The tendency of the American courts on the other hand has been from the first to allow to a property owner a wide latitude of business use of his premises without liability for the harm resulting therefrom to others.

This divergence of latitude is exhibited with great distinctness in the cases dealing with the right of riparian owners to the use of the stream and its water.

In England three kinds of use are recognized, that which can be fully enjoyed however harmful to other riparian owners, that which is prohibited though no actual harm results from it and that which may be made of the stream if, and only if, it causes no appreciable harm. In the first class falls the use of water for primary and, in the sense in which Cairns, L. C., uses the term in Rylands v. Fletcher, "natural" purposes, ordinary and usual residential and agricultural uses, the taking of water for drinking, washing and the watering of cattle, or the pollution of the stream by the ordinary drainage of a house or farm. Of the second class, the abstraction of water for sale or for use outside the riparian land are instances. In the third are included the taking of water, any change in its flow or its pollution incident to the owner's use of his riparian land for irrigation, for manufacturing, or for any other lawful purpose for which he thinks it profitable to employ his land.

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84 See Wood v. Naud, 3 Exch. 748 (1846); Embry v. Owen, 6 Exch. 353 (1851); Sampson v. Houdinot, 1 C. B. N. S. 590 (1857); Mason v. Hill, 5 B. & Ad. 1 (1834); Swindon Waterworks Co. v. Wilts, etc., Canal, L. R. 7 H. L. (E. & I. App.) 697 (1873).
In America, while there was an abundance of streams capable of furnishing any required amount of water power, there was of course, when the country was first settled, an entire absence of "ancient mills" privileged to erect dams upon them. Had the law as it then existed, and indeed still exists, in England been adopted by the Colonies and a riparian owner's right to the uninterrupted flow of the water for use for his ordinary residential and farming purposes been regarded as sacred from appreciable interference, it is evident that no dams could have been erected, save as a privilege or franchise granted by the Crown or Proprietor, for every dam must appreciably affect the flow of the stream. Without dams no mills could be erected, without mills to saw the abundant timber into lumber, only the most primitive buildings could be put up, without grist mills, let the settler grow what grain he pleased, it could only be prepared for use as food by the most primitive methods. The law, in its effort to protect a right incident to the riparian proprietor's domestic and farming use of his land, would have put almost insuperable obstacles in the way of his building either houses or barns and would have practically destroyed the value of his principal crop; for at that time men farmed that they might live on the produce not to sell the grain unground. To the settler there was nothing more vitally essential than means to saw timber and grind corn. That needs so urgent should go unsatisfied, while streams, which could easily furnish the power required, must be suffered to go unused to the sea lest the legal rights of the various riparian owners be in the least invaded by their use for this purpose, was properly regarded as intolerable.

Thus it was inevitable that the erection of mills for the service of the neighborhood should be encouraged and that protection should be given to their owners. Mill acts were therefore

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85 This is admirably set forth by Robinson, J., in Great Western Co. v. Hawkins, 30 Ind. App. 557 (1903), p. 571. It must also not be forgotten that newly settled countries, especially those in which such streams were usually found, were sparsely settled, there was an abundance of land and a great lack of the machinery of civilization for its utilization; a slight invasion of riparian land would naturally appear of little practical moment compared with the great desirability of securing the opportunity to have grain ground into meal and timber sawed into lumber.
passed by the majority of the Colonies at a very early stage of their development which gave to the owners of "mills serviceable for the public good and benefit of the town or any considerable neighborhood in or near to which they (were) erected" the right to flood the lands of other riparian owners, so far as in the opinion of the jury it was necessary and "justified by the public convenience," without liability save as provided by the acts. By these acts the mill dams were protected from abatement or prostration by legal process and their owners were relieved from the burden of constant litigation whereby the owners of the land flooded might recover the damage accruing from time to time. Such owner's only remedy was the payment of a compensation for harm, future as well as past, assessed once for all in the proceeding provided by the act and payable under some acts in a lump sum, under others in annual payments so long as the mill dam was maintained.

The early acts did not, as a general rule, authorize the erection of dams for the supply of water power to all kinds of mills. In Virginia the courts were only required to sanction such mills as were designed for the public use; in Massachusetts the mills allowed were mills "serviceable for the public good of the neighborhood in which they were erected." In many of the Colonies the language of the act was more general, but the mills actually erected were usually, if not exclusively, saw and grist mills whose services were either by law or custom open to all who choose to avail themselves of them and whose charges were often limited by statute. They were, in a word, "public services" utilities quite as essential to the early settler as are transportation facilities to

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86 The first acts were those of Virginia (1667), Massachusetts (1714) and New Hampshire (1718). A full list of such legislation down to 1884 is contained in a note to Mr. Justice Gray's opinion in Head v. Amoskeag Mfg. Co., 113 U. S. 9 (1884), p. 17. The whole opinion contains a valuable sketch of the history of these acts.
87 Preamble to the earliest Massachusetts act, Prov. St. 12 Anne 8 (1714).
88 Massachusetts Act 1799, c. 74, secs. 2 and 4.
90 Preamble to Prov. St. 12 Anne 8.
91 See the Laws of Plymouth Colony, Part III, p. 276; General Laws and Liberties of the Massachusetts Colony (1672), p. 106. The original statute seems to have been enacted in 1638.
the modern citizen. It was this and not the incidental profit to the owner which led the Colonial Assemblies to sanction the appropriation of private lands, or at least the expropriation or demiseisin of their proprietors, if necessary to their operation. It was not till after the Revolution that mills to whose service the public had no right, whose primary object was the purely private advantage of the owner, which benefited the public only in so far as they contributed to the general prosperity of the country, in which the general public indirectly and unequally shared, became at all common.

In many States the benefit of existing acts were extended to such mills, in some, special acts were passed covering them. Some analogy may be found for the earlier acts in the early English decisions allowing trades, essential to supply the needs of mankind, to be carried on even to the discomfort of the neighbors if a place were chosen when the least possible annoyance would be caused. With the later acts and the decisions extending the benefits of the earlier ones to purely private manufactures, appears a new idea of public benefit sufficient to justify an invasion of the rights of private property.

