reason that such waters partook of the nature of the sea, over which the king had clear dominion; rivers were to be considered as branches of the sea so far as the sea flowed in them. The court did not doubt that the king could convey his rights in a navigable river, but held that in this case the right of fishery did not pass by implication with a grant of the adjoining land, since the royal right was in no wise an appurtenance of the adjoining land, but existed in gross.

Later in the century, Lord Hale criticized the opinion in *The River Banne*, pointing out that a royal river was not a river in which the king held the sole property rights, as the court assumed, but was a public river,

144. *Supra* note 93.

whose use was under the king's special care and protection. The ownership of the bed, said Hale, was immaterial in determining a royal river, as was the ebb and flow of the tides; the proper criterion was whether a river was susceptible of common passage by the public, which put it under the king's care.¹⁴⁵ However, Lord Hale agreed in distinguishing between private and royal property in rivers upon the basis of the limit of the tide, and later English cases have followed a similar course.¹⁴⁶

Under such an approach, the public has a right to navigate upon all rivers susceptible of navigation, whether royal or private, but the property interest of the public is limited to a right of passage in the nature of an easement. This doctrine probably arose from the tendency of the sixteenth and seventeenth century jurists to conceive of a river as an appendage either of the land or of the sea, and as such, property owned by the king, as holder of the sea, or by those holding the adjoining land. Primarily, watercourses were a part of the land, but by using an analogy to land highways the public might be accorded a right of passage over them. In this connection, it seems clear that rivers were looked upon as private property subject to a public right, rather than as public property subject to certain private rights. As early as 1581 it was held that persons in the exercise of a public right of navigation or fishing had no right, without the consent of the owner, to land upon the banks of a river or to spread their nets thereon.¹⁴⁷ Further, although the owner of adjoining land was under a duty to cleanse a ditch of silt or obstructions, he was under no duty to cleanse a river next to his land unless he made active use of it; but those who had "ease and passage" on such a river did have an active duty to cleanse it.¹⁴⁸ Thus the position of the navigator was clearly delineated: he must remain upon the water and must perform whatever acts were necessary in order to keep the watercourse open and free. The adjoining landowners were under no positive duty to aid navigation, although quite clearly they were prohibited from engaging in positive acts which interfered with it, such as diverting the water of the river.¹⁴⁹ In this connection, navigable rivers were treated as highways, and purprestures, ob-

145. *Op. cit. supra* note 83, at 8.

146. COULSON AND FORBES, *THE LAW OF WATERS* 100-114 (6th ed. 1952).

147. *Inhabitants of Ipswich v. Browne*, Sav. 11, 14, 123 Eng. Rep. 985, 986 (1581).

148. *Cf. Repair of Bridges, Highways, etc.*, 13 Coke 33, 77 Eng. Rep. 1442 (1609).

149. *Hind v. Manfield*, Noy 103, 74 Eng. Rep. 1068 (1614).

structions or other interferences with their use were cognizable by the king, and criminal sanctions were applicable.

In addition to problems of obstructing and diverting water from mills and questions of navigation, these early cases also indicate that pollution was occasionally a problem, the watercourses becoming unfit for household use or the fish in a river being killed.¹⁵⁰ Since domestic consumptive uses were small and quite often satisfied from wells and springs, there were few instances of interference with household uses by diversion or obstruction of watercourses.¹⁵¹ Certainly in the decisions of the courts there was no indication of any preference to be accorded domestic uses over use of other kinds.

Summing up, the early seventeenth century judicial mind conceived of a watercourse as a part of the real property, although it was recognized that the nature of running water was wholly different from that of land. The term "common right" was used with respect to watercourses upon several occasions, but this usually referred either to the public right of navigation¹⁵² or to the rights of persons owning land adjacent to a stream.¹⁵³ From the point of view of the public, a right to navigate watercourses was recognized; the interest of the English nation in ships and the sea could not be ignored. However, it cannot be asserted that there was any refined doctrine relating to rights to the use of watercourses. As late as 1638, the right to use water was based solely upon ancient use, *i.e.*, being able to establish the user or his grantor had been employing a river for a particular purpose from time out of mind. Such an approach can emerge only from a static society in which change is associated with decay or disaster. These were meager beginnings; water law was as yet undetached from its real property background.

VIII. REPORTED DECISIONS: 1675 TO 1710

After the decision in *Sands v. Trefuses* in 1639, a hiatus of more than thirty years occurred in the development of the common law of watercourses. Although it might not seem implausible to attribute this to

150. Cf. *Aldred's Case*, 9 Coke 57b, 77 Eng. Rep. 816 (1610).

151. But cf. *Shury v. Piggot*, 3 Buls. 339, 81 Eng. Rep. 280 (K.B. 1625); *Anonymous*, Cro. Car. (3 Cro.) 500, 79 Eng. Rep. 1031 (1638).

152. Cf. *Repair of Bridges, Highways, etc.*, *supra* note 148.

153. Cf. *Case of the Royal Fishery of the Banne*, *supra* note 93, at 56, 80 Eng. Rep. at 541.

the political disturbances of the age, this notion is proved false by the fact that the courts quite decidedly continued to function throughout the conflict. Furthermore, Parliament was not altogether silent during this period, for quite early in the reign of Charles II statutes were passed declaring the Wye, Lugg, Itchen, Avon, and Medway rivers to be subject to a public right of navigation.¹⁵⁴ Therefore, one may assume that in these years there were few riparian conflicts of any substantial nature.

