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"**Water Law in Canada: the Atlantic Provinces**"

by

G. V. La Forest, Q.C. and Associates

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Water Law in Canada

The Atlantic Provinces

G. V. La Forest and Associates

Regional Economic Expansion
Expansion Économique Régionale

WATER LAW IN CANADA
—THE ATLANTIC PROVINCES—

by

Gerard V. La Forest, Q.C., and Associates

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PREFACE

In April, 1967, the Atlantic Development Board asked me to prepare a comprehensive analysis of the legal framework of water resources in the Atlantic Provinces. The work was one of a series dealing with water demand and supply in the Atlantic Provinces of Canada, and with existing legal and administrative frameworks relevant to water resource development.

The major portion of the work, consisting of three volumes entitled *Water Resources Study of the Atlantic Provinces—The Legal Framework,* was published in the latter part of 1968. A fourth volume, comprising an appendix dealing with regulations, orders in council, by-laws and other subordinate legislation, was published in 1969. It was later decided that the work should be prepared in a more durable form, and I undertook to do this for the Department of Regional Economic Expansion early in 1970. I took the opportunity not only to bring the study up to date, but to make some organizational changes. In particular, it was divided into chapters and a table of cases and an index were prepared. In this revision, I have omitted the appendix, as being of less general interest, but I have incorporated some of the more important parts of it in the work.

As already mentioned, the study is intended to give a comprehensive analysis of the legal framework of water resources in the Atlantic Provinces. As in any practical undertaking, however, the term "comprehensive" has had to be interpreted in a reasonable manner, both in determining the scope of the study and the sources of research material.

In so far as the scope of the study is concerned it is limited to water as a resource; for example, the use of water for consumption, for irrigation, or for the generation of power fall clearly within the terms of reference. So, too, activities affecting the quantity or quality of water, e.g. pollution, come within the study. But activities having only an incidental connection with water, for example, distribution of electric power, are not covered by the study. Sometimes the line is hard to draw. Thus navigable waters are covered in the study, but navigation and shipping are not. Similarly fish and their ownership receive attention, but fishing as an activity is not within the scope of the study. Even when these distinctions are drawn, however, exceptions are made where necessary to give a balanced view of water law. Thus while navigation and shipping are generally excepted, it is necessary to deal with navigation to some extent in understanding the law of navigable waters. In constitutional matters, it is also necessary to go even further afield. For in determining the division of governmental power in so far as it affects water, something must be known not only of powers like fisheries and navigation and shipping, but also of such matters as the spending and lending powers and Indian lands. But the focus of attention is always on water as a resource.

The second manner in which comprehensivess had to be interpreted was in determining the material consulted. In so far as the framework of legal resources is based on the common law, a balance had to be struck between reading only the

cases decided in the Atlantic Provinces or all those decided in the common law world. The first alternative is too narrow as not providing a sufficient body of experience, the second, practically impossible, and on many points, misleading. The course chosen was to study all Canadian cases on the matter. In one area—surface and ground water—however, it was felt that Canadian cases did not provide a sufficient body of experience and English cases were freely examined. In other areas of the law, such as the law respecting rivers, lakes and streams, English cases, though useful, are at times misleading.

In the constitutional field, all Canadian cases were studied if the subject matter was felt to be substantially connected with water resources.

Finally, an attempt was made to examine all the statutes, both public and private, and the regulations and orders in council, as well as many of the municipal by-laws and ministerial regulations of the federal government and the four Atlantic Provinces. The importance of the legislation determined the degree of exhaustiveness of the study. For example, statutes such as the Navigable Waters Protection Act and the water authority Acts receive very close attention, but private Acts governing some local activity are only examined in a general way.

The study is divided into the following parts:

Part I —The Constitutional Position
Part II —The Administrative Framework
Part III —Rivers, Streams and Lakes
Part IV —Interprovincial Rivers
Part V —International Rivers
Part VI —Surface and Ground Water
Part VII—Coastal Waters

The reasons for these divisions are as follows. The basic framework of water resources was developed by the English courts, and later adopted and modified by Canadian courts, in settling individual disputes over the centuries. This is the common law background. In doing this the courts made a number of basic distinctions, between water in determinate bodies of water such as rivers, streams and lakes, surface water, ground water, and to a lesser extent coastal waters. These matters are largely dealt with in Parts III, VI, and VII.

The common law was, however, modified from time to time by statute. In Canada this raises constitutional problems of determining which level of government, federal or provincial, has power to modify or replace existing doctrine. These questions are dealt with in Part I. Many of the statutes simply modified the law *ad hoc* to accommodate particular needs, but there has been a growing tendency for legislative schemes to replace many areas of the common law. This has been accompanied in recent years by a rapid growth in administrative structures to control the development of, and to protect water resources. The statutes are dealt with following the appropriate common law classifications, but the administrative structure is dealt with separately in Part II.

Finally some rivers and streams fall within more than one jurisdiction. Accordingly Part IV and Part V deal with interprovincial and international rivers, respectively.

As already mentioned the study was one of a series commissioned and financed by the Atlantic Development Board. A federal-provincial supervisory committee assisted in the collection and evaluation of data. The committee included representatives of the Provinces of Newfoundland and Labrador, Prince Edward Island, New Brunswick and Nova Scotia and the federal Departments of Energy, Mines and Resources, Fisheries, Finance, Forestry and Rural Development, and Health and Welfare; some of the federal members are now with the Department of the Environment. I would like to express my appreciation for the assistance of the committee. More particularly I would like to convey my thanks for the helpfulness displayed throughout by J. R. Lane, then of the Planning Branch of the Atlantic Development Board, and now of the Department of Regional Economic Expansion, and David W. Ross, Vice-President of Hedlin Menzies & Associates Ltd., Vancouver (who was a special consultant to the supervisory committee and responsible for co-ordinating this study with the engineering and administrative studies). I should also like to express my thanks to Dean William F. Ryan, Q.C., of the Faculty of Law of the University of New Brunswick, who kindly gave me permission to undertake this study while I was a Professor of Law there and to use the facilities of the faculty.

The work was accomplished by a team consisting of my colleagues on the Faculties of Law at the University of New Brunswick and at Dalhousie University and by graduates of both faculties. I, of course, planned, organized, and edited the work, and for it I must bear the entire responsibility, but so far as it has merit, the credit must be shared with my associates and with the law schools they represent.

At the University of New Brunswick, I had the benefit of the assistance of Professor Alan D. Reid. Assisting us in gathering information respecting federal and New Brunswick legislation were Charles S. Shannon, Mrs. Mildred B. Hilborn, and John G. Bryden, all former law students at the University of New Brunswick. At Dalhousie Law School my associates were Dean W. A. MacKay, Professor W. R. H. Charles, and Professor T. W. Somerville, They were assisted by the following team: Ian A. Blue, Brian D. Bruce, Mrs. Lucille Kerr, and Kenneth A. McInnis. All are former students at Dalhousie Law School with the exception of Mrs. Kerr who is a graduate of the Faculty of Law of the University of New Brunswick. The information respecting Prince Edward Island was collected by a Dalhousie Law School graduate, George Mullally. In Newfoundland the information was gathered by Barry R. Sparkes, and David Day. The former is a graduate of the Faculty of Law of the University of New Brunswick; the latter, of the Dalhousie Law School.

I will now set out how the work was apportioned between myself and my colleagues. I personally did the work on the constitutional position, the common law (except that related to surface and ground water), interprovincial and international rivers, the Navigable Waters Protection Act and the right of floating in Newfoundland. I also wrote a substantial part of the final version of the Nova Scotia and Newfoundland material. Professor Reid wrote the various sections dealing with the federal, New Brunswick and Prince Edward Island statutes and the common law dealing with surface and ground water. He was also invaluable to me in arranging for the typing and printing of the work in its later stages. A

team under Dean W. A. MacKay wrote preliminary drafts of the study dealing with the Nova Scotia legislation. Mrs. Kerr was especially helpful in preparing the revision. Professor Charles wrote preliminary drafts and some of the final drafts of the Newfoundland legislation. Where the work can be attributed solely to one contributor, I have done so in the chapters.

In order to complete the work within the shortest possible time, my method was to delegate the work with fairly general and flexible instructions respecting the organization and the manner of referring to authority. As might be expected of a study involving work in four provinces (indeed six, for part of the work had to be done in Ottawa, and during the latter stages I was Dean of Law at the University of Alberta), there are at times minor variations in style and format. Whatever merit it may have, the work is the most ambitious study of the legal framework of water resources yet completed in Canada. The personnel of the Atlantic Development Board who conceived the project are to be congratulated on their initiative in having this, and the complementary engineering and administrative studies, undertaken.

Gerard V. La Forest, Q.C.
Stanhope, P.E.I.

July 31, 1970

The Revised Statutes of Canada, 1970 were published after the completion of this study, but I have made the appropriate references to them in the main body of the work. I have also prepared an addendum of the statutes passed up to the date noted below, dealing specifically with water, and have made reference in the footnotes to some new material.

I should also add that the chapter on interprovincial rivers has already been published in somewhat modified form in the March, 1972, issue of the Canadian Bar Review, at pp. 39-49. I am grateful to the editor, Dr. J. G. Castel for his permission to republish it here.

G. V. La F.
Ottawa

April 30, 1972

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Riparian Rights

By Gerard V. La Forest

INTRODUCTION

The owner of land adjoining a river, stream or lake has certain rights respecting the water therein whether or not he owns the bed.[1] These rights arise from his ownership of the bank, and from the Latin word for bank, *ripa,* they derive their name of riparian rights.[2] The owner is similarly referred to as a riparian owner.

It is sufficient for the land to be riparian that it comes in contact with a body of water for a substantial part of every day in the ordinary course of nature, but such contact need not continue for the whole of the day. Thus land that comes in contact with the sea or a tidal stream at high tide is riparian land, and its owner is entitled to riparian rights in respect of it.[3] There is high authority that the contact may be lateral or vertical;[4] but this does not apply to shore property covered by water at high tide, for it does not form part of the *ripa.* Thus in *Francis Kerr Co.* v. *Seeley,*[5] Seeley was a lessee of a water lot lying in Saint John harbour on the flats between high and low tide. There were other such lots to the south, including that of the defendant company, which proceeded to build a wharf on its lot. This had the effect of blocking access by sea to Seeley's wharf and he brought action. The Supreme Court of Canada held that Seeley was not a riparian owner and did not, therefore, have an action for infringement of access to the sea.

Difficult problems may at times arise as to whether or not land comes in contact with water for the purposes of the rule. Thus in *Merritt* v. *Toronto*[6] the plaintiff claimed to be a riparian owner on the shore of Toronto harbour and sought damages and an injunction to prevent the city from interfering with his access to the water when digging a channel on the side of the bay. But the Supreme Court of Canada held on the evidence that between the plaintiff's land and the bay there was marsh land, and not land covered with water. Accordingly the plaintiff was not a riparian owner, even if the marsh consisted of coarse hay growing on a vegetable mass having no contact with the soil.

Since riparian rights depend on the contact of the land with water it follows that changes effected by nature can result in the creation or termination of riparian rights. Thus in *Municipality of Queen's County* v. *Cooper,*[7] the respondent's land

1. *Byron* v. *Stimpson* (1878), 17 N.B.R. 697; *Attrill* v. *Platt* (1883), 10 S.C.R. 425; *Municipality of Queens County* v. *Cooper,* [1946] S.C.R. 584.
2. *Byron* v. *Stimpson* (1878), 17 N.B.R. 697.
3. *Ibid.; North Shore Ry.* v. *Pion* (1889), 14 A.C. 612.
4. *North Shore Ry.* v. *Pion* (1889), 14 A.C. 612.
5. (1911), 44 S.C.R. 629.
6. (1913), 48 S.C.R. 1; see also *McFeeley* v. *British Columbia Electric Ry.* (1917), 37 D.L.R. 686.
7. [1946] S.C.R. 584.

when originally granted from the Crown was situate on the Saint John River and was separated from an island thereon by a narrow channel. In the course of time the island became connected with the mainland through a process of accretion, and the alluvium blocked off the respondent's land from the channel. The Supreme Court of Canada held that he had ceased to be a riparian owner.