The constitutionality of these later acts and of the early acts, considered as applicable to purely private mills and manufacturers, has been sustained on two grounds—the one that they are a proper exercise of the right of eminent domain, the other that they "are a just and reasonable exercise of the power of the legislature, having regard to the public good, in a more general sense, as well as to the rights of the riparian owners, to regulate the use of the water power of running streams, which, without such regulation, could not be beneficially used."44

44 See ante, p. 325, especially note 29.
45 See cases collected in Nichols on the Power of Eminent Domain, secs. 243, 244 and notes. In many jurisdictions the acts are held to apply, or to be constitutional only if they do apply, to dams erected for businesses to whose services the public are of right entitled, Tyler v. Beach, 44 Vt. 648 (1872); Avery v. Vermont Electric Co., 75 Vt. 235 (1903); Dice v. Sherman, 107 Va. 424 (1907); and see the valuable opinion of Robinson, J., in Gaut Wistow Co. v. Hawkins, 30 Ind. App. 357 (1903).

46 This latter position was foreshadowed by certain dicta of Chief Justice Shaw in Fiske v. Framingham Co., 12 Pick. 68 (1832); and while in Chase v. Sutton Co., 4 Cush. 154 (1849), he declared that such acts could "rest only in the right of eminent domain," the weakness of the argument in favor of
Whichever of two views be taken, the constitutionality of such acts can be sustained only if "the public interest is regarded as coinciding with that of the mill owner," if, and only if, the development of individually profitable industry is so essential to the general prosperity of the community, in which every member, though indirectly and unequally, shares, as to be paramount to the right of a private proprietor to the exclusive occupation of his premises.

In this attitude, where the mills were not open to public use but were solely for private profit, appears to have so impressed him that he abandoned it in Murdock v. Stickey, 8 Cush. 113 (1853), and definitely committed himself to the second view. His opinion has been consistently followed in Massachusetts—Lowell v. Boston, 111 Mass. 454 (1873), and has been carried to its logical conclusion in the cases which uphold acts permitting flooding wherever necessary to assist in a profitable and economically valuable development of private property, as for cranberry culture, Bearse v. Perry, 117 Mass. 211 (1875), or even for the purpose of conducting experiments as to the possibility of stocking the streams of a county with trout, Turner v. Nye, 154 Mass. 579 (1891). This view was adopted by Mr. Justice Gray, himself at one time a Justice of the Supreme Judicial Court of Massachusetts, in Head v. Amoskeag Co., 113 U. S. 9 (1885), but has not been followed in any other jurisdiction and has been ably criticised and in the writer's opinion conclusively refuted by Munson, J., in Avery v. Vermont Co., 75 Vt. 235 (1903), p. 242.

In fact, it appears the Mill Acts, at least such as allow flooding by private manufacturers, can only be sustained, if at all, on the ground stated by Field, C. J., in his dissenting opinion in Turner v. Nye: "Mill Acts were in force long before the adoption of the Constitution, and it could not properly be held that it was the intention of that instrument to render them void."


"In fact, it is in the cases upholding these acts as proper and reasonable regulations of the conflicting rights of riparian owners to the enjoyment of this common natural advantage that the importance of manufactures to the community is most insisted upon.

So Shaw, C. J., says, in Fiske v. Framingham Co., supra: "The public interest coincides with that of the mill owners," and again in the same case he says that such acts "rest for their justification partly upon the interest which the community at large has in the use and employment of mills and partly upon the nature of the property, which is often so situated that it cannot be beneficially employed without the aid of the power."

In Lowell v. Boston, 111 Mass. 554 (1873), Wells, J., says, p. 465, that among the capacity of streams for the service of riparian owners "no one is more important than that of the force of the current to supply power for the use of mills," and in Turner v. Nye, 154 Mass. 579 (1891), Morton, J., says, p. 583, "it is also for the public good that streams should be used to operate mills, to raise cranberries and to cultivate fish therein. If private rights appear to some extent to be invaded, that is inseparable from the nature of the use authorized, without which the streams could not be advantageously or profitably used. The character of the property and the resulting general good are deemed sufficient to justify the action of the legislature."

There is much to be said in favor of the criticism of Munson, J., in Avery v. Co., supra, p. 239, that "the reasoning in some of these cases cited comes dangerously near the argument that it is for the public benefit to have property of this character in the hands of those who will put it to the best use and that the refusal of an obstinate or grasping owner to part with his property right not to block the wheels of progress."
These acts while only dealing with dams which flooded the lands of other riparian owners, tacitly recognize the right to dam for mill purposes, at least for the purpose of supplying power for mills whose services were of right open to the public, if the fall of the stream within the owner’s property made it possible to do so without flowing by the back water the lands of any other owner. As the object of the act was to protect the mill owner from constant suits and from liability to the prostration of his dam as a nuisance, it is evident that if the erection of dams was in itself unlawful, as an infringement of the rights of other riparian owners to the unimpeded flow of the stream, the acts would wholly fail of their purpose, for, while the owners would be protected from litigation of abatement by the other owners whose lands were physically flooded, they would still be at the mercy of those with whose right to the unintercepted flow of the stream their dams had interfered.

In view of the importance attached to the use of water as a motive power, to the recognition that one of the most important capacities in which the stream is useful not only to the riparian owners, but to the public generally is “the force of the current to supply power for the use of mills” it is not surprising to find that from the earliest cases, no distinction is made in the great majority of jurisdictions between the right to use the stream for or-

*See, however, Evans v. Merriweather, 4 Ill. 492 (1842), in which Lockwood, J., states, pp. 495-496, the English view with great clearness and ability and distinguishes sharply between the use of water to supply the “natural” and “artificial needs” of the riparian owner—and while holding that each owner may in turn consume all the water of a stream for the satisfaction of his natural needs, to quench his thirst and for household purposes and to water his cattle, for which “in civilized life” “water is also necessary” he may not use the stream for irrigation or for manufacturing purposes unless he have enough to supply the natural wants of lower owners. Accord: Bliss v. Kennedy, 43 Ill. 67 (1867) and see Wheatley v. Christman, 24 Pa. 298 (1855); Penna. R. R. v. Miller, 112 Pa. 34 (1886); Clark v. R. R., 145 Pa. 438 (1891); Wilkes-Barre Water Co. v. Lehigh C. & N. Co., 3 Culp (Pa.) 389 (1885); Foot v. Arnold, 12 Wend. (N. Y.) 330 (1834).

