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NOTES

CAN A STREAM BE RETURNED TO ITS NATURAL CHANNEL AFTER HAVING BEEN DIVERTED FOR THE STATUTORY PERIOD.—The question of whether one who has by adverse use acquired the prescriptive right to divert a stream into an artificial channel, or in some way interferes with the normal flow of the stream, can return it to its original course or condition has been severely debated. The variance in opinions has been due to the different interpretations given to prescriptive rights.

Those jurisdictions which have held that the original adverse user can return the stream to its original state, even though this should work a hardship on those who have used their land in view of the artificial condition, have done so on the ground that use by these parties in no way infringed upon the rights of the original adverse user, and thus they acquired no rights as against him.[1]

Some jurisdictions which ordinarily follow the above rule state, however, that where the party now seeking the continuation of the

1 Drainage Dist. No. 2 v. City of Everett, 171 Wash. 471, 18 Pac. 2d 53 (1933); Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299 (1871); Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 60 S. E. 650 (1908); Goodrich v. McMillan, 217 Mich. 630, 187 N. W. 368 (1922).

status quo is a party who could have prevented the prescriptive right from having been acquired, but who acquiesced in it, can have the new condition continued.[2]

Those jurisdictions which refuse to recognize the rights of a party benefited by the changed location of the stream to prevent its being returned to its original course, refuse on the ground that there can be no prescriptive right without an adverse use. Thus when the party originally diverting the stream gained a prescriptive right by adverse use this did not make the new course the natural course, but it merely estopped those who formerly had had rights to the stream in its original state from asserting these rights. No one, therefore, could gain rights in the new channel or flow except by use adverse to the rights of the original adverse user. As an individual who, as a lower riparian owner, uses the water in its new location, or one who utilizes the dry bed of the original stream is in no way infringing upon the rights of the original adverse possessor so as to be considered a trespasser as to him, he can gain no rights against this adverse possessor. For this reason the original adverse possessor can return the stream to its original channel or to its normal flow at will.

In *Hanson v. McCue*[4] where the plaintiff sought the continuation of the flow of a stream across his land on the grounds of an easement by a presumption of a grant, the court held that as a presumption of the grant of an easement is founded on the conduct of one of the parties in submitting to the adverse use for such a length of time without objection, that no other hypothesis than that of a grant will account for it, and such party must have had the right to object to, or complain of, the conduct of the other party in using it, and failed to assert it, and, as in this case, the defendant, or those preceding him in title, had no right to complain that the water flowing in the artificial channel after leaving the spring was appropriated by the plaintiff and those preceding him in title, there can be no presumption of a grant of an easement.

On the other hand those jurisdictions which hold that those who have been benefited by the changes wrought by the adverse use of the original adverse user may insist upon the continuation of the new condition, follow the doctrine laid down in *Belknap v. Trimble*[5] where the court in speaking of easements stated that the rule for a prescriptive right must be reciprocal, and that the proprietor at the head of a stream who has changed the natural flow of the waters, and who has continued

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2 Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901).

3 Arkwright v. Gell, 5 M. & W. 203, 8 L. Exch. 201, 10 Eng. Rul. Cas. 218 (1839).

4 42 Cal. 303, 10 Am. Rep. 299 (1871).

5 3 Paige (N. Y.) 576 (1832).

such change for more than the period of the statute of limitations, cannot afterwards be permitted to restore it to its natural state when this will have the effect of destroying or damaging the property of other proprietors below, that has been erected so as to utilize the stream in its changed state.

In some jurisdictions which follow the doctrine of reciprocal easements this reciprocity is dependent upon the permanency of the artificial condition. Thus in *Greisinger v. Klinhardt* [6] where the plaintiff sought to have the present level of a lake retained, the court stated: "this artificial lake was intended to be permanent, such that the adjacent proprietors acquired riparian rights the same as if it were a natural body of water." Also in *Smith v. Youmans* [7] the court said: "it has long been settled that the artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained. The water course, though artificial, may have originated under such circumstances as to give rise to all the rights riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural water course prescriptively."

In *Lake Drummond Canal & Water Co. v. Burnham,*[8] where the court allowed the defendant to return the stream to its former state, the court stated: "where the proprietor of an upper tenement constructs and maintains on his own premises, and for his own convenience and advantage, an artificial structure affecting the flow of water, and such structure invades no right of the lower proprietor, and gives indication that it is for a temporary purpose, or a specified purpose which may at any time be abandoned, the upper proprietor comes under no obligation to maintain the structure and the conditions produced by it from lapse of time, though the incidental effect has been to confer a benefit on the lower tenant. Nor in such case does the lower proprietor acquire any right which rests only on prescription."

In *Mathewson v. Ward,*[9] one of the best reasoned cases in favor of the theory that an adverse user can not return the stream to its original state, where an adverse user had diverted a stream for thirty years and then sought to return it to its original channel to the detriment of lower owners on the artificial course, it was decided that upon the running of the statutory period the artificial course became the natural course and riparian rights would arise on this course. The original adverse user could not return the stream to its original channel as this channel was no longer the natural channel of the stream.

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6 321 Mo. 186, 9 S. W. 2d 978 (1928).
7 96 Wis. 103, 70 N. W. 1115 (1897).
8 147 N. C. 41, 60 S. E. 650 (1908).
9 24 Wash. 407, 64 Pac. 520 (1901).

One of the strongest arguments against allowing a stream to be returned to its original course is on the theory of estoppel. This theory is emphasized in one of the leading cases on this subject, *Kray v. Muggli.*[10] In this case where the defendant had given third parties the right to remove a dam the court held that where the flow of a natural stream has been diverted from its natural channel, or obstructed by a permanent dam, and this condition has existed for the time necessary to establish a prescriptive right to perpetually maintain the same, the riparian owners along such stream of water who have improved their property in reliance on the continuance thereof, acquire a reciprocal right to have the artificial condition remain unchanged. This case further states that the person who placed the obstruction in the stream or caused the diversion thereof is estopped upon the principles of equity from restoring the water to its natural condition or channel to the detriment of such riparian owners.

The reasonableness of the application of the doctrine of estoppel in cases of this sort cannot easily be discounted. If the defendant by an adverse use for the statutory period has acquired a prescriptive right to have the stream run in its new state, and the plaintiff, or any third person, is estopped from denying that this new course is the natural course of the stream, then it seems only equitable that the defendant should likewise be estopped, from denying that this is the natural course and that others have on this course rights upon which an action may be maintained should the defendant seek to return the stream to its original state.

In those jurisdictions which recognize the theory of reciprocal easements or which would decide this question on the theory of estoppel a question still arises as to just what the obligations of the original adverse user are as to maintaining the condition which he has created. In these jurisdictions there is no question but that he must do nothing positive toward causing the stream to return to its original channel or to its natural flow.[11] It has never been decided whether the adverse user must take any positive action to maintain the present condition, but by way of dictum it has been stated in several cases that such an adverse user would have no positive obligation to do so.[12] Also by way of dictum it has been stated that such a person would have the obligation to allow other parties interested in maintaining the stream in its present flow, to enter upon his land and repair a dam, clear out a channel, or do whatever might be necessary to maintain the stream in its present condition.[13]

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10 84 Minn. 90, 86 N. W. 882 (1901).

11 Hammond v. Antwerp Power & Light Co., 132 Misc. 786, 230 N. Y. S. 621 (1928); Kray v. Muggli, 84 Minn. 90, 86 N. W. 882 (1901).

12 Hammond v. Antwerp Power & Light Co., 132 Misc. 786, 230 N. Y. S. 621 (1928).

13 Kray v. Muggli, 84 Minn. 90, 86 N. W. 882 (1901).

While at the present time the majority of courts probably adhere to the theory that an adverse user can return a stream to its original state,[14] and while it is also true that the theory of reciprocal easements is not in complete harmony with the theory of prescriptive rights,[15] nevertheless, it seems that either upon the theory of estoppel,[16] or upon the theory that upon the running of the statutory period the new course should become the natural course,[17] an adverse user could be prevented from returning the stream to its former state to the detriment of others, and this is certainly a result to be desired.

Bernard F. Grainey.

CHATTEL MORTGAGES ON UNPLANTED CROPS — GENERALLY AND IN MICHIGAN. — A brief introduction is proper, in considering the question of chattel mortgages on unplanted crops, as to the status of crops generally, whether realty or personalty. Crops, the product of the soil, may be the result of nature's growth or the labors of man on the land. If the former, they are called *fructus naturales;* whilst the latter are designated as *fructus industriales.* This distinction has served to determine crops as either realty or personalty. We shall be concerned only with the second class of crops.

Generally growing crops are considered as personalty, but for purposes of conveyancing they pass with and as appurtenant to the realty, unless severed by reservation or exception therefrom. As long as crops are growing they present no particular problem to the one interested in them as a security factor. According to *Edwards v. Thompson* [1] growing crops are personal property and as such are subject to execution, mortgage and sale.

A different problem is raised where the crops have not as yet been planted. In such a situation it must be determined whether a present valid mortgage can be executed on future crops. Three views or theories have been adopted in the determination of this question. One view, adopted by some states,[2] is that such a mortgage is void. However, in

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14 Goodrich v. McMillan, 217 Mich. 630, 187 N. W. 368 (1922).

15 Arkwright v. Gell, 5 M. & W. 203, 8 L. J. Exch. 201, 10 Eng. Rul. Cas. 218 (1839).

16 Kray v. Muggli, 84 Minn. 90, 86 N. W. 882 (1901).

17 Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901).

1 85 Tenn. 720, 4 Am. St. Rep. 807 (1887).

