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THE NATURAL USE OF LAND.

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PART I.

OVER seven years have passed since the Supreme Court, in *Sanderson v. The Pennsylvania Coal Company*,<sup>1</sup> reversed their previous decisions in the same case.<sup>2</sup> The final judgment of the court has been considered in several more recent cases and at this lapse of time the principles of the decision may be impartially and critically considered.

The facts are well known. To rehearse them briefly we find that the plaintiff, Sanderson, purchased in 1868 a tract of land within the limits of the city of Scranton through which flowed "Meadow Brook," a seven-foot wide stream of excellent water. The plaintiff was in part induced to purchase his land on account of this stream, the condition of which he investigated with some care. He built a handsome residence near by; dammed the stream to make ponds for ice and fish, and used the water in his

<sup>1</sup> 113 Pa. St., 126 (1886).

<sup>2</sup> 86 Pa. St., 401; 94 Pa. St., 302; 102 Pa. St., 370.

home for domestic and culinary purposes. A few years thereafter the defendant corporation sunk their shaft and drove several tunnels in their land which comprised some 1600 acres, situated on the same stream about three miles above the plaintiff's residence. Water, contaminated and polluted by the coal and minerals, not only flowed from the drifts, but also collected in this shaft from which it was pumped to the surface and conveyed by a ditch or conduit to the Gypsy Grove swamp on the defendant's land, through which the Meadow Brook flowed. As a consequence the water of this stream became acid and unfit for use; the fish in the stream were killed; the trees along its bank died; the water-pipes were corroded; and, finally, in 1875, the plaintiff abandoned the use of the water and used instead the water supplied by public water-works. The plaintiff thereupon brought an action of trespass on the case to recover damages.

Upon the first trial the court entered a non-suit, on the ground that the discharge of the mine water was necessary and was conducted without negligence or malice, and that the plaintiff's damage was *damnum absque injuria*. The Supreme Court was, in 1878, composed of AGNEW, C. J., and SHARSWOOD, MERCUR, GORDON, PAXSON, TRUNKEY and WOODWARD, JJ. Before these judges it was forcibly argued in behalf of the plaintiff in error, that the mining of anthracite coal could not be carried on in any other way. That the coal lies at great depth beneath the surface and cannot be mined without driving tunnels or shafts into the ground; that the collection of acidulated mine water was inevitable; that the mines are, and necessarily must be, freed from this water by pumping them out; that the water so removed must find its way to the surface streams; that the ordinary rules which prohibit the fouling of streams by a riparian owner could not be applied in such a case without destroying one of the greatest industries of the State and prohibiting the owners of mines from the ordinary development of their property.

Justice WOODWARD delivered the opinion of the

majority of the court (Justice PAXSON dissenting). It was held with great reason that the magnitude of the interests involved should not lead to the "relaxation of legal liabilities and the remission of legal duties," although "the proprietors of large and useful interests should not be hampered or hindered for frivolous or trifling causes." But the case was considered to fall within the general rule that a riparian owner had no right to injure the quality of the water to the detriment of others, and stress was laid upon the defendant's use of "an artificial water-course from the mines to Meadow Brook."

Upon this latter point the writer will observe although the water-course, or conduit, in question appears to have been laid from the shaft to the swamp in which Meadow Brook took its rise that the water would, in all probability and almost certainly, have flowed there anyway. One of the plaintiff's witnesses, an engineer, testified on the second trial<sup>1</sup> that it might have been thrown into Little Roaring Brook, but would not have flowed there naturally, if emptied on the ground at the head of the shaft. Indeed, Sanderson himself, a civil engineer by profession, testified on cross-examination in the second trial:<sup>2</sup> "Q. Where could The Pennsylvania Coal Company have taken the water to if they hadn't let it run into Meadow Brook? A. They could very easy take it across to the water shed, northeast of Meadow Brook, going down toward Olyphant."

