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## THE RIGHTS AND OBLIGATIONS OF RIPARIAN PROPRIETORS.

The law relating to the subject which we are about to consider, forms, from the nature of the element to which it is applied, one of the most interesting portions of our jurisprudence; and the many valuable interests which it now affects, give to it a much more general importance than it formerly possessed. Its protection now not only extends over the rights which the occupant of a cottage has in a stream, the simple use of which is, that it flows in beauty near his door, but determines questions concerning rights upon the security of which immediately depend the prosperity and wealth of large manufacturing districts. It shall be our endeavor to show how perfectly all these rights are secured and guarded.

It is evident, from the terms commonly used when treating of this branch of the law, and the maxims in which many of the principles upon which it is administered are announced, that the early English jurists made frequent reference to the Roman law. But whatever they may have borrowed from that source has been so modified in the transition, and so blended in the general system which they fashioned, that it is a matter rather of curious inquiry than of real utility to seek to ascertain what has been adopted and what created. By a perfect fusion of materials, and not by

elegant mosaic work, has our noble system of the common law been constructed.

We shall, as fully as we may in the limited space prescribed, consider the rights of riparian proprietors in reference to their ACQUISITION, as connected with the title to land lying on streams above tide water; the ENJOYMENT of those rights, and the attendant *obligations*, independent of special grants or statutes; their TRANSFER, by grant, license, and prescription, and the privileges thus conferred.

The interest that may be held in certain things must depend on their nature. While the soil of the earth and its products are subjects of absolute property, there can only be established in the elements of air, light, and running water, a usufructuary right. It seems to have been the policy of the law, in assigning an ownership to every thing, to acknowledge only such an ownership as would prove most widely beneficial.

According to the principle of the maxim *cujus est solum ejus est usque ad cælum*, the owner of the soil over which a watercourse naturally flows, holds, as a corporeal right, or hereditament, a property in the water.<sup>1</sup> A grant of land, whether by the State or an individual, carries with it a right to the water flowing over it, although it is not described as land covered with water; unless there be contained in the grant an exception or reservation by which the right to the water is retained.<sup>2</sup> The right, then, being originally founded in the ownership of the soil, it becomes necessary to determine what terms will carry the property in the soil covered with water.

When the limits of a grant are distinctly defined by metes and bounds, without reference to a watercourse, no question can arise as to the right of the grantee to all waters within its limits. But one of the most frequent ways of bounding tracts of land, especially in the early settlement of a country, being by the permanent natural marks in the face of the country, as its mountains and streams, questions frequently arise as to the exact extent of grants thus

<sup>1</sup> *Buckingham vs. Smith*, 10 Ohio, 288.

<sup>2</sup> *Browne vs. Kennedy*, 5 Harr. and Johns. 195.

made. In the determination of these questions courts have had reference to the character of the object designated as a boundary.

It was early settled in England, that where an estate was bounded by navigable water, the boundary line was the line marked by high tides, but when upon unnavigable streams, the thread of the stream must be taken as the boundary. All tide waters being there considered, for the purposes of boundary, as *navigable*, and all streams above tide water, as *unnavigable*. The propriety of adopting such a rule in this country, where many of our rivers are actually navigable for thousands of miles above tide water, has been frequently doubted, and in some States the rule has been entirely discarded.<sup>1</sup> In a great majority of the States, however, the English rule has been adopted, and under it the principles upon which the rights of parties are to be determined, have become quite well established.<sup>2</sup> In a recent case before the Supreme Court of the United States, in which the question was as to the extent of the admiralty jurisdiction of the United States Courts, it is held, that the English definition of the term *navigable*, is entirely inapplicable to the great lakes and rivers of this country.<sup>3</sup> But the decision of this case, going merely to the defining of a jurisdiction, cannot be considered as extending to the disturbing of private rights, which have been or may be acquired under the rule, as it has been understood and adopted in the courts of the several States, when determining upon the rights of property,<sup>4</sup> and we shall, therefore, proceed to consider the rights of riparian proprietors, as they exist under the rules of our common law.

Where grants of land are bounded by water, it is necessary to ascertain the character of the water, not only for the purpose of finding the exact boundary line, but that we may also ascertain the extent of the incident rights that have been acquired. The pro-

<sup>1</sup> *Carson vs. Blazer*, 2 Binn. (Penn.) 475; 2 Port. (Ala.) 436; 1 McCord (S. C.) 580.

<sup>2</sup> *Commiss. of Canal Fund vs. Kempshall*, 16 Wend. (N.Y.) 404; 5 Pick. (Mass.) 190; 9 N. H. 461; 3 Scam. (Ills.) 500; 3 Blackf. (Ind.) 193; 16 Ohio, 540; 1 Rand. (Va.) 417.

<sup>3</sup> *Propeller Genesee Chief vs. Fitzhugh*, 12 Howard, (5 ct.) 443.

<sup>4</sup> See *Covert vs. O'Conner*, 8 Watts (Penn.) 470.

prietary interest in tide-waters, as well as the property in the soil over which they flow, is in the public.<sup>1</sup> If a stream be uninfluenced by tides, and unboatable, the proprietors of its banks take title to the bed of the stream, and the entire and uninterrupted use of the water. But if a stream be *boatable*, they hold their rights subject to the easement which the public have in it, as a highway for watercraft. It is only in fresh waters that *riparian* rights, strictly speaking, can be said to exist, although the term is applied to the more limited rights held by those bounding on tide-waters. We purpose to confine our attention to the law governing fresh-water streams.