CLASSIFICATION

The riparian rights may be classified under the following heads:

(1) the right of access to the water;

(2) the right of drainage;

(3) rights relating to the flow of water;

(4) rights relating to the quality of water (pollution);

(5) rights relating to the use of water; and

(6) the right of accretion.

THE RIGHT OF ACCESS

Protection and Definition of the Right

The most basic of the riparian rights is the right of access to the water; for without it a riparian owner could not enjoy the others. The right of access is a property right, and the owner may, therefore, maintain an action or obtain an injunction against anyone,[8] even the owner of the bed,[9] or the Crown,[10] who interferes with the right. These remedies are not restricted to the absolute owners; whoever lawfully occupies riparian land, for example a tenant, may bring an action to enforce it.[11] Interference with access, being a property right, is actionable *per se* without proof of damage.[12] While there is early authority for the proposition that an injunction, being a discretionary remedy, the courts will not grant one for interference with the right if this is against the balance of convenience,[13] later authority in other areas of the law make it clear that an injunction will ordinarily issue.[14]

The right includes access to and from the water.[15] On the sea and in other tidal waters this involves the right to go on the shore, i.e. the land between high and

8. *Byron* v. *Stimpson* (1878), 17 N.B.R. 697.
9. *Pickels* v. *R.* (1912), 14 Ex. C.R. 379; see also *Merritt* v. *City of Toronto* (1913), 48 S.C.R. 1.
10. *Pickels* v. *R.* (1912), 14 Ex. C.R. 379; *Nelson* v. *Pacific Great Eastern Ry.*, [1918] 1 W.W.R. 597.
11. *Austin* v. *Snyder* (1861), 21 U.C.Q.B. 299; *Byron* v. *Stimpson* (1878), 17 N.B.R. 697; *Phair* v. *Venning* (1882), 22 N.B.R. 362; *Burgess* v. *City of Woodstock*, [1955] O.R. 814.
12. *Grand Trunk Pacific Ry.* v. *British Columbia Express Co.* (1916), 55 S.C.R. 328, *per* Duff J. at pp. 339-40; *Baldwin* v. *Chaplin* (1915), 21 D.L.R. 846; *Nicholson* v. *Moran*, [1949] 4 D.L.R. 571.
13. *Garret* v. *Squarebriggs* (1880), 2 P.E.I. 351.
14. See pp. 214, 219-20.
15. *Smith* v. *Grieve* (1899), 8 Nfld. L.R. 278; *Nelson* v. *Pacific Great Eastern Ry.*, [1918] 1 W.W.R. 597.

low water mark, for the purpose.[16] And a riparian owner has a right of access over the shoal waters of a lake to the deeper waters where navigation practically begins.[17] No one, not even the Crown, can erect any structure on the shore or otherwise permanently obstruct a riparian owner's right of access.[18] For example, a permanent boom of logs in front of a riparian owner's land or a neighbouring wharf that blocks his access[19] would entitle him to a right of action.[20] Indeed, even a temporary interruption can ground an action unless it is in the reasonable exercise of rights by the person causing the obstruction. This will be discussed more fully in examining its relation to the right of navigation.

The riparian owner's right of access exists in a direct line from every point along the whole frontage of his land on the water.[21] It is, therefore, no answer to an action for damages for obstruction of the right that the owner can get to and from the water from another part of his land.[22]

Finally it should be mentioned that an expropriation of property between a riparian owner's land and the water, for example in building a railroad along the shore, amounts to "injurious affection" of the land because the owner loses his right of access, and accordingly the owner may recover compensation for such loss even though none of his property is taken.[23]

Relation to Right of Navigation

Where an obstruction occurs in water, interference with the right of access must be distinguished from interference with the exercise by an individual of the public right of navigation. A riparian owner shares with the public generally the right of navigation, but he has in addition his right of access.[24] The right of access, as already mentioned, is a private right of property, and an action for interference with it may be brought without proof of damage. To support an action for interference with his exercise of the public right of navigation, however, an individual must be able to show that he has suffered special damages not common to other members of the public; otherwise proceedings for interference with navigation must be by way of indictment or by action by the Attorney-General.[25]

16. *Byron* v. *Stimpson* (1878), 17 N.B.R. 697; *Rorison* v. *Kolosoff* (1910), 13 W.L.R. 629 (reversed on other grounds: (1910), 15 W.L.R. 497).
17. *Stover* v. *Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Kennedy* v. *Husband,* [1923] 1 D.L.R. 1069.
18. *Reg.* v. *Lord* (1864), 1 P.E.I. 245; *Byron* v. *Stimpson* (1878), 17 N.B.R. 697; *Garret* v. *Squarebriggs* (1880), 2 P.E.I. 351; *Rorison* v. *Kolosoff* (1910), 13 W.L.R. 629 (reversed on other grounds: (1910), 15 W.L.R. 497); *Nelson* v. *Pacific Great Eastern Ry.,* [1918] 1 W.W.R. 597; *Kennedy* v. *Husband,* [1923] 1 D.L.R. 1069.
19. *O'Dwyer* v. *Tessier* (1859), 4 Nfld. L.R. 278; *Tessier* v. *O'Dwyer* (1859), 4 Nfld. L.R. 284; *Smith* v. *Grieve* (1899), 8 Nfld. L.R. 278.
20. See *Drake* v. *Sault Ste. Marie Pulp and Paper Co.* (1898), 25 O.A.R. 251; *Ireson* v. *Holt Lumber Co.* (1913), 18 D.L.R. 604.
21. *Reg.* v. *Lord* (1864), 1 P.E.I. 245; *Byron* v. *Stimpson* (1878), 17 N.B.R. 697; *Rorison* v. *Kolosoff* (1910), 13 W.L.R. 629 (reversed on other grounds: (1910), 15 W.L.R. 497).
22. *Byron* v. *Stimpson* (1878), 17 N.B.R. 697.
23. *Bigaouette* v. *North Shore Ry.* (1888), 17 S.C.R. 363; *North Shore Ry.* v. *Pion* (1889), 14 A.C. 612; *In re False Creek Flats Arbitration* (1912), 17 B.C.R. 282; earlier cases had taken the opposite view: *Re Widder and Buffalo and Lake Huron Ry.* (1861), 20 U.C.Q.B. 638; *Reg.* v. *Buffalo and Lake Huron Ry.* (1864), 23 U.C.Q.B. 208.
24. *Byron* v. *Stimpson* (1878), 17 N.B.R. 697; *Bell* v. *Corporation of Quebec* (1879), 5 A.C. 84; *North West Navigation Co.* v. *Walker* (1885), 3 Man. R. 25; *North Shore Ry.* v. *Pion* (1889), 14 A.C. 612; *Nelson* v. *Pacific Great Eastern Ry.,* [1918] 1 W.W.R. 597; *Irving Oil Co.* v. *Rover Shipping Co.* (1961), 45 M.P.R. 311; *Nicholson* v. *Moran,* [1949] 4 D.L.R. 571.
25. See pp. 187-90.

The distinction between the right of access and the right to navigation has thus been drawn:

> A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway and if any obstruction be placed in his doorway or gateway, or if it be a river, at the edge of his wharf, so as to prevent him from obtaining access to his own premises to the highway, that obstruction would be an interference with a private right. But immediately he has stepped on to the highway, what he is using is not a private right, but a public right.[26]

Consequently an obstruction at some considerable distance from the land, even so as to block access of a riparian owner to certain waters, will not constitute an interference with the right of access. For example, a fisherman living on a navigable river flowing into Lake Superior who was obstructed in his passage to the lake by the defendant's lumber at the mouth of the river could not sue for interference with his right of access, though on proof of special damages, he was able to recover for the damages suffered from the interference with the navigation of the river[27].

Difficulties arise, however, when the obstruction is not at the very edge of the property, but at a short distance. Such an obstruction can equally block access to land as one on the edge of it. However if access is made more difficult but not impossible, this will not amount to an interference with the right of access, though it may constitute an obstruction to navigation, as for example where a wharf is not, by reason of some obstruction, as easy to approach or perhaps approachable only by another route.[28] An examination of *London* v. *City of Vancouver*[29] where the court went somewhat further than the established law may perhaps best show the line of demarcation. There the defendant had built a bridge, one of the piers of which was sixty feet from the wharf. This made access to a wharf more difficult but not impossible and MacFarlane J. of the Supreme Court of British Columbia held this constituted an interference with the right of access. In the subsequent case of *Nicholson* v. *Moran*,[30] however, a judge of the same court properly disagreed with this conclusion. In the latter case, the plaintiff owned a summer residence on navigable water, and the adjoining riparian owner began a boat repairing business involving use of the fronting water lot. This made it more difficult for larger boats to manoeuvre into the plaintiff's wharf. The court, however, held that this did not constitute an interference with the plaintiff's right of access, and since he was unable to establish special damage he failed in his action. One should not, however, expect complete agreement in all cases, for whether there is an interference with access is a question of fact,[31] and exact consistency in appreciation of facts is not to be expected.

26. *W. H. Chaplin & Co.* v. *Westminster Corp.*, [1901] 2 Ch. 329, at p. 334; cited in *Nicholson* v. *Moran*, [1949] 4 D.L.R. 571, at pp. 575-6.
27. *Drake* v. *Sault Ste. Marie Pulp and Paper Co.* (1898), 25 O.A.R. 251; see also *Grand Trunk Pacific Ry.* v. *British Columbia Express Co.* (1916), 55 S.C.R. 328.
28. *Baldwin* v. *Chaplin* (1915), 21 D.L.R. 846; *Nicholson* v. *Moran*, [1949] 4 D.L.R. 571; see also *O'Dwyer* v. *Tessier* (1859), 4 Nfld. L.R. 278; *Tessier* v. *O'Dwyer* (1859), 4 Nfld. L.R. 284; *Smith* v. *Grieve* (1859), 8 Nfld. L.R. 278.
29. (1934), 49 B.C.R. 328.
30. [1949] 4 D.L.R. 571.
31. *Bell* v. *Corporation of Quebec* (1879), 5 A.C. 84; *Baldwin* v. *Chaplin* (1915), 21 D.L.R. 846.

Magee v. *Reg. and City of Saint John*[32] is an instructive case. There the defendant had constructed a trestle on which a railway was built which prevented ships from passing as freely and directly as formerly to the plaintiff's wharf and further prevented larger vessels from docking there because they would extend into the water now occupied by the trestlework. The Exchequer Court of Canada held that the impediment to navigation was not actionable but that the inability of the larger vessels to dock constituted an actionable interference with the plaintiff's right of access.

