American Legal History – Russell

Review of Joseph K. Angell, *A Treatise on the Common Law in Relation to Water Courses*, 2 *Am. Jurist* 25, 30-34 (1829).

Art. II.--THE LAW OF WATER PRIVILEGES.

A Treatise on the Common Law in relation to Water Courses, intended more particularly as an Illustration of the Rights and Duties of the Owners and Occupants of Water Privileges. To which is added an Appendix, containing the principal Adjudged Cases. By Joseph K. Angell, Counsellor at Law. Boston. Wells & Lilly. 1824.

The profession are indebted to Mr. Angell for the great labor he has bestowed upon several branches of the law. The work, whose title is prefixed to this article, has been before the public for a considerable time; and the approbation with which it has been received by our learned jurists, while it is the evidence of its merit, renders it unnecessary for us to enlarge upon its object, or its excellencies and defects.

The law in relation to *Water Courses* is every day becoming more important, as our mills and manufactories multiply, and the improvements in the science of agriculture lead to a more general application of water to the purposes of husbandry.

It is not our purpose, however, to discuss so broad a subject as the law in relation to the various rights and interests which make up the property in water courses; but we shall confine these remarks to the respective rights of parties interested in those streams of water which are suitable for mill privileges. The law upon this subject, aside from our peculiar statute regulations, may be considered as well settled, and to a good degree accurately defined; and yet, in the application of these well-defined rules, difficulties often arise, and resort is often had to courts of justice to remove doubts which cannot otherwise be settled. A stranger may not, for instance, divert nor essentially diminish the water of a stream which has been appropriated to the working of an ancient mill. But whether the water of such stream has been actually so appropriated, whether the mill is an ancient one, or whether by disuse

of a portion of the stream the right to enjoy it has not been surrendered, may often be questions difficult of solution.

If difficulties may arise under the well-established principles of the common law, how much wider is the door for embarrassments to counsel and courts in Massachusetts, Maine, Rhode Island, Virginia, and Kentucky, where a series of laws singular and extraordinary in their provisions, have been enacted, which, though at variance with the common law, have not substituted any system which obviates the necessity of resorting to the principles of the common law to determine the questions which are from time to time arising under their operation.

Few, comparatively, of these questions have been the subjects of judicial cognizance, partly because they have been unimportant in themselves, and partly because parties have been unwilling to incur the risk and expense of settling questions in courts of justice so doubtful in their nature that no counsel, however learned in the law, could confidently give advice concerning them. If these statutes are constitutionally binding upon the citizen, and courts, and are hereafter to be made the subjects of adjudication by our judiciary, many new principles; and much judicial legislation, must, we conceive, be resorted to in order to determine the respective rights of the litigant parties.

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Although the common law is thus entitled to our confidence and veneration as a system, it must obviously be necessary, at times, to modify or annul certain parts of it, in order to adapt it to the changes in the wants and condition of society. Such was the origin of those statutes which were early passed for ‘the support and regulation of mills,’ which authorized their owners to raise and keep up a head of water upon neighboring lands not their own. The first of these was passed in Massachusetts in 1713, during the reign of Queen Anne. The preamble of the statute recites, that ‘whereas it hath been found by experience that when some persons in this province have been at great cost and expenses for building of mills, *serviceable for the public good*, and *benefit of the town* or considerable neighborhood in or near to which they have been erected, that in raising a suitable head of water for that service it hath sometimes so happened that some *small quantity of lands* or meadows have been thereby flowed and damnified, not belonging to the owner or owners of such mill or mills, whereby several controversies and lawsuits have arisen; for the prevention whereof for the future’ the provisions of the statue which then follow were made. Here, then, we have a history of the origin of this statute, which authorized the occupant of a mill to keep

up the pond flowed for the use of it, subject to pay such annual sum in damages to the land owner as should be assessed by a jury drawn for that purpose. This statute took away the right which till then the land owner possessed, of removing from his land a nuisance by which he suffered, nor did it provide him an adequate remedy or recompense for such injury.

But the circumstances under which the people of the colonies were placed at and anterior to that time, serve to explain the reason of its enactment and of the public acquiescence for so long a time in its provisions. The country had been in a state of slow progress from a wilderness to cultivation. Lands were of comparatively little value, while the support of corn and saw mills for the grinding of their bread stuffs and the erection of their houses, was a measure of vital necessity to the scattered population of the state, and consequently encouraged in every possible manner. Mill sites were in some instances appropriated from common lands by the votes of their proprietors, and mills were often exempted from taxation by the corporations within which they were established. In many instances they were erected in parts of the country still covered by the primitive forest, and where the extent of the flowing and even the owners of the lands were unknown. Mills therefore, thus established, might with propriety be considered *public* easements, and as 'of public convenience and necessity,' and the property of private individuals might, with great propriety, be appropriated for their support under suitable restrictions. So where lands were flowed which had never been appropriated to private owners, or where lands of little or no value were greatly enhanced by the establishment of what was so necessary to their enjoyment, it was certainly a measure of expediency, if not of justice, that such mill owners should be permitted to continue the enjoyment of what they had thus appropriated.