As early as 1800 the right of an owner to dam a stream running through his own land, where by so doing he did not flood the land of any other proprietor was recognized in Pennsylvania in Beissel v. Sholl, 4 Dall. 411, see also Rogers, J., in Hay v. Sterrett, 2 Watts Pa. 332 (1834), p. 332, and Hetrick v. Deachler, 6 Barr. (Pa.) 32 (1847), (the decision though *per curiam* is probably by Gibson, J.). So in New York in which no Mill Act was or is in force it was intimated in Palmer v. Muligan, 3 Caines 308, (1805), pp. 312, 313 that the construction of a dam for mill purposes was lawful and for the public benefit and the owner’s right to dam the stream for such purposes is more definitely assented in Merritt v. Brinkerhoff, 17 Johns 305 (1829), p. 321.
dinary residential and agricultural purposes and the right to use it as a motive power for mills. Throughout the early cases the two rights are regarded as identical; the argument is constantly used that, since a certain harm caused by residential or farming use is not actionable, no action will lie for a similar harm caused by the use of the stream for purposes of manufacture.

So a riparian owner was allowed to dam the stream with as little liability for the diminution, acceleration or detarding of its flow for “reasonable” manufacturing purposes as he might in order that he might use the water for drinking, washing and watering his cattle. And, as the lower owner must bear the inconvenience caused by the pollution of the stream inherent in an upper owner’s use of his land for the latter purpose, so too he must put

“Throughout the cases the right to use water for manufacturing purposes is grouped in the same category as the right to use it for domestic and agricultural purposes—See Savage, C. J., in Arnold v. Foot, 12 Wend. (N. Y.) 330 (1834), p. 331. So Bellows, J., says in Hayes v. Waldron, 44 N. H. 580 (1863), at p. 384, that it is “well settled in the use of a stream for domestic agricultural and manufacturing purposes, to which every riparian owner is entitled,” some diminution, etc., of the current is permissible, and Shaw, C. J., in a long line of decisions, beginning with Cary v. Daniels, 8 Mets. (Mass.) 456 (1844), adopted by Cooley, J., in Dumont v. Kellog, 29 Mich. 420 (1874), at p. 474, holds that such owner has the right to the use of the stream “on his own land and amongst other things for mill purposes.” In Vermont Chief Justice Redfield went even further in Snow v. Parsons, 28 Vt. 459 (1856), pp. 461-462; to him the right to use the stream for purposes of irrigation and of manufacturing appear of predominant importance. He gives as the uses which are either so obviously proper or whose propriety has “been so long settled by common consent” as to be determinable as matter of Law, “the uses for irrigation, for propelling machinery and for watering cattle and some others.” Well might Pollock, C. B., say, as he did in Wood v. Ward., 3 Exch. 748 (1846), p. 781, that, “In America a very liberal use of water for irrigation, and for carrying on manufactures has been allowed,” when so eminent a judge as Chief Justice Redfield mentions the obviously proper uses of water in this order and includes, if indeed he has it in mind at all, the earliest recognized right, that of use for domestic purposes, in the vague general phrase “and some others.”

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up with such contamination by the waste necessarily discharged by saw mills or other manufactures. 61

But while the lower owner must bear the inconvenience incident to an upper owner's manufacturing as well as his ordinary residential and agricultural use of his premises, he is not entirely at such upper owner's mercy. The use must be "reasonable." By whom and by what rule or test is this to be determined? The question is generally regarded as one of fact for the jury. But in determining it they are, of course, not to be guided by their purely personal views, but to be controlled by the instructions of the court as to the elements which determine whether a particular use is or is not reasonable. The reasonable nature of the use appears generally to be regarded as depending on two distinct considerations.

The first concerns the nature of the stream as adapted to serve business of the kind for which the owner is using the stream and its waters, so the jury should consider the "business to which it is subservient," "the adaptation of machinery to it," and in many jurisdictions the general usage of the neighborhood in putting it or other similar streams to such use. 62

This always involves a comparison of the value to the common good of the defendant's and the plaintiff's actual or possible use; 63 the use of the water for manufacturing purposes of the stream, People v. Elk River Co., 107 Cal. 214, (1895). As to the right of a city to deposit its sewage into a stream on which it is situate, see Gray v. Patterson, 58 N. J. Eq. 71 (1899), and cf. Merrifield v. Worcester, 110 Mass. 214, (1872).

61 Snow v. Parsons, supra; tanbark discharged into stream by tannery; Hayes v. Waldron, supra; Green v. Gilbert, 60 N. H. 144 (1880); Prentice v. Geiger, 74 N. Y. 341, (1874), "saw dust from saw mills.

62 Pitts. v. Lancaster Mills, 13 Met. (Mass.) 156 (1847); Cary v. Daniels, 8 Met. 466 (1844); Dumont v. Kellogg, 29 Mich. 420 (1874). In Snow v. Parsons, 28 Vt. 459 (1856), it was held that residence should be admitted to show a "custom of the country" which, if uniform and "all one way," "would have almost the force of law." Such evidence was however excluded in Hayes v. Waldron, supra, p. 586, and in Timon v. Bear, 29 Wis. 269 (1871).