In the 1673 case of *Cox v. Matthews*,¹⁵⁵ Lord Hale approved by way of dictum the ruling in *Sands v. Trefuses*, saying that where a watercourse supplying a mill was diverted, the mill owner need not plead *antiquum molendinum*—an ancient mill—but that the issue would hinge upon a determination of whether the defendant “used to turn the stream as he saw cause, for otherwise he cannot justify it, though the mill be newly erected.”¹⁵⁶ Thus, the common law in 1673 seemed to be reaching a point where persons actively using water were able to establish their rights without having to prove a use time out of mind, through the simple expedient of requiring anyone disturbing the *status quo* to prove that he had a right to do so rather than imposing the burden upon the complaining party whose use had been disturbed.

During the following decade, in *Keblethwait v. Palmes*,¹⁵⁷ the Court of King’s Bench successfully resisted an attempt to reinstate the doctrine that a right to the flow of a watercourse must be based both upon ancient use and the continued existence of the stream in its particular bed from time out of mind. *Keblethwait* was an action upon the case for diversion of a watercourse which supplied a mill; plaintiff pleaded that the water had been turned from its ancient course, but did not allege that the mill was ancient.¹⁵⁸ At Common Pleas this pleading was held adequate to sustain

154. 14 Car. 2, c. 14; 16 and 17 Car. 2, c. 12. According to English usage in dating statutes and other official acts, the reign of Charles II is considered to have begun when Charles I lost his head in 1649 and not when Charles II actually assumed the throne in 1660; therefore, although dated 14 and 16 Charles II, these Parliamentary acts were passed in 1662 and 1664, relatively early in his reign.

155. 1 Ventr. 237, 239, 86 Eng. Rep. 159, 160 (1673).

156. *Id.* at 237, 86 Eng. Rep. at 159.

157. Comb. 9, 90 Eng. Rep. 311 (K.B. 1686). See also the report of this case in 2 Show. 243, Carth. 85, Skin. 65, 175, 3 Lev. 133.

158. Plaintiff, in referring to the watercourse in his pleading, used the words *ab initio & solito cursu*, which the court held to be equivalent to *de jure currere debuisset & consuevisset*—that the water of right customarily flowed and ought to flow in a certain course. The term *consuevisset*, which referred to the fact

a verdict for the plaintiff,¹⁵⁹ and the defendant brought error in the Court of King's Bench, where the pleading was held sufficient upon the authority of the 1622 decision of *The Countess of Rutland v. Bowler*.¹⁶⁰ Lord Holt, the Chief Justice, dissented, contending that unless plaintiff possessed an ancient use no right existed:

Suppose a water-course run to my ground, and I have no use for it, and one, upon another ground, divert it before it come to mine, will an action lie? Is this not the same, must you not lay some use for it?¹⁶¹

Had no use at all been shown by the plaintiff, the other judges might have agreed with Lord Holt; but they were not prepared to say that the use must have existed time out of mind before the courts would protect it.

The 1687 case of *Glyn v. Nichols*,¹⁶² however, presented the Court of King's Bench with this very problem. The plaintiff brought an action for the diversion of a watercourse and pleaded neither title to the watercourse, nor any use thereof save that it flowed over his messuage. It was contended by the defendant that the declaration was not good, but the court held for the plaintiff, apparently finding the pleading adequate. The reports of the case are very cryptic and there is no discussion of the issues, nor are reasons given for the court's holding. Eight years later, in 1695, the Court of King's Bench was again presented with a diversion case containing no allegation that any use of the water by the plaintiff had been interfered with. In *Richards v. Hill*,¹⁶³ the plaintiff, due to an error in pleading, removed from the cause the fact that diversion of an ancient stream had impaired the operation of his mill. As in *Glyn v. Nichols*, however, the diversion alone was held to be sufficient foundation for the action on the case.

Murgatroid v. Law,¹⁶⁴ on the other hand, decided in 1690, indicated that it was not wrongful to divert a watercourse from lands to which it

that the water had customarily flowed in a certain course, imparted that the stream was ancient, or had existed time out of mind, and therefore was sufficient to found a prescription.

159. *Nulmes v. Hoblethwayte*, 3 Lev. 133, 83 Eng. Rep. 615 (1683). The discrepancy in the names is indicative of the inaccurate reporting of these early decisions; of the half-dozen different reports of this case, no two are precisely similar and several disclose wide and substantial deviations.

160. Palm. 290, 81 Eng. Rep. 1087 (1622), discussed in text accompanying note 125 *supra*.

161. 1 Show. at 64-65.

162. Comb. 43, 90 Eng. Rep. 333, 2 Show. 507, 89 Eng. Rep. 1069 (1687).

163. 5 Mod. 206, 87 Eng. Rep. 611, 1 Raym. Ld. 102, 91 Eng. Rep. 964 (1695).