In many cases, of course, it makes no difference whether an act is categorized as an interference with access or navigation, for the plaintiff may well suffer special damages in cases where it might otherwise be important to draw a distinction between the rights of navigation and access, for as already seen a riparian proprietor is more likely to suffer special damages for an obstruction to navigation near his land.[33] But the distinction is often of importance, as, for example, where persons have been authorized by statute to interfere with the right of navigation.[34]

The relation of the right of navigation to the right of access when they come in conflict must now be examined. The right of navigation may be exercised even though it interferes with a person's right of access to some extent.[35] Thus in *Quiddy River Boom Co.* v. *Davidson*,[36] it was held that a person driving logs down a river might boom them in front of a riparian owner's land for a reasonable time to prevent them from floating out to sea, and to secure them until they could be carried away by tugs, the only practicable way of moving them. Similarly, a ship at anchor for a reasonable time might temporarily block a riparian owner's right of access to his land.[37] Again where lumber is in the course of navigation left by the tide between high and low water mark, this does not constitute an unreasonable interference with the rights of a riparian owner if it is removed within a reasonable time.[38] The right of navigation must be exercised in a reasonable manner so as not to interfere with the right of access. Reasonableness depends on all the circumstances of the case, such as the quantity of lumber or size of a ship, the tide and the weather; whether an act is reasonable or not cannot, of course, be decided *a priori*.[39]

Relation to the Public Right of Fishing

It is obvious that under some circumstances an accommodation must be made between the public right of fishing and the right of access. The right of access certainly cannot be permanently blocked by fishing installations,[40] but the public

32. (1897), 5 Ex. C.R. 391; see also *Robinson* v. *Reg.* (1895), 4 Ex. C.R. 439; affirmed: (1895), 25 S.C.R. 692.
33. *Bell* v. *Corporation of Quebec* (1879), 5 A.C. 84; *Drake* v. *Sault Ste. Marie Pulp and Paper Co.* (1898), 25 O.A.R. 251; this question is discussed in more detail at pp. 188-9.
34. See *Champion and White* v. *City of Vancouver*, [1918] 1 W.W.R. 216; *Irving Oil Co.* v. *Rover Shipping Co.* (1961), 45 M.P.R. 311.
35. *Quiddy River Boom Co.* v. *Davidson* (1866), 25 N.B.R. 580; *McNeil* v. *Jones* (1894), 26 N.S.R. 299; *Hamilton Steamboat Co.* v. *MacKay* (1907), 10 O.W.R. 295.
36. (1886), 25 N.B.R. 580.
37. See *McNeil* v. *Jones* (1894), 26 N.S.R. 299.
38. *Quiddy River Boom Co.* v. *Davidson* (1886), 25 N.B.R. 580.
39. *Ibid.*; see also *Smith* v. *Grieve* (1879), 8 Nfld. L.R. 278; *McNeil* v. *Jones* (1894), 26 N.S.R. 299.
40. See *Rorison* v. *Kolosoff* (1910), 13 W.L.R. 629 (reversed on other grounds: (1910), 15 W.L.R. 497).

in exercise of its right of fishing may land fish on the seashore[41] or dig for clams,[42] and such acts may conceivably temporarily obstruct access in a minor degree.

THE RIGHT OF DRAINAGE

There is a right in owners of land adjoining a natural stream to drain their lands in the stream even though this must affect the flow downstream, but the exact extent of the right is still somewhat obscure. In the first place it is not clear whether the right is limited to riparian owners or extends to other landowners as well. In *McGillivray* v. *Township of Lochiel*[43] the court seemed clear that the right was limited to riparian owners. Yet a number of the judges of the Ontario Court of Appeal in *Re Townships of Orford and Howard*[44] spoke of the right of every landowner to drain his land in any natural watercourse *accessible* to him. Other cases are simply not clear, but several deal with municipal drainage, which could scarcely be limited to riparian lands.[45] Perhaps the better approach is to permit all landowners to drain in accessible watercourses, for the natural function of watercourses is to drain land within the drainage area.

In *Re Township of Orford and Howard*,[46] Maclellan J. A. stated flatly that so long as a landowner acted reasonably he could exercise his right of drainage without concerning himself with the effects produced lower down the stream, even when this results in the overflow of the stream. This also receives support from the Manitoba case of *Romanica* v. *Greater Winnipeg Water District*.[47] But there are several Ontario cases, beginning with *Young* v. *Tucker*[48] in 1899, which make it clear that an upper landowner may not drain into a natural watercourse a larger volume of water than it can carry off at its natural capacity, and if he does so a person who suffers injury thereby may recover damages or obtain an injunction.

It is possible that the cases may be reconciled. Fundamentally, the right of drainage must be exercised reasonably. It may well be reasonable for a municipality to drain into a natural watercourse which forms part of the St. Lawrence River system even though this results in water overflowing some miles downstream as occurred in *Re Townships of Orford and Howard*. The overflow might well have resulted in any event from natural drainage. But it is another thing to collect water and have it carried by drains into a small pond that is not large enough to hold the additional volume of water as occurred in *Young* v. *Tucker*.

Whatever doubts there may be about the liability of a landowner for increasing the flow of water downstream from his draining his upstream land, the law

41. *Reg.* v. *Lord* (1864), 1 P.E.I. 245.
42. *Donnelly* v. *Vroom* (1907), 404 N.S.R. 585; affirmed: (1909), 42 N.S.R. 327; *Delap* v. *Hayden* (1924-5), 57 N.S.R. 346.
43. (1904), 8 O.L.R. 446.
44. (1891), 18 O.A.R. 496, *per* Maclellan J.A., Hagarty C.J.O. and Burton J.A. (diss.).
45. *McGuire* v. *Township of Brighton* (1912), 7 D.L.R. 314; *Romanica* v. *Greater Winnipeg Water District* (1921), 31 Man. R. 178; see also *Groat* v. *City of Edmonton*, [1928] S.C.R. 522.
46. (1891), 18 O.A.R. 496; see also *per* Hagarty C.J.O. and Burton J.A. (diss.).
47. (1921), 31 Man. R. 178.
48. (1899), 26 O.A.R. 162; appeal quashed: (1899), 30 S.C.R. 185; see also *McGillivray* v. *Township of Lochiel* (1904), 8 O.L.R. 446; *McGuire* v. *Township of Brighton* (1912), 7 D.L.R. 314.

regarding pollution is clear. If a landowner pollutes the water, he is liable for damages and he may be enjoined from doing so by injunction. This question is discussed in more detail under "Pollution".[49] A landowner would not ordinarily be liable, however, where water in its flow carries with it material, for example, oil, naturally in the earth which affects the quality of the water downstream.[50]

RIGHTS RESPECTING FLOW

Introduction

A riparian owner is entitled to certain rights respecting the manner in which water reaches and leaves his land. He is, first of all, entitled to have the water flow down to his land as it has been accustomed to flow, substantially undiminished in quantity and quality, subject to the rights of other riparian owners to use the water, and to the public rights of navigation and floating.[51] This is a natural right inseparably annexed to the land; it is not an easement and cannot be permanently separated from the inheritance.[52] One of the best statements of the law respecting a riparian owner's rights to the way in which water must reach his land is that of Lord MacNaghten in *John Young & Co.* v. *Bankier Distillery Co.*,[53] which reads as follows:

> A riparian owner is entitled to have the water of a stream on which his property lies flow down as it has been accustomed to flow down to his property subject to the ordinary use of the flowing water by upper proprietors, and to such further use as may be reasonable under the circumstances. Every riparian owner is thus entitled to the flow of his stream in its natural flow, and without any substantial alteration in its character or quality.

A riparian owner is also entitled to have the water leave his land without obstruction. Moreover, non-riparian owners are also protected from the use of water that may damage their lives or property by flooding or otherwise.

The various riparian rights relating to the flow of water may conveniently be classified as follows:

(a) the right to have the water flow in its natural course;

(b) rights preventing the permanent extraction of water from the stream;

(c) rights preventing the alteration of the flow to property downstream;

(d) the right to have the water leave one's land in its accustomed manner.

49. *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599; *Crowther* v. *Town of Cobourg* (1912), 1 D.L.R. 40; *Clare* v. *City of Edmonton* (1914), 26 W.L.R. 678; *Groat* v. *City of Edmonton*, [1928] S.C.R. 522.

50. *Groat* v. *City of Edmonton*, [1928] S.C.R. 522, *per* Lamont J.

51. For statements of the principle, see *Graham* v. *Burr* (1853), 4 Gr. 1; *Miner* v. *Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *Tucker* v. *Paren* (1858), 7 U.C.C.P. 269; *McLean* v. *Davis* (1865), 11 N.B.R. 266; *Steadman* v. *Robertson* (1879), 18 N.B.R. 580; *Ratté* v. *Booth* (1886), 11 O.R. 491; affirmed: (1890), 15 A.C. 188; *North Shore Ry.* v. *Pion* (1889), 14 A.C. 612; *McCann* v. *Pigeon* (1901), 40 N.S.R. 356; *Saunders* v. *Wm. Richards Co.* (1901), 2 N.B. Eq. 303; *Leahy* v. *Town of North Sydney* (1906), 37 S.C.R. 464; *Wade* v. *Nashwaak Pulp & Paper Co.* (1918), 46 N.B.R. 11; *Canadian Westinghouse Co.* v. *Hamilton*, [1948] O.R. 144; *McKie* v. *The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed with variation: [1949] 4 D.L.R. 497 (S.Ct.Can.); *Stephens* v. *Village of Richmond Hill*, [1955] O.R. 806; *Re Faraday Uranium Mines Ltd.*, [1962] O.R. 503.

52. *Tucker* v. *Paren* (1858), 7 U.C.C.P. 269; *McLean* v. *Davis* (1865), 11 N.B.R. 266; *Watts v. Robson* (1873), 33 U.C.Q.B. 570; *McCann* v. *Pigeon* (1901), 40 N.S.R. 356; *Saunders* v. *Wm. Richards Co.* (1901), 2 N.B. Eq. 303; *Leahy* v. *Town of North Sydney* (1906), 37 S.C.R. 464.

53. [1893] A.C. 691, at p. 698.

The Right to Have the Water Flow in its Natural Course

A riparian owner is entitled to have the water flow down the stream to his land along its regular channel.[54] This being a proprietary right, anyone who diverts the water from its regular course may be restrained from doing so without proof of damage, actual or apprehended.[55] A few examples may be given. In *McLean* v. *Crosson,*[56] an upstream owner on whose land a river ran in curves forming "oxbows" dug a low narrow trench near the river during low water in such a way that when the freshet came the river made a new channel in line with the trench. The effect was to deprive the plaintiff, a downstream owner, of the flow of the river along a portion of his land and to wash away one-half acre of his land. The Ontario Court of Appeal held the defendant upstream owner liable, and it made no difference that the river would sooner or later have forced its way through. The court also expressed the view that even if the ditch had been dug in the ordinary course of husbandry, the defendant would have been bound to take precautions to prevent the stream from forcing its way through. Another example is *Diamond* v. *Coleman,*[57] where the owner of a downstream mill successfully sued an upstream owner for diversion. Again in *Ellis* v. *Clemens,*[58] the defendant was held liable because in restoring water to a stream which he had used, he did so at such times and in such manner that it froze as it was being restored and formed a mass of ice that blocked the stream and forced the water to leave its natural channel and flow onto and damage the plaintiff's land.

A riparian owner may, however, alter the course of a stream on his own land, so long as he returns it to its normal channel without affecting the flow downstream. Thus there is nothing to prevent a landowner from straightening, cleaning out or deepening the channel on his land.[59] Similarly the diversion of the waters of a stream to a flume or mill-race to operate a mill is permissible.[60] So too is irrigation.[61] But if the diversion affects the flow to the detriment of a riparian owner downstream, the upstream owner will be liable. For example, in *Soulicky v. City of Sault Ste. Marie,*[62] the defendant city straightened out a natural watercourse. The plaintiff's land was flooded, and he sued the defendant alleging the flooding occurred because of the alteration in the watercourse. The defendant, however, claimed the flooding occurred because of an unusual rainfall, but the

54. *Hamilton* v. *Gould* (1864), 24 U.C.Q.B. 58; *McLean* v. *Crosson* (1873), 33 U.C.Q.B. 448; *Diamond* v. *Coleman* (1876), 38 U.C.Q.B. 632; *Jenny Lind Co.* v. *Bradley-Nicholson Co.* (1883), 1 B.C.R., Pt. II, 185; *Ellis* v. *Clemens* (1892), 22 O.R. 216; *Arthur* v. *G.T.R.,* (1895), 22 O.A.R. 89; *Leahy* v. *Town of North Sydney* (1906), 37 S.C.R. 464; *Reynolds* v. *Hamilton and Dundas St. Ry.* (1919), 16 O.W.N. 4; *Parr* v. *Troop* (1922), 55 N.S.R. 252; *King* v. *MacKenzie* (1964), 49 M.P.R. 57.