63 This appears in the statement of Bellows, J., in Hayes v. Waldron, supra, at p. 585, that whether the discharge of saw dust into a stream was reasonable "must depend upon the use to which the stream below can be or is applied, whether as a mere highway alone, or for manufacturing purposes, requiring pure water or for the supply of an aqueduct of a large city." The difference between the first and second uses may determine whether the plaintiff's rights are in fact appreciably injured by the pollution of the stream, for a discharge of waste which would not appreciably affect the
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if the stream be one adapted to the propelling of machinery, being regarded as of equal, if not superior, public advantage to its use for ordinary domestic and farming purposes.54

But in some jurisdictions55 a further comparison is to be made by the jury between the extent of the inconvenience or harm to the individual plaintiff and to the individual defendant.56 The con-

use of the stream as a highway might well seriously impair its value as a source of supply of pure water, but the contamination of the water just as greatly affects the value of its use for the private needs of a lower owner as for the supply of drinking water to the largest city. Whether the water is or can be used for the one or the other purpose is important, if, and only if, the reasonableness of a use depends on the comparative value to the community of the respective purposes of the plaintiff's and defendant's use of the stream, and if a use which is for the service of the many is worthy of greater protection than a beneficial only to the lower owner himself. See the same thought suggested in Russell v. Com., 172 Pa. 506, (1896), where it is intimated that the rule in Sanderson v. Coal Co., 113 Pa. 126 (1886), might not apply to protect a mine owner who by pumping mine water from his mine had polluted the water supply of a city.

54 See Andrews, J., in Prentice v. Geiger, 74 N. Y. 341 (1878), p. 345. "The public interest is promoted by the erection of mills and manufactories; and to construe the maxim, "Sic utere tuo ut alienum non laedas" as prohibiting the use of the water for propelling machinery, if to any extent it interfered with the use of the stream by other owners would produce great public inconvenience and prevent, in most cases, the beneficial use, and render unavailable the water power furnished by the streams and water courses of the country."

55 Especially New Hampshire and Vermont, see cases given in note 56. The same idea appears in a modified form in Hughes v. Anderson, 68 Ala. 280 (1881).

56 So Redfield, C. J., says in Snow v. Parsons, 28 Vt. 459, (1856), p. 463: "The reasonableness of the plaintiff submitting to this inconvenience must depend upon its extent, and the comparative benefit to the defendant, to be judged by the triers of the facts (the jury)." So in Hayes v. Waldron, supra, Bellows, J., says that in determining whether a mill owner's use of a stream as a depository for saw dust waste or "the extent of the benefit to the mill owner and the inconvenience or injury to others may as stated in the charge, very properly be considered." The same test is also applied to determine whether an obstruction of surface water is or is not reasonable. So Carpenter, C. J., says, in Rindge v. Sargent, 64 N. H. 293 (1886), that "the effect of the use upon the interests of both parties, the benefit derived by the one, the injury caused by it to the other, and all the circumstances affecting either of them, are to be considered"—and in Swett v. Cutts, 50 N. H. 439 (1870), Bellows, C. J., says, at p. 446, that in determining whether the obstruction of surface or subterranean water by the defendant's erection of an embankment to protect his garden was done in the course of a reasonable use of his land, the jury should consider, mutu alia, "the nature and importance of the improvements sought to be made, the extent of the interference of the water, and the amount of injury done to the other land owners as compared with the value of such improvements." In Ladd v. Brick Co., 68 N. H. 185 (1894), it is stated as a general rule of law that "the owner may put his land or other property to any use not unlawful which in view of his own interest and that of all persons affected by it, is a reasonable use. In the consequence to others of such a use he is not responsible. The question of reasonableness is a question of fact." See also Moore v. Berlin Mills Co., 74 N. H. 305, (1907) and cases cited therein.
ception seems to be that if the benefit to the one is greater than the injury to the other there is a surplus of advantage to the common wealth of the community. While it affords the utmost latitude of uses to the landowner, it in effect places every owner of property situated near the manufactory under a servitude of bearing without redress all the harm which is incidental to its profitable operation. It allows the landowner, so fortunate as to be able to profitably employ his land in his business and so to increase incidentally the sum of the prosperity of the neighborhood, to do so at the cost of his less fortunately situated neighbors. While he may not appropriate their land, while the State could not give to him, his business being primarily for his private benefit, the right to do so even upon payment of its value, he can without liability harm them, so long as his benefit surpasses in the opinion of the jury the sum of their injuries. Surely this is a very practical application of the principle that “to him that hath shall be given, but from him who hath not shall be taken away even that which he hath.”

The right of an upper owner to utilize the water for his own purpose reaches its extreme assertion in New Hampshire, he is not restricted to those acts of use necessary to carrying on the business or manufacture to which he has chosen to devote his land, it is enough that what he does, though injurious to those above or below him, will “add greatly to the productive value of

67 It may be confidently stated that in no other State in the Union has the landowner “right to subject his property to such uses as will in his judgment best subserve his interests” been more broadly stated. Lane v. Concord, 70 N. H. 485, (1900), p. 488. “The common law right of the ownership of land does not sanction or authorize practical injustice to one owner by the arbitrary and unreasonable exercise of the right of another, based upon a narrow view of the effect of the land titles. Rightly understood and judicially applied, the law in this respect protects every one in the reasonable enjoyment of his property, and imposes upon none burdensome servitudes for the benefit of others by the strict enforcement of a technical rule of ownership briefly expressed in an ancient maxim. Reasonableness is the vital principle of the common law,” Walker, J., in Franklin v. Durgee, 71 N. H. 186, (1901), p. 190. The case was one of obstruction of surface water but while the statement was made in regard to the right of ownership “in relation to surface water,” it has been seen that the same conception rules the cases already cited as to the respective rights of riparian owners and seems to be applicable to all uses of land at least for business purposes, see Moore v. Berlin Mills Co., 74 N. H. 305, (1907).
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the mill power;” 58 the question is not whether such acts are “necessary to the enjoyment of the defendant's rights, in the sense that without them, they could not be enjoyed at all, but whether such acts were done in the reasonable use of the stream; in deciding that question the jury should consider the necessity or importance of the right claimed to do such acts, (i.e., discharge waste into a stream) as well as the extent of the injury likely to be caused to the plaintiff.” 59