It is sometimes a question of no little difficulty to determine, from the words of a grant, whether or not it is to be viewed as being bounded by a water-course; as in cases where certain objects, designated as the *termini* of the lines running towards a stream, stand some distance from the bank, and the course between them is said to run "up the stream," or "down the stream," or "along the stream," or by other similar words referring to the water-course. Where a map is referred to, and the lines are marked as terminating on the stream, the grantee will hold to the stream.<sup>2</sup> And although no such reference is made, yet if there be nothing in the circumstances of the case showing a *clear intent* on the part of the grant to stop short of the bank or margin of the stream, the lines must be so extended.<sup>3</sup> The general rule to be gathered from the cases is, that courses and distances must yield to a designated natural boundary. The boundary being carried to the bank, or edge of the stream, the grantee will hold, by *common right*, to the centre or thread of the stream, unless the bed of the stream and water privileges be expressly reserved. Finally, by whatever words a grant may be bounded on a fresh water stream—whether they be "to the river," or "to the bank of the stream," or "the margin," and then "up" or "down the same"—the grantee will hold by the common law to the centre of the stream.<sup>4</sup>

When the grants are bounded on a natural pond or lake, the

<sup>1</sup> Hale's *De Jure Maris*.    <sup>2</sup> *Reid vs. Langford*, 3, Marsh. 99, (Ky) Rep. 420.

<sup>3</sup> 1 Hay. (N. C.) 237. Where the lines were extended to the natural boundary.

<sup>4</sup> *Jennings, ex parte*, 6 Cowen, (N. Y.) 518; 3 Kent's Com. 428, and note.

grantee will only hold to the water's edge.<sup>1</sup> But where, by means of a dam or other works, an artificial pond has been made on a running stream, grants bounded on it will give title to the centre of the stream.<sup>2</sup> In cases where a natural pond has been raised by artificial means, there may be a latent ambiguity in the grant, that can be explained by parol proof.<sup>3</sup>

The right to the bed and the water of a stream is generally found divided between opposite riparian proprietors, each holding to the thread of the stream, or *usque ad filum aquæ*. And the difference between the rights which a party holds in a stream running through his land, and one which thus forms his boundary, consists in their extent, not in their nature; in the former case he has a title to the whole, in the latter to one-half of the stream.

The soil which may by *imperceptible* deposition be added to the land lying on a water-course, belongs to the proprietors of the estates on which it is deposited.<sup>4</sup> This increase, called *alluvium*, must be divided among the several proprietors along the line of its formation, in proportion to the extent of their lines upon the old margin.<sup>5</sup>

If the stream suddenly change its course, *relying* the soil over which it was wont to flow, and making for it a new channel, the boundaries of the estates affected remain according to their former lines;<sup>6</sup> and in the case of a boatable river, the soil over which the public once had an easement, is relieved, and the easement is held in the new course of the river. When, as in cases of *avulsion*, the soil of one man's estate is, by the manifest force of the stream, taken suddenly and transferred to another, no property will be conferred, unless by acquiescence.<sup>7</sup>

*Islands*, not otherwise appropriated, if in the middle of the stream, are divided between the opposite riparian proprietors; but if they are on one side of the centre of the stream, they belong to the owner of that side.<sup>8</sup> The sand-bars and islands that may be formed in fresh-water streams are apportioned in the same manner.

<sup>1</sup> Canal Commis. vs. People, 5 Wend. (N. Y.) 413.

<sup>2</sup> Smith vs. Miller, 5 Mason, C. C. 196.   <sup>3</sup> Waterman vs. Johnson, 13 Pick. 261.

<sup>4</sup> Case of Batture, New Orleans, 2 Amer. Law Jour. 282.

<sup>5</sup> Rule given in note on 47 p. Angell on Water-Courses.

<sup>6</sup> Lynch vs. Allen, 4 Dev. & Bat. (N. C.) 62.   <sup>7</sup> Hale's De Jure Maris.

<sup>8</sup> Ingraham vs. Wilkinson, 4 Pick. 268.

Along with the other rights incident to the interest which a riparian proprietor holds in a water-course, is the *exclusive* right of *fishery* in that part of the stream included within his territorial limits.<sup>1</sup> And this right cannot be abridged by a custom which others may have established of fishing in such waters; unless it be set up by prescription as belonging to some estate.<sup>2</sup> This absolute and unshared right that a riparian proprietor has to fish in his own waters, has been termed a *several fishery*, as distinguished from a *free* or *common fishery*, which is a public right to fish in public or tide-waters.<sup>3</sup> Trespass will lie for an injury done to a several fishery, whether it is held as an incident to the proprietorship of the land, or by a grant conveying the right of fishery, without the title to the soil.<sup>4</sup>

Having noticed the rights acquired by the holding of land lying on water-courses, we come to the consideration of the law governing their enjoyment.