The laws of Maine on this subject are similar to those of Massachusetts, being a part of the code common to the two states. The laws of the other states, as far as we have had an opportunity to examine them, excepting those of Rhode Island, differ materially from those of Massachusetts and Maine. The statutes of Connecticut only confirm the doctrine of the common law, by providing that 'if any person dam any stream, or turn it out of its course, to the prejudice of any town, proprietors, or any particular person, the same shall be deemed a common nuisance, and be removed as such.'

By the laws of Rhode Island, as they stood formerly, if a person intending to erect a 'water-grist-mill' proposed to rest a part of his dam upon the land of another, or to flow any lands belonging to others, he must *previously* apply to the court for a jury to view the premises, report whether the proposed dam would flow so as to

encroach upon the buildings, yards, &c. of another, and estimate the damage. In the revised laws of 1798 of that state, the party erecting a mill has a right, as in Massachusetts and Maine, to flow the lands first, being subject to pay the damage subsequently assessed by the viewing jury.

The laws of Virginia and Kentucky are very similar to those of Rhode Island before the alteration of these latter in 1798. According to the Virginia code, a person owning land on one side of a stream who proposes to erect a 'water-grist-mill, or other machine or engine useful to the public,' may make application to the court, through which, by appraisement by a jury, he obtains the title to the opposite bank, and the right to flow the land of other proprietors, provided the flowing does not extend to a house, yard, &c.

Whatever reasons might have led to the original enactment of the statutes we have alluded to, they have ceased to exist with the disappearance of the forests from our valleys, the increase of our population, the introduction of the arts of husbandry, and the multiplication of mills and manufactories, which supply the public convenience, and reward those who have thus invested capital. It could not, therefore, we are persuaded, have been upon the ground of *public necessity* that in 1796 the provisions of the provincial act of Massachusetts were substantially re-enacted; and we cannot, in the language of Chief Justice Parker, (in Stowell *v.* Flagg) 'help thinking that this statute was incautiously copied from the ancient colonial, and provincial acts which were passed when the use of mills, from the scarcity of them, bore a much greater value, compared to the land used for the purposes of agriculture, than at present.' And we may add, that this remark becomes more forcible in proportion as the lands in the Commonwealth become more and more valuable.

Since the re-enactment of this law in 1796, the subject has been one of frequent examination by courts of that state, and five several additional acts in regard to the 'support and regulation of mills,' have been passed by the legislature. In all these acts the same principle as to the occupation of another's lands, and the payment of annual damages only, has been retained; and a recent attempt so to modify the principle as to secure to the land owner, at his option, the actual value of the land so taken from him, and thereby the means of purchasing other lands, has been defeated. If such property must be taken in any manner from one citizen for the benefit and profit of another, it would be more analogous to the provisions of the statutes which authorize the appropriation of private lands for public uses, as in the cases of roads, canals, &c., that the damages done by the mill owner to the former

should be paid in gross, and at once, than the present mode of doling it out in annual pittances.

Under the present system of the laws of Massachusetts on this subject, the yeomanry of that state, especially the small farmers, often feel that they are oppressed, and the question is often asked, whether the exercise of such a power by one citizen over another *can be constitutional?* It is certainly a very unusual and extraordinary provision of the law. I may not seize my neighbor's goods, except by process of law, against his consent, even though I may offer him their full value in return. I may not plough my neighbor's land, even though the thorn and the thistle alone flourish there under the sluggish husbandry of its owner. I may not obscure the light from the ancient cottage window, though poverty and weakness alone may have enjoyed its cheerful influence; nor may I poison the water or air that has, for years, given health and comfort to my neighbor, though the trade I may follow would enrich my coffers, and accommodate the neighborhood. But the ordinary rules of right and wrong, as to the enjoyment of private property, seem not to apply to estates which border upon any of the beautiful and healthy streams which enliven our scenery. They may be sacrificed to the speculating spirit of the manufacturer. No matter with what labor acquired, no matter with what fond associations connected, the farmer may be obliged to yield his acres to another's enjoyment; and the soil which his fathers may have tilled, the tree which sheltered him in his childhood, the scenes of his early sports, and the very graves of his kindred, may fade beneath the hand of the manufacturer, and the slimy pool which drives his spindles may send forth its miasmata where the green meadow or the waving harvest once greeted the eye. And for this, the recompense to be sought is an *annuity* to be estimated by *strangers*.