Of course, such a proceeding would only result in a change of plaintiffs to a riparian owner on the other stream who could complain with justice that an artificial water-course was used to pollute his stream. Indeed, to throw the water "toward Olyphant" would require it to be *pipéd* across Meadow Brook, its natural drain.

"Q. How far would they have been obliged to have dug a ditch to carry the water into Eddy Brook? A. I wouldn't say to the brook. I only have reference to the other side of the hill.

<sup>1</sup> Record, p. 70.

<sup>2</sup> Record, pp. 139-140.

“Q. The other side of the hill then—the divide? A. Well I should think 1500 feet would carry it; it might be 2000. 1500 to 2000 feet, I should think, would carry it.

“Q. Wouldn't a ditch dug from the shaft toward the divide cross the Meadow Brook? A. Yes, sir; if dug direct.

“Q. Then they would have been obliged to put an aqueduct, or something, in to get water across Meadow Brook? A. A flume would have carried it across; pipes would have carried it over.

“Q. Water cast on the ground at the point where it is discharged from Gipsy Grove Breaker would run into Meadow Brook without any ditch, wouldn't it? A. Yes, sir; if it didn't waste away in the ground.

“Q. This Gipsy Grove Breaker is located on the edge of the swamp; isn't it? A. Yes, sir.

“Q. So any water put into the swamp would naturally go into Meadow Brook? A. Yes, sir.

“Q. So that the digging of this ditch 1000 feet long is of no consequence as to getting the water into Meadow Brook? A. It is more direct; it gets in quicker and gives it no chance to waste.”

As the report of the case does not clearly give the facts in relation to the “water-course” the writer feels that no apology is due for the above extract from the plaintiff's testimony.

While the opinion of Justice WOODWARD would give the reader the impression that the injury complained of would not have occurred save for the “artificial water-course from the mines to Meadow Brook,”<sup>1</sup> it clearly appears that no substantial difference was thereby occasioned in the result.

Justice WOODWARD, however, appears to have considered the case in this respect analogous, *e. g.*, to *Wood v. Sutliffe*,<sup>2</sup> where the waste water of a dye-works was pumped into a stream which it befouled; and to *Barclay v. Com-*

<sup>1</sup> 86 Pa. St., 406.

<sup>2</sup> 16 Jurist, 75.

monwealth,<sup>1</sup> where the wash from a barn-yard was permitted to escape into a spring dedicated by the Penns to the use of the town of Bedford. His opinion, however, was carelessly written and was afterward severely criticised in argument: Thus, *Smith v. Kenrick*,<sup>2</sup> stated to be of doubtful value was, on the contrary, applied by AGNEW, J., in *Locust Mountain Co. v. Gorrell*.<sup>3</sup> *Fletcher v. Rylands*,<sup>4</sup> is quoted as containing references not contained in it. DENMAN, C. J., is quoted as having held in *Mason v. Hill*,<sup>5</sup> what he expressly says was merely the plaintiff's contention in the case; and the injunction in *Wood v. Sutcliffe*,<sup>6</sup> was said to have been granted when, in fact, it had been refused.

The judgment of the court below was reversed and a new trial awarded. All the justices concurred, save Justice PAXSON, who delivered a dissenting opinion<sup>7</sup> remarkable for its vigor and breadth. Said he: "The population, wealth and improvements (of the mining region) are the result of mining, and of that alone. The plaintiffs knew when they purchased their property that they were in a mining region; they were in a city born of mining operations, and which had become rich and populous as the result thereof. They knew that all the mountain streams in that section were affected by mine water or were liable to be. Having enjoyed the advantages which coal mining confers, I see no great hardship nor any violence to equity in their also accepting the inconvenience necessarily resulting from the business." Continuing, the learned Justice argued that the defendant had a right to mine its coal and that it had a right to free its mine of water by pumping if necessary, for otherwise no mine can be operated. This right is "a right of property which, when duly exercised,

<sup>1</sup> 25 Pa. St., 503.