The same stream that flows by one estate, giving rise to riparian rights, may in its course be the boundary of many others, to which, originally, like rights are given. As, from its nature, no property can be held in the *corpus* of running water, these rights must be limited to its use as it passes along. The language of the law is, *aqua currit et debet currere, ut currere solebat*.

Many of the various uses which flowing water subserves, do not affect perceptibly the character of the stream. It imparts fertility to the soil, and beautifies the landscape through which it flows; supplies the natural wants of man and beast, and may, in many cases, be applied as the motive power to machinery, without causing the least injury to the rights of those situated either above or below on the same stream. When thus used in strict accordance with the maxim, *sic utere tuo ut alienum non lædas*, there can be no doubt but that the use is such as the law sanctions. But there are cases where a profitable use cannot well be made of the stream without affecting, to a certain extent, the rights of other riparian proprietors; and it

<sup>1</sup> *Smith vs. Miller*, 5 Mason, C. C. 191.

<sup>2</sup> *Waler vs. Lilly*, 4 Pick. 145; *Gatewood's cs.* 6 Coke, R. 60.

<sup>3</sup> *Melvin vs. Whiting*, 7 Pick. 79; *Schultes on Aquatic Rights*, p. 60.

<sup>4</sup> *Hart vs. Hill, Wharton*, (Pa.) 124.

must be determined how far this will be permitted. The authorities lay down as the limit, a *reasonable use*.

A distinction between a *natural* and an *artificial* use of water, seems to be now quite well established.<sup>1</sup> To make such a use of water as the wants of man and beast absolutely require to sustain existence, may well be considered a reasonable use. And if in thus using, the upper riparian proprietor exhausts the stream, no action will lie against him for such entire appropriation. If, however, the use made is only calculated to increase his comfort and prosperity, the law will not permit it at the expense of the rights of others. Those over whose lands nature causes the water first to flow, being first in position, have thus an opportunity of prior use, but the right is still limited by the *reasonableness* of the use.

In some of the early cases in this country, the use of water for the purposes of irrigation was sustained as a reasonable use, provided the water not absorbed by the soil was returned to its natural channel.<sup>2</sup> But the later cases only go to the extent, that such use may be made, provided it does not materially diminish the quantity of water naturally flowing in the stream.<sup>3</sup> Irrigation not being regarded as an absolute necessity, it cannot be maintained as a paramount right.

The general rule governing the use of running water, is, that it must be used in such a manner as not to be inconsistent with, or prejudice the right which other riparian proprietors have to the use of the *entire* stream in its *natural flow* by their estates.

It is evident that every detention of water by dams or diversions, must, to a certain extent, reduce, by evaporation or absorption, the quantity of water, and affect the rapidity of the current. When these effects are insensible, or inevitable from the establishment of dams for the fair and reasonable use of the water—not materially affecting the rights of other proprietors, there is no actionable wrong done. The question in such cases must turn on the *nature and extent* of the injury.<sup>4</sup> To deny the right of causing such slight

<sup>1</sup> *Evans vs. Merewether*, 3 Scam. (Ill) 496; *Wood vs. Ward*, Law Jour. R. Aug. 1849.

<sup>2</sup> *Perkins vs. Dow*, 1 Root's, (Conn.) 535; *Weston vs. Alden*, 7 Mass. 136.

<sup>3</sup> *Anthony vs. Lapham*, 3 Pick. 175; *Arnold vs. Foot*, 12 Wend. 330.

<sup>4</sup> *Palmer vs. Mulligan*, 3 Caine's, (N. Y.) 307.

variations in the quantity or the current of the water, would be to prevent many profitable uses of it, and leave one of the most valuable of powers unemployed. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness subversive of common use, nor into an extravagant looseness which would destroy private rights.<sup>1</sup> The question as to the reasonableness of the time of the detention, is for a jury to determine.

In the exercise of the *usufructuary* right which a riparian proprietor has in water, he may take advantage of its momentum, or impetus, as it flows through his land, but in so doing he must not throw back-water on the lands of upper riparian proprietors, or flood, at times, in an unreasonable manner, the lands of those below.<sup>2</sup> It is only to the fall of the water within the boundaries of his own estate that he has any title, and to those limits must the effects of his use be confined.<sup>3</sup> He must not disturb the natural flow of the stream above his estate, and must give the full flow of the stream, in its natural channel, where it leaves his land.<sup>4</sup>

Where there are opposite riparian proprietors, it is not lawful for either to draw off any part of the water, without the consent of the other; for the title which each has, is not to any specific part or portion of the stream, but to an equal use of the *entire* stream. The property in the stream is *indivisible*. And the joint proprietors must use it as an entire stream in its natural channel; a severance would destroy the rights of all.<sup>5</sup> And where mills have been erected on either side of a private river, and in times of drought the greater proportion of the water flows to one side of the main channel, the riparian proprietor whose mill is left without sufficient water, cannot erect a permanent dam to turn the water to his mill, but, it seems, may, under the direction of the court, excavate in the bed of the river, and so obtain a fair proportion of the water.<sup>6</sup> If in the erection of a dam or other works, the proprietor of one bank places

<sup>1</sup> Tyler *vs.* Wilkinson, 4 Mason, c. c. 401.