164. Carth. 116, 90 Eng. Rep. 672 (K.B. 1690).

had customarily not flowed, and, therefore, one diverting a watercourse might successfully defend his acts by establishing that it customarily flowed otherwise than onto the land of the plaintiff.¹⁶⁵

In *Leveridge v. Hoskins*,¹⁶⁶ decided in 1709, there was some question whether the plaintiff pleaded that his diverted watercourse was ancient, but the decision went off upon issues of proper pleading and venue and adds little to the development of the law of watercourses. The *Leveridge* case does, however, raise an important problem which was not answered in any of these early common law decisions: what is included within the term "diversion"? A diversion is usually pictured as a turning of a watercourse into a new channel, yet in *Leveridge* it may have been that the defendant, who abstracted much of the river's water through two ditches, was making a consumptive use of the water, as for irrigation. Conceivably, then, a diversion in the understanding of the seventeenth and early eighteenth century legal mind meant any taking of the water which diminished the flow of the stream.

Problems of pleading in water law cases were still prominent at the close of the seventeenth century; if anything, pleading had become more technical than before. The Court of King's Bench was called upon to decide whether a messuage was the same thing as a tenement,¹⁶⁷ and whether a declaration was sufficient which alleged that water ought to flow to plaintiff's tenement, but not that it ever had so flowed.¹⁶⁸ But the all time high for technicality must have been approximated in *Richards v. Hill*,¹⁶⁹ where a pleading was held bad because the plaintiff, from whose mill a watercourse had been partially diverted, misspelled a word; intending to use the Latin "*molere*," meaning to grind, plaintiff said "*molare*," which was apparently not a word at all.

Several cases during this period disclose a continued recognition of the high public interest in navigation of rivers. Thus it was held both a public and a private wrong to cut down the banks of the Wye so as to

165. These remarks are strictly by way of dictum, since the defendant in the *Murgatroid* case employed improper pleading and lost the decision on those grounds.

166. 11 Mod. 257, 88 Eng. Rep. 1025 (Q.B. 1709).

167. *Scoble v. Skelton*, 2 Show. K.B. 195, 89 Eng. Rep. 886 (1682).

168. *Jackson v. Savage*, Skin. 316, 90 Eng. Rep. 142 (K.B. 1692); the same case is also reported as *Jackson v. Salway*, 1 Show. 350 (1692). See also *Prickman v. Trip*, Comb. 231, 90 Eng. Rep. 447, Skin. 389, 90 Eng. Rep. 173 (1693), where the issue was the failure to allege a *terminus a quo* of a diverted watercourse.

169. *Supra* note 163.

interfere with the navigation thereupon.¹⁷⁰ Likewise, the unauthorized construction of locks on the Thames, and the charging of a toll for passage was held to be a proper cause for prosecution by public officials.¹⁷¹

The building of mills and dams inevitably caused flooding cases, often of considerable local consequence. In 1701, for example, one Policarpum Wharton was indicted for causing a riot over the construction by a neighbor of an obstruction in a stream which would have flooded the upstream lands.¹⁷² It was held that Policarpum and his fellows could not employ self help to abate such a structure while it was being built; they had to wait until it actually became a nuisance to their lands.¹⁷³ The Chief Justice, Lord Holt, further pointed out that a person who "has a river" is under a duty to scour or cleanse it, and will be liable if the neighboring land is flooded due to his failure to act. The typical cause of flooding, however, seemed to be the result of intentional obstructions, such as mill dams¹⁷⁴ or weirs to aid in the taking of fish.¹⁷⁵

In the second of these pre-1825 periods, then, the common law underwent only a moderate development. The courts reaffirmed the advances made during the previous era, but were apparently not presented with any novel issues of consequence. Watercourses were still largely looked upon as incident to the ownership of certain lands, although it had begun to be recognized that the nature of rivers and streams as an object of property was singular, and concepts suitable for real property in general were not always appropriate where watercourses were concerned. Thus it was perceived to be inadequate to say that the freeholders upon opposite sides of a watercourse each owned half of the river; by the opening of the eighteenth century it had begun to be accepted that such owners have a common interest in the river as an entity. The legal notion that rights in a watercourse were freely transferable to strangers was still retained, however.¹⁷⁶

170. *The King v. Stanton*, 2 Show. K.B. 30, 89 Eng. Rep. 773 (1679).

171. *The King v. Clark*, 12 Mod. 615, 88 Eng. Rep. 1558 (K.B. 1701).

172. *The King v. Wharton*, 12 Mod. 510, 88 Eng. Rep. 1483 (K.B. 1701).

173. *Cf. Kendrick v. Bartland*, 2 Mod. 253, 86 Eng. Rep. 1056 (C.P. 1677).

174. See, e.g., *Prince v. Moulton*, 1 Raym. Ld. 248, 91 Eng. Rep. 1062 (1697).

175. In *Courtney v. Collet*, 1 Raym. Ld. 272, 91 Eng. Rep. 1079 (1697), the breaking of such a weir caused the flooding of plaintiff's land and his fish ponds, allowing his fish to escape down the river. It was held that an action of trespass *quare clausum fregit* was proper, rather than action on the case as defendant contended.

176. *Cf. Holt, C. J.*, in *The King v. Wharton*, *supra* note 172: "If a river run contiguously between the land of two persons, each of them is, of common right, owner of that part of the river which is next his land; and may let it to the other, or to a stranger."