2 Ga., Cusseta Bank v. Ellaville Guano Co., 143 Ga. 312, 85 S. E. 119 (1915); Ill., Roy v. Goings, 6 Ill. A. 162 (1880); Stowell v. Bair, 5 Ill. A. 104 (1879); Ky., Cheatham v. Tennell, 170 Ky. 429, 186 S. W. 128 (1916); Me., Kelly v. Goodwin, 95 Me. 538, 50 A. 711 (1901); Mo., Littlefield v. Lemley, 75 Mo. A. 511 (1898); N. H., Cudworth v. Scott, 41 N. H. 456 (1860); S. C., Moore v.

these states an equitable lien will be imposed on the crop on its coming into existence. In another group of states such mortgages have been made valid by legislative enactment. Thus in North Dakota for instance a valid legal mortgage can be executed on an unplanted crop.[3] Most states in this group limit the time after the mortgage arrangement within which the seed may be sown, as in Arkansas where the statute provides that the mortgage shall be valid only against crops to be planted within twelve months of the execution of the mortgage.[4] Sometimes statutes stipulate that the mortgage shall be executed after January 1 of the year in which the crop is grown as in Alabama.[5] In such a jurisdiction, if the mortgage is executed before January 1, the mortgagee gets only an equity.[6] The Minnesota statute [7] limited the mortgage to apply to crops sown within the year.[8]

The third view adopted quite universally is the *potential existence* theory. This is followed in Michigan and is exemplified by the case of *Dickey v. Waldo*.[9] The doctrine of *potential existence* in the cases [10] has been considered as applying to crops which are the natural product or the expected increase of land already belonging to the vendor or mortgagor. The reason, no doubt, of the courts in developing the doctrine of potential existence was to extend the operation of the mortgage to property potentially belonging to the mortgagor in that it was an incident to other property already in existence and actually belonging to him.[11]

Legally things are said to have a potential existence when they are the natural product or expected increase of something already belonging to the mortgagor. The first requisite therefore is that the mortgagor actually possess the land to which the crops are incident or, in the case of animals, the dam to which offspring are incident. This primary requirement of actual possession is expressed in the case of *Grantham v. Hawley* [12] by analogy to a mortgage on the products of animals. "Land is the mother and root of all fruit, therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the tithe wool that he shall have in such a year, yet perhaps he shall have none, but

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Byrum, 10 S. C. 452, 30 Am. R. 58 (1877); Tex., Silberberg v. Trilling, 82 Tex. 523, 18 S. W. 591 (1891); Wis., Merchants' etc. Sav. Bank v. Lovejoy, 84 Wis. 601, 55 N. W. 108 (1893).

3 Thompson Yards v. Richardson, 51 N. D. 241, 199 N. W. 863 (1924).

4 Word v. Cole, 122 Ark. 457, 183 S. W. 757 (1916).

5 Gaston v. Marengo Impr. Co., 139 Ala. 465, 36 S. 738 (1904).

6 Clemmons v. Metcalf, 171 Ala. 101, 54 S. 208 (1910).

7 Gen. Statute of 1894, Section 4154.

8 Ward v. Rippe, 93 Minn. 36, 100 N. W. 386 (1904).

9 97 Mich. 255, 56 N. W. 608 (1893).

10 Hutchinson v. Ford, 9 Bush 318, 15 Am. Rep. 711 (1873); Booker v. Jones, 55 Ala. 266 (1876); Stowell v. Bair, 5 Ill. App. 104 (1879).

11 Ludlum v. Rothschild, 41 Minn. 218, 43 N. W. 137 (1889).

a man cannot grant all the wool that he shall grow upon his sheep that he shall buy hereafter, for then he hath it neither actually nor potentially." No principle of law will allow a chattel mortgage to operate on property not in either actual or potential existence at the time of the mortgage.[13] The mortgagor must have a present interest in the land of which the mortgaged crops are to be an incident as distinguished from a mere belief, hope or expectation of a future acquired interest.[14] Thus a mortgage on the crops of any indefinite piece of land to be rented by the mortgagor would not constitute a present interest. Such a transaction would be void as an attempt at the conveyance of a mere possibility or expectancy not coupled with an interest in or growing out of property.

Further, as a second requirement the crops themselves or subject matter of the mortgage must have a potential existence and must not be a mere possibility or expectancy that they will come into existence.[15] The subject matter must also be specific or identified and capable of delivery.[16]

The doctrine of potential existence embraces the situation where the crop has not yet been planted. We have pointed out the necessary requisites for the application of the doctrine, *viz.* the existence of a present interest or actual possession of the land to which the mortgaged crops are incident and the potential existence, as distinguished from a mere expectancy, of the mortgaged crops themselves. We have proceeded on the acceptance of the theory that crops may have a potential existence while the seeds are yet unplanted, being the products of land already in possession.

Some courts do not conform to this holding and have held that a mortgage on crops, the seeds of which are yet unplanted, is invalid and of no effect. Such courts deny the potential existence theory. For instance, the Illinois court held in *Stowell v. Bair* [17] that crops, the seed for which is not in the ground at the time of the mortgage, cannot be regarded as having a potential existence in the soil at the time of the mortgage, and cannot pass under such a mortgage without a bill in

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12 1 Hob. 132 (1603-25).

13 Farmers Loan and T. Co. v. Long Beach Imp. Co., 27 Hun. 89 (N. Y., 1882).

14 Low v. Pew, 108 Mass. 347, 11 Am. Rep. 357 (1871); Crinkley v. Egerton, 113 N. C. 444, 18 S. E. 669 (1893); Minn. Linseed Oil Co. v. Maginnis, 32 Minn. 193, 20 N. W. 85 (1901); Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718 (1877); Sanborn v. Benedict, 78 Ill. 309 (1875); Brunswick Balke Collander Co. v. Stevenson, 51 Hun. 640, 4 N. Y. S. 123 (1863); 21 N. Y. S. R. 862; Van Hoozer v. Cory, 34 Bar. 9 (N. Y., 1860).

15 Paden v. Bellenger, 87 Ala. 577, 6 S. 364 (1889); Hurst v. Bell, 72 Ala. 336 (1882).

16 Skipper v. Stokes, 42 Ala. 255, 94 Am. Dec. 646 (1868); Purcell v. Mather, 35 Ala. 570, 76 Am. Dec. 307 (1860).

17 5 Ill. App. 104 (1879).

equity to subject them to the operation of the mortgage, brought after they have come into existence of the possession taken by the mortgagee. Only a year later the Illinois court handed down what seemed a contrary ruling, seemingly accepting the potential existence theory on unplanted crops, the case being that of *Hansen v. Dennison.*[18] But in this case the crop was already in existence, being fall wheat which was mortgaged early in the spring of the following year. In the *Stowell case*[19] the security given for two promissory notes was "all the crops of every description to be raised on certain premises during the years 1877 and 1879." The court held that a mortgage on future crops, the seed for which had not been sown, was invalid. The Illinois court evidently felt that the security interest was too remote where the seeds had not yet been planted, although a North Carolina court in the case of *Fonville v. Casey*[20] went so far as to hold that a tenant for life might sell the profits of land for three or four years to come, even though the crops were not *in esse.* The later Illinois case differs from the former ruling in that at the time of the execution of the mortgage the crop (wheat) was actually in the process of growing. By the ruling in the *Hansen case*[21] the Illinois court did not accept the potential existence theory as to unplanted crops. Nebraska, without accepting the theory, maintains in *State Bank of Gering v. Grover*[22] that such an invalid mortgage can become effective only by the intervention of some new act after the crop is planted.

The Kansas court chooses to adopt the potential existence theory and it is followed by Michigan. The Kansas court in *Beall v. Spear*[23] held that a mortgage on an unplanted crop, which is afterwards planted and grown, may be enforced as between the original parties, where no rights of third persons are thereby affected. The Michigan court has held that future crops can be the subject of sale or mortgage and has relied on the potential existence theory to uphold such decisions. In *Dickey v. Waldo*[24] the plaintiff sold peach trees to one Schultz with the provision that the plaintiff might select any two years in which to take an undivided half interest in the fruit as consideration for the sale. Schultz conveyed to the defendant who contested the claim of the plaintiff to a half interest in two years of fruit, on the ground that the plaintiff was not entitled to a lien on the fruit since it was not *in esse* at the time of the sale. But the court in holding that plaintiff and defendant were tenants in common as to two years of fruit, said that the defendant, having purchased with notice, stood in the same relation to the plaintiff as did his grantor.

18 7 Ill. App. 73 (1880).
19 5 Ill. App. 104 (1879).
20 5 N. C. 389, 4 Am. Dec. 559 (1810).
21 7 Ill. App. 73 (1880).
22 110 Nebr. 421, 193 N. W. 765 (1923).
23 106 Kan. 690, 189 P. 938 (1920).
24 97 Mich. 255, 56 N. W. 608 (1893).

A later Michigan case, *In re Miller*,[25] involves a mortgage executed on future greenhouse produce such as radishes, lettuce, tomatoes, flowers and plants, to secure two notes executed by one Miller in satisfaction of a debt owed to the Fremont Co-operative Produce Company for coal supplied to Miller. The problem of whether a lien on crops to come into existence in the future was valid was presented and the court held in behalf of the produce company that such a lien could be enforced. The court referred to the ruling of Justice Weist in *Michigan Sugar Co. v. Falkenhagen*[26] who therein relied on Ruling Case Law[27] to this extent that "the contract (as to future crop) was valid, though made before the crop was *in esse*. At least it attached when the crop came into existence."

So far consideration has been confined exclusively to crops. But very important observations may be made at this point, incidentally, as to the application of the potential existence theory to additions and accumulations to furniture,[28] machinery,[29] and stocks of goods.[30] It has been a very practical way of engaging in business and has been the means of financing many an enterprise. An example of such a mortgage on additions to furniture is the case of *Smithurst v. Edmunds*,[31] wherein a lessor, to secure the payment of rent on a hotel building, took back a chattel mortgage on the present stock of furniture of the hotel under an agreement that also any additional furniture placed on the premises by the lessee should belong to the lessor as collateral to the original furniture for the payment of the rent. The court held that the contract, although not operating as a mortgage at law did create an equitable mortgage on such after acquired property which a court of equity would enforce and protect as against a subsequent execution creditor of the lessee.

