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RIPARIAN RIGHTS TO WATER QUALITY

by Gary Letcher

In the Eastern United States, a long tradition of common law provides land owners with vested rights in water flowing through or adjacent to their land. Although property owners do not own the water itself, they are entitled to the benefit of the use of water in an adjacent stream. No one landowner, however, may use water to the detriment of others on the same watercourse.

The owners of land abutting a watercourse are known as riparian owners. The doctrine of riparian rights entitles each riparian owner to use water in the stream, while protecting each from any detrimental use by other riparian owners. Every riparian owner has an equal right to use water in the common stream.[1]

If Jones is a riparian owner whose use has been diminished because of Smith's pollution, Jones may bring a civil action in equity to enjoin Smith's contamination,[2] or in law for damages.[3] For example, if Smith diverts water to irrigate his rice crop, thereby depriving Jones of an adequate supply of water to turn his mill, such action may be enjoined or become the subject of a claim for damages.

The riparian doctrine must be distinguished from the doctrine of prior appropriation. In the Western states, an owner of land may claim exclusive use of water in an adjacent stream if his appropriation is claimed prior to that of other owners. This doctrine of first in time, first in right is necessitated by the scarcity of water in most Western states; there is simply not enough water for every owner of land adjacent to a stream to use water in the stream.[4] The Western states have codified most aspects of water law, based on the theory of prior appropriation. In contrast, the abundance of water in Eastern states affords every riparian owner the use of the common watercourses, therefore the doctrine of riparian rights is well established.[5]

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[1] 93 C.J.S. *Waters* § 10 (1956). "[G]enerally, every riparian owner has the right to make any use of the water, beneficial to himself, on the riparian land. . . ." *Id.*

[2] 93 C.J.S. *Waters* § 55 (1956); Worthern v. White Spring Paper Co., 74 N.J. Eq. 647, 70 A. 468, *aff'd*, 75 N.J. Eq. 624, 78 A. 1135 (Ch. Div. 1908).

[3] 93 C.J.S. *Waters* § 54 (1956).

[4] *See* Comment, *The Rights of a Riparian Landowner in Missouri*, 19 MO. L. REV. 138 (1954) for a succinct differentiation of riparian rights—the natural flow, reasonable use, and prior appropriation theories.

[5] *See* RESTATEMENT (SECOND) OF TORTS § 856 (1977).

The typical application of the riparian doctrine involves a diversion or impoundment by an upstream riparian owner which diminishes the quantity of water available to downstream riparian owners. The riparian doctrine, however, provides landowners with more than rights to a quantity of water. Every owner of land abutting a watercourse has a vested, co-equal, right to water of adequate *quality*. It is the purpose of this study to determine exactly what rights riparian owners have in water quality, how those rights have been defended and accepted, and what trends may develop.

Some states abide by the English view (or natural flow theory) that all riparian owners are entitled to water absolutely undiminished in quantity and quality.[6] This strict rule operates harshly against a polluter who diminishes downstream water quality. In the case of *Jessup & Moore Paper Company v. Zeitler,*[7] farmer Zeitler alleged that the Jessup & Moore Company dumped wastes into Little Elk Creek, contaminating the stream and making it unfit for watering livestock. The Maryland Supreme Court, adopting the strict English view, enjoined the paper company from further dumping. The court held that "*any* use that materially fouls and adulterates the water, or the discharge therein of *any* noxious substance, that so far affects the water as to impair its value for the ordinary purposes of life will be deemed a violation of the rights of the lower riparian proprietor."[8] (emphasis added).

Most states follow the less restrictive American view (or reasonable use theory), which entitles riparian owners to unimpaired water quality, subject to reasonable use by other riparians.[9] Thus, all riparian owners share an equal right to the reasonable use of the common watercourse. If an upstream riparian discharges pollutants into a stream, the court would look to whether the discharge was a reasonable use of the water.[10] It should be noted that although cases to the contrary are conceivable, a downstream riparian's use cannot be unreasonable with respect to an upstream riparian.

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[6] Comment, *supra* note 4, at 139.

[7] 180 Md. 395, 24 A.2d 788 (1942).