<sup>2</sup> Merrit *vs.* Brinkerhoof, 17 Johns. (N. Y.) 306.

<sup>3</sup> M'Calmot *vs.* Whittaker, 3 Rawle, (Pa.) 84.    <sup>4</sup> Howell *vs.* McCoy, 13 Rawle, 397.

<sup>5</sup> Vandenburg *vs.* Vanbergen, 13 Johns. (N. Y.) 212.

<sup>6</sup> Arthur *vs.* Case, 1 Paige, (N. Y.) Ch. 447.

materials beyond the thread of the stream, he becomes a trespasser, and the opposite proprietor may remove them; and if having done it with proper care, an injury results to the remaining portion of the works, he is not liable.<sup>1</sup> Where opposite proprietors have become owners in severalty, of parts of a dam extending across the stream, there is an implied covenant, running with the land, that each will keep his part in repair, so long as he continues to use the water; and when he abandons the use, the other has the right to repair the whole.<sup>2</sup>

If lands be inundated, and injury sustained, by reason of the erection of any dam, an action will lie, as for a private nuisance.<sup>3</sup> And besides the remedy at law, the party whose land is overflowed may protect it against the encroachments of the water, and if the result be an injury to the original wrong-doer, he has no legal ground of complaint.<sup>4</sup> Where the water-course is unlawfully turned upon the land of another, no right is conferred, and the water may be returned to its former channel by the wrong-doer, at any time within twenty years.<sup>5</sup>

When it is necessary to the protection of any land from being overflowed, or carried away by the force of a river, works that shall be a sufficient defence may be built; but they must not be so constructed as to throw the water back in times of ordinary floods, to the injury of other proprietors.<sup>6</sup> The flooding of land, or annoying a mill below, either by *wilfully* discharging the water from a mill-pond in unreasonable quantities, or by the unskilful construction of a dam which is swept away, are injuries for which the law gives a remedy. The party who constructs a work for the retaining of water, must use such care as shall be proportionate to the extent of the injury which would be likely to result, if the work should prove insufficient. If the stream upon which it is erected is *subject* to *extraordinary* floods, it is not enough that he builds a work sufficient to withstand ordinary floods. He must under such circumstances build with the same care that he would if the whole risk

<sup>1</sup> Wigford vs. Gill, Cro. Eliz. 269.   <sup>2</sup> Runnels vs. Bullen, 2 N. H. 531.

<sup>3</sup> Alford's Case, 9 Rep. 59.

<sup>4</sup> Merritt vs. Parker, Coxe, (N. J.) 460.

<sup>5</sup> Shields vs. Arant, 3 Green's (N. J.) Ch. 234.

<sup>6</sup> Rex vs. Trafford, 1 B. & Aol. 874.

were his own.<sup>1</sup> But a proprietor cannot be held liable for consequences which are remote and unforeseen; as where winds and heavy rains should fortuitously unite their effects with the back-water of a dam, and carry off a bridge.<sup>2</sup> The maxim, *causa pro-pinqua non remota, spectatur*, which is so frequently applied to mark the limits of liability, must govern all such cases. Neither must these restrictions be taken as applying to those increased damages from floods which necessarily result from the erection of any dams upon running streams. These must be regarded as inseparable from a reasonable use of the water. It is better for the whole community, that these slight damages should be suffered in times of flood, and even greater damages on extraordinary occasions, than that the whole power of the water, for mechanical purposes, should not be used.

Another of the rights of riparian proprietors, that is held subject to certain limitations, is that of *fishery*. Although it is an exclusive right,<sup>3</sup> and may be pursued with nets, or seines, yet it must not be so pursued as to injure the rights of fishery that may exist in others.<sup>4</sup> And the weirs and dams built upon a stream must be so constructed as not to prevent fish from ascending and descending the stream.<sup>5</sup> In many of the States there are statutes regulating very minutely the exercise of this right. There are, also, statutes extending or limiting and controlling the general rights and obligations of riparian proprietors; but upon the law under these, our limits forbid us to remark. Where they exist, the common law must, of course, be administered as modified by them.

No one has a right, by using a water-course, or by other means, to corrupt it so as to render it unwholesome or offensive.<sup>6</sup> And when the water is so used as to render the *atmosphere* impure, an action for damages will lie by those whose health may be affected.<sup>7</sup> The considerate care of the law has applied to all cases where ripa-

<sup>1</sup> Mayor and Corporation of N. Y. City vs. Bagley, 3 Denio, 433.

<sup>2</sup> Town of China vs. Southwick, 3 Fairfax, (Me.) 238.

<sup>3</sup> Case of River Banne, Ireland, Davie's Rep. 149.

<sup>4</sup> Commonwealth vs. Ruggles, 10 Mars. 391.

<sup>5</sup> Weld vs. Hornby, 7 East. 195; 3 Kent's Com. 411.

<sup>6</sup> Co. Lit. 200, b, 13 Hen. 7, 26. <sup>7</sup> Story vs. Hammond, 4 Ohio, 833.

rian rights are exercised, the just maxim, *sic utere tuo ut non alienum lædas*.