In regard to machinery the principle has been held to apply to repairs, replacements and additions to the original equipment. Thus in New York in *Kribbs v. Alford*,[32] although New York has failed to recognize the doctrine as regards to additions to a stock of goods sold in the ordinary course of business,[33] nevertheless held that the mortgage lien of the mortgagee extended only to after acquired property installed on the premises by the mortgagor, and a prominent feature of the case was the ruling that property installed by the assignee of the mortgagor could not be subject to the mortgagee's lien. The reason that

25 244 Mich. 302, 221 N. W. 146 (1928).
26 243 Mich. 698, 220 N. W. 760 (1928).
27 8 R. C. L. 371.
28 Smithurst v. Edmunds, 14 N. J. Eq. 408 (1862).
29 Kribbs v. Alford, 120 N. Y. 519, 24 N. E. 811 (1890).
30 Brett v. Carter, Fed. Cases No. 1844, 2 Lowell 458 (Mass., 1875).
31 14 N. J. Eq. 408 (1862).
32 120 N. Y. 519, 24 N. E. 811 (1890).
33 Triswold v. Sheldon, 4 Comst. (4 N. Y.) 581 (1850).

the court gave was that the assignee did not contract that the machinery installed by him should be subject to the provisions of the mortgage. The assignee did not agree to pay the mortgage, and hence should not be additionally burdened with the obligation of paying the personal covenants given by the lessee to third parties as security for an indebtedness. The assignee would be required to fulfill only the covenants running with the land.[34]

The application of the principle to additions to stocks of goods represents the practicability of the acceptance and adherence to such a doctrine. In Massachusetts, in the case of *Brett v. Carter,*[35] a mortgage was given to secure the payment in instalments for the purchase money for goods. The mortgage conveyed the stock "and any other goods which may from time to time, during the existence of this mortgage, be purchased by the grantor and put into said store to replace any part of said stock which may have been disposed of." The Massachusetts court upheld such a mortgage, whereas the New York court in a similar situation, in the case of *Triswold v. Sheldon,*[36] held that such a mortgage of chattels which permits the mortgagor to continue in possession and to sell the goods in the ordinary course of business, is void on its face. Such a mortgage, the Massachusetts court held, was not a fraud on purchasers or those dealing with the firm as creditors. The Massachusetts court pointed out the effect of the application of the New York holding: "It is plain that such a doctrine virtually prevents a trader from mortgaging his stock at any time for any useful purpose; for if he cannot sell in the ordinary course of trade, or only as the trustees and agent of the mortgagee, he might as well give possession to the mortgagee at once and go out of business. In this case he never could have begun business, for the whole stock was supplied by the defendant." Under the Massachusetts holding creditors are not defrauded as against the mortgagee who is most outrageously defrauded by a rule such as the New York one which devotes his property to the payment of another person's old debt the very instant that he has parted with the possession, taking a security which is admitted to be honestly given.

We mentioned the practicality of the application of the doctrine by the way of encouraging business enterprises. The Michigan court, as early as the case of *Gay v. Bidwell,*[37] which was referred to in the Massachusetts case of *Brett v. Carter,*[38] pointed out the practicality and the business expediency of allowing such mortgages. "Many small merchants, especially beginners in business, have no other means of

34 Oil Co. v. Blair, 113 Pa. St. 83, 4 Atl. Rep. 218 (1886).
35 Fed. Cases No. 1844, 2 Lowell 458 (Mass., 1875).
36 4 Comst. (4 N. Y.) 581 (1850).
37 7 Mich. 519 (1859).
38 Fed. Cases No. 1844, 2 Lowell 458 (Mass., 1875).

securing their creditors for the stock they purchase, and can only meet their debts out of current sales. If any creditor is likely to be injured by allowing the debtor to dispose of the mortgaged property, it is rather the creditor whose security is thus cut down, than the one who has no claim upon the specific property. To hold that a merchant cannot mortgage his goods without closing his doors, would be to hold that no mortgage of a merchant's stock can be made at all."

By way of summary as to crops, we may say that in regard to whether still unplanted crops may be subject matter of mortgage, sale or otherwise three views have been adopted. The application of the doctrine to furniture, machinery or stock of goods is one analogous to the theories as herein applied to crops. One theory adopted by a certain group of states is that such a mortgage is void; while another group allows such mortgages, although restricting the time within which the mortgage may be executed. The third type of jurisdictions proceeds on the potential existence theory, requiring of the mortgagor a present interest in land to which the crops are incident and the potential existence of the crop itself, as distinguished from a mere hope or expectancy. This is the theory or view followed in the majority of states and exemplified in Michigan by *Dickey v. Waldo* [39] and *In re Miller.*[40]

In the light of the foregoing it seems the most reasonable and workable theory of the three. By way of application to the country's present accelerated agricultural program it seems highly desirable for increased crop production to supplement the fight for freedom. Under it small commercial country banks could extend credit to farmers for the purchase of seed, machinery, etc., taking as security the yet unplanted and unharvested crop. A certain amount of discretion, considering all elements that may occur to impair the crop, must be used; but the general effect of such a policy would tend towards the development of possibly otherwise undeveloped rural areas. Such a policy affords an opportunity to farmers, who are confronted with the difficulty of a lack of necessary funds, to make the initial start. So that, as was stated in the opinion in *Dickey v. Waldo,*[41] such contracts are reasonable and beneficial to both vendor and vendee (mortgagor and mortgagee). Especially are they beneficial to the vendee and the mortgagor, because he avoids all expense except his labor, runs no risk and if in indigent circumstances obtains a gain which he could not otherwise have realized.

Leo L. Linck.

39 97 Mich. 255, 56 N. W. 608 (1893).
40 244 Mich. 302, 221 N. W. 146 (1928).
41 97 Mich. 255, 56 N. W. 608 (1893).

RIPARIAN RIGHTS AND THE "NECESSARY INDUSTRY DOCTRINE." STREAM POLLUTION — INJUNCTION AGAINST — DAMAGES FOR. — Riparian proprietors upon both navigable and unnavigable streams are entitled, in the absence of grant, license, or prescription limiting their rights, to have the stream which washes their lands flow as it is wont by nature, without material diminution or alteration.

Riparian owners have, also, a natural right to have natural streams flow unimpaired in quality as well as quantity; and any use of the stream by one proprietor, which defiles or corrupts it to such a degree as essentially to impair its purity and usefulness for any of the purposes to which running water is usually applied, is an invasion of private right, for which those injured thereby are entitled to a remedy.[1]

However proprietors upon streams may cast sewage and waste material therein, if they do not thereby cause material injury to public or private rights, as was decided in the case of *Hayes v. Waldron*.[2]

The natural right of one proprietor to have the stream descend to him in its pure state must yield in a reasonable degree to the equal right of the upper proprietors in their use of the stream for mill and manufacturing purposes which will tend to make the water more or less impure.

So it is of public importance that the proprietors of useful manufactories should not be held responsible only for slight inconveniences or occasional annoyances or even some degree of interference with irrigation or agriculture. When an injunction is sought to stop large and expensive works which cause a stream to be polluted, it must clearly appear that the legal remedy is inadequate, and that the plaintiff will suffer irreparable injury from the continuance of the pollution.

In some cases an injunction will be refused if the plaintiffs' premises are several miles below those of the defendant, and the water of the stream in the plaintiffs' vicinity is not materially affected.

The right of each riparian owner to deposit in the stream is a question of reasonable use, as in the case of the detention, obstruction, or diversion of water. So in each case we must look to the test of "reasonableness" to determine if the injunction should or should not be granted.

For the most part the cases have held for the sanctity of the "pure water" theory. This is best summed up by the following quotation: "The right of a riparian owner to have the water of a stream come to him in its natural purity, or in the condition in which he has been in

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1 Woodward v. Worcester, 121 Mass. 245 (1876); Dwight Printing Co. v. Boston 122 Mass. 583 (1877).

2 47 N. W. 485, 44 N. H. 580, 84 Am. Dec. 105 (1863).

the habit of using it for the purposes of his domestic use or of his business, is as well recognized as the right to have it flow on his land in the usual quantities." [3]

As the courts emphatically proclaim the right for the lower riparian to the "pureness" of the water, so do they proclaim his remedy. The first to be considered is the powerful weapon of the injunction. In *Indianapolis Water Co. v. American Strawboard Co.*[4] the court set out the doctrine of the injunction. "Where the right of a riparian proprietor to the use and enjoyment of the flow of a stream of pure and wholesome water, free from corruption and pollution, has been actually invaded, and such invasion is necessarily to be continuing, and to operate prospectively and indefinitely, and the extent of the injurious consequences is contingent and doubtful pecuniary estimation, the writ of injunction is not only permissible, but it affords the only adequate and complete remedy."

In most of the cases the courts are disposed to limit the granting of relief strictly to restraining in general terms, the defendants' pollution of the stream since as a rule they appear to be unwilling to incorporate into the decree any mandatory order, such as one for the closing of the manufacturing establishment. This was adhered to in *French v. Chapin-Sacks Mfg. Co.*[5] and *Wanamaker v. Bushnell*[6] very strictly. Here the court held that the injunction is usually upon the condition that it shall not be effective immediately, but only at a later time, after the defendant shall have a reasonable time to remedy the pollution. So, although the courts recognize the existence of the possibility of an injunction, in case of large manufactories they are reluctant to restrain their operation merely because of some small riparian owner who is bothered, or the appreciation of his land affected. The more equitable, and more sensible, rule will be set out later. It is the way the courts of Indiana have recognized the situation and have handled it drastically.

Another example of the timidity of the courts is exemplified in *Duncan v. Union-Buffalo Mills Co.*[7] where the court held that a decree which totally enjoined the operation of a sewage plant which polluted a stream was too stringent because it decreed the closing of the plant. The court held that the injunction should extend only to the unlawful use of the plant.