55. *Ibid.*

56. (1873), 33 U.C.Q.B. 448.

57. (1876), 38 U.C.Q.B. 632.

58. (1892), 22 O.R. 216; see *Reynolds* v. *Hamilton and Dundas St. Ry.* (1919), 16 O.W.N. 4.

59. See *McGillivray* v. *Township of Lochiel* (1904), 8 O.L.R. 446; *Romanica* v. *Greater Winnipeg Water District* (1921), 31 Man. R. 178.

60. *Baird* v. *Elliott* (1890), Cout S.C. 84; affirming (1879), 26 Gr. 549; *Re Burham* (1895), 22 O.A.R. 40.

61. See *Howatt* v. *Laird* (1857), 1 P.E.I. 157; *McLean* v. *Crosson* (1873), 33 U.C.Q.B. 448; *Keith* v. *Corry* (1877), 17 N.B.R. 400; *Re Burham* (1895), 22 O.A.R. 40; *Watson* v. *Jackson* (1914), 31 O.L.R. 481; *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188; *Good* v. *Freimark,* [1950] 2 W.W.R. 1156, 1216.

62. [1935] O.W.N. 522.

court nonetheless found the defendant liable. Anyone who interferes with the course of a stream, it was held, must see that the works he substitutes for the natural channel are adequate even when there is an extraordinary rainfall; if the damage results from the deficiency of the substitute he is liable.

Rights Preventing the Permanent Extraction of Water from the Stream

Closely related to the diversion of the course of a stream is the diversion or permanent extraction of water from it. Here the courts have appeared to hold firmly to the principle that the water must be returned to the stream substantially undiminished in quantity and quality.[63] Accordingly, one who diverts water for the purpose of irrigating his land must do so without sensibly diminishing the flow of the water downstream.[64] Similarly in *Maughn* v. *G.T.R.*,[65] a railway erected a pumping station on the bank of a stream to supply the needs of its locomotives and of a nearby village. This caused the plaintiff's land fed by the stream to become stagnant and foul. The plaintiff brought action, and the court held that the railway, though a riparian owner, had no right to use the water to the prejudice of the plaintiff for its own use, let alone for the use of the village. Again in *Leahy* v. *Town of North Sydney,*[66] the town had taken water for municipal water purposes from Pottle Lake whose outlet was Smelt Brook where the plaintiff owned land, and it was held that the plaintiff was entitled to damages and to an injunction to prevent the diversion.

Of course, the damage must be appreciable—minimal diminution of the quantity of water will not give rise to a claim for legal redress, under the principle of *de minimis non curat lex.*[67] But as soon as there is a sensible diminution, an action will lie. Thus in one case the abstraction of 1/80 or 1/100 part of the waters in a stream was held sufficient to ground an action;[68] whether the courts would always be as rigorous may now be open to some question.[69]

Rights Preventing the Alteration of the Nature of the Flow to Property Downstream

A use of water may not alter the total flow downstream, but affect the nature of the flow, by altering the times when the river will flow, by increasing or decreasing the rate of flow, or otherwise. Such action by an upstream owner may, of course, be detrimental to a downstream owner. Consequently, if the principle that a riparian owner is entitled to have the water flow to his land in the manner in which it has been accustomed to flow is interpreted strictly (as once appeared to be

63. See, in addition to the cases discussed, *Bras D'Or Lime Co.* v. *Dominion Iron and Steel Co.* (1911), 9 E.L.R. 348; *Cook* v. *Vancouver,* [1914] A.C. 1077; *Johnson* v. *Anderson* (1936), 51 B.C.R. 413; *Lockwood* v. *Brentwood Park Investments Ltd.* (1967), 64 D.L.R. (2d) 212.
64. See *Howatt* v. *Laird* (1857), 1 P.E.I. 157; *Miner* v. *Gilmour* (1858), 22 Moo. P.C. 131; 14 E.R. 861; *McLean* v. *Crosson* (1873), 33 U.C.Q.B. 448; *Keith* v. *Corry* (1877), 17 N.B.R. 400; *Re Burnham* (1895), 22 O.A.R. 40; *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188.
65. (1904), 4 O.W.R. 287; see also *Graham* v. *Northern Ry.* (1863), 10 Gr. 259; *Stanford* v. *Imperial Oil Co.* (1920), 54 N.S.R. 106.
66. (1906), 37 S.C.R. 464; see also *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188.
67. See *Howatt* v. *Laird* (1850), 1 P.E.I. 7; *Saunders* v. *William Richards Co. Ltd.* (1901), 2 N.B. Eq. 303; *West Kootenay P. & L. Co.* v. *Nelson* (1906), 12 B.C.R. 34; *Watson* v. *Jackson* (1914), 31 O.L.R. 481; *Lockwood* v. *Brentwood Park Investments Ltd.* (1967), 64 D.L.R. (2d) 212.
68. See *Graham* v. *Northern Ry. Co.* (1863), 10 Gr. 259.
69. See *Lockwood* v. *Brentwood Park Investments Ltd.* (1967), 64 D.L.R. (2d) 212.

the case)[70] the upper riparian owner would be highly restricted in his use of the water. The maintenance of a dam, for instance, would be almost out of the question on many streams. It is true that the principle *de minimis* would prevent actions for the closing of a dam pending the building up of a sufficient head of water to operate a mill or to effect repairs.[71] But the operation of the *de minimis* principle is not sufficient to effect an adequate allocation of the flow of water. Accordingly, the courts have made clear that a riparian owner is entitled to the reasonable use of water in a stream on or adjoining his land, and in making such use they recognize that he must, in many cases, of necessity affect the flow downstream.[72] This goes well beyond the principle of *de minimis*; even if the lower riparian owner does suffer appreciable injury from the use made of the water the upper riparian owner may make reasonable use of it. Otherwise, the upper riparian owner would not have an equal right with the lower landowner to make use of the water.[73]

The difficult question, of course, is to determine whether a particular use is reasonable or not. This requires a consideration of all the circumstances, including the size of the stream, the season of the year, the nature of the use and of the operation involved.[74] To this may be added the state of mechanical and manufacturing advances.[75] What may be reasonable in regard to one river at one season of the year may be highly unreasonable on another river at a different season. A few examples may be given. In *Keith* v. *Corry*,[76] the plaintiff had a mill on a river and the defendant owned another mill upstream. At certain seasons the defendant closed his gates. This was essential to raise a sufficient head to run his mill, but the plaintiff was naturally detrimentally affected by the closure of the dam. The plaintiff admitted that, assuming the defendant had a right to stop the water in this manner, he had not done so in an unreasonable manner. On these facts the Supreme Court of New Brunswick held for the defendant. The case may be contrasted with another New Brunswick case *Brown* v. *Bathurst Electric and Water Power Co.*[77] There the defendant, an electric power company, built a dam in connection with their power house upstream from the plaintiff's carding and grist mill. The defendant ran their machinery at night, and in the morning their practice was to store the water until the dam was full again, without regard to the length of time required for the purpose. In consequence, the plaintiff was deprived of water and his mill was forced to shut down for a long number of days at a time. On these facts Barker J. held that the use of the defendant was unreasonable and issued an injunction to prevent its continuance.

70. See *McKechnie* v. *McKeyes* (1850), 10 U.C.Q.B. 37; *Howatt* v. *Laird* (1850), 1 P.E.I. 7.
71. *Howatt* v. *Laird* (1850), 1 P.E.I. 7; *Keith* v. *Corry* (1877), 17 N.B.R. 400; *Saunders* v. *William Richards Co. Ltd.* (1901), 2 N.B. Eq. 303; *Watson* v. *Jackson* (1914), 31 O.L.R. 481.
72. *Hamilton* v. *Gould* (1864), 24 U.C.Q.B. 58; *Keith v. Corry* (1877), 17 N.B.R. 400; *Dickson* v. *Carnegie* (1882), 1 O.R. 110; *Saunders* v. *William Richards Co. Ltd.* (1901), 2 N.B. Eq. 303; *Roy* v. *Fraser* (1903), 36 N.B.R. 113; *Brown* v. *Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *Watson* v. *Jackson* (1914), 31 O.L.R. 481; *Wade* v. *Nashwaak Pulp & Paper Co. Ltd.* (1918), 46 N.B.R. 11; cf., *Ellis* v. *Clemens* (1892), 22 O.R. 216.
73. *Keith* v. *Corry* (1877), 17 N.B.R. 400.
74. *Ibid.; see also Brown* v. *Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *Watson* v. *Jackson* (1914), 31 O.L.R. 481.
75. *Brown* v. *Bathurst Electric and Water Co., ibid.*
76. (1877), 17 N.B.R. 400.
77. (1907), 3 N.B. Eq. 543.

In the above cases, liability resulted from an interruption to the flow of water. It can also arise from increasing the rate of flow.[78] Thus in *Canadian Westinghouse Co.* v. *Hamilton,*[79] the defendant municipality straightened the course of a creek by means of a culvert, thereby increasing the velocity of the water and causing stones and debris to be deposited on the bed and sides of the stream to the plaintiff's injury. The defendant was held liable. Here again, however, the rule of reasonableness must be brought into play. One who builds a dam, for example, must of necessity retard or accelerate the natural current.[80] Thus lumbermen may make dams to increase the volume of water and the force of the current for the purpose of floating their logs, but must do so in a reasonable manner having due regard to the rights of riparian landowners.[81] Thus in *Bathurst Lumber Co.* v. *Harris,*[82] the Supreme Court of New Brunswick held a lumberman liable for injury to the intervale land of an owner caused by artificial floods resulting from the opening of dams erected by the lumberman to assist him in driving down his logs.