<sup>2</sup> 7 C. B., 515.

<sup>3</sup> 9 Phila., 247.

<sup>4</sup> L. R., 1 Ex., 280.

<sup>5</sup> 5 B. & A., 1.

<sup>6</sup> 16 Jur., 75.

<sup>7</sup> 6 W. N. C., 101; 113 Pa. St., 156.

begets no responsibility." Mining operations may destroy the springs upon a neighbor's land by interfering with the natural subterranean flow, and sinking one well may drain another. Agricultural and mining operations may increase the volume of water without occasioning an actionable injury, and the impurity necessarily occasioned by such operation should give no right of action. If this were not so, mines could not be operated except by consent of the riparian owners. In other words, "the trifling inconvenience to particular persons must sometimes give way to the necessities of a great community. Especially is this true where the leading industrial interest of the State is involved, the prosperity of which affects every household in the Commonwealth."

The second trial resulted in a verdict for the plaintiff for \$250. Plaintiff and defendant each took a writ of error. The defendant's writ was first heard.<sup>1</sup> AGNEW, C. J., had retired from the bench, and WOODWARD, J., had died. The case was argued before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON, TRUNKEY and STERRETT, JJ. It was urged in behalf of the coal company that their disposition of the mine water had been according to universal custom and common consent ever since coal mining was begun; but the Supreme Court held that such a custom would be unreasonable and unlawful, and affirmed the judgment in an opinion by GORDON, J., which, it may be said, added nothing to the previous decision. Justice PAXSON again dissented, and with him agreed Justice STERRETT, who had taken his seat on the bench since the first decision had been rendered.

Had the plaintiff, Sanderson, been satisfied with the amount of the verdict, this second decision would have been final. But the lower court upon the trial of the case had permitted the defendant to show "in mitigation of damages" that the mining of coal was below water level; that water was necessarily encountered, and that the defendant worked its mine in the ordinary, reasonable and

<sup>1</sup> 94 Pa. St., 302 (1880).

proper method. This admission of testimony and certain instructions on the question of damages were assigned for error and held erroneous by the Supreme Court, Justice TRUNKEY delivering the opinion, in which he spoke approvingly of the former rulings of the court upon the main question.

The Supreme Court had thus in three opinions held that the plaintiff, Sanderson, was entitled to recover damages for the pollution of the stream through the mining operations of the coal company, and the case was tried for a third time before a jury. The defendant asked the Court to charge that: "If the jury believe from the evidence that it was impossible for the defendant to mine its coal on its lands along this stream without discharging the mine-water from its mines, and that the mining was done without malice or negligence, and that no foreign substance was introduced into the mine-water by the defendant, and that when the mine-water was so discharged it followed the law of gravity as directed by the natural conformation of the land, and flowed by a natural flow into this stream and thence through the plaintiff's property, then, even if thereby the plaintiffs were damaged, it is a *damnum absque injuria*, and plaintiffs cannot recover."

The Court, in very proper conformity with the decisions of the Supreme Court, refused so to charge the jury, and a verdict was rendered in favor of the plaintiff for \$2872.74.

The situation was extremely serious for the coal company. The verdict was a large one in itself, and every riparian owner had an equal right with Sanderson to bring an action.

Sanderson, himself, might bring other actions to recover subsequently accruing damages, and it needed no prophet to predict the time when, in Justice PAXSON'S phrase, "the subsequent verdicts would be such as to empty the cash-box of any coal company and make mining practically impossible." Indeed, it is more than likely, as CLARK, J., observed,<sup>1</sup> that the plaintiff, having thus estab-

<sup>1</sup> 113 Pa. St., 144.

lished his right at law, could ask a Court of Equity to enjoin its continued violation.

It was, therefore, determined to make a last endeavor to induce the Supreme Court to reconsider their decision and to establish a rule more favorable to the coal mining industry so closely connected with the prosperity of the Commonwealth.