True, it works great hardships upon plants, but until they can clean up the pollution of the stream, it seems only right that they should be restrained from using it. Merely because their exercise of the stream

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3 27 R. C. L. 1212.
4 57 Fed. 1000 (1893).
5 118 V. 117, 86 S. E. 842 (1915).
6 22 Pa. Dist. R. 926 (1913).
7 110 S. C. 302, 96 S. E. 522 (1918).

entails a great fortune in the building of the factory, their riparian rights are no more than the common farmer and should be treated as such.

In discussing the further remedy of "damages" as well as the injunction it is well to test the general background. Here we refer to damages due to the "noxious" odors coming from the stream.

In the early law the double remedies were not allowed. As typified in *Davis v. Lambertson* [8] and in *Barton v. Union Cattle Co.*[9] the courts held that where the plaintiff sought both damages and an injunction, and was merely awarded damages, his action having been regarded by the court as one at law and not equity, the judges said that in such a case the plaintiff had his election as to what action he would bring, and that the courts would not elect for him which action he should prosecute.

However, the modern rule and one followed by most courts today is that set out in *Ameircan Tar Products Co. v. Jones.*[10] The court held that one who has filed a bill against certain defendants to enjoin the continued pollution of a stream, and also an action for damages already suffered, will not be required to elect as to which of these two remedies he will rely upon, since the relief sought in each case is different.

So the courts agree that when the plaintiff seeks and is granted an injunction, because of the abolition of the distinction between cases of law and equity, he can be granted the restraining order of the court as well as damages because of the depreciation of the rental value of the property or the natural use of the land, its enjoyment and fruits.

In *Weston Paper Co. v. Pope* [11] the court allowed that there should be a larger amount of damages because of the impairment of the rental value. It further said, "In the recovery of damages for the pollution of a watercourse, a riparian owner who has been injured is not limited in his recovery to the actual loss by depreciation in the market or rental value of the property, but it is proper to consider the impairment of his comfortable enjoyment of the property, together with such other special damages as may be proved."

"It is the general rule that where an upper riparian owner has caused the pollution of the watercourse to the injury of a lower riparian owner, and the evidence shows that the injury is permanent and irreparable, the measure of damages is the difference in the market value of the property before and after the creation of the nuisance." So held the court in *West Muncie Strawboard v. Slack.*[12]

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8 56 Barb. (N. Y.) 480 (1868).
9 28 Neb. 350, 44 N. W. 454 (1889).
10 17 Ala. 481, 86 So. 113 (1920).
11 155 Ind. 394, 56 L. R. A. 899 (1900).
12 164 Ind. 21, 72 N. E. 879 (1904).

Whether the injury is a permanent one, for which the measure of damages is the depreciation in market value of the property, or whether it is only a temporary one, for which the measure of damages is the depreciation in the rental value is a question for the jury.

In *Body v. Oskaloosa* [13] the court held that not only was the measure of damages the depreciation in the rental value of the property, but that there would be a recovery for the inconvenience and discomfort caused by the odors.

In summarizing this case it is well to cite here the case of *Weston Paper Company v. Pope* [14] which facts are alike to those in the case at the bar and which is the law in Indiana. From this case I wish to extract the decision for the case at the bar, and for the summary of this paper.

It is universally held that land on a lower level owes a natural servitude to that on a higher level, in respect to receiving the waters that naturally flow down to it in such state of increased impurity as is imposed by upper inhabitants from the ordinary use of their lands for domestic purposes. Every owner is entitled to the free use and enjoyment of his property, within "reasonable" bounds. He may do with his own land, in its use and development, as he pleases, and is not answerable for the elements and forces of nature that may by natural processes affect an inferior estate. He may, with a careful regard for the rights of his neighbors, develop and utilize the "natural" resources of his land.

However, that principle is not applicable to the case here. Here the defendant is not engaged in the development of any natural resource, or in any usual or ordinary use of its own land. Its sole business is the manufacture of articles of commerce for its own profit. It is engaged in a business that may be carried on elsewhere less injuriously to the rights of others. It is engaged in bringing to its mill, not from its own premises, but from elsewhere, materials from which, by artificial means, it evolves putrescent matter, which it casts into the stream to the serious and substantial injury of lower proprietors. This the defendant has no right to do.

A defense which has been frequently invoked is the so-called "comparative injury" doctrine spoken about at the beginning of this decision. This is the contention that the plaintiffs' injury is or would be small as compared with the defendant's in case the latter should be enjoined. While some of the courts appear to have been influenced by this doctrine so as to apply it to the extent of suspending the operation of an injunction, as quoted before, and occasionally even denying injunctive

13 179 Iowa 387, 161 N. W. 491 (1917).
14 155 Ind. 394, 56 L. R. A. 899 (1900).

relief altogether upon the theory that the defendant's injury would be greater than the plaintiff's, yet as a rule the courts of this country are reluctant to apply the doctrine, and many of the cases apparently repudiate it altogether.

No court has gone so far as to recognize the right of a manufacturer to establish his plant upon the banks of a non-navigable stream, and pollute its waters by a business wholly brought to the place, entirely disconnected with any use of the land itself, and which he may just as well conduct elsewhere, without responding in damages to those injured thereby, and to injunction if the injury done is substantial and continuing.

The fact that the defendant has expended a large sum of money in the construction of its plant, and that it conducts its business in a careful manner and without malice and evil makes no difference with regard to its rights on the stream. Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion, or corruption, subject only to the reasonable use of the water, by those similarly entitled, for such domestic purposes as are inseparable from and necessary for, the free use of their land. And they were bound to know the character of their proposed business, and to take notice of the size, course, and capacity of the stream, and to determine for themselves, and at their own peril, whether they should be able to conduct their business upon the stream having regard for its size and character.

And the magnitude of their investment, and their freedom from malice furnish no reason why they should escape the consequences of their own folly. The consequences which shall be an injunction against the mill to stop the pollution of the stream and a responding in damages to the lower riparian for the injury already caused to his property.

Illinois, on the other hand, takes the position that a necessary industry is in the same position as any other riparian owner.

An early Illinois case dealing with the pollution of water and of the air was *City of Jacksonville v. Edw. Lambert.*[15] In this case the city constructed a sewer so that the garbage, suds, slops, offal and filth from the dwelling houses and woolen mills by which it ran, was conducted, discharged, and flowed upon and through the real estate of the plaintiff, situated in the city and near the terminus of the sewer. This corrupted and polluted the atmosphere so as to render the land unsaleable and unsuitable for residences, and otherwise injure the use of the land or a portion thereof. The city was held liable to the plaintiff for the damage sustained.

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15 42 Ill. 519 (1867).

In *City of Springfield v. North Folk Drainage District* [16] the court held that the servient estate has the right as part of the freehold to have water flow in a stream free from pollution. Also held that the right of the servient estate to have water flow in a stream free from pollution and corruption could not be taken away by legislation.[17] There is a vast difference between natural debris carried by streams and pollution cast therein by artificial means as regards the right to have water flow in a stream free from pollution.[18]

Cook v. City of DuQuoin held that the owner of riparian land has the right to the flow of a stream in its natural state with its quality unaffected.[19]

Barrington Country Club v. Barrington the court said that riparians have the right to have the stream carry only water naturally collected by drainage of the basin wherein it flows.[20] As against riparian owners, the Village of Barrington has no inherent right to use the creek, as the only available natural water course, as the outlet for a sewage system and waste water from waterworks and wells, thereby causing pollution and placing additional burden on riparian owners, notwithstanding some of the pollution existed from other sources.[21]

Johnson v. City of Galva held a municipal corporation has no greater right to commit a nuisance than has any individual, and a riparian owner cannot be deprived of the use of his land and the flow of water in the stream in its natural state by the deposit therein of sewage by a city, except by due process of law. This is true even though a system of sewage disposal is an agency for the protection of the health of a city's inhabitants. To corrupt or render unwholesome or injure the water of any stream to the injury or prejudice of lower riparians constitutes a public nuisance and violates the Criminal Code.[22-23] The rule requiring the injured party to protect himself from the consequences of the wrongful act of another by the exercise of ordinary effort, care, and expense on his part, does not apply in cases of nuisances.[24]

Thomas v. Ohio Coal Co. was an action to recover damages sustained by the pollution of a stream on the plaintiff's property claimed to have been caused by oil escaping from the defendant's oil wells.[25] The defendant claimed that others were equally responsible for the pollution

16 249 Ill. App. 133 (1929).
17 249 Ill. App. 133 (1929).
18 249 Ill. App. 133 (1929).
19 256 Ill. App. 452 (1930).
20 357 Ill. 11, 191 N. E. 239 (1936).
21 357 Ill. 11, 191 N. E. 239 (1936).
22 316 Ill. 598, 147 N. E. 453 (1925).
23 Sec. 221 Crim. Code; Smith's Stat. 1923, p. 708.
24 145 Ill. 21, 33 N. E. 878 (1893); 62 Ill. 519 (1872); 57 Ill. 29 (1870).
25 199 Ill. App. 50 (1919).

of the stream. The court held in this regard that it was for the jury to determine in what proportion the defendant was liable and to assess damages accordingly. The court said that it is well settled law in Illinois that no one can directly or indirectly foul or pollute a stream of water, *even in the pursuit of a legitimate business,* and thereby damage a lower proprietary owner without rendering himself liable.

The most recent Illinois case was *Racine v. Catholic Bishop of Chicago.*[26] Appellant in this case owned land which was subdivided into lots for the purpose of sale. Appellee caused to be erected a large seminary in the vicinity of said subdivision. A creek ran alongside the subdivision. Appellee permitted the sewage from the seminary buildings to flow into the creek. As a result the air over the subdivision was filled with foul odors. Appellant claims as result of this his business was completely destroyed. Appellant in this case tried to recover damages which under the law he was not entitled. Appellant did not live on the premises nor show they were rented. It was held that the pollution of the stream by sewage is a continuing nuisance, and that, when a nuisance is regarded as a continuing rather than a permanent one, judgments at law are held to afford compensation only for the injury sustained to the time of such judgment, and a continuing of the nuisance is a grievance for which subsequent actions may be maintained.[27] Appellant was trying to obtain the entire market value of the lots and such was not the proper element of damage in this case.