The spirit of the age is perhaps typified in the often quoted, but overly general words of Lord Holt in *Tenant v. Goldwin*:¹⁷⁷ “every one must so use his own, as not to do damage to another.”¹⁷⁸ In short, the broad and grand principles which have always been possessed by the law existed then; but so far as application to particular cases was concerned, jurists were still largely groping in the medieval after-dusk.

IX. THE AGE OF BLACKSTONE

By and large, the eighteenth century in England, until its closing decades, was a time of famine in the common law with regard to water law decisions. The single exception, the 1747 case of *Brown v. Best*,¹⁷⁹ certainly cannot be described as applying anything but the principles laid down in earlier times. The case involved the diversion of water from a stream into a pit for use in watering meadows and cattle, and was decided upon the principles of ancient use. Since the defendant had not anciently used the water in that manner, his use was wrongful insofar as it interfered with the plaintiff’s needs. The Court of King’s Bench recognized that a “watercourse is a quite distinct thing from the land,”¹⁸⁰ but clearly found the time-honored doctrines of prescription to be suitable.

Between 1765 and 1769, Sir William Blackstone published his *Commentaries on the Laws of England*, which were to have an overwhelming effect upon the common law world for many years to come. Blackstone’s observations relating to the use of watercourses were sparse, but by piecing them together it is possible to derive a mid-eighteenth century view of the subject. Water was classified as among those few elements which, by nature, are susceptible only of being common property, in which persons can acquire at most a usufructuary right.¹⁸¹ This usufructuary right was acquired by occupancy and existed so long as the occupancy continued.¹⁸² Interference with the occupancy of another, however, was wrongful:

If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor’s prior mill, or his meadow; for he hath by the first occupancy acquired a property in the current.¹⁸³

177. 2 Raym. Ld. 1089, 92 Eng. Rep. 222; also reported as *Tenant v. Gouldwin*, 3 Raym. Ld. 324, 92 Eng. Rep. 712 (1705).

178. 2 Raym. Ld. at 1092, 92 Eng. Rep. at 224.

179. 1 Wils. K.B. 174, 95 Eng. Rep. 557 (1747).

180. *Id.* at 175, 95 Eng. Rep. at 558, per Dennison, J.

181. 2 BLACKSTONE, COMMENTARIES 14.

182. *Ibid.*

183. 2 *id.* at 403.

Further, although water was a "species of land," nevertheless Blackstone recognized that it was also a "movable, wandering thing," in which a person could only have a "temporary, transient, usufructuary property," and for this reason an action to recover possession of water or a river was not proper, but rather should be to recover certain land covered with water.¹⁸⁴

Thus, Blackstone rejected the test of ancient use as determining rights to the use of watercourses, and substituted therefor a doctrine of strict prior use. In doing so, it was necessary to strike a balance between the natural advantage possessed by the upstream owner¹⁸⁵ and the legal advantage which had theretofore been afforded persons whose uses had existed time out of mind.

In solving this problem, Blackstone first said that water was common property, but that certain private property might be acquired in it through occupancy. This private property was to last only so long as the occupancy continued. Unquestionably, when Blackstone used "occupancy," he did so in the sense of a taking of possession to at least a limited extent. Certainly, there could be no constructive occupancy; a man in Scotland could not occupy water of the Thames simply by willing it, but was required to travel to England and perform acts of a character sufficient to constitute occupancy. By this concept, water flowing in a stream could be "occupied" by the act of putting a bucket into the stream and abstracting some of the water. However, only the water in the bucket would actually be occupied by such an act; the remaining water in the stream would still be common property, and subject to occupation by other persons for their own use.

A system of this nature would, of course, put a premium upon being able to get as close to the head of the stream as possible, in order to take water before anyone else got it. Any orderly use of the water would be rendered impossible. To avoid this, Blackstone added a new principle to his doctrine: a watercourse might be occupied by a person in the same manner as individual molecules of water might become private property by occupancy. Thus if *A* builds a mill upon the river Wye, *B* may not sub-

184. 2 *id.* at 17.

185. The upstream user would, of course, have the advantage of having the first opportunity to use the stream, whether by consuming the water, polluting it, or damming it for power or other purposes. About the only time the upper owner would be adversely affected by a downstream use would be when the lower owner constructed a dam which obstructed the stream and caused the water to flow back upon the upper owner, drowning his land or interfering with the turning of his millwheel.

sequently take water from the Wye above *A*'s mill in such quantities as to interfere with the operation thereof. Although by no means can it be said that *A*'s act of building a mill constitutes occupancy of all of the molecules of water in the river Wye before they come down to his mill, *A* has acquired a property interest in these molecules just the same, and *B* therefore may not acquire an interest in them against *A*, although his occupancy of the water itself might well precede any act of *A*'s in relation to those particular molecules of water. The explanation for this must lie in the fact that *A* has occupied the watercourse, and in so occupying it has acquired a private property not merely in certain individual molecules of water but in the whole river Wye. At this point, the idea of common property in the water has been thoroughly destroyed, since rights in the water itself are decidedly inferior to rights acquired in the watercourse. Actual occupancy of the water itself now means nothing; the only rights of substance which can be acquired are through prior occupancy of the watercourse as an entity. By being the first to build his mill on the Wye, *A* has acquired a distinct property right in each and every drop of water in the river from the time it entered a tributary of the Wye—and perhaps even from the time it fell from the clouds onto the watershed of that river.