The other concerns the regulation of the use so as to provide a reasonable equality in the distribution of the use of an advantage given by nature to all the riparian owners in common. This presupposes that the use, whether for domestic farming or manufacturing purposes, is in itself lawful. 60 It operates to prevent an appropriation of an undue share of the steam by any one proprietor. The use therefore while reasonable in its nature must not be excessive or “inconsistent with a like reasonable use by other proprietors of land on the same steam above and below.” In determining this question the size of the steam is obviously an important consideration for an amount of diminution or pollution, which would be insignificant in a large stream, might in a small one be wholly destructive of the common right. 61 And it would seem that the “state of improvement in manufacture and the useful arts” should be considered and that an upper owner, should not be allowed by the use of antiquated


While it was held in Jacobs v. Allard, 42 Vt. 303, (1869) that an owner of a saw mill was not bound to accumulate his saw dust on his premises or have it hauled away with teams, if such was not the usual custom of saw mill owners, it was held in Canfield v. Andrews, 54 Vt. 1 (1882), that “such damages as are incident to and necessarily result from a proper use of the water must be borne; but the manufacturer has no right to do any act that in its consequence is injurious to others because it is a matter of convenience or economy to do so.”

60 The earliest cases and many of the later cases deal with the conflicts between the riparian owners desiring to use the stream for manufacturing purposes.

In such the question as to whether the right to use the water for domestic and farming purposes is or is not paramount to the right to use it for business purposes arises, if at all, merely incidentally.

methods, for no matter how proper and publicly beneficial a use, to unnecessarily diminish or pollute the stream to the detriment of lower owners.  

However lacking either of the above tests may be in that certainty, which many regard as desirable in the judicial ascertainment of private rights and in the determination of the proper boundaries to be set to efforts of individuals to advance their mutually conflicting interests, there can be no doubt that the test adopted in New Hampshire "is flexible" and whether, as its author asserts, it is "suited to the growing and changing wants of communities," or is not, it undoubtedly affords to the courts and juries the amplest opportunity to give legal effect to their economic opinions in determining what the needs of a given community may be at a given time and what uses of property so tend to further it that they should be allowed even at the cost of "inconvenience or injury" to others.

These cases, it is true, deal with the respective rights of riparian proprietors to the use of the stream, a natural advantage common to all, and of adjacent owners to relieve and protect their lands from natural disadvantages such as surface water. But as compared with the English cases on the same subject, they exhibit a marked tendency to regard land primarily as a productive asset rather than as a private domain, to prefer the interest of him, who is endeavoring to utilize his land by developing its profitable value, to the interest of him who merely desires to remain in undisturbed enjoyment of and dominion over his property.

The difference between the English and American law is on this subject great and fundamental. The English courts regard as of paramount importance the preservation intact of the owner's right to the use of the streams for those purposes to which riparian lands had been from the earliest time devoted and which had come to be regarded as a natural right, as such the legal

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62 Accord: Shaw, C. J., in Pitts. v. Lancaster Mills, supra; contra, Hartzell v. Sill, 12 Pa, 248 (1849), when it was held that a mill owner might continue to use a mill wheel of an antiquated type though it required the water to be retained for a length of time wholly unnecessary had a modern wheel been employed.

63 Bellows, J. Hayes v. Waldron, p. 586.
right *par excellence*; no considerations of business necessity being regarded as adequate to justify any appreciable infringement of this right. In America on the other hand, the essentially different conditions existing in a newly settled country led the courts to recognize as of equal value all those uses which were necessary to satisfy the needs of all the riparian owners and so to place in the same category as the uses of the stream for domestic and farming its use to supply power to drive those mills, whose services were, not only open to the public, but essential to anything approaching an adequate enjoyment of the right to farm or to build dwellings or barns upon riparian lands, for, as has been said, it would be of little avail to allow an owner to use a stream for the supply of a house if he could not build it because there were no mills to saw the abundant timber into lumber, to allow him to raise crops if he could not have them ground into meal and so made fit for food. So long as only those uses were permitted which were necessary, in the broadest and most inclusive sense, to the domestic and farming use of riparian lands, which, while specially profitable to the mill owner, were, in a sense, directly beneficial to all riparian proprietors, there is perhaps no essential difference between the concepts of the English and the American courts. The difference of decision may well be regarded as due to a difference in external conditions in the two countries rather than to any serious conflict of economic opinion.

The real change to a new conception, the true point of divergence, appeared when a riparian owner's right to use the stream for the purpose of a manufactory, to whose services the other owners had no right, whose operations did not directly serve their needs, but which was operated for the purely private profit of the owner, was held to be equal to the right to use it for ordinary domestic and farming purposes. While theoretically such businesses, by increasing the general prosperity are taken to indirectly benefit every member of the community, what ever benefit there is, is shared by all the community, the riparian owners, while bearing the entire cost of this additional prosperity, do not as such obtain any appreciably greater share therein.
The English courts are concerned chiefly in preserving the integrity of the traditional distribution of an advantage given by nature by all riparian owners, as it were in common or, perhaps better, successively—the American courts are endeavoring to so distribute it that it may be best utilized in building up the industrial and commercial prosperity of the country in so far as this is compatible with a reasonable equality of distribution. The first is the view natural in a country whose development, gradual and slow, is substantially complete. It is the natural attitude of an aristocracy more concerned with land as a possession, a domain, under their exclusive occupation and dominion, than with its development as a commercial asset. The latter is the view natural to a new settled country urgently requiring development even at the cost of some apparent injustice or of some entailment of individual rights. It is the attitude of a commercial people as distinguished from landowning aristocracy.