Slowing down the rate of flow of a stream may also give rise to an action.[83] Here again this is subject to the *de minimis* rule [84] and the rule of reasonableness.[85]

Increasing the volume of water may also give rise to an action,[86] subject to the same exceptions as to *de minimis* and reasonableness.[87] It must, however, be remembered that riparian and perhaps other land-owners have a natural right of drainage and cannot be made liable for increasing the volume of a stream by using it to drain surface waters if they act reasonably.[88]

Finally, it should be pointed out that an upstream owner is not liable for damages suffered by a downstream owner by reason of the upstream owner's doing something to restore the natural flow of water, for example, by removing casual obstructions like timber and driftwood from a stream.[89]

Rights Respecting the Manner in which Water Leaves a Man's Land

A riparian owner has a right to have water leave his land without obstruction. The most frequent sources of obstruction, of course, are dams penning the waters

78. *Howatt* v. *Laird* (1851), 1 P.E.I. 157; *James Richardson & Co.* v. *Paradis* (1915), 23 D.L.R. 720; *Canadian Westinghouse Co.* v. *Hamilton,* [1948] O.R. 144.
79. [1948] O.R. 144.
80. *Howatt* v. *Laird* (1851), 1 P.E.I. 7; *Keith* v. *Corry* (1877), 17 N.B.R. 400; *Bathurst Lumber Co.* v. *Harris* (1919), 46 N.B.R. 411.
81. *James Richardson & Co.* v. *Paradis* (1915), 23 D.L.R. 720; *Bathurst Lumber Co.* v. *Harris* (1919), 46 N.B.R. 411; *Hugh W. Simmons* v. *Foster,* [1955] S.C.R. 324.
82. (1919), 46 N.B.R. 411.
83. *McLean* v. *Davis* (1865), 11 N.B.R. 266; *Keith* v. *Corry* (1877), 17 N.B.R. 400; *McDougall* v. *Town of New Liskeard* (1914), 7 O.W.N. 256.
84. See *West Kootenay P. & L.* v. *Nelson* (1906), 12 B.C.R. 34.
85. *Keith* v. *Corry* (1877), 17 N.B.R. 400.
86. *Howatt* v. *Laird* (1857), 1 P.E.I. 157; *Keith* v. *Corry* (1877), 17 N.B.R. 400; *McCready* v. *Gananoque Water Power Co.* (1902), 1 O.W.R. 438.
87. *Howatt* v. *Laird* (1857), 1 P.E.I. 157; *Keith* v. *Corry* (1877), 17 N.B.R. 400.
88. *Groat* v. *City of Edmonton,* [1928] S.C.R. 522; see also pp. 205-6.
89. *Wegenast* v. *Ernst* (1859), 8 U.C.C.P. 456; *Danard* v. *Corporation of Chatham* (1875), 24 U.C.C.P. 590; *Parry* v. *Reid* (1920), 13 Sask. L.R. 219.

back.[90] The owner of the bed is entitled to build a dam thereon,[91] and an upper owner has no right to complain if he does so or if he raises an existing dam.[92] But as soon as it obstructs the flow from his land he may bring an action for damages or an injunction. Among the most usual types of damages from such obstruction appearing in the cases are interferences with the working of an upstream owner's mill by obstructing his wheels or reducing the amount of water power on his land,[93] or overflowing or flooding his land.[94] But these are by no means all. It may, for example, be the washing away of a bridge,[95] or the destruction of water power, (i.e. the power generated by the difference of the level of the water where the stream enters a man's land and when it leaves it),[96] even if he is not using it,[97] and it may even be the flooding of a ford.[98]

In fact, the damages to warrant an action for damages or an injunction may be very slight.[99] No actual damage may be suffered; any interference with property, other than one so negligible as to fall within the principle of *de minimis* will ground an action for damages (which may be nominal where there is no present damage suffered) and for an injunction. Otherwise the lower riparian owner might acquire prescriptive rights to back the water up, preventing the upper owner from later making use of the land as he would otherwise have been able to do. Though there is no immediate damage, therefore, there is technically an injury to the land.[100]

90. *McLaren* v. *Cook* (1847), 3 U.C.Q.B. 299; *Howatt* v. *Laird* (1850), 1 P.E.I. 7; *Graham* v. *Burr* (1853), 4 Gr. 1; *Nigh* v. *Sowerwine* (1854), 12 U.C.Q.B. 67; *Smith* v. *Wallbridge* (1857), 6 U.C.C.P. 324; *Wright* v. *Turner* (1863), 10 Gr. 67; *Watson* v. *Perine* (1863), 13 U.C.C.P. 229; *Dickson* v. *Burnham* (1868), 14 Gr. 594; varied on other grounds: (1870), 17 Gr. 261; *McNab* v. *Taylor* (1874), 34 U.C.Q.B. 524; *Breathaur* v. *Bolster* (1864), 23 U.C.Q.B. 317; *Ahern* v. *Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852; *Saunby* v. *London, (Ont.) Water Commissioners,* [1906] A.C. 110; *Montreal Light, Heat and Power Co.* v. *Attorney-General of Quebec* (1908), 41 S.C.R. 116; *Crosby* v. *Yarmouth St. Ry.* (1911), 45 N.S.R. 330; *Weber* v. *Bowman* (1912), 21 O.W.R. 242; *Girton* v. *Ontario and Minnesota Power* (1918), 13 O.W.N. 446; *Cook* v. *Davidson Lumber and Manufacturing Co.* (1920), 53 N.S.R. 375; *Ruthig* v. *Stewart Brothers Ltd.* (1923), 53 O.L.R. 558; *Desbarres* v. *Polaris Shipping Co.* (1925), 58 N.S.R. 237; *R.* v. *Southern Canada Power Co.,* [1937] 3 D.L.R. 737 (P.C.); *Robinson* v. *Heplett,* [1939] O.W.N. 61; *Kelley* v. *Canadian Northern Ry.,* [1950] 2 D.L.R. 760; *King* v. *MacKenzie* (1964), 49 M.P.R. 57.

91. See pp. 234-5.

92. *McLaren* v. *Cook* (1847), 3 U.C.Q.B. 299; *Nigh* v. *Sowerwine* (1854), 12 U.C.Q.B. 67; *Beamish* v. *Barrett* (1869), 16 Gr. 318; *Dominion Textile Co.* v. *Skaife,* [1927] S.C.R. 59.

93. *McLaren* v. *Cook* (1847), 3 U.C.Q.B. 299; *Graham* v. *Burr* (1853), 4 Gr. 1; *Watson* v. *Perine* (1863), 13 U.C.C.P. 229; *Saunby* v. *London (Ont.) Water Commissioners,* [1906] A.C. 110.

94. *Wright* v. *Turner* (1863), 10 Gr. 67; *Dickson* v. *Burnham* (1868), 14 Gr. 594; reversed on other grounds: (1870), 17 Gr. 261; *Breathaur* v. *Bolster* (1864), 23 U.C.Q.B. 317; *Girton* v. *Ontario and Minnesota Power* (1918), 13 O.W.N. 446; *Cook* v. *Davison Lumber and Manufacturing Co.* (1920), 53 N.S.R. 375; *Desbarres* v. *Polaris Shipping Co.* (1925), 58 N.S.R. 237; *Robinson* v. *Heplett,* [1939] O.W.N. 61.

95. *Montreal Light, Heat and Power Co.* v. *Attorney-General of Quebec* (1908), 41 S.C.R. 116; *R.* v. *Southern Canada Power Co.,* [1937] 3 D.L.R. 737 (P.C.).

96. *Dickson* v. *Burnham* (1868), 14 Gr. 594; reversed on other grounds: (1870), 17 Gr. 261; *Re Burnham* (1895), 22 O.A.R. 40; *Ahern* v. *Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852.

97. *Ahern* v. *Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852.

98. *Ruthig* v. *Stewart Brothers Ltd.* (1923), 53 O.L.R. 558.

99. *Dickson* v. *Burnham* (1868), 14 Gr. 594; reversed on other grounds: (1870), 17 Gr. 261; *McNab* v. *Taylor* (1874), 34 U.C.Q.B. 524; *Weber* v. *Bowman* (1912), 21 O.W.R. 242.

100. *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed with a variation: [1948] O.W.N. 812; affirmed with a variation: [1949] 4 D.L.R. 497 (S.Ct.Can.).

Dams, of course, are not the only structures that may cause damage by penning waters back to the damage of upstream owners. Bridges are a frequent cause of such damage, sometimes in conjunction with ice or log jams that might not otherwise have been formed.[101] Of course, if the jams are caused by the negligence of the persons sending the logs or ice down, liability for penning back water and flooding will fall on those persons.[102] Among other structures that may give rise to liability for penning back water are walls,[103] railways,[104] highways[105] and booms.[106]

The onus of proving that the damage has resulted from the defendant's structure, whether a dam, bridge, or otherwise, and not from other causes, such as a freshet, is on the person who alleges it.[107]. If the damage would have occurred in any event, the owner of the dam or other structure is not liable. In many cases, of course, the source of the damage is obvious, but the point is important in marginal cases. Where damage would have resulted in any event, but it is increased by the defendant's structure, an apportionment will be made. In one case, for example, it was shown that although the plaintiff's land would have been flooded anyway, he would have been able to begin operating his mill ten days earlier if the defendant's dam had not existed; the court allowed the plaintiff damages for the loss incurred owing to the shutting down of the mill for this additional period.[108] The onus would appear to be on the defendant to show the basis of apportionment; otherwise he will be liable for the whole damage.[109]

Damages from the Use of Water Irrespective of Riparian Rights

Damages from the use of water have been discussed in the context of the riparian owner's rights to the natural flow of the stream. But the cases must be examined in the context of a broader principle, applicable to both riparian and non-riparian owners. That principle is this: any person who interferes with the course of a stream has the duty to see that the works he substitutes for the natural channel are adequate to carry the water brought down even by an extraordinary rainfall, and if damage results from the deficiency of the substitute he is liable.[110] The cases are also often dealt with in terms of the rule in *Rylands* v. *Fletcher*:[111]

101. *Patterson* v. *Town of Peterborough* (1869), 28 U.C.Q.B. 505; *Wigle* v. *Gosfield South* (1912), 25 O.L.R. 646; *Davies* v. *Can. Nor. Ont. Ry.* (1920), 19 O.W.N. 194; *Brooks* v. *Steelton* (1920), 19 O.W.N. 352.

102. *Patterson* v. *Town of Peterborough* (1869), 28 U.C.Q.B. 505; see also *Hodder* v. *Turvey* (1873), 20 Gr. 63; *Wade* v. *Nashwaak Pulp and Paper Co.* (1918), 46 N.B.R. 11.

103. *Foster* v. *Fowler* (1858), 3 N.S.R. 425; see also *Wigle* v. *Gosfield South* (1912), 25 O.L.R. 646.

104. *Townsend* v. *Canadian Northern Ry.* (1922), 65 D.L.R. 85.

105. *Martin* v. *County of Middlesex* (1913), 4 O.W.N. 1540.

106. *Wade* v. *Nashwaak Pulp and Paper Co.* (1918), 46 N.B.R. 11.

107. *Wadsworth* v. *McDougall* (1876), 24 Gr. 1; *Bradley* v. *Gananoque Water Power Co.* (1903), 2 O.W.R. 716; affirmed: (1904), 3 O.W.R. 913; *Miller* v. *Beatty* (1906), 7 O.W.R. 605; affirmed: (1907), 8 O.W.R. 326; *Doolittle* v. *Orillia* (1911), 18 O.W.R. 673; *Smith* v. *Ontario and Minnesota Power Co.* (1918), 44 O.L.R. 43; *Elliott* v. *Hewitson* (1919), 16 O.W.N. 364.

108. *Lockhart* v. *Minnesota and Ontario Power Co.* (1921), 21 O.W.N. 298; see also *Smith* v. *Ontario and Minnesota Power Co.* (1918), 44 O.L.R. 43.

109. *Kelley* v. *Canadian Northern Ry.*, [1950] 2 D.L.R. 760, *per* Sydney Smith J.

110. *Mackenzie* v. *West Flamborough* (1899), 26 O.A.R. 198; *Wade* v. *Nashwaak Pulp & Paper Co. Ltd.* (1918), 46 N.B.R. 11; *Smith* v. *Ontario and Minnesota Power Co.* (1918), 44 O.L.R. 43; *Kelley* v. *Canadian Northern Ry.* [1950] 2 D.L.R. 760.

111. (1868), 1 Ex. 265; (1863), 3 H.L. 630.

that he who for his own purposes brings on his land anything likely to do injury if it escapes is, subject to certain exceptions, liable for all damage that is the natural consequence of its escape.[112] Accordingly, if water is penned back by a dam so as to flood the land of another, whether that other is a riparian owner or not, the owner of the dam is liable. The same is true if a dam is suddenly opened causing flooding or other damage downstream.

Whether the above rules are considered as different formulations of the same principle, or whether they are separate principles is a matter of little importance in many cases. But some difficulty has been experienced in relation to the exceptions to the rule in *Rylands* v. *Fletcher,* i.e. that liability does not accrue to the landowner for acts of God or malicious actions of a third person.