Summarizing these cases we may reach a general rule for the State of Illinois as regards pollution of the water and air of a lower riparian. We have seen that cities, villages, and mining companies have been enjoined from polluting the water and making property untenable for dwelling purposes. Surely then, by analogy, if the above named municipalities and companies have been enjoined, we may draw the conclusion that in Illinois there is no weighing of equities. A necessary business stands on the same footing as any riparian owner. It seems that equal emphasis is placed on the nuisance . . . whether it be contaminating the water or fouling the air.

So we conclude that in Illinois, the upper riparian, whether he is operating a necessary industry or not, may only use the stream reasonably, and that means without doing injury to others.

A modification of the "necessary industry rule" has been adopted in Pennsylvania.

There are decisions to the effect that where the upper proprietor is carefully exercising a right in the only known practicable mode, he incurs no liability for the resulting pollution of a stream, and it has

26 290 Ill. App. 284, 8 N. E. 2d 210 (1937).
27 142 Ill. 511, 32 N. E. 693 (1892); 279 Ill. App. 98 (1935).

also been held by some courts that where the public has a general interest in the business carried on, and the business is of such a character that it cannot be conducted at any other place than where nature has located it, or where public necessity requires it to be, individual rights must yield to the public good.[28] If a person has the right to use the waters of a stream as it naturally flows over his property, private persons polluting it cannot urge, in mitigation of the damages caused by them, that they offered to give him a substitute for it. The right to decline arbitrarily the use of any other water offered is as absolute as the right to use the unpolluted water.[29]

The right acquired by prescription to pollute the waters of a stream is limited by the character and extent of the right exercised during the period of prescription, and for any increase causing material injury to the riparian owners an action may be maintained.[30] A prescriptive right to render running water unfit for drinking or domestic purposes requires the strictest proof of its existence.[31] The weight of modern authority supports the rule that a person who, by permitting the pollution of his own soil or the water thereunder, contaminates his neighbor's well or the streams under the neighbor's land, from which water is appropriated, is liable to the latter in damages, and in some cases the continuance of such pollution has been restrained by injunction.

In another Pennsylvania case,[32] however, an injunction was granted where it was shown that upon a former occasion, when the defendant manufactured dynamite, the stream had become so polluted as to kill fish and vegetation, as well as to affect its value as water power by corroding machinery, and that defendant intended to resume his former operations in the same way. The same policy was earlier followed in a case [33] where the court said since the pollution was known to be dangerous to public health and to be increasing in degree, a preventative remedy should be granted without waiting for an epidemic actually to occur. In enjoining the continuance of the discharge of sewage in a stream in such a way as to be deposited on plaintiff's land and lawn it was stated that plaintiff was entitled to enjoy his property in the way he wished. Court said that it would not do to ask plaintiffs to continue to submit to the pollution, relying upon the prospect that at some time in the future the nuisance would be abated by some means other than those sought to be put into force under the prayer of the bill.

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28 Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 6 A. 453 (1886).

29 Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 50 A. 818 (1902).

30 McCallum v. Germantown Water Co., 54 Pa. St. 40 (1867).

31 Hough's Appeal, 102 Pa. St. 42 (1883); Hauch v. Tidewater Pipe Line Co., 153 Pa. St. 366, 26 A. 644 (1893).

32 Rarick v. Smith, 17 Pa. Co. Ct. 627 (1896).

33 New Castle City v. Raney, 6 Pa. Ct. 87 (1888).

The defendant or "offender" has at times sought to show that his use of the stream was necessary. While some of the courts recognize that under certain circumstances, as for instance, where a business has to be conducted in a certain place and cannot be conducted elsewhere, one may be justified in polluting the stream in connection with such business, particularly if it cannot be awarded, or possibly if due care be exercised, yet the courts limit this doctrine strictly, and appear to apply it only seldom, except in the case of mining operations.

The Pennsylvania rule is that the use and enjoyment of a stream by an individual lower riparian owner must give way to the interests of the community, in order to permit the development of the natural resources of the country as outlined in the Sanderson case, supra. New York is contra to this rule and refuses to change the law relating to the ownership and use of property in order to accommodate a great business enterprise. The Pennsylvania court itself indicated its disinclination to extend to the pollution of a public water supply the rule laid down in the Sanderson case, supra. This is the reason for the ruling in the case [34] where the company furnishing water to a borough sought to enjoin the pollution of a stream, the state was properly made a party plaintiff and the court apparently considered that the state would be entitled to the injunction if it should present sufficient proof.

An injunction was also granted in a case of dynamite manufacturing [35] and the court said that the business of the defendant had no necessary relation to the land itself, and was not an ordinary or natural use of the land. The Pennsylvania courts have oftentimes applied the "comparative injury" doctrine which states that the plaintiff's injury is or would be small as compared with the defendant's in case the latter should be enjoined. Such was the reasoning in the Norristown case [36] where the plaintiff's damage was not shown, the court said in refusing the injunction, that it was no small matter to silence the defendant's factory, which cost $120,000 and employed nearly 300 hands.

Exceptions are not only made in the case of coal mining in Pennsylvania, but since there are also vast deposits of crude oil, the courts have also seen fit to formulate a body of law to apply to cases arising in the oil fields. For an injury to an adjoining or lower riparian owner by waste from oil wells it has been generally held except in Pennsylvania and Ohio that the right to extract petroleum from one's land does not include the right to discharge, or permit the escape, of waste oil or salt water upon the lands of adjoining proprietors or into streams to the detriment of the lower owners.[37]

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34 Russell v. Com. ex rel McCormick, 172 Pa. 506 33 A. 709 (1896).
35 Rarick v. Smith, 17 Pa. Co. Ct. 87 (1896).
36 Norristown Woolen Co. v. Taubel, 28 Pa. Co. Ct. 194 (1901).
37 Pfeiffer v. Brown, 165 Pa. 267, 30 A. 844 (1895).

In Pennsylvania the rule has been laid down that, in the absence of negligence or malice, no liability attaches for the pollution of a stream caused by mining operations conducted in the ordinary and usual manner. So held in the 1886 Sanderson case, but on retrial in 1878 the decision was overruled. In the former case the court said "we are of the opinion that where private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community." That case was distinguished in subsequent cases.[38] In those cases the defendants attempted to draw the water from their mines and drain it into a stream which was 5 miles distant, and which did not form the natural outlet for the water from their mines.

Moreover, the Pennsylvania courts have taken the position that the exceptional rule of the Sanderson case must be strictly limited to its facts the most salient of which were that the stream was already polluted and that the mine water flowed naturally from the mine into the stream. In a more recent case the court refused to follow the rule of the Sanderson case, saying that the cases were unlike in nearly every essential particular and to allow the application of such a rule would be to extend the rule too far. [39] The court continued, saying that the exception introduced in the Sanderson case had resulted in the pollution of nearly every stream in the western end of the state and it has become a serious problem how to obtain pure water sufficient to supply the inhabitants.

The latest decision in the Pennsylvania courts with respect to the pollution of a stream by mining operations is the Sagamore Coal Co. case.[40] A reservoir had been constructed on a creek for the purpose of obtaining water to operate the locomotives of the railroad company, and that, later, arrangements were made whereby a large population in the vicinity (75,000 people) were served with this water for domestic purposes. The pollution began after the erection of the dam and an injunction to sustain discharge of acid mine waters into the creek after first being refused by a lower court was sustained on appeal. Thus we see the modern trend of Pennsylvania courts. Now let us turn to nuisances, i. e., smell.

To constitute a nuisance it is not necessary that a noxious trade or business should endanger the health of the neighborhood. It is sufficient

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38 Getting v. Union Improvement Co., 7 Kulp. 493 (1895); Williams v. Union Improvement Co., 6 Kulp. 417 (1892).

39 McCune v. Pittsburgh and B. Coal Co., 238 Pa. 83, 85 A. 1102 (1913).

40 Penna. R. Co. v. Sagamore Coal Co., 281 Pa. 233, 126 A. 386 (1924).

if it produces what is offensive to the senses and which renders the enjoyment of life and property uncomfortable. In the Hauck case (supra) the escape from a pipe line of oil brought from a distance is not in any sense a natural and necessary development of the land so as to make liability for injury, caused by the percolation of the oil into the premises of a neighboring proprietor, depend upon negligence; but it is a case of nuisance for which the pipe-line proprietor is liable irrespective of negligence. Probing further into the question, we see [41] that smoke and gases from the defendant's coke ovens were carried by the wind and lodged upon the plaintiff's land, injuring his crops and making the land generally unfit for habitation. It was held that the defendant is liable in damages to the plaintiff only because it was not a natural use of defendant's land to manufacture coke. Had he been mining and refuse had come on to plaintiff's land through no negligence on the defendant's part the plaintiff could not recover against him. In slaughterhouse cases a court of equity may grant an injunction to restrain a nuisance which must inevitably result in cases involving slaughterhouses, stockyards, and similar establishments.[42] So where there was an oil well near a refinery [43] a court of equity would not interfere where the threatened nuisance is not inevitable, but only contingent, depending on the manner of operation.

Consequently we see that the startling rule adopted in the Sanderson case has been modified by later decisions until today it is no longer the law except in cases involving mine waters where there is no other means of disposing of it. In other words, in order to follow the Sanderson rule, the facts of the case must closely parallel it. So it has not been completely overruled. It is called the "necessity rule" — so called because in order to apply it the defendant must be operating a necessary industry. Notwithstanding the more recent tendency to somewhat alter and modify the Sanderson rule, Pennsylvania is still very liberal in allowing pollution of streams.

The doctrine of "prior appropriation" must be taken into consideration in any discussion of the rights of riparian owners in Montana and most of the Pacific states.