The Court was now composed of MERCUR, C. J., GORDON, PAXSON, TRUNKEY, STERRETT, GREEN and CLARK, JJ. Of these, GORDON and TRUNKEY, JJ., had already delivered opinions favorable to the plaintiff. PAXSON and STERRETT, JJ., had dissented in favor of the defendant. MERCUR, C. J., had agreed with the majority of the Court, but GREEN, J., was not on the bench when the case was first argued, and was absent when the second and third arguments took place. CLARK, J., was a member of the Court when the question of the measure of the damages was argued, but was absent, so that Justices GREEN and CLARK had had no occasion to express their opinion upon the case.

The argument made in behalf of the coal company was successful. A bare majority of the Court reversed the judgment of the Court below, MERCUR, C. J., GORDON and TRUNKEY, JJ., adhering to their original opinions.

On the one hand, the Court was met by the well-known rule repeatedly applied in Pennsylvania that a riparian owner cannot pollute or contaminate a stream of water flowing through his land; on the other hand, they were confronted with the disastrous consequences which would follow the application of the rule to the case at bar. It is perhaps not too much to say that no case ever arose in Pennsylvania of equal, certainly none of greater, importance to the industrial and material prosperity of the State.

It may be well at this point to refer to some of the prior decisions in this State.

In *Howell v. McCoy*,<sup>1</sup> a tanner was entitled by contract

<sup>1</sup> 3 Rawle, 256 (1832).

with the riparian owners to the use of so much of the water of the stream as should be necessary for the supply of his tan-yard, and covenanted to return to the stream all water which should thus be conducted to his yard over and above the quantity which should be necessarily used in his business. The tanner claimed under this lease the right to return the water to the stream mixed with the greasy and poisonous matter it acquired in the process of manufacture. But the well-established principle was followed that the corruption of a stream of water is actionable—a principle as old as the common law. The facts of this case are only alluded to in order to call attention to the argument made for the defendant, that it was a practical necessity for him thus to dispose of the waste from his business, and that the strict enforcement of the rule would prove injurious to “the manufacturing establishments which are arising so rapidly in this country.”

The answer of the Court was “that is no reason why private rights should be injured.”

In *Commonwealth v. Lyons*<sup>1</sup> the defendants were the owners of land over which ran a creek on which they had erected an iron furnace, forge and mills. They washed their ore with the water and thus corrupted it to the damage of the inhabitants on the creek below them. They were indicted (apparently for a nuisance) and convicted; the only question raised was whether the indictment was brought in the proper county.

*Wheatley v. Chrisman*,<sup>2</sup> came very close in its facts to the *Sanderson* case. There the upper riparian owner had a lead mine on his land and pumped the impure water from the mine into the channel of the stream, so that the same was rendered unfit for watering cattle and for the domestic purposes of the plaintiff. The quantity of water was also diminished. The disputed questions of fact were determined by a jury in favor of the plaintiff, who obtained the verdict. The defendant claimed in error that he had

<sup>1</sup> 1 Clark, 497 (1843).

<sup>2</sup> 24 Pa. St., 298 (1855).

a right to use a reasonable quantity of the water for the purposes of his business, but Judge BLACK, in his most trenchant manner, said there was no difficulty in the case. Said he: "The necessities of one man's business cannot be the standard of another's right in a thing which belongs to both. The true rule was given to the jury. The defendant had a right to such use as he could make of the water without materially diminishing it in quantity *or corrupting it in quality*. If he needed more, he was bound to buy it. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor. One who desires to work a lead mine may require land and money as well as water, but he cannot have either unless he first makes it his own."

Justice PAXSON, in his dissenting opinion in the Sanderson case,<sup>1</sup> refers to this case in connection with Howell *v.* McCoy,<sup>2</sup> and McCallum *v.* Water Works,<sup>3</sup> as having no application, because in each of them "the water had been fouled by the admixture of dyestuffs or some other injurious substance." This criticism applies to Howell *v.* McCoy and McCallum *v.* Germantown Water Works; but it is impossible to see any difference between pumping water out of a lead mine into a stream and pumping water out of a coal mine, as in either case the water in the stream is rendered unfit for use.