The principles set forth by Blackstone represented a substantial advance over previous English water rights law. The doctrine was revolutionary in that it clearly recognized—perhaps for the first time in the common law—that due to the singular nature of running water, water use law involves principles different, even radically different, from the rules governing rights in the land itself. Certainly, in an eighteenth century England experiencing substantial population and industrial growth, where virtually the entire countryside was being remade, it was highly important that the test of ancient use be abandoned and a new principle be adopted which would allow the recognition of more modern uses.

The prior use test was not wholly successful in achieving its purpose. Although it was a wide departure from seventeenth century law, it possessed many faults which made it less than adequate for an industrial, urban society. Principal among these was the relatively quick ossification of water rights which must inevitably follow the adoption of this doctrine. Wide new possibilities for the use of watercourses may have been opened when ancient use was abandoned, but doubtless these were rapidly appropriated to new uses initiated under the prior use test. If this theory is correct, during one brief period there existed great opportunities to initiate

new uses; but after a few years the situation was probably little better than before.

For all of the criticism which may be made of the prior use doctrine, however, it must be recognized that a great deal of the credit for the common law's abandonment of the doctrine of ancient use must be attributed to Blackstone and the other jurists of his time from whom he drew his principles of water rights. Without this shift in theory, Story and Kent would have had a much more difficult task in bringing the riparian doctrine to American law. Historically, then, Blackstone stands squarely between the water law of Coke's day and the riparian doctrine of our own.

X. REPORTED DECISIONS: 1785 TO 1825

By the year 1785 the Industrial Revolution was in full progress in England. New factories throughout the countryside meant greater urbanization, and required new and increased water supplies. It was to be expected that litigation over watercourses would increase and that the common law relating to water use would be modified to meet the demands of a new age.

The forty years following 1785 saw considerable change in English water law. During this time the courts moved from the doctrine of ancient use, as employed in *Brown v. Best*,¹⁸⁶ to that of simple prior use as set forth by Blackstone; when the year 1825 arrived, it was as though Blackstone had been literally adopted as declaratory of English water law. Although the doctrine of prior use was not long to remain as the guiding principle of the common law, the fact that it was considered at all indicates the need during this era to devise rules of water use which would aid, rather than hinder, the further development of society. At some point in the eighteenth century western man ceased looking solely to the past for inspiration and began to sense that the golden age lay in the future. Progress became dogma; cultural thought ceased to be static and acquired a dynamic outlook. But because the law has always been burdened with a greater affection for the past than most human pursuits, it was very difficult for time-honored concepts to be discarded, although they had ceased to benefit society. In view of this, the fact that the English courts were at all able to modify water use doctrine at the dawn of the nineteenth century is a sizable accomplishment.

186. *Supra* note 79, discussed in text accompanying note 179 *supra*.

Ancient use as the sole basis of water use rights had been abandoned by the year 1785, when *Robinson v. Lord Byron*¹⁸⁷ was decided. In that case the defendant was enjoined from interfering with the "usual" flow of a stream which supplied a cotton mill, apparently on the basis that the right to modify the flow of a stream to the detriment of another user could be acquired only through twenty years continual use. The decision clearly indicates that the chancellor had adopted, at least in part, the theory of prior use as governing water rights: where a downstream use is interfered with by the subsequent initiation of an upstream use, the downstream use is to be preferred. Having first appropriated the stream to his uses, the lower user is to be protected.

Twenty years later the same problem came before the Court of King's Bench in the landmark case of *Bealey v. Shaw*.¹⁸⁸ In this controversy, the defendants' predecessors had in 1724 erected a mill on the river Irwell, from which they diverted some of the water by means of a weir and sluice, returning the water to the river some distance below the mill. In 1787 the plaintiff erected a mill on the Irwell below the defendants' mill, but above the place where defendants returned the water to the river, so that all water used by the defendants by-passed the plaintiff's mill. Four years later, in 1791, defendants enlarged their sluice so as take more water for their mill; this substantially reduced the flow of the water to the plaintiff's mill. The defendants argued that rights to the use of water were acquired only by prescription, *i.e.*, twenty years use, and that plaintiff's use having been less than twenty years, the plaintiff had no right to the use of the water, whereas since defendants had used the water of the river in such quantities as they saw fit for eighty years, they had gained a prescriptive right to the entire river. The justices were unanimous in affirming a verdict for the plaintiff, agreeing that rights to the use of water were acquired by simple prior use, apparently to be ascertained upon a quantity principle. Since the plaintiff, when he built his mill in 1787, had been the first to use that part of the Irwell not diverted by defendants, he then acquired a right that the defendants should not subsequently initiate a new use or modify an old use which would interfere with his mill by diminishing the quantity of water that flowed to it. As the Chief Justice, Lord Ellenborough, said, subject to previous uses of the stream by other persons, "every man has a right to have the advantage of a flow of water in his own land without

187. 1 Bro. Ch. 588, 28 Eng. Rep. 1315 (1785).