Customs which have evolved into law have given upper riparian owners greater rights in the mining districts of the western states. Thus in *Atchison v. Peterson,*[44] a case appealed from the Supreme Court of the Territory of Montana, the United States Supreme Court stated, "On the mineral lands of the public domains in the Pacific States and Territories the doctrines of the common law declaratory of the rights

41 Robb v. Carnegie Bros. and Co., 145 Pa. St. 324, 22 A. 49 (1891).

42 Sellers v. Penna. R. Co., 10 Phila. 319 (1875).

43 Smith v. Bellows, 20 Pa. Dist. R., 383 (1910).

44 20 Wall 507, 22 Led. 441 (1874).

of riparian proprietors respecting the use of running waters are inapplicable, or applicable only to a very limited extent, to the necessities of miners, appropriation gives the better right to running waters, to the extent in quantity and quality necessary for the uses to which the water is applied."

Congress has recognized the doctrine of prior appropriation.[45] "Whenever by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have suected and accrued, and the same are recognized and acknowledged by local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

While custom gives a riparian owner somewhat broader rights in the use of water the use must nevertheless be reasonable in view of the work carried on. Thus in *Fitzpatrick v. Montgomery*[46] where an upper owner allowed large quantities of tailings to be carried down and deposited on the land below, the court ruled that "While a proper use of the water of a stream for mining purposes must contaminate it to a certain extent, yet it cannot be carried to such a degree as to inflict substantial injury upon another riparian proprietor." This decision followed the decision handed down in *Lincoln v. Rogers.*[47] These decisions held that if the quality of the water was so deteriorated that it could not be used for mining it would be an unreasonable use.

In *Alder Gulch Consol Mining Co. v Hayes*[48] the court stated that the prior appropriator must permit the water to flow on for the use of the lower proprietors, subject only to the reasonable deterioration in quality and dimunition in quantity made necessary by the use of it by him for purpose for which he appropriated it.

In *Montana Co. v. Gehring*[49] the court ruled that a subsequent appropriator of the waters of a stream for mining purposes cannot cast mining debris therein, to the injury of a lower prior appropriator.

Thus in considering the problem of pollution by a paper mill in view of the doctrine of prior appropriation we are confronted with two problems: whether the upper riparian or mill owner was a prior appropriator or not and whether the industry was commonplace enough that a custom would develop which would place it under the rule of prior appropriation.

From the statement of facts this cannot definitely be determined but it seems more likely that A, the lower riparian owner, was also the prior appropriator.

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45 30 U. S. C. A. § 51.
46 20 Mont. 181, 50 Pac. 416 (1897).
47 1 Mont. 217 (1870).
48 6 Mont. 31, 9 Pac. 581 (1886).
49 22 C. C. A. 414, 44 U. S. App. 529, 75 Fed. 384 (1896).

As to the question of whether prior appropriation would apply it is shown by the federal statute [50] that such a custom could grow up around manufacturing just as it would around mining. It seems highly improbable, however, that in Montana such protection as is afforded a vital industry such as mining would be given to an uncommon plant such as a paper mill. If this protection was not extended the general common law rule would apply and A would be granted an injunction.

In considering the problem of odors we find the general rule to be that one has the right to have the air diffused over his premises to come to him in its natural state and free from artificial impurities. Thus in *Higgins v. Decorah Produce Co.*[51] the court stated that "Every property owner has the right to have air diffused over his premises without undue impregnation with foreign substances, such as soot, smoke, or noisome fumes."

Before an injunction will be granted for such a nuisance, however, the degree of inconvenience is usually considered. In *Murphy v. Cupp* [52] the courts stated that "Noise, as regards injunction for nuisance must be such as to produce substantial injury or annoyance to normal persons."

The more recent tendency is that a person living in a community must expect some inconveniences. Thus in *Wilson v. Evans Hotel Co.*[53] the court said that a person who lives in a city, town or village must of necessity submit himself to the consequences and obligations of the occupations which may be carried on in his immediate neighborhood, which are necessary for the enjoyment of property and the benefit of the inhabitants of the place; and matters which, although in themselves annoying, are in the nature of ordinary incidents of city or village life, cannot be complained of as a nuisance.

While some consideration is now given to industry this has not gone so far as to license a nuisance merely because it is a result of a business enterprise.

A Montana statute [54] states that "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal or basin, or any public park, square, street, or highway is a nuisance.

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50 30 U. S. C. A. § 51.

51 214 Iowa 276, 242 N. W. 109 (1932).

52 182 Ark. 334, 31 S. W. 2d 396 (1930).

53 H. S. E. 2d 155, 124 A. L. R. 373.

54 4 S. E. 2d 155, 124 A. L. R. 373 (1939).

In applying this statute in *Cavanaugh v. Corbin Copper Co.*[55] the court stated that it was no defense that a business alleged to be a nuisance was carried on according to approved methods, with due care, and was necessary to the industrial life of the particular community.

In *Purcell v. Davis* [56] a case which the plaintiff sought an injunction to prevent the erection of an oil refinery near his property and where the evidence showed that should the oil which owners expected to refine be processed there would be no odors, but if other nearby oils were refined there would be odors, the court refused the injunction for an anticipated nuisance. In so doing the court stated that for an anticipated danger equity will not interfere unless it is shown that (a) that the proposed construction or the use to be made of property will be a nuisance per se; (b) or that, while it may not be a nuisance per se, under the circumstances of the case a nuisance must necessarily result from the contemplated act or thing.

Perhaps the best explanation of the requirements before an injunction will be issued is found in *Cavanaugh v. Corbin Copper Co.* [57] where the court stated in applying § 6162 (Rev. Codes of Mont. 1935 § 8642) that on the one hand it takes care that a legitimate and useful business shall not be suppressed because of some imaginary or trifling annoyance, which offends the overrefined tastes or disturbs the supersensitive nerves of fastidious persons; on the other hand it does not permit any one whatever his circumstances, to be driven from his home, or compelled to live in it in positive discomfort, in order to accommodate another, in the pursuit of his business which offends the mind and tastes of the average individual.

Thus we find that the granting of an injunction will depend upon the reasonableness of the nuisance.

In summary it seems that in Montana whether or not one could enjoin an upper riparian from operating a paper mill which polluted the water and gave off obnoxious odors would depend upon several things. As far as the pollution is concerned it would be a question of whether such an owner could come under the theory of prior appropriation. Because this theory arises out of custom and as a paper mill

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55 55 Mont. 123, 174 P. 184 (1918).

56 100 Mont. 480, 50 P. 2d 255 (1935).

57 55 Mont. 173, 174 P. 184 (1918).

is rather in the category of an exception, it seems highly improbable that it would: If it would, however, and the business was conducted in the ordinary manner of conducting such a business there would be no injunction issued. If it did not apply we must resort back to the common law in which case an injunction would lie.

As to the problem of odors it seems that an injunction could be obtained if the nuisance was such as to be considered unreasonable.

Robert Sinon, Illinois.
Bernard Grainey, Montana.
James McVay, Pennsylvania.
Jerry J. Killigrew, Indiana.

STATUTE OF FRAUDS: SUFFICIENCY OF A WRITTEN AGREEMENT TO EXTEND A MORTGAGE. — The recent case of *Healy v. Fidelity Savings Bank*,[1] is in accord with the weight of numerical authority [2] to the effect that a mortgage executed as security for a particular debt, with no provisions regarding future advances, cannot be extended later to cover an additional advance by the mortgagee in the absence of a written agreement, even though no rights of third parties intervene. An oral extension of the mortgage would violate the Statute of Frauds, on the theory that a parol agreement extending a mortgage to serve as security for a subsequent loan would be the equivalent to the execution of a new mortgage.

If the Statute of Frauds requires a written agreement to extend the type of mortgage in question, how sufficient need this writing be? What requirements must the writing meet? The answers to these questions are the chief concerns of this note.

First of all it should be apparent that there is no defect in a mortgage which fails to disclose on its face the amount of the debt secured. Reference can be made validly to some other instrument to determine the exact amount.[3]

Wylly v. Screven [4] is one of the earliest cases on this subject and is the leading case. On February 1, 1892, Wylly executed and delivered to Screven a deed of property to secure the former's promissory note. Wylly was still indebted to Screven when they entered into a written

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1 238 Wis. 12, 298 N. W. 170 (1941).

2 Riess v. Old Kent Bank 253 Mich. 557, 235 N. W. 252 (1931). See annotation 76 A. L. R. 575.

3 Jones on Mortgages, § 88, (8th Ed.)

4 98 Ga. 213, 25 S. E. 435 (1896).

agreement whereby Screven agreed to advance Wylly an amount not to exceed $3,200. Wylly agreed: "The party of the second part, in consideration of the advance thus to be made, agrees to make and deliver unto said party of the first part his promissory note of even date with these presents, for $3,200, due and payable on Jan. 10, 1894, said note being secured by a deed being made by the said party of the first part of date of Feb. 1, 1892, and the note therein described for the sum of $8,000." The note for $3,200 was delivered and money was advanced according to this agreement. In Feb., 1894, Screven sued for the balance of $4,525.02 still due and prayed that the realty (and personalty) described in the deed be sold to satisfy his claim. The defense claimed that the deed did not operate as a lien covering the advance made under the later agreement of Feb. 13, 1893. The Court held for the Plaintiff, Screven, saying: "There was no reason why the parties could not enter into an agreement, which should be binding as between themselves, that the title, though conveyed as security for one debt should stand as security for another. No particular form is required for an agreement to constitute a lien. It is sufficient if it clearly indicates the intention to create a lien, the debt to secure which it is given, and the property upon which it is to take effect . . . By means of this description (in the agreement) the deed referred to could be identified, and by reference to the deed the property which it was intended should stand as security for the debt could be easily ascertained, the property being fully and specifically described therein." Notice here that the reference to the deed in the subsequent writing, which was deemed sufficient, was by way of date only.