For all that appears it was just as necessary to pump the water out of the lead mine in order to work it properly as to free the coal mine of water. The lead water had to go somewhere and the mining company had apparently the same right to rid themselves of it by means of the natural water course by which their works were placed as the Pennsylvania Coal Company had to use Meadow Brook for the same purpose.

From the standpoint of this case the plea of necessity is brushed aside much as the starving man's excuse is not

<sup>1</sup> 113 Pa. St., 157.

<sup>2</sup> 3 Rawle, 256.

<sup>3</sup> 54 Pa. St., 46.

regarded as a defence in a prosecution for the theft of food, although his necessity may appeal to our sympathy. It is hard to understand why Justice WOODWARD did not cite this case, especially as it seems to have been referred to in argument.<sup>1</sup>

*Wheatley v. Baugh*,<sup>2</sup> was decided in the same year as *Wheatley v. Chrisman*. The same defendant appeared in the case, but this time his alleged tort arose from the working of a copper mine. Chrisman sunk a shaft on his ground and so drained a spring on the plaintiff's premises. The Supreme Court held that the plaintiff had no cause of action in the absence of any malice or negligence in the conduct of the mining operations. It appeared that the spring depended for its supply upon percolations alone, and that no distinct water course had been cut off or diverted. "In conducting extensive mining operations," said the Court, "it is in general impossible to preserve the flow of the subterranean waters through the interstices in which they have usually passed, and many springs must be necessarily destroyed in order that the proprietors of valuable minerals may enjoy their own. The public interest is greatly promoted by protecting this right, and it is just that the imperfect rights and lesser advantage should give place to that which is perfect and infinitely the most beneficial to individuals and the community at large." And, in another place: "The law has never gone so far as to recognize in one man the right to convert another's farm to his own use for the purposes of a filter." This case was followed in *Haldeman v. Bruckhart*.<sup>3</sup>

Justice PAXSON cited *Wheatley v. Baugh* in his dissent in the Sanderson case; but the distinction seems to be that in *Wheatley v. Baugh* "it was impossible for him (*Wheatley*) to know from whence the supply of water came. He had no knowledge that it was derived from percolations through his own land. In this respect there is a material

<sup>1</sup> 86 Pa. St., 402.

<sup>2</sup> 25 Pa. St., 528 (1855).

<sup>3</sup> 45 Pa. St., 514 (1863).

difference between hidden veins of water under the ground and water courses flowing on the surface." And again, the opinion in *Wheatley v. Baugh* admitted that "a subterranean *stream* which supplies a spring with water cannot be diverted by the proprietor above for the mere purpose of appropriating the water for his own use."

In *The New Boston Coal and Mining Company v. Pottsville Water Company*,<sup>1</sup> the Court refused to issue an injunction against a coal company which drained its mine into a creek, but the decision went on other grounds and the Court expressed no opinion on the merits.

*Kauffman v. Griesemer*,<sup>2</sup> and *Martin v. Riddle*,<sup>3</sup> recognize the principle that the volume of water in a stream may be increased by the superior riparian owner in the improvement of his land. But an act of the legislature was considered necessary to enable the owner of swampy ground to extend his drain over the land of others "in order to effect the agricultural improvement and development of his land" and this was not permitted without compensation to the person injured.<sup>4</sup>

<sup>1</sup> 54 Pa. St., 164.

<sup>2</sup> 26 Pa. St., 407 (1856).

<sup>3</sup> 26 Pa. St., 415 (1848).