[8] *Id.* at 397, 24 A.2d at 790. *See also* Beach v. Sterling Iron and Zinc Co., 54 N.J. Eq. 65, 33 A. 286 (Ch. Div. 1896); Holsman v. Boiling Springs Bleaching Co., 14 N.J. Eq. 335 (Ch. Div. 1862). New Jersey clearly adopted the "reasonable use" theory in 1956 in Borough of Westville v. Whitney Home Builders Inc., 40 N.J. Super. 62, 122 A.2d 233 (App. Div. 1956).

[9] 93 C.J.S. *Waters* § 11 (1956). "The use of water by a riparian owner must be reasonable when considered with reference to the needs or rights of other such owners on the same stream." *Id.*

[10] *Id.*

In a suit to enjoin a riparian owner from impairing water quality, the burden is on the polluter to show that his use is reasonable.[11] In considering the reasonableness of a polluting use, the court should take into account the size and capacity of the watercourse; the use to which all riparian owners intend to put the stream; the importance of the use to the user (*i.e.*, how important is it for the polluter to pollute?); the severity of injury to the plaintiff; the state of improvement in the industry; and the public's interest in a clean environment.[12]

The most potent test to determine the reasonableness of a riparian's use may lie in the defendant's compliance with modern water pollution control statutes. Increased environmental contamination and resultant public agitation in the 1960's and 1970's has led to the passage of state and federal legislation to improve and protect water quality. The Federal Water Pollution Control Act of 1972[13] and the Clean Water Act of 1977[14] impose strict permit requirements on all dischargers of specified pollutants, and require industries to employ the best practicable (water pollution) control technology or best available technology[15] in specified circumstances. The federal statutes and regulations, along with a myriad of state and local laws, seek to protect the public interest in water quality.

Although no cases have yet been so decided, public water pollution control laws may be used to support a riparian owner's private right to water quality. It is well settled, in other areas of the law, that statutory violations bear on the reasonableness of a defendant's activity.

In the law of negligence, a statutory violation is regarded differently by various jurisdictions. In New York, for example, a statutory violation is negligence per se.[16] A defendant who illegally passes through a stop sign, thereby causing an accident, would be automatically found negligent. In West Virginia, a statutory violation creates a rebuttable presumption of negligence.[17] Lastly, a statutory violation is merely evidence of negligence

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[11] Red River Roller Mills v. Wright, 30 Minn. 249, 15 N.W. 167 (1883).

[12] Davis, *Theories of Water Pollution Litigation*, 1971 WIS. L. REV. 738.

[13] 33 U.S.C. § 1251 (1972).

[14] 33 U.S.C. § 1251 (1977).

[15] *Id.* at § 1311.

[16] 57 AM. JUR. 2D *Negligence* 239 (1971) reads in relevant part "[W]here a statute . . . imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed. . . ." *See also* Van Gaasbeck v. Webtuck Central School Dist., 21 N.Y.2d 239, 234 N.E.2d 243 (1967). This was a wrongful death action against a bus driver who did not instruct pupil correctly on crossing and pupil was hit by passing car.

[17] *See, e.g.*, Tarr v. Keller Lumber & Constr. Co., 106 W. Va. 99, 144 S.E. 881 (1928); 57 AM. JUR. 2D *Negligence* § 245 (1971).

in New Jersey and in a minority of other states.[18] In all jurisdictions, however, violation of a statute bears on the standard of care exercised by the defendant, *i.e.*, the reasonableness, of the defendant's activity.

It is possible that courts would follow similar rules in applying the riparian doctrine when a violation of a water quality statute is included in a plaintiff riparian's case against a polluting defendant riparian. The statutory violation may be regarded as proof of unreasonable use per se, as a rebuttable presumption of unreasonable use, or as evidence weighing against the reasonableness of defendant's use.

Using the last and least severe of the above rules, the discharge of pollutants in violation of a defendant riparian's discharge permit would be evidence that defendant's use is unreasonable. From a plaintiff riparian's point of view, application of the unreasonable per se or rebuttable presumption rules would be preferable.