In the case, *Bank of Chatsworth v. Patterson*,[5] the Court held the writing in a promissory note sufficient to extend the prior executed mortgage to the indebtedness represented by this note: "said bank is hereby expressly authorized to retain any special or general deposit, collateral, real or personal security, or the proceeds thereof, belonging to either of us, now or hereafter in possssion of it during the time this note remains unpaid, and before or after maturity hereof apply the same to this or any other debt or liability of either of us to said bank, due or to become due."

In *Georgia National Bank of Albany v. Reese*[6] the writing was contained in a promissory note as in the previous case; the terms of which recited that the borrower had deposited with the bank his security deed, also the date of the deed, and a description of the land covered by the deed. The Court held this a sufficient writing to extend the mortgage to the subsequent indebtedness.

However, in a relatively recent case, wherein the mortgage itself failed to provide for extension to future indebtedness, and where there

[5] 148 Ga. 367, 96 S. E. 996 (1918).
[6] 156 Ga. 652, 119 S. E. 610 (1893).

was no agreement showing such an intent, the mere renewal of a promissory note was not enough in itself to hold the prior mortgage as security for the subsequent indebtedness. See *Durrance v. First National Bank & Trust Co. in Orlando,* (1934), 116 Fla. 526, 156 So. 526.

The Case of *First National Bank of Missoula v. Marlowe* [7] is very interesting because the security was in form an absolute deed and the subsequent written instrument was a letter addressed to the bank. The letter, Exhibit X, referred to the deed, the book and page where the deed was recorded, and declared that the bank held the deed as security for its debts of the Garden City Garage. For a later indebtedness, the following writing, Exhibit Z, was executed on the back of Exhibit X: "In consideration of $1 paid by the First National Bank that property referred to in the letter is and shall be held by the bank as security for the payment of indebtedness referred to in said letter and also as security for payment to said Bank of all debts and obligations, either direct or indirect or to become due or which may be at any time hereafter created from the Garden City Garage, or from the undersigned individuals to said Bank, and that said property referred to in said letter shall be held by said First National Bank as security for all present and future advances to and indebtedness from said the Garden City Garage." The Court said: "The effect of the reference in each instrument is to incorporate in the instrument which makes the reference, the document to which reference is made."

It is imperative that the subsequent written agreement refer either to the mortgage or to the realty secured by the mortgage, and not to the debt alone. Otherwise the Courts will be most reluctant to regard such an instrument as extending the mortgage because the apparent intent of the parties is absent.[8] Another limitation is placed on the extension agreement by several jurisdictions, and validly. The debts to be incurred, and secured by the prior mortgages, must be of the same class as the original indebtedness and so related to the primary debt secured that the assent of the mortgagor will be inferred. This is based on the reason that mortgages by the use of general terms ought never to be so extended as to secure debts which the debtor did not contemplate.[9] The Case of *Fleming v. Georgia R. R. Bank* [10] is illustrative of this point. The subsequent written agreement showed that the class of securities intended to be secured were of the kind capable of manual delivery, not realty; thus the Court refused to extend the mortgage.

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7 71 Mont. 461, 230 P. 374 (1924).

8 Fleming v. Georgia R. Bank, 120 Ga. 1023, 48 S. E. 420 (1904).

9 Hendrickson v. Farmer's Bank & Trust Co., 189 Ark. 423, 73 S. W. (2d) 725 (1934); Bank of Searcy v. Kroh, 195 Ark. 785, 114 S. W. (2d) 26 (1938); Beavers v. LeSueur, ... Ga. ....., 3 S. E. (2d) 667 (1939); 12 S. E. (2d) 581, 583 (1941).

10 120 Ga. 1023, 48 S. E. 420 (1904).

The rule of thumb essentials are that the writing must show the intent to extend the mortgage; the new debt must be of the same class as the primary debt; and sufficient reference must be made to the mortgage or to the land, which is subject to the mortgage, to constitute reasonable identification.

Warren A. Deahl.

ZONING ORDINANCE LAW IN OHIO.—Zoning ordinances are provided for and authorized by Article XVIII, section 3, of the Constitution of the State of Ohio, and under sections 4366-1 to 4366-12 of the Ohio General Code. More specifically the Ohio Code [1] provides that "the city planning commission of any municipality shall have the power to frame and adopt a plan or plans for dividing the municipality or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity or general welfare, for the limitations and regulation of the height, the bulk and location (including percentage of lot occupancy, set back building-lines, and area and dimensions of yards, courts and other open spaces), and the uses of buildings and other structures and of premises in such zones or districts. The council of any village is hereby empowered to create and appoint a planning commission with the powers set forth in this act."

The regulation and control of private property by the governing body involves and might dangerously affect one of our most sacred rights, therefore it is important to appreciate and understand the pertinent aspects of zoning ordinances. This paper shall for the most part concern itself with the constitutionality of zoning ordinances, ways of ameliorating hardships necessarily resulting from the broad scope of such ordinances, amendments and alterations of zoning regulations themselves, and lastly the changing of the use of a structure already in a zone devoted to a specific purpose.

In *Pritz v. Messer* [2] zoning ordinances dividing municipalities into districts regulating the use and locations of buildings for trade, industry, residence and other uses, was held valid. The court said that an ordinance enacted by a municipality under Article XVIII, section 3, of the Ohio Constitution, and under sections 4366-1 to 4366-12, General Code, dividing the whole territory of the municipality into districts according to a comprehensive plan, which in the interest of the public health, public safety, and public morals, regulates the uses and the location of buildings, and other structures and of premises to be used for trade, industry, residence, or other specific uses, the height, bulk or

1 Ohio General Code § 4366-7.
2 112 Ohio State 628, 149 N. E. 30 (1925).

location of buildings and other structures thereafter to be erected or altered, including the percentage of lot occupancy, set back building lines, and the area of yards, court, and other spaces, and for such purposes divides the city into zones or districts of such number, shape and area as are suited to carry out such purposes, and provides a method of administration therefor, and prescribes penalties for the violation of such provisions, is a valid and constitutional enactment. This decision, it seems, would be a good general statement of the law in Ohio as regards the constitutional requirements of a zoning ordinance. As is true of most laws the application and practical enforcement of it bring many problems to the surface.

Probably the most famous case on zoning ordinances in Ohio at this time is the *Village of Euclid v. Amber Realty Co.*[3] which went to the Supreme Court in 1926. It was said that:

"The exclusion from residential districts by zoning ordinances of business and trade of every sort, including hotels and apartment houses, cannot be said to be so clearly arbitrary and unreasonable, and to have no such substantial relation to the public health, safety, morals, and general welfare, as not to be within the police power.

"Whether the power exists to forbid the erection of a building of a particular kind or for a particular use is to be determined not by an abstract consideration of the building, or of the thing considered apart, but by considering it in connection with the circumstances and the locality.

"The court cannot say as a matter of law that the end in view in the passage of a zoning ordinance was not sufficient to justify the exclusion of all industries from sections set apart for residences, although some industries of an innocent character may fall within the proscribed class."

In short the court decided that the fact that industrial development will be diverted from its natural course by a zoning ordinance, to another course, whereby injury to the residential public will be obviated, is not alone sufficient to render a zoning ordinance unconstitutional.

In the case of *Mehl v. Stegner*[4] the plaintiff's property was a corner lot in Cincinnati, fronting 75′ on the east side of Reading Rd. and about 118′ on the south side of Lexington Ave. All of the square to the south of plaintiff's lot on Reading Rd., under the zoning provisions of the city, was included in a business A district, and all of the square on Lexington Ave. to the east of plaintiff's lot was included in residence B district. Plaintiff's lot was included in residence C district, which crossed Lexington Ave. and extended northwardly along Reading Rd. The property opposite plaintiff's property on Reading Rd. was also included in a business A district. So it was that the plaintiff's lot was

3 47 S. Ct. 114, 71 L. ed. 303, 54 A. L. R. 1016 (1926).
4 38 Ohio App. 416, 175 N. E. 712 (1930).

bounded on the south and west by business A district, on the north by Lexington Ave. and the remaining portion of residence C district, and on the east by a residence B district. The plaintiff, being in such a location, had applied for a permit to erect a building, the lower floor to be stores and the two upper floors to be apartments, which application was refused by the director of the department of buildings. Then she appealed to the zoning board of appeals for special mitigation of the strictness of the zoning law in view of her situation. The court in a review of the evidence failed to find where the health, safety, convenience, or general welfare of the part of the city affected will in any way be promoted by arbitrarily and unnaturally including the plaintiff's property in a residence district across Lexington Ave., and so held that the inclusion of private land in a residential district under a zoning ordinance to the owner's serious damage violates the Constitution, if the general welfare of the city affected will not be promoted thereby. This makes it very clear that the ordinance cannot be merely arbitrary and that it must bear a relation to the safety, health, morals, and general welfare of the community affected.

The question of whether or not aesthetic grounds bear a sufficient relation to the general welfare to validate a zoning ordinance is becoming more significant. In *State v. Woodworth* [5] it was held that:

"Zoning ordinances can only be sustained to protect or preserve public health, morals or safety.

"Zoning ordinance, in so far as preserving appearance of a designated neighborhood, held invalid.

"Provision in ordinance providing that, until zoning ordinance is passed definitely defining districts, inspector of buildings shall determine what part of city belongs in various districts, held void as unlawful delegation of legislative power."

Here the neighbors were trying to invoke the zoning ordinance laws to keep Jennie Srigby from putting up a gas station, and it was pointed out that a gas station was not a nuisance *per se*. Then in the case of *Meade v. City of Cincinnati* [6] the court stated that:

"A section of a municipal ordinance pertaining to the construction and regulation of garages which provides that 'Except when the commissioner of buildings otherwise approves, minor garages shall be located to the rear of the established line of houses facing the street,' is unconstitutional, where such ordinance is based on purely aesthetic grounds, and the question of public morals, safety, health, and welfare is not involved."

From this is seems that any zoning ordinance in Ohio will have to be sustained on some ground other than pure aesthetic appeal.

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[5] 33 Ohio App. 406, 169 N. E. 713 (1929).

[6] 14 Ohio App. 412 (1921).