<sup>4</sup> The Act of Assembly reads as follows: "When the owner or owners of wet, or spouty land, in this commonwealth, shall desire to improve the same for agricultural purposes, by surface or under drains, or both, and when, from any cause, *it becomes necessary to extend said drains upon or over the land of other owners*, in order to render them effectual, the person or persons so desiring to drain, may present a petition to the court of quarter sessions of the county wherein such land may be, setting forth the situation thereof, and the *necessity for an extension of the proposed drain or drains upon or over the land of such other owners*, specifying the probable extent thereof, and thereupon the said court shall appoint three judicious persons to view the proposed drain or drains; and said viewers shall view the same, and if they, or a majority of them, shall agree that there is occasion for such extension of such drain or drains, *in order to effect the agricultural improvement and development of said land*, they, or a majority of them, shall proceed to lay out the same, having respect to the shortest distance and the best ground for the location thereof, *and in such manner as shall do the least injury to private property*, and also be, as far as practicable, agreeable to the desire of the petitioners, and make report to the next term of said court of their

This "drainage act" was subsequently extended to several counties so as "to authorize the drainage and ventilating of coal and other mines, or banks, stone quarries, etc., in over or under the lands of other owners by drains, shafts, drifts or otherwise,"<sup>1</sup> and the anthracite coal mine act of June 30, 1885, P. L., 218, Art. IV, the bituminous coal mine acts of March 3, 1870, P. L., 3, § 4, June 30, 1885, P. L., 205, § 7, and May 15, 1893, P. L., 52, Art. IV, provide that a mine owner may make openings or outlets under, through or upon adjoining lands to meet the requirements of the statutes in regard to the ingress and egress of the employes, and the drainage and ventilation of the mine. The last-named act provides also for "a right of way not exceeding fifteen feet in width from any such opening to any public road to enable persons to gain entrance to the mine through such opening or to provide therefrom upon the surface a water-course of suitable dimensions to a natural water stream to enable the operator to discharge the water from said mine." While damages are to be assessed and paid for such right of way the act is silent upon the question of the pollution of streams, settled by Sanderson's case. The third section of the same article (IX) of this act deserves attention, which provides that where water has been allowed to accumulate in dangerous quantities and "can be tapped and set free and flow by its own gravity to any point of drainage" it shall be lawful with the approval of the inspector of the district to remove the danger by driving a drift across property lines if needful; and it is declared to be unlawful for any person to obstruct the flow of water from said mine or any part of its passage to the point of drainage.

proceedings; and said viewers, or a majority of them, shall assess the damages on behalf of the person entitled thereto, if any, in their opinion, will ensue from such extension, and report the same, together with a plot or draft of the drain or drains by them laid out, specifying also whether the same shall be surface or under-drains." Act of April 4, 1863, P. L., 293. It may be that this act is unconstitutional. See Rutherford's Case, 72 Pa. St., 82, on the similar Act of May 9, 1871, P. L., 263.

<sup>1</sup> E. g., Act February 18, 1870, P. L., 197; March 10, 1871, P. L., 318; May 19, 1871, P. L., 987; March 9, 1872, P. L., 303.

No damages are directed to be assessed by this section.

Let us turn now to the English cases upon the subject decided prior to Sanderson's case.

*Hodgkinson v. Ennor*<sup>1</sup> was decided by COCKBURN, C. J., BLACKBURN and MELLOR, JJ. The plaintiff was a paper manufacturer on the banks of a stream which had its source in a cavern at the foot of a hill. The owner of the land on the summit of the hill, and, therefore, above the cavern, erected certain works for the manufacture of lead which he obtained from his land. The water, fouled in the process of manufacture, passed from the pits in which it was used through drains into what were known as "swallets"—*i. e.*, fissures or rents immemorially existing in the limestone rock of which the hill was composed. Through these fissures the water found its way into the cavern, and so polluted the stream to the detriment of the plaintiff, who was held entitled to judgment. Indeed, the Court did not hesitate to compare the case to *Tenant v. Goldwin*<sup>2</sup> (an action for damages caused by the non-repair of a privy well), and to quote the remark there made, "he whose dirt it is must keep it that it may not trespass." In *Hodgkinson v. Ennor* it appears singularly enough that the lead existed in the defendant's land in the shape of minute particles and bits of ore which had "before the time of living memory" been brought there from distant parts to be smelted—the soil practically representing the *debris* of an ancient manufactory. So that it might be queried whether the lead was "naturally" in the soil and its mining a natural use in the phraseology adopted in Sanderson's case.