Not only was the economic opinion of the American courts diametrically opposed to that of the courts of England but they had become more definitely committed, than even the English courts, to the view that, except in certain definitely classified and rigidly restricted groups of case, there could be no tort liability for the harm caused by an act, lawful and carefully done. And furthermore for various reasons a number of cases had come up upon facts, on the surface closely resembling those of Rylands v. Fletcher, at a time, when the tendency, already noted, to regard the law as a collection of groups of actions classified in accordance with their procedural incidents rather than the substantive nature of the situation dealt with, was at its hey-day, and when therefore the fact that, in all the actions covering the usual circumstances under which one man's use of his land might injure his neighbor in the enjoyment or possession of his adjacent land, liability was imposed irrespective of fault suggested no general principle common to that general situation. On the contrary, each action was regarded as sporadic, governed by some principle peculiar to itself and not to be extended beyond the facts already covered by it, dealing with a wrong or right defined by the limitations of the remedy by which it was redressed. Thus in their search for a general principle appropriate
to any novel situation, even of this kind, the lawyer of that period
was driven to that class of case which dealt with injuries to the
person and personal property, in which from the very frequency
of new situations the courts had been forced to the formulation of
such a principle, and adopted, as the general rule governing all
tort liability, the rule early evolved therein that fault was essen-
tial to responsibility. So when the case arose of a lower riparian
owner injured by the escape of water from a mill dam, it was
held, in accordance with the view that a business use was as fully
permissible as a domestic use, that the dam was lawful and that if
the dam burst and the water was poured all at once into the stream
to the lower owner's injury, the mill owner was not liable if the
dam was carefully built, but that if the water seeped or percolated
through the dam or by the pressure of the back water through the
river banks and formed a marsh upon the adjacent lands the owner
was liable for this continuously harmful condition, this abiding
nuisance, no matter how carefully and skillfully he had acted.

As has been shown the difference between the facts in the two
cases is of purely procedural importance but the result of the
two shows clearly that, while the courts will still follow the rule
that a technical nuisance is actionable however caused, they will
not extend it to cases no matter how external and accidental the
difference in facts may be, no matter how similar the rights in-
vaded or the injuries done, or how identical the actual quality of

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"Livingston v. Adams & Rider, 8 Cowen N. Y. 175 (1828); Shrewsbury
v. Smith, 12 Cush. (66 Mass.) 177 (1853); Todd v. Cockhill, 17 Cal. 97 (1860);
Everett v. Hydraulic Co., 23 Cal. 225 (1863); Kug v. Miles City Irrigating
Co., 16 Mont. 463 (1895); and see Noyes v. Shepherd, 30 Me. 173 (1849),
semble.

"Pixley v. Clark, 35 N. Y. 520 (1866); Texas, etc., R. R. v. O'Mahoney,
24 Tex. Civ. App. 631 (1900); Aldworth v. Lynn, 153 Mass. 553 (1891);
Central Co. v. Pinkert, 29 Ky. L. R. 273 (1906). So where oil or gas refuse
percolates into adjacent premises and pollute the springs or wells thereon,
Pottstown Oil Co. v. Murphy (1861); Gas Co. v. Freeland, 12 Ohio St. 392
(1861); Ottawa Gas Co. v. Graham, 28 Ill. 74 (1862); Kinnard v. Standard
Oil Co., 89 Ky. 468 (1890); Beatrice Gas Co. v. Brady, 41 Neb. 662 (1894);
Pensacola Gas Co. v. Pebby, 25 Fla. 381 (1889). See also Brady v. Steel
Spring Co., 102 Mich. 277 (1894), where fuel oil percolated into a sewer,
where it generated gas, which coming into the plaintiff's nearby bakery,
seriously interfering with his enjoyment thereof. Contra: Moore v. Berlin
Mill Co., 74 N. H. 305 (1907), and see Griffith v. Lewis, 17 Mo. App. 605
(1885), where it was held that there was no liability for the escape of filth
into a neighbor's premises until the defendant had a reasonable time, after
notice of the nuisance, to abate it.

"Ante, p. 311, et seq.
the defendant's conduct, but will apply to the new situation, if a situation can be called new which is so like another recognized as old, the principle which the courts had deduced as the general test of tort liability from the cases of personal injury.

When the rule in Rylands v. Fletcher came before the Courts of the various American States it was but natural that Lord Blackburn's opinion, conflicting as it did with the consistent course of decision in these cases, apparently so similar, and with the general conviction that without fault there could be in no new situation any tort liability, should be declared erroneous and that Lord Cairns' classification of uses as "Natural" and permissible and "Non-natural" and forbidden, which, representing the preference of time honored legal rights to industrial development, was opposed to the settled economic policy enforced in the innumerable cases in which extreme individual rights had come into irreconcilable conflict with the necessities of business, should have encountered violent and indignant opposition.

The rule in Rylands v. Fletcher was definitely repudiated in New Hampshire, New York and New Jersey. In Pennsylvania the Supreme Court in 1878 adopted and applied it in Sanderson v. The Pennsylvania Coal Company, but, eight years later, on a subsequent appeal of the same case after holding that it did not apply to the facts therein they expressed themselves as

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67 Brown v. Collins, 53 N. H. 442 (1873), a case which did not at all involve the question of the liability of a landowner for harm done by his use of his premises, but presented the question of the liability of one whose acts carefully done in the enjoyment of his right to use a highway had accidentally harmed another in the enjoyment of his similar act, but which Chief Justice Doe utilized to pronounce his condemnation of the opinions of both Mr. Justice Blackburn and Lord Cairns. Garland v. Towne, 55 N. H. 55 (1874).

68 Losee v. Buchanan, 51 N. Y. 476 (1873).

69 Marshall v. Wellwood, 38 N. J. L. 338 (1876). In the recent case of Lake Shore, etc., R. R. v. Chicago, etc., Ry., 92 N. E. 989, the Supreme Court of Indiana expresses its disapproval of the rule in Rylands v. Fletcher—this, however, was dictum only, as even in jurisdictions following Rylands v. Fletcher the plaintiff could not have recovered in the facts of the particular case, which were closely similar to those of Eastern and South African Telegraph Co. v. Cape Town Tramways Company, L. R. 1902, A. C. 381, in which the Privy Council held Rylands v. Fletcher inapplicable.