Where the ordinance was not arbitrary, unreasonable, and confiscatory as applied to the particular property, although the property was rendered practically worthless for residence purposes by reason of the change in nearby residence property to commercial use, and although its value for business purposes was by such nearby change greatly enhanced as in *State v. City of Lakewood* [7] it was decided that a zoning ordinance classifying apartment buildings for residence purposes was not invalidated as to such property by the change in nearby property from residence property to commercial use.

A zoning ordinance is a valid exercise of the police power, where it has a substantial relation to public health, safety, morals, and general welfare according to *State v. City of Lakewood* [8] and the introduction of business buildings in residential districts changes the character of the use of real estate in such a way as to affect the public health, safety, and general welfare.

In *City of Cincinnati v. Wegehoft* [9] the question is whether a city can exempt its own buildings from the restrictions of the general zoning ordinance. There the city wanted to erect a fire house in a restricted area. The complainant said that if the city could erect a fire house in a restricted area, then by the same token a slaughter or pest house by the city would be permissible in such an area. The court stated that a fire house is not a nuisance in any sense, the right, and the duty, as well, to exercise good faith in the furtherance of good municipal government, cannot be enjoined by the courts because there exists a possibility that such power may be abused by the representatives of the city. To follow the complainant's suggestion as to the fire house would be to substitute the judgment of the court as to its location for that of the city fathers. Such exemption is valid.

In a very recent case, *State ex rel Synod of Ohio of United Lutheran Church in America v. Joseph,* 39 N. E. 2d 515 (1942), a policy, declared by resolution of the village commission and the zoning commission, to exclude churches from residential district so long as sites in business district are still available, held not justified for protection of public health and safety by preventing increased noise, confusion, traffic congestion and parking difficulties or adverse effect on values of adjacent lands, nor for protection of public morals and general welfare. Here the court said:

"The governmental power to interfere with the general rights of the landowner by zoning regulations restricting the character of his use of land is not unlimited, and such restriction cannot be imposed, if it bears no substantial relation to public health, safety, morals, or general welfare.

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7 124 Ohio State 339, 178 N. E. 837 (1931).
8 41 Ohio App. 9, 179 N. E. 198 (1931).
9 119 Ohio State 136, 162 N. E. 389 (1928).

"It is not proper government function to exclude churches from residential district of municipality in the name of public for purpose of securing benefits of exclusive residential restrictions to adjacent owners." [10]

As we suggested in the introductory paragraphs the broad scope of zoning ordinances can be expected to result in some cases of hardship and almost violent measures as regards the individual's rights to the enjoyment of his property. However, such situations are met and handled in a manner reasonably consistent with the police power. In *Francisco v. City of Columbus* [11] it was held that ordinances passed under police powers granted cities by constitution or by virtue of statute, such as zoning ordinances, must be given broad interpretation to effectuate purpose of their passage, in absence of clear violation of federal or state constitution, and the court cannot limit such powers for fear of violating constitutional rights which do not in fact exist. A city, given right by constitution to zone property in interest of public health, safety, convenience, comfort and general welfare, may attach conditions ameliorating hardships arising on exercise of its rights and provide that property previously occupied for purposes conflicting with the general view of community's welfare when zoning ordinance is passed may continue to be occupied for nonconforming use. Then again in *L. & M. Investment Co. v. Cutler* [12] set back provision was held not mandatory in view of further provision of zoning ordinance for variance. Such zoning by conferring on the board as an administrative agency and as a fact-finding body the power of determining whether, in specific cases, practical difficulties or unnecessary hardships would result to the owner's zoned property, and, if so determined, the power to vary the strict application of the provisions of the zoning ordinance thereto, does not constitute a delegation of legislative power within the purview of the Constitution. The board, upon finding that such difficulties or hardships would ensue in applying the strict letter of the ordinance provisions, may vary the application in accordance with the provisions of such subsection, and may especially do so if it finds and assigns specific and adequate reasons therefor. But in *Central Trust Co. v. City of Cincinnati* [13] we learn that:

"The fact that property adjacent to that of plaintiff was used for purposes consistent with business zones in which such adjacent property was located could have no argumentative force in sustaining the claim of plaintiff that plaintiff's property should be included in a business zone on which it abutted.

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10 State ex rel Synod of Ohio of United Lutheran Church in America v. Joseph, 39 N. E. 2d 515 (1942).

11 134 Ohio State 526, 18 N. E. 2d 404 (1938).

12 125 Ohio State 12, 180 N. E. 379 (1932).

13 62 Ohio App. 139, 23 N. E. 2d 450 (1939).

"Courts will not interfere with sound discretion of those on whom rests the responsibility of fixing boundaries or zones in a municipality, unless the exercise of that function indicates a wholly capricious, arbitrary, and unreasonable action, entirely foreign to any consideration involving the safety, health, morals, or welfare of the public."

From these cases we conclude that the hardships occasioned by zoning statutes in themselves valid will have to be endured unless those very statutes set up boards or means of handling situations which seem especially violent and harsh.

We come now to the consideration of the permanency, reliability, and amendment of zoning ordinances. In the case of *Clifton Hills Realty Co. v. City of Cincinnati* [14] we have an action for a declaratory judgment that amended zoning ordinance was unconstitutional, the amended petition alleging that the plaintiff owned improved property in a district zoned for two-family and four-family multiple dwellings and private garages, that the ordinance was amended to permit the construction of public garages and apartment houses accomodating eight or more families, that the construction of such apartment houses and buildings would increase traffic problems, overcrowd schools, destroy privacy, increase noise and affect public health, and that the amendment was arbitrary and unreasonable and not a proper exercise of the police power. There the court held that:

"In passing zoning ordinances, municipal council is engaged in 'legislating' and not in 'contracting', and no one is bound to municipality as a result, and the municipality binds itself to no one thereby.

"Persons buying property in a certain district after the enactment of general zoning ordinance have a right to rely on the rule of law that classification made in the ordinance will not be changed unless the change is required for the public good."

In *Salvation Army v. Frankenstein* [15] where the defendant was seeking to erect a theater near a maternity hospital operated by complainants it was decided that in the absence of proof to show change in a zone line, since adoption of zoning plan, the Court of Appeals must accept lines of various zones as they presently exist on the official zoning plat. More recently in *State ex rel Fairmount Center Co. v. Arnold* [16] the court held that:

"A municipal council acting under the statutes providing the general laws for the zoning of municipalities, cannot amend or change the number, shape, area, or regulation of or within any zoning district without following the procedure in the statute providing the requisite steps for the enactment of the zoning ordinance.

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14 Clifton Hills Realty Co. v. City of Cincinnati, 62 Ohio App. 139, 23 N. E. 2d 450 (1939).

15 22 Ohio App. 159, 153 N. E. 277 (1926).

16 138 Ohio State 259, 34 N. E. 2d 777 (1941).

"A municipal council may not, by the enactment of an emergency ordinance, give retroactive effect to a pending zoning ordinance thus depriving a property owner of his right to a building permit in accordance with a zoning ordinance in effect at the time of the application for such permit."

We learn in *W. B. Gibson Co. v. Warren Metropolitan Housing Authority* [17] that the proper and necessary procedure for rezoning land in a municipal corporation is by an ordinance passed by the legislative body of the municipal government. It is easily understood that rezoning can only be motivated by the constitutional requirements so essential to original zoning, such as the public health, safety, morals, and general welfare.

The question of the status of property already located in a certain locality which locality is subsequently classified as a particular zoned district, and which property does not conform to the recent classification is a very interesting one and important as well. In *Ottawa Hills Co. v. Village of Ottawa Hills* [18] the facts disclosed that the zoning ordinance did not prevent the continued use of buildings in a residential district for business purposes to the extent that they had been used, but did prevent the erection of new buildings for business purposes. In that case the tract involved was a triangular area bounded by three streets; the proposed development consisted of a plan to run a street across the mentioned area and further on into the residential section and to construct thereon buildings of Old English style fronting on the proposed street, with storerooms on the ground floor and with the entrances only on the proposed street and the yards behind such buildings were to be inclosed with walls of artistic appearance. The court held that:

"A zoning ordinance, preventing the erection of business buildings substantially relating to the public health and safety without increasing the limitations on present business use of buildings was constitutional as a valid exercise of the police power." [19]

It was pointed out that the construction of such buildings would have a direct bearing on the public health and safety; and that many persons buying homes in the district believed the area involved and surrounding territory would not be used for business purposes. A few years before this the court held in *State ex rel City Ice & Fuel Co. v. Stegner* [20] that:

"The provisions of a zoning ordinance, limiting the subsequent addition, extension, or substitution of business buildings, or the use there-

17 65 Ohio App. 84, 29 N. E. 2d 236 (1940).

18 41 Ohio App. 276, 180 N. E. 903 (1931).

19 Ottawa Hills Co. v. Village of Ottawa Hills, 41 Ohio App. 276, 180 N. E. 903 (1931).

20 120 Ohio State 418, 166 N. E. 226, 64 A. L. R. 916 (1929).

of, existing in a residence district at the time of the enactment of such ordinance, where it does not appear that such restrictions have no real or substantial relation to the public health, safety, morals, or general welfare, is a valid exercise of the police power, and is not violative of either the state or federal Constitution."

In this case the ice plant wanted to enlarge its facilities and to use the building in question to manufacture ice by an electric machinery process instead of using the building as it had formerly been as a store-house for ice. The complainants argued that where as before trucks hauled ice both to and from the plant, there would under the new arrangement be less disturbance in that it would necessitate only the hauling away of the ice. They neglected to emphasize the fact that they intended to make three times as much ice as they had been in the habit of storing at the plant.

After considering these few cases and decisions of the Ohio courts we conclude that the problem of zoning ordinances has been handled in a very prudent manner with the court constantly mindful of its duty to blend and reconcile as far as is reasonably possible the sacred property rights of the individual with the safety, health, morals, and general welfare of community life.

Theodore P. Frericks.