In several modern cases, the question of the applicability of the law governing the use of water-courses on the surface of the earth, to subterranean streams, has been very ably discussed. And if there is a well founded distinction between cases where water is, by underground diversion, taken from an *artificial* well, or spring, in an adjoining close,<sup>1</sup> and those where the water thus withdrawn is taken from a spring *naturally* flowing out upon the surface,<sup>2</sup> the authorities harmonize, and the conclusion is arrived at, that where the water-courses are, to all appearances, *wholly* subterranean, the general law does not apply, and the proprietor's right to these *entirely subterranean* waters, is as absolute as that which he holds to the minerals beneath the surface. No such distinction is expressly laid down in the decisions, but it may be presumed that the courts have had it in mind in coming to their different conclusions.

But is there a sufficient reason, founded upon principle, for holding that a party may dig upon his own land and divert water from his neighbor's *well*, if he does not do it with the malicious intention of injuring his neighbor; but that he cannot, lawfully, thus dig if he thereby diverts water from a *spring* which *naturally* issues forth on an adjoining estate? The authorities have determined that there is; and it is with much hesitation that we venture to express a doubt as to the soundness of the distinction upon which they proceed.

The right to the water below the surface, being derived in the same way as is that to the open running streams—by title to the land, which, in its legal signification, extends indefinitely *downwards* as well as upwards—and it being as much the nature of water to flow in currents below, as upon the surface, it is difficult to conceive why, on principle, the law as applied to it should be different. In the enforcement of a right to an underground water-course, it would certainly be more difficult, if not quite impossible,

<sup>1</sup> *Roath vs. Driscoll*, 20 Conn. 533; *Greenleaf vs. Francis*, 18 Pick. 117; *Acton vs. Blundell*, 12 M. & Wels. 324.

<sup>2</sup> *Smith vs. Adams*, 6 Paige, 435; *Balston vs. Bensted*, 1 Camp. (N. Y.) 463; *Dexter vs. Providence Ag. Comp.* 7, 1 Story, Cir. Ct. 388.

to establish its exact extent; but where the evidence could be rendered *clear and conclusive*, we see no reason why the right should not be protected. The mere difficulty of obtaining evidence, certainly ought not to be considered as varying the right. In *Acton vs. Blundell*, the court, having under consideration a case where the water of a well was diverted by the sinking of coal pits, speaks of the "unreasonable" consequences that would follow the application of the law governing surface streams to those under ground; but may not the law as applied to surface streams, sometimes, produce consequences, seemingly, quite as unreasonable? Or, if we are to look to consequences, may it not, at least, work as unreasonably to protect the right to a natural *spring* from injury by diversions, as to protect a *well*? The difference in the magnitude of the interests might incline a court to sustain, if possible, according to the rules of law, the greater; but we conceive that the simple fact, that a man may carry on a very profitable business, by only doing his neighbor a little injury, is no sufficient excuse for the injury done. If there be a great difference in the interests, the greater may well afford to pay for the damage done to the less.

As, to establish a prescriptive right, the use must have been public and such as might be said to give notice to those whose estate it affected, there cannot be a prescriptive right gained in subterranean streams; for no man can be presumed to know that his neighbor's well is supplied by a stream running beneath his own soil.

Before leaving this part of the subject, it may be well to inquire, whether by mere *prior occupation*, short of the period of prescription, any title can be acquired to the use of so much of a stream as may be appropriated. The doctrine has been laid down, that upon streams having so gradual a fall as to afford sites for mills only at considerable distances, the riparian proprietor who first erects his mill, and raises his dam only to a proper height to create a water power, has a right to maintain it, although it sets the water back upon a *supra*-riparian proprietor so as to prevent him from making a like use of the water on his own estate. That to this extent prior

occupation gives an exclusive right.<sup>1</sup> If this view could justly be maintained in cases where all the proprietors were so situated that no one of them could take advantage of the stream for mill purposes, without setting water back upon the land of another, it is submitted, that it would work great injustice where an upper proprietor, owning for a great distance along the stream, and having a sufficient fall altogether upon his own land, should have the water so set back as to prevent his erecting a mill, because of the back-water that he would find upon his wheels.

In cases where mere occupancy gives title, it is upon the supposition, that there was no previous ownership or right existing to the thing thus appropriated. But as we have seen that our law regards water as it naturally flows over an estate—and to that extent—as an incident to the land, there is no opportunity for the creation of a title by mere occupancy. Not only is there a previous title, but, also, a previous use, as every riparian proprietor, necessarily, and at all times, is using the water running through his estate, in so far at least as it fertilizes the soil and renders more valuable his estate.<sup>2</sup>

And again, the Roman law, which is sometimes referred to as sustaining the proposition that the occupancy of water gives title,<sup>3</sup> did not consider running water as a *bonum vacans* in which a property might be thus acquired; but only as public and common in the sense that all might use it for the necessary purpose of supporting life, and held a property in that which they took from the stream and thus appropriated.<sup>4</sup>

The only right which prior occupancy can be considered as giving is, in cases where one proprietor has erected a mill, and a supra-riparian proprietor then diverts the water, damages may be recovered for the *injury to the mill*, although before the erection of the mill a recovery could only have been had for the *natural uses* of the water.<sup>5</sup> And this, we think, need scarcely be put upon the ground

<sup>1</sup> Cary vs. Daniels, 8 Met. (Mass.) 466;

<sup>2</sup> Pugh vs. Wheeler, 2 Dev. & Batt. (N. C.) 50.