188. 6 East 208, 102 Eng. Rep. 1266 (1805).

diminution or alteration."¹⁸⁹ Only by acquiring a prescriptive right through twenty years adverse use could another person gain a right to use water in a manner inconsistent with a prior initiated use.¹⁹⁰

So far as the lower owner was concerned, therefore, the principle of prior use was to govern as against subsequent interference by persons upstream. But it was uncertain as to whether this rule applied in favor of the upper owners as well, or whether in their case a prescriptive right was necessary to protect them from the acts of a downstream owner who initiated a subsequent use. This question came before the Court of King's Bench in 1818 in *Saunders v. Newman*,¹⁹¹ which involved the raising of a dam by a lower owner so as to flood the wheel of an upper mill. The lower owner, defendant in the action, argued that the upper owner's right to maintain the mill was based upon prescription and had been lost when the mill was rebuilt in 1801 and a wheel of modified dimensions installed.¹⁹² The court, however, rejected defendant's theory and held for the plaintiff, three of the four judges asserting that through long use the plaintiff had gained a right that the water should flow away from his mill in its usual manner, and only the fourth judge basing his decision upon the principle of *Bealey v. Shaw*, that prior use alone gave a right with which it was wrongful to interfere. This outcome is illustrative of the uncertain state in which English water law found itself in the opening years of the nineteenth century.

A somewhat similar problem arose in *Wright v. Howard*,¹⁹³ decided in 1823 in the High Court of Chancery, involving diversion of water by an upstream owner. Ignoring the principles of prior use, the court introduced what has been termed the "natural flow" theory:

Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water,

189. *Id.* at 214, 102 Eng. Rep. at 1269.

190. But *cf.* *Balston v. Bensted*, 1 Camp. N.P. 463, 120 Eng. Rep. 1022 (1808), an early ground water case where the test of prescriptive use was employed.

191. 1 Barn. & Ald. 258, 106 Eng. Rep. 95 (K.B. 1818).

192. The action in this case, it should be noted, was not for flooding—which would clearly have been wrongful—but for interfering with the operation of the plaintiff's mill wheel, and therefore depended upon whether the plaintiff had a right to maintain the wheel and have the water flow normally away from it.

193. 1 Sim. & St. 190, 57 Eng. Rep. 76 (Ch. 1823).

which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above.¹⁹⁴

The court held that in order to diminish the flow of the water or to throw back the water upon the lands above, it was necessary to prove an express grant or to establish twenty years uninterrupted enjoyment of the right. From the opinion it would appear that this twenty years use must actually have been adverse to the interests of some other proprietor:

It appears to me that no action will lie for diverting or throwing back water, except by a person who sustains an actual injury, but the action must lie at any time within twenty years when the injury happens to arise, in consequence of a new purpose of the party to avail himself of his common right.¹⁹⁵

Therefore, if this language is to be interpreted literally, no right by prescription could ever be gained as against proprietors who might conceivably initiate a new use in the future and at that time suffer injury because the flow of the stream was less than it originally had been. If such a theory were adopted, use and development of water resources, other than of a minimal character, would be brought to a standstill, unless somehow the consent of all prospectively affected persons might be acquired through an actual grant.

But, in spite of its unhappy implications, the doctrine propounded in *Wright v. Howard* is remarkable in a twofold aspect. In the first place, it demonstrates how desperately the courts were seeking a solution to the problem of water use in the years prior to 1825. True, this particular proposal would not have been a cure; in fact, it represents one virtual extreme in the possible doctrines which could be adopted. However, the prior use test was not wholly successful, and apparently the courts were willing to attempt a certain degree of experimentation in order to discover a doctrine workable under nineteenth century conditions. Secondly, with reference to the first quotation above, it is surprising how few changes would have to be made in the wording of the opinion for the reasonable use test of the present riparian doctrine to emerge. By inserting the word "unreasonably" once in each sentence at the appropriate spot, this statement would be the equivalent of the words employed by Mr. Justice Story just four years later in America, in the case of *Tyler v. Wilkinson*, when he introduced the principle of riparian rights to the common law world.

194. *Id.* at 203, 57 Eng. Rep. at 82.

195. *Ibid.*

Not all English courts at once concerned themselves with the possible ramifications of the natural flow doctrine. In fact, the Court of King's Bench was not at all influenced by the principles advocated in the High Court of Chancery. In the 1824 decision of *Williams v. Morland*,¹⁹⁶ the prior use doctrine was approved as against a plaintiff who contended that he had a right to the flow of all the water of a river. The three judges who decided the *Williams* case, however, clearly indicated in the course of their opinions that they were deeply concerned with the legal nature of watercourses.

Judge Bayley examined the nature of flowing water and concluded that originally it was *publici juris*, but that when "appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it."¹⁹⁷ An exclusive right could be acquired, although "in derogation of the primitive right of the public";¹⁹⁸ only the right to the unappropriated water remained in the public.

Judge Holroyd generally agreed with Bayley, adding:

Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it. Before it came there, it was clearly not his property. It may perhaps, become, quasi, the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other person had acquired a prior right to it.¹⁹⁹

Holroyd, clearly troubled by Blackstone's concept that property in water was acquired only through occupancy, but that use of a watercourse gave prior rights to the water, was thus forced to assert that flowing water, while perhaps not private property, was at least quasi-private property. This, of course, was wholly at variance not only with all of the time-honored jurists but also with Blackstone himself.