86 Pa. 401 (1878).
unwilling, if it did apply "to recognize the arbitrary and absolute liability which it declares, to the full extent, at least, to which its general statement would necessarily lead."\(^1\)

\(^{1}\) 113 Pa. 126 (1886).

This much criticised case undoubtedly allows to mine owners a much greater freedom from liability for harm caused to others by their mining operations than did the earlier case of Wheatley v. Chrisman, 24 Pa. 298 (1855). But it is submitted that it does not, as its critics assert, introduce any novel or revolutionary doctrine.

It had been held in Wilson v. Waddell, L. R. 2 A. C. 95 (1876), quoting and applying the statement of Cairns, L. C., in Rylands v. Fletcher, L. R. 3 H. L. p. 338, and in Atty.-Gen. v. Tomline, L. R. 12 C. H. D. 214 (1879), per Fry, L. J., at p. 230, that the owner of land on which there are subterranean or surface deposits of minerals or other valuable and useful materials, might without liability, by his operations for the purpose of extracting them, cause the invasion of adjacent lands by the water collected thereby and flowing by its own force upon such adjacent lands, and this, because the operations, which necessarily cause the collection of the water, were necessary for the removal of the substances. If the consequent invasion of adjacent lands was wrongful the adjacent owners might, in effect, enjoin the removal of the mineral and other deposits and so deprive not only the mineowner but the public of the benefit thereof. Therefore, in order that all the mineral wealth of the country be not suffered to remain unused, the neighboring owners were forced to bear the burden of the harm caused by artificial conditions created primarily for the mineowners' benefit and profit.

At the time that the decision in Sanderson v. Coal Company was rendered the bulk of the anthracite coal deposits of Pennsylvania were found at so deep a level that they could not be practicably mined without ridding the mines artificially of the mine water. If this be true, and it was assumed as the basis of the opinion of the court, it would seem that, if one owning land near a mine or another mine situated below it must, that mining may go on, bear without complaint water artificially collected, he ought also to bear the burden of its artificial expulsion if without such expulsion not this particular mine alone, but practically all mines, could not be worked. It is true that in the one case the operations are primarily intended to extract the minerals and the damage only results as an incident thereof and in the other the immediate object is to relieve the mines of water at the expense of neighboring lands, but this is only as a means to make it possible to reach and extract the minerals. In other jurisdictions this difference had been held immaterial where land was drained to fit it for farming, building and other natural, or even lawful, use, Tuttle v. Goodale, 29 N. Y. 459 (1864); Sheehan v. Flynn, 59 Minn. 436 (1891). And such cases go in reality much further than does Sanderson's Case, for the artificial drainage of mines is absolutely necessary to the mining of, if not all, at least the great bulk of all the coal in the State, so that, if it were preventable by the adjacent owners, the greater part of the coal lands must remain undeveloped with what resulting harm not to the State of Pennsylvania alone, but to the whole country, the anthracite strike of 1903 has shown. On the other hand, though an individual owner might suffer by not being allowed, by draining it, to reduce a part of his land to cultivation or to fit it for building or other lawful use, there would still be a sufficiency of farming land nor would there be a likelihood of any real dearth of building sites. Furthermore, by the drainage the evil is but transferred to the land of another, the very draining which fits the land of the one for use destroys the value of his neighbor's land for a similar use, there is little or no gain in the total quantity of arable or building land. By draining a mine into a stream, on the contrary, the one mineowner does not take advantage of his natural position to transfer his burden to another mineowner—he does not ruin another mine to make his available for use. He
As has been seen, the courts of New Hampshire allow owners of property great freedom in developing the productive value of their land as they may deem will best serve their interests. It is not surprising, therefore, that Chief Justice Doe should have regarded the rule in Rylands v. Fletcher which required the owner, who, in the course of his use of his premises in the way which he deemed would best serve his interests, had brought thereon a substance likely to escape despite the utmost care to confine it, to bear the risk rather than that it should be distributed among his neighbors as archaic and barbarous, as unfitted to the conditions of civilized life, as putting "clog upon the natural and reasonably necessary uses of matter and (as tending) to embarrass and obstruct much of the work which it seems a man's duty carefully to do." So it was natural that the Court of Appeals of New York, where the erection of mills had long been regarded as a public benefit, should hold that "manufactories, machinery dams, canals and railroads being demanded by the man-

merely injures the extreme rights of owners, whose land, until the region was developed as a mining district, was situate in a wilderness and was valueless, its principal if not whole value being due to the population which the mines have brought to the neighborhood and whose land, together with all the other land near it, would again become valueless were the mines were exhausted or shut down. It may be admitted that the opinion goes too far in holding that the pumping is "natural," because it is natural for an owner to do what may best aid in developing his land—such a use of the term "natural" would justify any act tending to the profitable use of land and would make the term "natural" sanction an even greater freedom of use than the term "reasonable" as defined in New Hampshire. But it is submitted that under the conditions of coal mining in Pennsylvania it is no more artificial, no less natural, to pump water from a mine than to collect it by excavations and allow it to flow away by gravity. Both the excavations and the pumping are equally artificial, both are equally necessary for a use of the land, "natural" in the sense that by it, and only by it, can the land be utilized for those purposes for which nature itself has marked it as designed to serve the needs of mankind.

The decision in Sanderson v. The Coal Co. has been held to apply to the artificial collection and discharge of salt water from oil wells, Pfeiffer v. Brown, 165 Pa. 267 (1895). It has been repudiated in England, Young & Co. v. Bankier Co., L. R. 1893, A. C. 691, especially pp. 701-702, and Ohio, Straight v. Hover, 70 Ohio St. 292 (1909), but has been followed and extended in Indiana, Barnard v. Sherley, 135 Ind. 547 (1895). In Barnard v. Sherley, a point left open in the case of Robb v. Carnegie, 145 Pa. 324 (1891), the right of an owner of land possessing mineral wealth not only to extract it but to commercially utilize it upon the premises without liability for harm done thereby, where it could not be profitably utilized elsewhere, was decided in favor of the owner; an owner of land, on which mineral springs existed, being held not liable for the pollution of a stream by the discharge into it of the drainage of a hotel and baths erected for the accommodation of the public desiring to benefit by the waters.
fold wants of civilized mankind one who has them on his land" is not responsible for the damage which they accidentally and unavoidably do his neighbor unless they are in themselves nuisances or so managed as to become such.