<sup>3</sup> Higgins vs. Juge, 7 Bing. 692.

<sup>4</sup> 2 Just. 7, 5, 1. Vin. Com. on Just., Dig. B. 43, tit. 13. Angell on Watercourses.

<sup>5</sup> Mason vs. Hill, 3 Barn. & Ad. 304; Pugh vs. Wheeler, 2 Dev. & Bat. N. C. 50.

of prior occupancy; for if the owner of any property gives to it an increased value, and an injury be then done to it, he can recover for the increased value.

The right to the use of the waters following, as an incident to the title to the land over which they flow, the most complete mode of transfer is, by a deed of the land covered by the water, containing no exception or reservation. It may also be granted as an *incorporeal hereditament*, by deed, devise, or record. And as the title to things incorporeal lies in grant, and not in livery,<sup>1</sup> it is *only* by one of these modes, or by the establishment of a prescription, from which a grant is presumed, that a water right can pass from the proprietorship of the land. The right thus granted may be of the entire or a limited use, and made subject to any conditions and restrictions to which the parties may agree. The nature and extent of the easement thus created must be determined by the terms of the grant, in connection with the nature of the right granted.<sup>2</sup> So, the rights which, primarily, were held by the owner of the land bounded on a river, may be found apportioned among many—the right of *fishery* being in one; the *water power* divided among several; and the title to the soil still remaining in the original proprietor.

The extent of the right granted is not to be determined by a strict interpretation of the words of the instrument of conveyance; for the subject of the grant of a right to erect a dam may be the *water power*.<sup>3</sup>

And the devise of a mill, and its appurtenances, will not only confer a right to the use of the water, but will also carry title to the land connected and *used* with the mill, and *necessary* to its beneficial enjoyment. The land in such case being held to pass, not as appurtenant to the mill, but as being comprehended and sufficiently described by the word “mill.”<sup>4</sup>

The quantity of water to which any grantee may be entitled by

<sup>1</sup> Co Litt. 9 a.

<sup>2</sup> Mayor, &c. vs. Commissioners of Spring Garden, 7 Barr. (Penn.) 349.

<sup>3</sup> Nitzell vs. Paschall, 3 Rawle, (Penn.) 76.

<sup>4</sup> Whitney vs. Olney, 3 Mason C. C. 280.

the terms of his grant, must be ascertained by a reference to the usual and ordinary mode according to which the terms of such a grant would be fulfilled. He cannot take advantage of any new discoveries or appliances, not generally known at the time of the grant, by which the flow of the water within the prescribed limits of his use would be increased, to the injury of his grantor or others.<sup>1</sup> He may, however, apply the actual quantity granted to any purposes of profit, although, by the letter of the grant it was conveyed to carry on a particular manufacture.

There are, sometimes, connected with the grant of an incorporeal hereditament, or easement in a water-course, *secondary easements*. These are such as are necessarily connected with the principal subject of the grant, or such as without which the grant would be of no effect. *Quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest*. Thus the grant of a mill will pass all the water power used with it;<sup>2</sup> and in the grant of a water right there is implied all such use of the land as is necessary to its beneficial enjoyment.<sup>3</sup> Where an easement is held in a natural or artificial stream running through the land of another, the party holding the easement may enter upon the land, and remove any obstructions that interfere with his right.<sup>4</sup> It is not sufficient that what is claimed as a secondary easement should be shown to be *convenient*; it must be, in common intendment, a part of the thing granted, or absolutely *necessary* to its beneficial use.<sup>5</sup>

The covenants affecting water rights may be divided, as regards the nature of the estate on which, and the parties on whom they are binding, into *real* and *personal*.<sup>6</sup> Real covenants run with the land, and bind heirs and assigns; but personal covenants affect only the individuals making them, or, at farthest, their personal representations in respect of assets. All *implied* covenants entered into by parties to the grant of a water-course, run with the land, binding

<sup>1</sup> Schuylkill Nav. Co. vs. Moore, 2 Whart. (Penn.) 477.

<sup>2</sup> Elliot vs. Sheppard, 12 Shep. (Me.) 371.

<sup>3</sup> Kilgour vs. Ashcorn, 5 H. & Johns. (Md.) 82.

<sup>4</sup> Prescott vs. Williams' Adm'rs, 5 Met. (Miss.) 429.