An act of God may be defined as an accident resulting from a natural cause that could not have been prevented by any reasonable care or foresight.[113] There are a few early cases where owners of dams, bridges or other obstructions have been absolved from liability for flooding by such obstructions where the flooding resulted from an extraordinary rainfall or other unusual weather conditions.[114] But it now seems well settled that a person who interferes with the natural course of a stream will not be absolved from damage caused by reason of his dam or other obstruction even if there is an extraordinary rainfall. In the first place it seems doubtful that an extraordinary rainfall would be categorized as an act of God. It can be foreseen that such a rainfall will occur from time to time in most areas of the country. Moreover, the cases indicate that, whatever the situation may be as regards surface waters,[115] no one who obstructs a natural watercourse will be absolved from damages caused thereby even where there has been an act of God unless the damage would have occurred whether or not the stream was obstructed.[116]

The mere fact that a person has obtained competent advice and taken reasonable care to avoid the type of damage that occurred will not absolve him from liability.[117] A Quebec case before the Supreme Court of Canada, *Montreal Light, Heat and Power Co.* v. *Attorney-General of Quebec,*[118] exemplifies this statement. There the defendant had constructed works in a river which created a large reservoir where ice formed in larger quantities than before; and during the spring freshet, following a severe winter, the ice was driven with such force against the superstructure of a bridge as to partially demolish it. The defendant was held liable for the damage notwithstanding that it had taken precautions for

112. *Hudson* v. *Napanee River Improvement Co.* (1914), 31 O.L.R. 47; *Wade* v. *Nashwaak Pulp & Paper Co. Ltd.* (1918), 46 N.B.R. 11; *Kelley* v. *Canadian Northern Ry. Co.,* [1950] 2 D.L.R. 760.

113. See *Nugent* v. *Smith* (1876), 1 C.P.D. 423.

114. *Pinkerton* v. *Greenock* (1906), 8 O.W.R. 967; *Hudson* v. *Napanee River Improvement Co.* (1914), 31 O.L.R. 47.

115. For the discussion of the rule respecting surface waters, see p. 402.

116. *Greenock Corporation* v. *Caledonian Ry.,* [1917] A.C. 556; *Wade* v. *Nashwaak Pulp & Paper Co.* (1918), 46 N.B.R. 11; *Smith* v. *Ontario and Minnesota Power Co.* (1918), 44 O.L.R. 43; *Brooks* v. *Steelton* (1920), 19 O.W.N. 352; *Townsend* v. *Canadian Northern Ry.,* (1922), 65 O.L.R. 85; *Kelley* v. *Canadian Northern Ry.,* [1950] 2 D.L.R. 760.

117. *Montreal Light, Heat and Power Co.* v. *Attorney-General of Quebec* (1908), 41 S.C.R. 116; *Martin* v. *County of Middlesex* (1913), 4 O.W.N. 1540.

118. (1908), 41 S.C.R. 116.

the protection of the bridge against such possibilities, and that the formation of the ice in increased weight and thickness resulted from an unusually severe winter.

The exception from liability for the acts of a malicious third party is strongly exemplified by *Hudson* v. *Napanee River Improvement Co.*[119] in the Ontario Court of Appeal. There the defendant's dam was destroyed by the malicious act of an unknown person, and as a result the plaintiff's son was drowned while driving on a bridge lower down. There was bad feeling in the area because of the erection of the dam, and it had been attacked before. But the court held the defendant not liable. He was under no obligation to have a watchman.

Remedies

A riparian owner whose right to have water flow to or from his land in its accustomed manner is interfered with may sue in an action for damages. If he suffers substantial damage, he will receive damages accordingly. But if his right is merely interfered with and he suffers no actual damage, he is entitled to at least nominal damages.[120]

At one time an injunction would not be granted where the plaintiff merely showed an interference with his legal rights; he had further to show actual loss or inconvenience of a substantial character. The question the courts asked was whether the injury suffered was susceptible of adequate compensation by damages.[121] Nowadays, however, *de minimis* apart if the plaintiff can establish that he is suffering a legal injury that could ripen into an easement by prescription—for example, that the flow of water to his land is interfered with, or that his water power is affected by penning the water back, even if he is not using it—he will be entitled to an injunction to restrain the interference as a matter of course.[122] Thus in *Wright* v. *Turner*,[123] the defendant built a mill by which waters were forced back and overflowed two acres of adjoining land damaging it to the extent of two pounds per annum. The small amount of the damage was held not to be a sufficient reason for withholding an injunction. In special cases, however, an injunction will not be granted—where the damage is capable of being adequately compensated by a small money payment and an injunction would be oppressive to the defendant.[124] Nor will an injunction be granted where the damage suffered is not of a recurring kind or is unlikely to happen except at rare intervals. This was the ground for the refusal of an injunction in *Davies* v. *Canadian Northern Ont. Ry.*[125] where the plaintiff's bricks and brickyard suffered damage from spring flood waters dammed back by the defendant's bridge.

119. (1914), 31 O.L.R. 47.
120. See *McKie* v. *The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed with a variation: [1948] O.W.N. 812; affirmed with a variation: [1949] 4 D.L.R. 497 (S.Ct.Can.).
121. *Howatt* v. *Laird* (1851), 1 P.E.I. 21; *Graham* v. *Burr* (1853), 4 Gr. 1, *per* Esten V.C. (diss.); *Graham* v. *Northern Ry.* (1863), 10 Gr. 259.
122. *Graham* v. *Burr* (1853), 4 Gr. 1; *Wright* v. *Turner* (1863), 10 Gr. 67; *McNab* v. *Taylor* (1874), 34 U.C.Q.B. 524; *Ahern* v. *Booth* (1903), 2 O.W.R. 696; affirmed: (1904), 3 O.W.R. 852; *McKie* v. *The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).
123. (1863), 10 Gr. 67.
124. See *Lockwood* v. *Brentwood Park Investments Ltd.* (1967), 64 D.L.R. (2d) 212.
125. (1920), 19 O.W.N. 194.

One early Prince Edward Island case, *Howatt* v. *Laird*,[126] shows how the court's discretionary power to grant injunctions could be used as a device for allocating the water resources of a stream. There the plaintiff built a mill on a stream where some ten years before the defendant had also built one higher up the stream. The natural flow of water was insufficient at certain seasons to drive the mills, and the defendant daily shut the gates of his dam, stopping water for a considerable portion of the time and thereby interfering with its natural flow to the plaintiff's mill. The plaintiff recovered damages[127] and then sought an injunction.[128] The court granted him the injunction, but limited its operation to a certain period at night. The effect was to secure to each party reasonable participation in the common resource. In a later action when it was shown that the defendant did not need to hold the water back for as long a period as was allowed in the original injunction, a second injunction was granted compelling him to keep the gates open for a longer period.[129] At the time this case was decided, however, the courts took a more rigid approach to the rule that the lower landowner was entitled to have the water flow down in its accustomed manner substantially undiminished in quantity and quality.[130] Nowadays, it is clear that this is subject to the upstream owner's right to make reasonable use of the water.[131] Accordingly, judicial allocation of the waters of a stream could be based on that principle.

Easements and Prescriptive Rights

A person may, of course, enter into a contract with another permitting him to increase or decrease the flow of water in a stream, or to overflow the other's land or otherwise interfere with the latter's common law rights. Such contracts may create personal obligations between the parties only. But it is possible to create rights respecting the flow or penning back of water that runs with the land (both the land to be benefitted and the land upon which the burden rests). Such rights are called easements.[132] For example, it is possible for the owner of the bed of a stream to acquire an easement to overflow the land of an upstream owner by means of a dam; such right then continues no matter who owns the land benefitted or burdened. It is beyond the scope of this study to examine the law of easements in any detail. It suffices to say that such rights may, if sufficiently defined, be acquired by grant, from the owner of the land subject to the burden, to the owner of the land for the benefit of which the right exists. Something must, however, be said of the acquisition of easements by long user or prescription.

A person who makes use of water in a manner that involves the proprietary rights of another person may, if he continues the uninterrupted use of the water for the period required under the Easements Act or by prescription under the

126. (1851), 1 P.E.I. 7, 21, 157.
127. (1851), 1 P.E.I. 7.
128. (1851), 1 P.E.I. 21.
129. (1857), 1 P.E.I. 157.
130. See pp. 208-9.
131. See pp. 209-10.
132. For a discussion of easements of water, see Coulson and Forbes on *Waters and Land Drainage*, 6th ed. (London, 1952), c. IV; for some Canadian examples, see *Rutton* v. *Winans* (1855), 5 U.C.C.P. 379; *Wilson* v. *Sinclair* (1856), 8 N.B.R. 343; *Gooderham* v. *Routledge* (1864), 10 Gr. 398; *Hendry* v. *English* (1871), 18 Gr. 119; *Young* v. *Wilson* (1874), 21 Gr. 144, 611; *Malcolm* v. *Hunter* (1884), 6 O.R. 102; *Union Bank of Canada* v. *Foulds* (1924), 26 O.W.N. 179.

fiction of lost modern grant—usually twenty years—acquire the right to do so.[133] Thus one may acquire a prescriptive right to have water flow in an artificial channel.[134] Again a person who pens back water onto another person's land for the prescribed period acquires the right to do so.[135] And the right to hold back the flow may equally be acquired against the person downstream.[136] However, no prescriptive right is acquired by a person doing what he is authorized to do in the exercise of his riparian rights.[137]

A prescriptive right is confined to the right as actually exercised, and any subsequent excess beyond the right acquired will give rise to an action.[138] Thus in *McNab* v. *Adamson*[139] the defendant had a prescriptive right to dam a stream, but was held liable for putting up more erections obstructing the water in the stream. Again in *McKechnie* v. *McKeyes,*[140] where a dam had been in existence to serve a mill for over the prescribed period, but the water had been used only for one or two months a year when the water was high and no injury or detention occurred, it was held that such use would not support a prescriptive right to pen back water in such a manner as to prevent the plaintiff from operating his mill lower down the stream. Moreover, it is not the height of the dam that is relevant, but the extent to which a person claiming a prescriptive right has enjoyed the privilege. What is relevant is the extent to which the property of the person against whom the privilege is claimed is affected, not the structure placed on the claimant's land to take advantage of that privilege.[141] Consequently, a person who for the prescribed period

133. It is beyond the scope of this study to examine in any detail the nature of the use required to obtain a prescriptive right of easement. Suffice it to say that it must be uninterrupted use as of right. The use is not as of right, for example, when the person making the use does so with the permission of the owner of the burdened land; see *Malcolm v. Hunter* (1884), 6 O.R. 102; *Hunter* v. *Richards* (1912), 26 O.L.R. 458; affirmed: (1913), 28 O.L.R. 267. In the case of prescription under the Easements Act, the prescribed period must be measured from the time the action is brought, so it must still be exercised at the time, but prescription at common law may relate to a period that took place before the action is brought so long as it has not been abandoned; see, *inter alia, McKechnie* v. *McKeyes* (1850), 10 U.C.Q.B. 37; *Watson* v. *Jackson* (1914), 31 O.L.R. 481; *Abbell* v. *Village of Woodbridge and County of York* (1917), 39 O.L.R. 383; reversed on other grounds: (1919), 45 O.L.R. 79; reversed: (1920), 61 S.C.R. 345. In England there is also common law prescription where it can be shown that a right existed from time immemorial, defined to be the commencement of the reign of Richard I. Obviously this has no application to Canada where the courts rely either on Easements Acts or the fiction of lost modern grant; see *Grand Hotel Co.* v. *Cross* (1879), 44 U.C.Q.B. 153; *Abbell* v. *Village of Woodbridge and County of York, supra.*

134. *Abbell* v. *Village of Woodbridge and County of York* (1917), 39 O.L.R. 383; reversed on other grounds: (1919), 45 O.L.R. 79; reversed: (1920), 61 S.C.R. 345; see also *Malcolm* v. *Hunter* (1884), 6 O.R. 102.