On the other hand, compliance with water pollution control laws by a defendant riparian would bolster his assertion that his use of the watercourse was reasonable. If a polluter can show that he was actually employing the best available control technology as prescribed by federal law, he may substantially carry the burden of proving that his use is reasonable.[19]

Pollution Not Prohibited by Riparian Doctrine Rights

A plaintiff riparian's right to water quality was curtailed in *Pennsylvania Coal Company v. Sanderson*.[20] Sanderson owned a rather elegant home located near Scranton on the banks of Meadow Creek which included a fish pond, cistern, and fountain. When she moved to the area the water of Meadow Creek was pure. This fact partly induced her to buy the property. After Mrs. Sanderson moved into her home the Pennsylvania Coal Company opened mines three miles upstream. The mineworks included dewatering shafts. Runoff from the shafts flowed into Meadow Creek, polluting the stream with acid mine water which was devastating to Mrs. Sanderson. Meadow Creek reeked of foul mine drainage; plants ceased growing along the banks, and all the fish died.

Mrs. Sanderson brought suit to enjoin the pollution. The Supreme Court of Pennsylvania held for the defendant coal company on two

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[18] *See, e.g.*, Mattero v. Silverman, 71 N.J. Super. 1, 176 A.2d 270 (App. Div. 1961); 65 C.J.S. *Negligence* § 19(2) (1956).

[19] *But see* Urie v. Franconia Paper Co., 107 N.H. 131, 218 A.2d 360 (1966) which reads in relevant part that pollution "authorized by law cannot be a public nuisance, but such authorization does not affect any claim of a private citizen. . . ." *Id.* at 133, 218 A.2d at 362.

[20] 113 Pa. 126, 6 A. 453 (1886).

grounds. First, the pollution was natural, not artificially induced by the mine operators. The shafts merely directed water already present into Meadow Creek. Second, Mrs. Sanderson knew she was in a mining region, and " '[h]aving enjoyed the advantages which coal mining confers . . . no great hardship, nor any violence to equity [is done] in their also accepting the inconveniences necessarily resulting from the business.' "[21]

In *Elder v. Lykens Val. Coal Co.*,[22] however, the Pennsylvania Court re-emphasized the exceptional nature of natural drainage. In *Elder*, a mine operator discharged refuse and culm into a stream, causing detriment to the downstream riparian plaintiff. The court held in favor of the plaintiff, finding that such discharge was not the natural and necessary consequence of mining coal. Diversion of existing, naturally present contaminants into a watercourse may be a reasonable use of that watercourse. A riparian owner, however, remains protected from unreasonable discharge of artificial or unnatural pollutants.[23]

In arriving at the second premise of the *Sanderson* case, the court approached the doctrine of coming to a nuisance—Mrs. Sanderson knew she was moving into a coal mining area and could have anticipated the hazards that resulted. Nuisance, however, is distinguishable from riparian doctrine. While pollution of a stream to the extent riparian rights are violated may indeed amount to a nuisance, the two causes of action are separate and must not be confused.[24]

The law of nuisance originated in tort and covers invasions of the use and enjoyment of land.[25] A person may pollute a stream so much that the contamination is a nuisance to a lower riparian owner, owners of other non-riparian lands nearby, or non-owners who use the water for fishing, boating or other activities. If there is measurable unreasonable harm, both the riparian owner and non-riparian users may find satisfaction in the law of nuisance.[26]

Riparian rights, on the other hand, are founded in property law. These rights are appurtenant to ownership of land adjacent to a stream, and protect only the proprietor's interest in the stream itself.[27] More like

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[21] Sanderson v. The Pennsylvania Coal Co., 86 Pa. 401 (1878) (Paxson, J., dissenting), *quoted in* 113 Pa. 126, 128, 6 A. 453, 465 (1886).

[22] 157 Pa. 490, 27 A. 545 (1893).

[23] *See also* Beach v. Sterling Iron & Zinc Co., 54 N.J. Eq. 65, 33 A. 286 (Ch. Div. 1895).

[24] Davis, *supra* note 12, at 742.

[25] RESTATEMENT (SECOND) OF TORTS § 821A intro. note at 84 (1977).

[26] RESTATEMENT (SECOND) OF TORTS § 841 intro. note at 183 (1977).