<sup>5</sup> Whitney vs. Olney, *ut. sup.*

<sup>6</sup> Platt on Covenants, 63.

the grantor not to disturb the grantee, his heirs or assigns, in its enjoyment.<sup>1</sup> And the confirmation of an easement by a grant gives to the successive owners of the estate to which the service is due, a right to the benefit conferred. It is not, however, every covenant that relates to land that can be considered as a real covenant, running with the land. To give it such an operation, it must affect the *nature, quality or value* of the estate conveyed, independently of collateral circumstances, or must affect the mode of enjoying it; and to bind an assignee by, or entitle him to the benefit of, a covenant, there must be a *priority of estate* between the contracting party and his assigns.<sup>2</sup> The case of *Norman vs. Wells*,<sup>3</sup> in which it is held that a covenant not to let any other site, or establish any other manufactory, on a certain stream, to be used for a particular purpose, respected the land, and was *co-extensive with the estate*, is regarded as having carried the power of covenants to run with the land, to the extreme limits of the law.<sup>4</sup>

The *personal contracts* of a riparian proprietor, for the furnishing of water power, whether under seal or not, may be enforced. They are held binding upon him during his life, and on his personal representatives after his decease, in respect of assets.<sup>5</sup>

The rights which are conferred by a *parol license* are still more limited in their nature, for they are only held during the pleasure of the licensor. So long as a license remains unexecuted, it may be revoked, unconditionally, at any time;<sup>6</sup> but when executed, the revocation must, in general, leave the parties in the same condition in which they stood previous to entering upon its execution.<sup>7</sup> Authority may be given by a *license* to do an act, or series of acts, upon another's land, and thus afford a sufficient excuse for what otherwise would be a trespass;<sup>8</sup> but it cannot create an *easement*, for that is only to be created by grant;<sup>9</sup> nor pass an estate in the land, for that would be directly contrary to the provisions of the Statute

<sup>1</sup> Kent's Com. 471.    <sup>2</sup> *Hurd vs. Curtis*, 17 Pick. 459.    <sup>3</sup> 17 Wend. (N. Y.) 136.

<sup>4</sup> Spencer's C. S., note—1 Smith's R. 85, *ib.* 134.

<sup>5</sup> Angell on Watercourses, p. 274.

<sup>6</sup> *Fentinam vs. Smith*, 4 East. 107.

<sup>7</sup> *Munford vs. Whitney*, 15 Wend. 330.    <sup>8</sup> 4 Kent's Com. 451.

<sup>9</sup> *Hewlins vs. Shippan*, 3 B. & Cress. 222.

of Frauds.<sup>1</sup> It is a permission founded in personal confidence, and is gone if the person giving the license transfers the estate, or if either party die.

Where a license comprises or is connected with a grant, so that the revocation of the former would defeat the latter, it cannot, in general, be revoked.<sup>2</sup> In such cases the license may well be considered as a part of, or *incident* to the grant, and as the grant cannot be revoked, the whole must stand. The distinction, as generally stated, is, between a *mere license* and a license *coupled with an interest*; and the rule is, that a *mere license*, though founded on a valuable consideration, may be revoked; but a license *coupled with an interest* is irrevocable. The utmost effect of a license in law is, that it may work the *extinguishment* of an existing easement.<sup>3</sup>

In equity, executed licenses are taken out of the operation of the Statute of Frauds; not on the ground that an easement, or any interest in land, passes by the license, but that when a license has been executed by the licensee making valuable improvements, it would be against conscience for the licensor to recall his authority.<sup>4</sup> So, where a party has given a license to another to draw off a certain quantity of water for any purpose, and in consequence money is expended or improvements made, a court of equity will hold the license irrevocable. The right under the license, when not specially restricted, is commensurate with the thing to which it is accessory, and its duration will be equal to that of the purposes for which it was given.<sup>5</sup>

To establish a right to an incorporeal hereditament, or easement, it is not always necessary to produce a grant from the original proprietor; for where a party has for a long time peaceably enjoyed a use, inconsistent with any right which may have been in another, a grant will be *presumed*, and the party quieted in his possession.<sup>6</sup> Title by *prescription* is founded upon this presumption of a grant. The length of time during which an uninterrupted enjoyment must

<sup>1</sup> Sugden on Vendors and Purchasers, 74.

<sup>2</sup> Wood vs. Leadbitter, 13 Mees. & Welsb. 843.    <sup>3</sup> Gale & Wheat. on Easem. 14.

<sup>4</sup> Le Fever vs. Le Fever, 4 Serg. & Rawle, 241.

<sup>5</sup> Kerrick vs. Kerr, 14 Serg. & Rawle, 267.    <sup>6</sup> 2 Starkie on Evidence, 1203.

have existed to give rise to this presumption, we find differently stated at different periods, the older authorities holding that it must have commenced time out of mind, or, in other words, prior to the reign of Richard I, and the more modern fixing the time, in analogy to the Act of Limitations, at twenty years.<sup>1</sup> And while the decisions have been shortening the time required to raise the presumption, their tendency has also been to give to it greater stability when raised. Formerly it was, like all other presumptions, rebuttable by circumstances, and, of course, destroyed if proof could be produced showing that no grant had been made;<sup>2</sup> now it is held to be conclusive evidence of the existence of a grant or right; being applied as a presumption *juris et de jure*, whenever by any possibility a right may be acquired in any manner known to the law.<sup>3</sup> When the circumstances of the use are perfectly consistent with the non-existence of a grant, they will not give rise to any presumption of this character.<sup>4</sup> Neither does an enjoyment that originated in mistake, license, or favor, or was commenced or continued in a manner not indicating a claim of right, go to the establishment of a prescription. Occupation to be effectual to the creation of a presumptive title, must have been with the *intent to claim*, and held as of right, peaceably and openly, so that the owner may be presumed to have had notice of the service imposed upon his estate.<sup>5</sup> The same principle being applied to easements that governs in determining as to adverse possession of land under the statute of limitations. Though continuous or uninterrupted enjoyment is held to be necessary, yet such slight interruptions as may be occasioned by the excessive dryness of the season, or like causes over which the party has no control, will not prevent the establishment of a title to the use of the water usually flowing in a water-course.<sup>6</sup>

It is upon the party claiming an easement by prescription, to adduce proof that leaves no doubt as to the existence of the essentials

Richard vs. Williams, 7 Wheaton, U. S. 59.