It is nothing against the argument to be drawn from facts like these, that much of the land flowed by dams across our mill streams is of comparatively little value. If a state of things in any measure like that we have here supposed has, in fact, existed,--and that it has, we could prove by cases which have been notorious,--it is a question of not a little moment, whether a law which authorizes such injuries can be consistent with those fundamental political principles incorporated into most of our constitutions of government. The rights which are guarantied to the citizen in these, are in accordance with the principles of natural justice, and among them is that 'of acquiring, possessing, and protecting property,' and that 'no part of the property of an individual can with justice be taken from him or applied to *public* uses without his own consent, or that of the representative body of the people.' But we no where find the right to apply the property of any one against his consent to *private* uses, and, on the contrary, it is provided in the constitution of the United

States, that no person shall be deprived of his property 'without due process of law.'

We would, in this connexion, quote the language of Chancellor Kent, (2 Com. 276) as expressing what we have endeavored to give more in detail. 'It must undoubtedly rest in the wisdom of the legislature to determine when public uses require the assumption of private property, and if they should take it for a purpose not of a public nature, as if the legislature should take the property of A and give it to B, the law would be unconstitutional and void.' And we do not see how a legislature can delegate a greater power than it possesses itself, or wherein consists the distinction between the taking of property itself, and the taking of the enjoyment of that property and whatever makes it worth possessing.

We are not aware that the constitutionality of this law has ever been discussed at all at large before our courts, although in the case of Stowell *v.* Flagg (11 Mass. R. 364) it seems to have been settled that the legislature of Massachusetts have a right to substitute the statute process by jury for the recovery of damages occasioned by flowing instead of the common law remedy by action. But we would venture the remark, that this dictum is very far from deciding that a legislature may, by a *prospective* act, authorize the commission of such an injury, or empower individuals to continue to enjoy an easement thus obtained. If the statute referred only to the recovery of damages for past injuries, the reasoning of the court might well apply. It is said that the legislature 'may declare that for an assault and battery an action of the case shall be brought instead of an action of trespass;' but we conceive that no legislature could authorize, beforehand, A B to committ an assault and battery upon C D, although it might see fit to change the form of the remedy. In regard to the statute relating to mills, the mill owner is not merely made liable in a particular manner for the injury he does, but he is also authorized to *continue* the injury--to continue the occupation and enjoyment of another's estate *forever*; which, we apprehend, is altogether unlike any other assumption of private property usually contemplated by our constitutions, and as being within the principle of the case of Bowman *v*. Middleton, (1 Bay's Rep. 252) which settles, if any case were necessary, that a legislature has no right to transfer to one man the freehold of another against his consent.

These may be called the popular objections to the laws under review, and yet there are other considerations connected with them which should not be overlooked. These laws have been fruitful sources of litigation, and although many of the questions which first arose under their operation have been settled, we apprehend that the most important and difficult ones yet remain to be determined. As the

property in mill privileges becomes more and more valuable with the increase of manufacturing in the state, many new and nice questions must arise, which, under the fostering care of self-willed litigants, promise to furnish a rich harvest for the now somewhat barren fields of litigation. What lawyer can, for instance, instruct his client as to what precisely shall constitute an occupancy of a mill site? whether this must be by a mill and dam, or a dam alone? Or how can he define to him the extent to which he may retain the water of a stream by means of reservoirs for the contingent uses of his mill?--a right which a mill owner has been held entitled to by the case of Wolcott M. Co. *v.* Upham (5 Pick. 292). Or how can he point out to the owner of lands which have been rendered worthless by flowing, the mode of obtaining adequate damages for his injuries, if the mill owner should cease to flow the land? These are questions which, we presume, are often asked a country practitioner; and some of them, we apprehend, cannot be settled satisfactorily, till some hardy sufferer under the law shall appeal to the courts to fix the limits of his rights by *judicial legislation*.

That we may not be misunderstood, let us suppose a common and simple case. A and B own lands adjoining each other, and near the boundary line of their lands there is a waterfall, sufficient for carrying one mill only. By the common law the owner of the upper lands could alone occupy it, because, in the case we suppose, the owner of the lower lands must flow back the water upon his neighbor's land in order to obtain his power. But by these statutes the site is open for the occupation of either. If both undertake to occupy it, what shall either do to secure it to himself? Suppose they begin simultaneously, is the occupation to be the erection of a mill? If so, the least important establishment shall exclude the other; and a turning lathe or a saw-mill might render worthless an extensive manufactory, because of the time taken in completing it. Then, again, what shall constitute a mill: the building alone without its water wheels and gearings? or must it all be completed for operation? If a mill is not necessary to the occupation of a privilege, but it may be made by the erection of a dam, when shall such an occupation be considered as made? with the first stone or timber laid, or only by completing the dam? and if with the first operations of constructing it, shall it be by the first stone or timber placed in the stream, or by the first furrow ploughed upon the bank? And if, according as the rule shall be settled, the occupancy of the contending parties shall be held to be simultaneous, which of the parties shall prevail; the one above, who has the common law right, or the one below, who has the physical power of rendering the other's works worthless and inoperative?