Judge Littledale was more complacent than his brethren, more willing to rely upon established principles of legal decision rather than attempt to examine fundamentals in order to formulate a doctrine of water rights in the light of the public need. He therefore contented himself with the

196. 2 B. & C. 910, 107 Eng. Rep. 620 (K.B. 1824).

197. *Id.* at 913, 107 Eng. Rep. at 621. Cf. *Moore v. Rawson*, 3 B. & C. 332, 336, 107 Eng. Rep. 756, 758 (K.B. 1824), in which Bayley, J., said: "The right to light, air, or water, is acquired by enjoyment, and will, as it seems to me, continue so long as the party either continues that enjoyment or shows an intention to continue it."

198. *Williams v. Morland*, *supra* note 196.

199. *Id.* at 913, 107 Eng. Rep. at 621.

observation that all persons have a right to use flowing water, provided they do not actively harm those in whom water use rights have already vested by virtue of prior use. Unless a prior user were actively injured, however, he could not complain of uses initiated subsequently: "The mere right to use the water does not give a party such a property in the new water constantly coming, as to make the diversion or obstruction of the water, per se, give him any right of action."²⁰⁰

It is plain that the judges in *Williams v. Morland* were performing the proper function of a common law court in questions involving water rights. Ascertaining first the nature of the subject matter—watercourses—they then asked themselves what rules of law could best be applied to watercourses so that, in view of early nineteenth century social and economic factors, watercourses might be employed in the most beneficial manner. It is true that in the *Williams* case there was no broad departure from prior decisions, for the principles of the earlier cases were found adequate. But, as in the earlier case of *Wright v. Howard*, the thinking of the court was profound, and in the remarks of the judges one may discover ideas which, taken as they are or slightly modified, embody many of the fundamentals of water law development across the next century and a quarter. Clearly, on the eve of the promulgation of the riparian doctrine, the English courts were groping toward substantial new development in the field of water use rights.

Other decisions reported during this period were concerned with problems of the use of watercourses or the nature of rights which could be acquired in them. One of these, *The King v. Directors of the Bristol Dock Co.*,²⁰¹ is particularly illustrative of the relationship between citizen and sovereign concerning the use of water. Woolfrye & Co., a brewery, took water for brewing through pipes put into the river Avon. Pursuant to parliamentary enactments,²⁰² the harbor of Bristol was improved, causing a part of the Avon to be adversely affected so that its water became "brackish and noxious," and no longer fit for brewing. Woolfrye & Co., forced to relocate its brewery, sought an award of £3000 under a clause of the enactments providing for compensation of persons whose property was rendered less valuable by the harbor improvements. Somewhat surprisingly, the Court of King's Bench denied compensation on the ground that since

200. *Id.* at 914, 107 Eng. Rep. at 622.

201. 12 East 429, 104 Eng. Rep. 167 (K.B. 1810).

202. 43 Geo. 3, c. 140, and 48 Geo. 3, c. 11.

the use of the river Avon was common to all of the king's subjects, Woolfrye & Co. had no greater right than any other citizen to complain. The proper remedy, said Lord Ellenborough, was indictment, since the injury was common to all of the subjects. If the claimant here was right, then "by the same rule if the salubrity of the air in *Bristol* were impaired in consequence of the docks, every inhabitant of the place might well claim a compensation."²⁰³ Judge Le Blanc added that Woolfrye & Co. had "no more claim to compensation under the Act than every inhabitant of *Bristol* would have who had been used to dip a pail into the river for water for the use of his house."²⁰⁴ Here the concept of the public interest in watercourses was carried to an extreme; it was so embracing that all private interests were swallowed up by it. This strongly indicates that on public rivers in England, at least, the public right was always recognized as being supreme, to the exclusion or extinguishment of any conflicting private rights. On the other hand, non-navigable rivers were largely regarded as private property, which could be conveyed relatively freely, so long as the rights of other persons were observed.²⁰⁵

The concept that any member of the public could use water, a great egalitarian idea respecting natural resources, received a substantial setback in 1821, when it was held that no common law right existed allowing the public to pass over private lands in order to gain access to the sea.²⁰⁶ A majority of the Court of King's Bench, quite evidently referring to watercourses as well as the sea, held that a common right of access was irreconcilable with the nature of private property in land. Judge Best, on the other hand, argued "on principles of public policy, I might say public necessity, that the interruption of free access to the sea is a public nuisance."²⁰⁷ The decision should be no surprise in view of the exalted position which English law has always accorded a man's freehold and in the light of earlier cases holding that upon the banks of public rivers no public right of landing or towing existed.²⁰⁸ If the public is generally denied access to common property, little use can be made of it. Given this denial of access, it was only natural that in later decades an effort was made, with remark-

203. 12 East at 432, 104 Eng. Rep. at 169.

204. *Ibid.*

205. See, e.g., *Mayor of Carlisle v. Blamire*, 8 East 487, 103 Eng. Rep. 430 (K.B. 1807), involving the conveyance of a part of the river Caldew to the city of Carlisle to be used to power the city's corn mills.