Campbell vs. Wilson, 3 East, 294.

Tyler vs. Wilkinson, 4 Mason, Cir. Ct. 397.

Brandt vs. Ogden, 1 Johns. N Y. 156.

Proprietors Kennebec Parch. vs. Skinner, 4 Mass. 416.

Hall vs. Smith, 6 Scott, 167.

necessary to constitute such a title.<sup>1</sup> The right confirmed will be co-extensive with the former use, and subject only to such restrictions as guard the rights of others, and are applied in cases where positive grants have been made. The quantity of water *actually used* is not always to be taken as decisive of the extent of the right, for where water has been diverted, the right will hold as to the whole quantity so diverted, although only a part of it may have been applied to any particular use.<sup>2</sup> Where there are no special customs to the contrary, the same rules govern artificial as natural water-courses; and title to them may be gained and lost in the same manner.<sup>3</sup>

The general doctrine of prescription does not apply to rights of a public nature. They can only be transferred by act of the government, or, possibly, by a prescription running back so *great a length of time* as to give rise to the presumption that the right was thus granted.<sup>4</sup> Consequently, no rights can be acquired in a boatable river, inconsistent with the public easement; and every encroachment that interferes with it is regarded as a public nuisance, and is liable to be abated. And even where the public use of the river may have been abandoned, and the stream left in an unboatable condition for more than twenty years, the rights of the public are not lost.

Rights that have their origin in use may be extinguished by non-user, or entire abandonment for such length of time as created them.<sup>5</sup> To work an extinguishment for non-user, there must have been an entire discontinuance for twenty years.<sup>6</sup> But the party to whom the servitude is due, may extinguish it short of that time, by doing any act incompatible with its nature or existence.<sup>7</sup> If by such act the right is extinguished for a moment, it is gone forever.<sup>8</sup> This doctrine does not apply to easements created by express grant.<sup>9</sup> And were the question here for the first time raised, it might well be doubted

<sup>1</sup> 2 Greenleaf's Evidence, p. 589.    <sup>2</sup> Tyler vs. Wilkinson, 4 Mason, C. C. 397.

<sup>3</sup> Magor vs. Chadwick, 11 Ad. & Ellis, 571.

<sup>4</sup> Inhabitants of Arundel vs. McCulloch, 10 Mass. 70.

<sup>5</sup> Shields vs. Arnt, 3 Green's (N. J.) Ch. 234.

<sup>6</sup> Corning vs. Gould, 16 Wend. 531.    <sup>7</sup> Taylor vs. Hampton, 4 McCord, (S.C.) 196.

<sup>8</sup> 3 Kent's Com. 449.

<sup>9</sup> Nitzell vs. Paschall, 3 Rawle, (Pa.) 76.

whether with the view now taken of *presumptions*, it should be applied to titles founded on prescription. If the presumption is to be taken as one *juris et de jure*, and held as conclusive evidence of a grant,<sup>1</sup> it is not very apparent why the rights acquired should differ, even in respect to the manner of their extinguishment. Such, however, is the distinction made by the authorities; and it is regarded by one of our most eminent legal writers, as establishing a wholesome and wise qualification of the rule by which grants are presumed, considering the rapid improvements that are constantly being made upon real property.<sup>2</sup>

Whether an easement be acquired by grant or prescription, it will be extinguished by *unity of possession*,<sup>3</sup> as in cases where the title to the estate to which the easement belongs, and the estate servient, become united in the same person. It cannot with propriety be said that a man can have an easement in his own estate. Even if the easement was a *way of necessity*, it may, most properly, be considered as extinguished by unity of possession, and that it is created anew on the severance of the estate.<sup>4</sup> But a natural water-course,<sup>5</sup> beginning and flowing *ex jure naturæ*, is not extinguished by unity of possession. The benefits that it confers upon the land through which it flows do not exist by reason of any grant or prescription, and are not extinguished by a possession that merges minor rights, but do survive during the unity of possession, and pass with the estate to which by the law of nature they are incident.

Having during the progress of our investigation seen with what justness the character and extent of the rights and obligations of riparian proprietors have been determined, and with what scrupulous care and exactness the most equitable rules have been applied in governing the enjoyment and transfer of those rights, we leave the subject, with the conviction that there is none which more perfectly illustrates the truth, that the common law is a science of principles.

<sup>1</sup> Tyler vs. Wilkinson, ubi sup.

<sup>2</sup> 3 Kent's Com. 449.

<sup>3</sup> Manning vs. Smith, 6 Conn. 289.

<sup>4</sup> Gale & Wheat. on Easem. 60.

<sup>5</sup> Sherry vs. Pigott, Hob. R. 339.