[27] Munninghoff v. Wisconsin Conservation Comm., 225 Wis. 252, 259, 38 N.W.2d 712, 715 (1949).

trespass[28] than nuisance, riparian doctrine does not necessarily require present measurable harm to the plaintiff; technical violation may amount to a cause of action.[29] Even if a downstream plaintiff has not put the stream to physical use, he may assert his riparian rights to preserve the stream's quality. So long as he comes with clean hands, a riparian owner's right to water quality exists regardless of his own use.

The *Sanderson* court apparently gave weight to the magnitude of the injury to Mrs. Sanderson in relation to the harm an injunction would do to the Pennsylvania Coal Company. By this test of comparative convenience, economic factors are considered in determining the reasonableness of a defendant riparian's polluting use.[30] A basis for application of such a test may be that industrial development (and concomitant pollution) is in the public interest, and an individual may not assert mere technical rights to the detriment of the local economy and society.[31] By this reasoning, an individual riparian owner would be virtually powerless in the face of a polluting industrial riparian owner.

The comparative convenience test, however, has been categorically rejected. In the case of *Whalen v. Union Bag and Paper Company,*[32] the defendant dumped acid, lime, sulphur, and other wastes into a stream which flowed past plaintiff's meadow. The Appellate Division of the New York Supreme Court applied the comparative convenience test, holding that a court of equity is not bound to issue an injunction where it would produce great public or private mischief merely for the protection of a technical or unsubstantial right.[33] The court refused to order an injunction, but awarded damages based upon the plaintiff's loss of property value.

The Court of Appeals reversed. There could be no comparison of convenience, no balancing of injury; if a riparian owner's rights are violated he is entitled to an injunction as well as damages.

> According to the old and familiar rule, every man must so use his own property as not to injure that of his neighbor; and the fact

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[28] 87 C.J.S. *Trespass* § 106 (1956). "One whose property rights have been invaded . . . can without proof of any amount of damage recover a nominal amount for the purpose of vindicating his right." *Id.*

[29] *See, e.g.* Kyser v. New York Central Railroad Co., 151 Misc. 226 (1934).

[30] Davis, *supra* note 12 at 742. *See* Maloney, *The Balance of Convenience Doctrine,* 5 S.C.L.Q. 159, 162 (1952).

[31] *See* Davis, *supra* note 12, at 762.

[32] 208 N.Y. 1, 101 N.E. 805 (1913).

[33] *Id.*

> that he has invested much money and employs many men in carrying on a lawful business upon his own land does not change the rule . . . or to so pollute the rest of the stream as to render it unfit for ordinary use.[34]

Before locating the plant and discharging pollutants, a riparian proprietor is bound to know that "every riparian owner is entitled to have the waters of the stream that washes his land come to it without . . . corruption."[35] A riparian entrepreneur should not escape liability for pollution because of the size of his investment.[36]

Other jurisdictions shortly followed the lead of the *Whalen* case and held that industrial enterprises cannot claim a right to pollute because of their economic contribution to the community. "Neither can the private business of one man or class of men, however important its successful operation may be to the public or to the development of the country, give such person or class of persons the right to destroy or materially injure the property of another in a thing in which they have common rights."[37] An individual plaintiff riparian owner can indeed successfully attack an industrial polluter. "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both."[38]

Even the *Sanderson* case was strictly limited to its facts. Nothing in *Sanderson* could justify the conclusion that the draining of mine water into a stream is a property right.[39] If public use of the watercourse is at issue, courts will tend to favor that use. In *Pennsylvania Railroad Company v. Sagamore Coal Company*,[40] the defendant coal company discharged acid mine drainage into a stream which led to a public water supply. The court enjoined the discharge, further limiting the *Sanderson* case, by ruling that *Sanderson* was based on exceptional circumstances and would not have been so decided if a public right were involved.[41] On the other hand, if pollution were caused by some essential public use, then a court would be reluctant to enjoin the use.[42]

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[34] Stroebel v. Kerr Salt Co., 164 N.Y. 303, 308, 58 N.E. 142, 147 (1898).