Bainbridge on Mines says of this case, *Hodgkinson v. Ennor*, in the third edition of the work, page 88: "If this judgment be correct and be strictly applied, it would follow that a mine owner in the proper exercise of his right might, in some cases, withdraw the whole of the water arising

<sup>1</sup> 4 Best & Smith, 229 (1863).

<sup>2</sup> 1 Salk., 360.

from springs, but that he could not disturb it by pollution." But this passage seems to be omitted in the fourth edition.<sup>1</sup>

In *Magor v. Chadwick*<sup>2</sup> the suit was by a brewer against a miner for fouling the stream the water of which was used in the brewery. It appeared that the stream had its source in an abandoned level made for the purpose of mining at some remote period. The water issuing therefrom was pure and passed by a distinct water-course over the plaintiff's land, and the plaintiff had had continued and uninterrupted enjoyment of the water in its pure state for thirty-six years. The defendant reopened the ancient mine and the water was drained therefrom into the old level and fouled the water of the stream. The trial judge left the question to the jury whether the evidence proved the existence of an alleged custom in Cornwall authorizing a mine-owner to resume such use of an "adit" or level after an abandonment of twenty years, and ruled that in the absence of such custom a riparian owner using the artificial stream for twenty years acquired the same right as in a natural stream. A rule for a new trial was discharged, DENMAN, C. J., delivering the opinion of the court.

In *Pennington v. Brinsop Hall Coal Co.*,<sup>3</sup> the plaintiff had for upward of forty years used the water of a brook to supply their engines and for general use in their mill. They claimed a right as riparian owners and also by prescription so to use the water. The defendants were the owners of a colliery adjoining the brook about two and a half miles above the plaintiff's mill, and they habitually pumped the water from the mine into the brook. This water contained sulphuric acid and other impurities which corroded and destroyed the plaintiff's boilers and machinery, causing considerable damage. The claim made by defendants as riparian owners and as entitled by prescription to enjoy the water of the stream in its natural purity was not denied by the defendants, who alleged that as matter of fact the

<sup>1</sup> See p. 233.

<sup>2</sup> 11 A. & E., 571.

<sup>3</sup> L. R., 5, Ch. Div., 769; S. C., 37, L. T. N. S., 149.

injury was not caused by their operations but by other causes, and further that at most damages should be awarded but not an injunction, the effect of which would be to close their colliery. The report states that the defendants claimed a right to continue to pump the mine-water into the brook, and that even if their mines were closed in obedience to an injunction, the water would ultimately find its way by natural channels into the brook and pollute it as much as ever. They further alleged that the colliery employed 500 men, who would be thrown out of work if the colliery were closed, and that the entire capital stock of the coal company, amounting to £190,000, would be lost, whereas the damage to the plaintiff's boilers did not amount to £100 a year. The court awarded an injunction.

While this case was relied upon by Justice WOODWARD in the first opinion rendered in *Sanderson v. The Coal Company*, it was strongly urged in 113 Pa. St. that, as the plaintiff's prescriptive rights were admitted, and the question debated was whether an injunction or damages should be awarded, the case decided nothing on the question raised in *Sanderson's* case, and was not authority. This view was adopted by the Supreme Court, Justice CLARK holding that the right of a riparian owner was neither discussed nor decided. Careful consideration of this case and the other English authorities constrains the writer, contrary to his first impression, to believe that this case did not discuss or decide the question merely for the reason that the question was not considered doubtful.<sup>1</sup>

<sup>1</sup> (The Rivers Pollution Prevention Act of 39 and 40 Vict., C. 75, § 5; 1876) provided in reference to mining pollutions that every person who causes to flow into a stream any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine *other than water in the same condition as that in which it has been drained or raised from such mine* shall be deemed to have committed an offence against said act, unless in the case of poisonous, noxious or polluting matter, he shows to the satisfaction of the court having cognizance of the case that he is using the best practicable and reasonable available means to render harmless the poisonous, noxious and polluting matter so falling, or flowing, or carried into the stream.