135. *McLaren* v. *Cook* (1874), 3 U.C.Q.B. 299; *Buell v. Read* (1847), 5 U.C.Q.B. 546; *McNab* v. *Adamson* (1849), 6 U.C.Q.B. 100; *McKechnie* v. *McKeyes* (1850), 10 U.C.Q.B. 37; *Bechtel* v. *Street* (1860), 20 U.C.Q.B. 15; *McLean* v. *Davis* (1865), 11 N.B.R. 266; *Lawlor* v. *Potter* (1869), 12 N.B.R. 328; *Campbell* v. *Young* (1871), 18 Gr. 97; *Roy* v. *Fraser* (1903), 36 N.B.R. 113; *Weber* v. *Bowman* (1912), 21 O.W.R. 242; *Carter* v. *Suddaby,* [1927] 1 D.L.R. 812.

136. See *Hunt* v. *Hespeler* (1957), 6 U.C.C.P. 269; *Bras D'Or Lime Co.* v. *Dominion Iron & Steel Co.* (1911), 9 E.L.R. 348; *Watson* v. *Jackson* (1914), 31 O.L.R. 481.

137. *Brown* v. *Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543.

138. *Buell* v. *Read* (1847), 5 U.C.Q.B. 546; *McNab* v. *Adamson* (1849), 6 U.C.Q.B. 100; *McKechnie* v. *McKeyes* (1850), 10 U.C.Q.B. 37; *Lawlor* v. *Potter* (1869), 12 N.B.R. 328; see also *Hendry* v. *English* (1871), 18 Gr. 119.

139. (1849), 6 U.C.Q.B. 100.

140. (1850), 10 U.C.Q.B. 37; see also *Lawlor* v. *Potter* (1869), 12 N.B.R. 328.

141. *Ibid.; Hunt* v. *Hespeler* (1857), 6 U.C.C.P. 269; *Bechtel* v. *Street* (1860), 20 U.C.Q.B. 15; *Cain* v. *Pearce Co.* (1911), 18 O.W.R. 595.

has had a dam capable of holding back a height of say ten feet of water, but has, in fact, held back a height of only eight feet acquires only a right to raise the water the latter height, and will be liable for raising it higher.[142] The courts will, however, presume that the water was as high at the beginning of the period in the absence of proof, and it is not necessary for the defendant to show that the water was backed up at all times, it being sufficient that it was done whenever necessary for his purposes.[143] Conversely, the mere fact that he erects a dam to replace one in respect of which he has acquired a prescriptive right that is higher than the preceding dam will not subject him to an action unless he, in fact, raises the water to a higher level.[144] It follows, too, that once a person acquires a prescriptive right respecting the water, he may, as the preceding sentence suggests, alter the instrument by which he exercises the right.[145] Equally he may alter the use he makes of the right; thus in early cases owners of prescriptive rights to dam water were held entitled, for example, to replace a clover mill with a saw mill or a grist mill, and so on.[146] And a short interruption of the use, as where a mill or a dam is rebuilt within a reasonable time, will not affect the right.[147] However, an easement may be lost by abandonment; otherwise one who made use of a stream where such an unused right existed might be put to very heavy costs.[148]

Statutory Power

Statutory power is frequently given to interfere with the flow of water when a development of any magnitude is planned on a stream. In such cases the procedure prescribed in the statute for such interference must be strictly followed; otherwise a riparian owner will have his common law rights to maintain his action preserved intact.[149] In *Leahy* v. *Town of North Sydney,*[150] the defendant municipality was, *inter alia,* authorized by statute to enter lands and beds of water, to cause water to overflow, and to take necessary water for a water distribution system. But such action was predicated on the municipality's submitting to arbitration, if need be, to determine compensation. Failure to comply with this step made the municipality liable for a diversion causing injury to the plaintiff. Otherwise the defendant would, in effect, have power to expropriate without statutory authority.

Generally, statutory powers are interpreted so as to interfere as little as possible with the common law and proprietary rights of others.[151] Thus in *Brown* v.

142. *Cain* v. *Pearce Co.* (1911), 18 O.W.R. 595.
143. *Bechtel* v. *Street* (1860), 20 U.C.Q.B. 15.
144. *Ibid.*
145. *McKechnie* v. *McKeyes* (1850), 10 U.C.Q.B. 37; *McLean* v. *Davis* (1865), 11 N.B.R. 266.
146. *McKechnie* v. *McKeyes* (1850), 10 U.C.Q.B. 37.
147. *McLean* v. *Davis* (1865), 11 N.B.R. 266.
148. *Ibid.*
149. *Leahy* v. *Town of North Sydney* (1906), 37 S.C.R. 464; *Saunby* v. *London (Ont.), Water Commissioners,* [1906] A.C. 110; *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188; see also *S.S. Eurena* v. *Burrard Inlet Tunne' and Bridge Co.,* [1931] A.C. 300; *Bulman* v. *Anderson, Booth and Green* (1946), 63 B.C.R. 297.
150. (1906), 37 S.C.R. 464.
151. *Canadian Pacific Ry.* v. *Parke,* [1899] A.C. 535; *Brown* v. *Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *Leahy* v. *Town of North Sydney,* (1906), 37 S.C.R. 464; *Miller and Thompson* v. *Halifax Power Co.* (1913), 47 N.S.R. 334; *Johnson* v. *Anderson* (1936), 51 B.C.R. 413; *Cook* v. *Davison Lumber and Manufacturing Co.* (1920), 53 N.S.R. 375; *Desbarres* v. *Polaris Shipping Co.* (1925), 58 N.S.R. 237; *Lethbridge Northern Irrigation District* v. *Maunsel,* [1926] S.C.R. 603.

Bathurst Electric and Water Power Co.[152] the statutory authorization given the defendant to build a dam was held not to entitle it to unreasonably interfere with the flow of water to the plaintiff's land. Moreover, if a work is authorized, it must be executed without negligence, and negligence includes so constructing a work that it causes damage where this could have been prevented by a reasonable exercise of the powers.[153] However, if a person is authorized to do something by statute, and it is properly done, he is under no liability to anyone who suffers injury thereby unless a remedy is provided by statute.[154]

POLLUTION

Riparian Right to Undiminished Quality

In the statement of the rights of a riparian owner in *John Young and Co.* v. *Bankier Distillery Co.*,[155] cited in connection with rights respecting the flow of water, Lord Macnaghten concludes by saying that such owner is entitled to have the water reach his land "without sensible alteration in its character or quality." In other words a riparian owner is entitled to the flow of water in its natural state—unpolluted. Accordingly riparian owners have maintained actions for pollution against upper riparian owners when the pollution has resulted from such diverse causes as privies,[156] mines,[157] sawdust slabs and other mill refuse,[158] dumped clay,[159] drains,[160] salt factories,[161] sewage systems,[162] sewage plants,[163] and tanneries.[164] And damages have been recovered or injunctions obtained for interference with the plaintiff's source of drinking water for domestic purposes or to water stock,[165] with his ability to run a paper mill because the water was discoloured by clay,[166] or a saw mill because the water was blocked by slabs;[167] damages have equally been awarded for detrimentally affecting fishing on,[168] or the

152. (1907), 3 N.B. Eq. 543.
153. *Canadian Westinghouse Co.* v. *Hamilton,* [1948] O.R. 144.
154. See *James* v. *Rural Municipality of West Kildonan* (1956), 63 Man. R. 474.
155. [1893] A.C. 691, at p. 698.
156. *City of Saint John* v. *Barker* (1906), 3 N.B. Eq. 358.
157. *Nepisiquit Real Estate and Fishing Co.* v. *Iron Corp.,* (1913), 42 N.B.R. 387; *Salvas* v. *Bell,* [1927] 4 D.L.R. 1099; see also *Re Faraday Uranium Mines Ltd.,* [1962] O.R. 503.
158. *Austin* v. *Snider* (1861), 21 U.C.Q.B. 299; *Mitchell* v. *Barry* (1867), 26 U.C.Q.B. 416; *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).
159. *Fisher & Son* v. *Doolittle & Wilcox Ltd.* (1912), 22 O.W.R. 445.
160. *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599; *Donovan* v. *Township of Lochiel* (1905), 5 O.W.R. 222, 785.
161. *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599.
162. *Clare* v. *City of Edmonton* (1914), 26 W.L.R. 678; *Batt* v. *City of Oshawa* (1926), 59 O.L.R. 520; *Groat* v. *City of Edmonton,* [1928] S.C.R. 522.
163. *Weber* v. *Town of Berlin* (1904), 8 O.L.R. 302; *Burgess* v. *City of Woodstock,* [1955] O.R. 814; *Stephens* v. *Village of Richmond Hill,* [1956] O.R. 88; *Howrich* v. *Holden Village* (1960), 32 W.W.R. 491.
164. *Weber* v. *Township of Berlin* (1904), 8 O.L.R. 302.
165. *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599; *City of Saint John* v. *Barker* (1906), 3 N.B. Eq. 358; *Clare* v. *City of Edmonton* (1914), 26 W.L.R. 678; *Burgess* v. *City of Woodstock,* [1955] O.R. 814.
166. *Fisher & Son* v. *Doolittle & Wilcox Ltd.* (1912), 22 O.W.R. 445.
167. *Austin* v. *Snyder* (1861), 21 U.C.Q.B. 299; see also *Mitchell* v. *Barry* (1867), 26 U.C.Q.B. 416.
168. *Nepisiquit Real Estate and Fishing Co.* v. *Canadian Iron Corp.* (1913), 42 N.B.R. 387; *McKie* v. *The K.P.V. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4. D.L.R. 497 (S.Ct.Can.).

agricultural quality of, the lower riparian owner's land.[169] While the alteration in the character of the water must be appreciable or sensible to give a cause of action to a riparian owner, it need not amount to pollution in the ordinary sense of the word. Thus if the operations of an upper riparian make soft water hard, as for example by adding hard water from a mine, even if it is pure, this will be actionable at the suit of a lower riparian owner.[170]

Damages need not be sustained by a riparian owner to entitle him to an action for pollution of the waters. For his right to receive the water substantially in its natural state is a property right appurtenant to his land.[171] However, in the absence of proof of damage he will be limited to nominal damages. But, even in the absence of damages, an injunction will be issued to a riparian owner as a matter of course if he establishes that the water has been polluted.[172] Otherwise the offending party might over time acquire a prescriptive right to introduce the offensive material in the stream.[173] Only when there is something special in the case will an injunction be refused, and the plaintiff limited to damages.[174] This will occur where the injury to the plaintiff is small, capable of being estimated and adequately compensated in money, and it would be oppressive to the defendant to grant the injunction.[175]

The relative social or economic importance of the activity sought to be enjoined will not, the courts have said, affect their discretion in granting the injunction.[176] For example, in *McKie* v. *The K.V.P. Co. Ltd.*[177] an injunction was granted enjoining a kraft mill from depositing waste from the mill in a stream which had the effect of reducing the number of fish in the stream where the plaintiff owned the bed. Similarly, in *Crowther* v. *Town of Cobourg,*[178] a municipality was enjoined from discharging sewage in a stream flowing through the plaintiff's land even though this might mean that a vast population might suffer. Otherwise the result would, in effect, be that a man would be compelled to sell his property interests for a compensation to be awarded by the court, thus leaving those with economic power to do what they pleased without regard to property rights. Only Parliament or the legislature may authorize such a result. However,

169. *Weber* v. *Town of Berlin* (1904), 8 O.L.R. 302; *Salvas* v. *Bell,* [1927] 4 D.L.R. 1099.