206. *Blundell v. Catterall*, 5 Barn. & Ald. 268, 106 Eng. Rep. 1190 (1821).

207. *Id.* at 287, 106 Eng. Rep. at 1197.

208. See *Ball v. Herbert*, 3 T.R. 253, 100 Eng. Rep. 560 (K.B. 1789).

able success, to deny completely to the public any rights in non-navigable rivers.

Flooding of lands caused by milldams and weirs continued to be something of a problem during this period, but the rules of law in this regard remained well settled.²⁰⁹ Due to the increased building of structures in streams, the upstream passage of salmon and other commercially valuable fish was interfered with, and persons possessing fishing interests were generally successful in collecting damages for these interferences.²¹⁰ But the fishing interests were not so successful when they asserted that navigators must not moor their ships in fishing beds; the courts reminded the fishermen that the public interest was superior to their private right.²¹¹ Navigators, in turn, were again denied the right to use the banks of navigable rivers to tow their vessels,²¹² but were permitted to use the land between high and low water marks as a place for their towpaths.²¹³ And it was held that navigators might moor their barges to the wharves or banks of a river if they could prove a custom allowing them to do so.²¹⁴

All things considered, during the period from 1785 to 1825 the courts continued to recognize the principles laid down in earlier times with regard to navigation, fishing, and instances of flooding of lands. These principles were retained largely because they continued to prove operable and relatively just. On the other hand, so far as uses of streams for power or consumptive purposes were concerned, the earlier doctrines were questioned and modified, primarily because the change in the economic and social structure had begun to make the old rules, designed for a static, rural society, unworkable. Modification of the established order became necessary; property rights in watercourses had to be reshaped by the courts. This was to be finally accomplished in later years, largely due to the adoption of American developments in the law of water rights.²¹⁵

209. *Cooper v. Barber*, 3 Taunt. 99, 128 Eng. Rep. 40 (C.P. 1810); *Alder v. Savill*, 5 Taunt. 454, 128 Eng. Rep. 766 (C.P. 1814).

210. See, e.g., *Hamilton v. Marquis of Donegall*, 3 Ridg. Parl. Rep. 267 (Ire. 1795); *Weld v. Hornby*, 7 East 195, 103 Eng. Rep. 75 (1806).

211. *Anonymous*, Durham Assizes, 1808, reported in a footnote in *Phillimore v. Barry*, 1 Camp. 513, 517, 128 Eng. Rep. 1040, 1042 (N.P. 1808).

212. *Ball v. Herbert*, *supra* note 208.

213. *The King v. Smith*, Dougl. 441, 99 Eng. Rep. 283 (K.B. 1780).

214. *Wyatt v. Thompson*, 1 Esp. 252, 170 Eng. Rep. 347 (1794).

215. It should also be noted that during this period pleading grew to be far more liberal than it had been in earlier times, and became, as it properly should be, a means of framing issues for decision, rather than itself the principal subject of controversy. Cf. *Fitzsimons v. Inglis*, 5 Taunt. 534, 128 Eng. Rep. 798 (C.P. 1814); *Griffiths v. Marson*, 6 Price 1, 146 Eng. Rep. 723 (1818); *Shears v. Wood*, 7 Moore 345 (1822).

XI. CONCLUSION

This, then, was the status of English water use law in 1825, immediately before Story and Kent conceived the riparian doctrine on the western shore of the Atlantic. In the years following 1825, the English courts were to abandon prior use as the crucial test and to embrace in its stead the "natural flow" doctrine of *Wright v. Howard*.²¹⁶ But the era of natural flow was to be short-lived, for in 1851 the Court of Exchequer, in *Embrey v. Owen*,²¹⁷ was to adopt from American law the riparian doctrine with its basis of reasonable use.

In 1825 the common law contained the seeds of the reasonable use test; the development across the centuries had been in the direction of a flexible legal standard which would enable the greatest beneficial use of watercourses.²¹⁸ Story and Kent were unquestionably conversant with this common law background. It is true, of course, that in constructing the riparian doctrine they drew heavily upon the Code Napoleon and Roman law. But at most the continental legal system can be assigned only a paternal role in the conception of the American riparian doctrine. The gestation of the doctrine occurred within the matrix of the common law, over centuries of judicial experience and growth.

216. In the 1833 King's Bench decision of *Mason v. Hill*, 5 B. & A. 1, 110 Eng. Rep. 692, the natural flow doctrine of *Wright v. Howard* was restated, and its basis laid as early as *Cox v. Mathews*, 1 Ventris 237, 239, 86 Eng. Rep. 159, 160 (1673). The doctrine was approved by way of dictum by the Court of Exchequer Chamber in *Acton v. Blundell*, 12 M. & W. 324, 152 Eng. Rep. 1223 (Exch. Ch. 1843).

217. 6 Exch. 353, 155 Eng. Rep. 579 (Exch. Ch. 1851).

218. The English courts were not unaware of the Roman law of watercourses. For instance, in 1833, in *Mason v. Hill*, *supra* note 216, at 23-25, 110 Eng. Rep. at 700-01, Denman, C. J., referred to and quoted from Vinnius and the Institutes and Digest of Justinian in discussing the nature of the public interest in watercourses.