The act provides for summary remedies by injunction and penalties for default, and further, that nothing in said act shall legalize any act or

In *White v. Dixon*,<sup>1</sup> the plaintiff, as riparian owner, sued an iron mining company for fouling the water of the stream by pumping into it polluted water from their pits or shafts by means of drains leading therefrom into the stream. The defence was, in the first place, that if the water was not pumped into the stream in this way it would rise in the shaft until it reached the old levels from which it would flow into the stream. The water, the defendant averred, was the natural drainage water of the ground, not used in any manufacture and uncontaminated by any artificial process. And the defendant further pleaded that it was necessary for the working of their mines that the water should be so pumped and discharged.

The plaintiff prayed to have his right as riparian owner declared and the defendant enjoined.

The report is upon the plaintiff's motion for trial before the Lord Ordinary instead of a trial by jury. The motion was granted on account of "the legal questions of novelty and difficulty in reference to the rights of mineral proprietors to drain their workings."

The Lord Justice CLERK thought this was a good reason, because the water complained of was not an "opus manufactum." And Lord NEAVES said: "I do not say that the natural drainage of the ground is not pollution merely because it is not the result of a manufacture, if it be produced or used in an unusual way."<sup>2</sup>

default which would, but for the act, be deemed to be a nuisance, or otherwise contrary to law; and it appears that the act does not affect private rights and duties, nor does it concern the relation which riparian proprietors bear to one another: Clerk & Lindsell Torts, 312.

<sup>1</sup> 2 Sessions Cases, Scotch, 4 Series, 904 (1875).

<sup>2</sup> The writer has, after diligent search, not been able to find any subsequent report of this case, discussing and deciding it on its merits. The reader may also refer to *Elwell v. Crowther*, 31 Beavan, 163; *Jegon v. Vivian*, 6 Ch. Ap., 758; *Wright v. Williams*, 1 M. & W., 77, where pollution from mine water seems to be considered as under the ordinary rules, though the report only concerns a question of pleading: *Wood v. Waud*, 3 Exch., 748. *MacSwiney on Mines*, 396, says a riparian owner may, by pumping water from his mines into a stream, "alter its quality in a reasonable degree," but "may not sensibly alter its quality." Authority for this somewhat ambiguous statement is wanting, and apparently no other writer is of like opinion.

If Justice WOODWARD, in 86 Pa. St., 401, had, in affirming the judgment of the lower court, recited the general rule on the subject of the pollution of streams as followed in *Howell v. McCoy*<sup>1</sup> and other cases, referred to the English cases above cited, and *Wheatley v. Chrisman*,<sup>2</sup> as applying the general rule to cases of mining and met the argument founded on the public importance of the case by the answer that the public welfare is better maintained by preserving the legal rights of the individual than by subordinating them to antagonistic interests however great—if his opinion had followed this line of thought the subsequent reversal would have been more difficult of accomplishment. But the opinion was founded in great part upon a case which seems, upon careful examination, to have no application—that of *Fletcher v. Rylands*.<sup>3</sup>

Having now reached a point where an analysis of *Rylands v. Fletcher* is necessary, that analysis, and considerations suggested by it, will form the subject of a second paper.

<sup>1</sup> 3 Rawle, 256.

<sup>2</sup> 24 Pa. St., 298.

<sup>3</sup> 3 H. & C., 774; L. R., 1 Exch., 280, S. C.; L. R., 3 H. L., 330.