These are questions, we apprehend, not easily settled in the present state of the laws. And even if we suppose the question of precedency established, the

difficulties in the case may not be entirely removed. A reservoir may be needed to supply the mill thus erected. How far above the site of his mill may the owner erect his reservoir? If at the distance at which the one referred to in the Wolcott Company and Upham was erected, why not at the distance of twenty or fifty miles, if the course of the stream permitted? and if he has erected his reservoir, what shall be the rights of those who shall subsequently erect mills between the reservoir and his mill? Must they be controlled, as to the quantity of water flowing along the stream, by the whim or necessity of one far below them, to be flooded one day by the excess, and kept idle the next day from a want of the natural flow of the current?

But we are not disposed to pursue these inquiries, which we apprehend may one day be subjects of litigation, if the laws shall remain as they now are. There are other objections to these laws which we an only allude to, from the length to which this article has been unexpectedly extended. Estates are often valuable only from the water privileges upon them, which may be destroyed by the erection of dams below them, whereby powers of little value may be created, and such estates may be in the hands of minors who cannot sell, or poor tenants who cannot occupy them in time to prevent such a destruction to their property. Estates too, which from their situation might be increasing in value or by improvements which every farmer has it in his power to make upon them, would repay the labor so bestowed upon them many fold, are, under this law, rendered incapable of improvement, and the damages to the owner are too often estimated rather by what the estate is at the time of its occupation, than what it might become by any increasing value from its relative situation, or other circumstances.

It is true that the legislature of Massachusetts have, of late, relaxed a little from the severity of the operations of this law, by providing a more adequate recompense to the land owner than a mere estimation of the damages actually done to the land flowed. But even the statute of 1824, c. 153, which authorizes a jury in such cases to estimate other than the mere damages to the land, may be and often is, an altogether inadequate remedy. It may perhaps be asked what remedy can be proposed which shall do justice to the manufacturer and the farmer, and secure to each their respective rights, and protect the interests of the public?

We would not, by any means, do aught to injure the manufacturing interests of our country. To the eastern and middle states, manufactures are as essential to the prosperity of the citizens, as the overflowing of the Nile is to the fertility of Egypt, and the sustenance of its inhabitants. We would not, therefore, do anything which can destroy the privileges already occupied. But we see not why these statutes

which have been under consideration, should not be repealed so far as future occupations of mill sites are concerned. Restore the citizen to his common law rights; compel the capitalist, who may hereafter wish to invest his money in manufacturing, to resort to the same means to acquire the real estate that he would occupy, which a farmer or mechanic are compelled to adopt,--to purchase it of the owner; make the rights of our citizens, in regard to their property, as equal as the original constitution intended they should be, and we are not apprehensive that manufacturing would flourish any the less. If it would, we say, let its progress be checked. If it cannot be supported without this burden on the landholder, it ought not to be supported by violent and forcible proceedings. It does not require such a law in England, nor in many of our states where manufacturing is flourishing, nor do we believe it needs it here. But if the measure we recommend should be thought too strong, we suggest whether it is not the best policy of the manufacturer, as well as the landholder, so to modify the present law that the actual value of the lands flowed should be estimated by the

jury, to whom the subject is referred, and that the manufacturer should be compelled to purchase it at such price, if the land owner prefers to sell the fee of the estate to receiving an annuity out of it. This rule is already adopted in the Virginia and Kentucky laws. A proposition like this has once or more been before our legislature of Massachusetts, and rejected by that body. But we are confident that such a modification of the law would be favorable to the manufacturer, since the interest of the sum he might be obliged to pay for the land flowed by him, would often be less than the annual damages which would be assessed in favor of the farmer. And the farmer could better afford to take up with that sum in gross, than to receive his annual damages, because he is deprived of the means of converting his labor into money on his land, or of increasing its value by art and industry the moment it is drowned by the manufacturer. We have, therefore, been surprised that a modification of the statutes so equitable and favorable to the parties concerned, should have been lost in the legislature.

Although this amendment would not restore the common law to the citizen, it would obviate many difficulties. But it would still leave the field of litigation open, and we should have to wait for a long series of judicial decisions before the law upon the subject would become settled.

The remarks which we have made will apply, in a great degree, to other states the laws of which authorize the taking away or flowing of land without the consent of the owner.

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