[35] Weston v. Pope, 155 Ind. 394, 57 N.E. 719 (1900) *quoted in* Whalen v. Union Paper Bag Co., 208 N.Y. 1, 2, 101 N.E. 805, 806 (1913).

[36] *Id.*

[37] Arminius Chem. Co. v. Landrum, 113 Va. 7, 11, 73 S.E. 459, 463 (1912).

[38] Wheatley v. Chrisman, 24 Pa. St. 298 (1855) *quoted in* Stroebel v. Kerr Salt Co., 164 N.Y. 303, 308, 58 N.E. 142, 147 (1898).

[39] Pennsylvania R.R. Co. v. Sagamore Coal Co., 218 Pa. 233, 126 A. 386 (1924).

[40] *Id.*

[41] *Id.* at 238, 126 A. 391.

[42] Borough of Westville v. Whitney Home Builders, 40 N.J. Super. 62, 122 A.2d 233 (App. Div. 1956). A sewage company created by defendant pursuant to statute authorized to dispose of house

A plaintiff riparian can have injunctive relief against a class of riparian polluters whether or not the defendants acted individually or in concert.[43] Likewise, plaintiffs could join in a suit against a single or against multiple riparian defendants;[44] indeed, joinder of plaintiffs would presumably strengthen the plaintiffs' allegations that the defendant's polluting use is unreasonable.

One of the reasons for the decline in cases asserting common law riparian doctrine is that riparian owners are satisfied with letting the state act for them, and they are not interested in exercising their own rights.[45] Indeed, the current myriad of water quality laws and regulations go far in protecting the public from undue pollution. Some statutes provide for individual initiative and/or participation in enforcement of public statutory rights.[46]

However, modern legislation has not negated the assertion of private riparian rights.[47] The Clean Water Act itself expressly preserves the common law rights of would-be riparian plaintiffs.[48] Although rarely pursued, the riparian doctrine continues to afford a viable private remedy against polluters. The riparian doctrine may be the only way to reach some forms of pollution, such as pollutants or polluting industries not regulated under water quality statutes or discharges that are regulated by statutes that have not yet been enforced.

The doctrine of riparian rights provides a private equitable means to abate pollution. Owners of land abutting a common watercourse have

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sewage was not enjoined from its function even though the discharge traversed defendant's property. *But see* McDaniel v. City of Cherryvale, 91 Kan. 40, 136 P. 899 (1913); Newark v. Chestnut Hill Land Co., 77 N.J. Eq. 23, 75 A. 644 (Ch. Div. 1910).

[43] Jessup and Moore Paper Co. v. Zeitler, 180 Md: 395, 24 A.2d 788 (1942). "The plaintiff, by interposition of the equity court, is relieved from the necessity of bringing a number of suits at law against different individuals to quiet the same common right. . ." 42 AM. JUR. 2D *Injunctions* § 52 (1969).

[44] Urie v. Franconia Paper Co., 107 N.H. 131, 218 A.2d 362 (1966). Plaintiffs were landowners in a common geographic area. They sued defendant paper company alleging that defendant's discharge into local streams adversely affected the use and enjoyment of their property.

[45] Davis, *supra* note 12, at 745.

[46] Federal Water Pollution Control Act (The Federal Clean Water Act), 33 U.S.C. § 1365(e) (1972) provides that a citizen may commence a civil action in U.S. District Court on his own behalf against any person or government agency alleged to be in violation of the Act.

[47] Urie v. Franconia Paper Co., 107 N.H. 131, 134, 218 A.2d 362, 363 (1966). Water pollution statute "was intended to protect public health and welfare. . . not to abrogate or suspend protection of the rights of individual landowners."

[48] 33 U.S.C. § 1365(e) (1972) provides that "nothing in this section shall restrict any right which any person may have under any statute or common law. . . ."

equal entitlements both to use the watercourse and to be free from detrimental polluting use by other riparian owners. In those few states that recognize the strict English view, a showing that *any* pollution has diminished stream quality will be cause for issue of an injunction against the polluting use. Most jurisdictions require a showing that the pollution is unreasonable and reasonableness may turn on the user's compliance with modern water quality statutes. It does not matter that the defendant polluter is a large industry and the plaintiff an individual landowner—both have equal rights to clean water.