In the New Jersey case of Marshall v. Wellwood the decision is placed flatly on the point that, except in cases of technical "nuisance," "blame must be imputable as a ground of responsibility for damage proceeding from a lawful act." But while the Court does not touch upon the economic inconvenience of the rule in Rylands v. Fletcher, it is well to recall the fact that it had been held in New Jersey as early as 1832 that the construction of a dam over the Delaware, at Trenton, so as to supply power for a large number of private mills was as much for a public purpose as the construction of a toll road.71a

While these courts united in refusing to follow Rylands v. Fletcher, it will be found that they do not all unite in rejecting either Lord Blackburn's opinion that all cases dealing with the injurious effects of an owner's use of his land should be treated as governed by a common principle or Lord Cairns' classification of uses as "natural" and "non-natural." It was to the preference shown by the latter to "natural" over other lawful uses that Doe, C. J., took particular exception as repugnant to the settled economic policy of the New Hampshire Court. The later New Hampshire cases recognize that the same rule must apply to continuous and momentary invasions of another's proprietary rights; and the liability for the one as well as the other is held to depend upon whether the defendant's use of his land which occasions it is "reasonable" in view of the respective interests of both parties, and so in a recent case it has been decided that a mill owner was not liable for the continuous inundation of neighboring land by percolations from the pond created by his dam unless the jury found that he had acted unreasonably by failing to prevent the percolation when he could and under the circumstances, after knowledge of the percolations have stopped them.72

71a Scudder v. Trenton Falls Co., 1 N. J. Eq. 694 (1832).
72 So one who stores explosives on his land is held to be liable only if, on account of the place selected, the proximity of other buildings and public highways, the character of the surrounding country, the nature of the build-
On the other hand the Pennsylvania Court has adopted and consistently applied what is practically Lord Cairns' distinction between "natural" and "non-natural" uses when the defendant has created "an abiding nuisance," but has just as consistently denied the existence of any general principle, common to all cases where one person by his use of his land has harmed another in the possession or enjoyment of his adjacent land, of which the liability for a technical nuisance is but an exhibition. So it has been held that in the absence of negligence, there is no liability if harm happens all at once as the indirect result of a condition created or acts systematically done in a lawful use of the defendant's premises, which till then has neither physically invaded the plaintiff's property or his rights as riparian owner nor substantially interfered with his comfortable enjoyment of it nor been so dangerous as to seriously menace its safe occupation or depreciate its value. But if the condition created by the defendant or the acts done by him, while it exists or they continue, do any of these harms and so are prima facie actionable technical nuisances, then his liability is held in a long line of cases to depend upon whether they are conditions or acts necessary to develop "the natural resources of the land" by the cultivation of the surface or the mining of minerals placed by nature beneath the surface, in which case he is not liable for the harm inevitably caused. But if the injury is due to the defendant's "election

ing used as a magazine, the quantity of explosives stored therein and the other circumstances of the particular case, the storage is in itself a "nuisance," Weir's App. 74 Pa. 230 (1873); Dilworth's Appeal, 91 Pa. 243 (1879); Tuckachinsky v. Lehigh, etc., Co., 199 Pa. 515 (1901), or if he is shown to have been guilty of negligence in its custody and the occurrence of the explosion is by itself no evidence of negligence, Sowers v. McManus, 214 Pa. 244 (1906), see contra, Judson v. Giant Powder Co., 107 Cal. 549 (1906).


"So Woodward, J., in Kauffman v. Greiseiner, 26 Pa. 407 (1856), makes, at p. 414, the much quoted statement that "it is no more natural that water should descend than that land should be farmed."

So it has been held that one may without liability pollute a stream, if it is impossible to appropriate the oil underlying his land without so doing, Pfeiffer v. Brown, 165 Pa. 267 (1895), or may burn on his premises the clay found thereon into bricks, Huckenstein's App., 70 Pa. 102 (1870), as explained in Robb v. Carnegie, 145 Pa. 324 (1891), p. 339. That is held necessary to develop the natural resources of the land without which the oil or coal or brick clay could not be profitably obtained or utilized. Huckenstein's App., supra; Pfeiffer v. Brown, supra. As to the limits of this principle see Roberston v. Coal Co., 172 Pa. 566 (1896), and Russell v. Cone, 176 Pa. 506 (1896).
to devote his land to a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata” he is “serving himself in his own way and has no right to claim exemption from the natural consequences of his acts,”74 no matter how wise the selection of the place, how secluded its situation, how convenient because of its proximity to the supply of raw material.

(To be concluded.)

74 Robb v. Carnegie, 145 Pa. 324 (1891), especially pp. 338 to 341, in which it was held that one, who had selected a place for burning coke, both secluded and convenient to himself, as close to the mines from which he obtained his coal, must pay for the physical damage done to adjacent farms, Williams, J., holding that “the production of iron, or steel, or glass, or coke, while of great public importance, stands on no different ground from any other branch of manufacturing. They are needed for use and consumption by the public, but they are the results of private enterprise, conducted for private profit, and under the absolute control of the producer,” who may transfer his business to another “place or State or abandon it;” “the interests in conflict in this case are, therefore, not those of the public and an individual, but those of two private owners who stand on equal ground as engaged in their own private business.” So in Hauck v. Tidewater Pipe Line Co., 153 Pa. 366 (1893), it was held that a pipe line for the transportation of oil was not necessary to the development of the land in which it was situate and that the oil not being placed by nature on the land, but artificially brought from a distance, the pipe line company was liable for the pollution of the plaintiff’s nearby springs and lands, by the percolation of oil leaking from its pipes. See also Evans v. Fertilizer Co., 160 Pa. 209 (1894).