170. *John Young & Co.* v. *Bankier Distillery Co.,* [1893] A.C. 691; cited in *Crowther* v. *Town of Cobourg* (1912), 1 D.L.R. 40.

171. *Mitchell* v. *Barry* (1867), 26 U.C.Q.B. 416.

172. *City of Saint John* v. *Barker* (1906), 3 N.B. Eq. 358; *Crowther* v. *Town of Cobourg* (1912), 1 D.L.R. 40; *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

173. *Ibid.;* see also *Mitchell* v. *Barry* (1867), 26 U.C.Q.B. 416; *Hunter* v. *Richards* (1912), 26 O.L.R. 458; affirmed: (1913), 28 O.L.R. 267.

174. *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.); *Stephens* v. *Village of Richmond Hill,* [1956] O.R. 88; *Howrich* v. *Holden Village* (1960), 32 W.W.R. 491; *Re Faraday Uranium Mines Ltd.,* [1962] O.R. 503.

175. *Howrich* v. *Holden Village* (1960), 32 W.W.R. 491; see also *Stephens* v. *Village of Richmond Hill,* [1956] O.R. 88.

176. *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599; *Crowther* v. *Town of Cobourg* (1912), 1 D.L.R. 40; *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.); *Stephens* v. *Village of Richmond Hill,* [1955] O.R. 806; affirmed: [1956] O.R. 88.

177. [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

178. (1912), 1 D.L.R. 40.

an injunction will frequently be stayed for a certain period, often up to two or three years, to give the defendant the opportunity to reorganize his works so as not to cause the injury.[179]

It is no defence against a riparian owner that the defendant's action by itself would not be sufficient to do any damage,[180] nor that the water was already polluted when the offensive matter was introduced.[181] Otherwise the plaintiff would have no remedy when there are several wrongdoers. This can be illustrated by *City of Saint John* v. *Barker*.[182] There the city sought an injunction to restrain an upper riparian owner from allowing outhouses to drain into Loch Lomond which flows into a river on the banks of which it owned lands and from which it obtained part of the city's water supply. Though Barker J. concluded that the amount of deleterious matter introduced into the water was too small to do any harm, he nonetheless granted the injunction; for, as he put it, if all the upper riparian owners did the same the water would become polluted. It does not matter, either, in the absence of statute, that the work causing the pollution is as carefully done as possible to avoid pollution.[183]

Rights Against Pollution Irrespective of Riparian Rights

The most obvious remedy available to a person, other than a riparian owner, who suffers damage from the pollution of a stream is an action in nuisance. Indeed at one time it could be stated that, generally speaking, a person who was not a riparian owner had no claim at common law against another for polluting a stream unless the pollution created a nuisance.[184] With the development of negligence as a generalized tort since *Donaghue* v. *Stevenson,*[185] however, an action on that ground may well lie in any circumstance where the courts are willing to hold that a person who pollutes a stream is under a duty to another who suffers damage from that pollution.

If pollution results in a nuisance, several procedures are available to have the nuisance abated. What amounts to a nuisance, however, must first be examined. To constitute a nuisance the act complained of must be such as to interfere substantially with the enjoyment of a person's land. What amounts to a substantial interference is measured by ordinary modes and standards of everyday living, not fanciful and fastidious ones. In *McKie* v. *The K.V.P. Co. Ltd.,*[186] for example, a foul smell emanating from a river polluted by waste from a kraft mill was held to amount to a nuisance.

179 *Nepisiquit Real Estate and Fishing Co.* v. *Canadian Iron Corp.* (1913), 42 N.B.R. 387; *Clare* v. *City of Edmonton* (1914), 26 W.L.R. 678; *Groat* v. *City of Edmonton,* [1928] S.C.R. 522; *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; [1949] 4 D.L.R. 497 (S.Ct.Can.).

180. *City of Saint John* v. *Barker* (1906), 3 N.B. Eq. 358; *Crowther* v. *Town of Cobourg* (1912), 1 D.L.R. 40; *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

181. *McKie* v. *The K.V.P. Co. Ltd.* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.)

182. (1906), 3 N.B. Eq. 358.

183. *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.)

184. *City of Saint John* v. *Barker* (1906), 3 N.B. Eq. 358.

185. [1932] A.C. 562.

186.[1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).

If the nuisance interferes with a private right it is a private nuisance for which the person may bring an action. Where a nuisance amounts to an interference with a public right, such as the public right of fishing or navigation,[187] the Attorney-General, as already explained,[188] may proceed either by way of indictment[189] or by action.[190] This will ordinarily be brought at the suit of the provincial Attorney-General, but where matters coming within the legislative competence of the Dominion are involved, such as the public rights of navigation or fishing, or public harbours, the suit may be brought by the Attorney-General of Canada.[191] If, however, a person suffers special damages not common to the public generally, he may bring an action.[192]. In such cases, the plaintiff is not limited to damages related to the public duty. Thus in *Watson* v. *Toronto Gaslight and Water Co.* ,[193] the court made it clear that the plaintiff could have succeeded in an action for nuisance for polluting navigable waters, though his use of the waters was not for navigating but for distilling whiskey. As in the case of an action for interference with riparian rights, it is no defence to an action in nuisance for pollution that what the defendant himself did was not sufficient to cause a nuisance but only became so because a number of other persons polluted the river.[194] As in the case of actions for violating riparian rights, an injunction may also be available, and what has been said above concerning this remedy is equally applicable here.

Pollution by Municipalities

Pollution of streams frequently arises in connection with drainage and sewage systems of municipalities. There is no question that municipalities like other landowners have the right to drain their lands, but this gives them no right to pollute streams.[195] For example, in *Groat* v. *City of Edmonton*[196] the city had constructed a large storm sewer having its outlet in an arm of a stream above the plaintiff's land. The primary purpose of the sewer was to carry off excess waters from the streets in the vicinity, but it not only discharged surface water into the stream but all the filth from the street, including a mass of dirt that accumulated in the winter and washed into the stream in the spring. The Supreme Court of Canada held that while the municipality had at common law the right to drain its lands, it was not permitted to collect and discharge filth off the streets through an artificial channel into a natural stream to the detriment of a riparian owner. Accordingly the court granted an injunction against the city in favour of the plaintiff.

187. *Ibid.*
188. See pp. 187-90.
189. *Attorney-General of Canada* v. *Ewen* (1895), 3 B.C.R. 468; *Filion* v. *New Brunswick International Paper Co.* (1934), 8 M.P.R. 89.
190. See, for example, *Attorney-General of Canada* v. *Brister,* [1943] 3 D.L.R. 50.
191. *Attorney-General of Canada* v. *Ewen* (1895), 3 B.C.R. 468.
192. *Clare* v. *City of Edmonton* (1914), 26 W.L.R. 678; *Batt* v. *City of Oshawa* (1926), 59 O.L.R. 520; *Suzuki* v. *Ionian Leader,* [1950] Ex. C.R. 427.
193. (1847), U.C.Q.B. 158; see also *McCann* v. *Pidgeon* (1901), 40 N.S.R. 356.
194. *Attorney-General of Canada* v. *Ewen* (1895), 3 B.C.R. 468; *City of St. John* v. *Barker* (1906), 3 N.B. Eq. 358; *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed: [1948] O.W.N. 812; affirmed: [1949] 4 D.L.R. 497 (S.Ct.Can.).
195. *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599; *Crowther* v. *Town of Cobourg* (1912), 1 D.L.R. 40; *Clare* v. *City of Edmonton* (1914), 26 W.L.R. 678; *Groat* v. *City of Edmonton,* [1928] S.C.R. 522.
196. [1928] S.C.R. 522.

It is no defence to a municipality that the offensive material is actually put in its sewage system by a third party if the material is conducted to the stream by means of the municipality's works. For example, in *Crowther* v. *Town of Cobourg*,[197] the town had laid a drainage tile leading to a stream for draining part of the town west of the stream. The stream was polluted because a number of the houses connected with the system emptied water closets into the drain. A lower riparian owner brought action and recovered damages and an injunction. If the law were otherwise a riparian owner would be compelled to bring an action against each of the individuals who contributed to the pollution.

Statutory Power

Though municipalities or other public or private organizations are in no better position than an individual who pollutes a stream, they are frequently given statutory power to construct works such as sewage systems. In such a case, the courts lean against an interpretation that would give power to create a nuisance or interfere with private rights. Only when it is absolutely necessary to the performance of the work authorized by the statute will a court so read it.[198] Absolutely necessary does not refer to what is theoretically possible, but what is possible according to the scientific knowledge of the time having regard to a common sense appreciation of the practical feasibility of the situation, and expense.[199] Authorization to cause a nuisance would probably more easily be inferred when a statute authorizes a particular work at a definite location. But a mere permissive power, for example, to construct a sewage disposal plant will almost certainly not be read as authorizing a nuisance or an interference with private rights.[200] From the foregoing it follows, *a fortiori,* that a lease of land by a provincial government to a private individual for a certain purpose will give that person no authority to pollute a stream to the detriment of a lower riparian owner.[201]

Sometimes a statute authorizing works contains specific provisions respecting damages resulting from such works. A municipality will not be able to resist a common law action on the ground that the common law remedy is replaced by the statutory provisions unless the municipality acted squarely within the statutory authorization.[202] Moreover the tendency appears to be to retain the common law remedy, at least where it is more effective. For example, in *Attorney-General of Canada* v. *Ewen*[203] an action for an injunction was brought to prevent the defendant from dumping fish offal from a fish cannery into the Fraser River. The defendant argued that the injunction would not lie because his activities were

197. (1912), 1 D.L.R. 40; see also *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599; *Weber* v. *Town of Berlin* (1904), 8 O.L.R. 302; *Batt* v. *City of Oshawa* (1926), 59 O.L.R. 520.

198. *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599; *Weber* v. *Town of Berlin* (1904), 8 O.L.R. 302; *Stephens* v. *Village of Richmond Hill,* [1955] O.R. 806; affirmed: [1956] O.R. 88; *Burgess* v. *City of Woodstock,* [1955] O.R. 814; *Howrich* v. *Holden Village* (1960), 32 W.W.R. 491.

199. *Stephens* v. *Village of Richmond Hill,* [1955] O.R. 806; affirmed: [1956] O.R. 88.

200. *Van Egmond* v. *Town of Seaforth* (1884), 6 O.R. 599; *Stephens* v. *Village of Richmond Hill,* [1955] O.R. 806; affirmed: [1956] O.R. 88; *Burgess* v. *City of Woodstock,* [1955] O.R. 814.

201. *Nepisiguit Real Estate and Fishing Co.* v. *Canadian Iron Corp.* (1913), 42 N.B.R. 387.

202. *Groat* v. *City of Edmonton,* [1928] S.C.R. 522; *Stephens* v. *Village of Richmond Hill,* [1955] O.R. 806; affirmed: [1956] O.R. 88; *Burgess* v. *City of Woodstock,* [1955] O.R. 814.

203. (1895), 3 B.C.R. 468; see also *Howrich* v. *Holden Village* (1960), 32 W.W.R. 491.

punishable by statute. The court agreed that an Act may take away a common law action for damages by substituting a statutory action with a definite remedy, but this did not take away the power of the court to grant an injunction. Moreover it held that what was affected there were rights independent of statute—the right of the public to pure air and water, and the public right of fishing.

A statute will frequently provide for compensation for land taken or injuriously affected by a work authorized by the statute. The courts have held that where the riparian rights of a landowner are injured, for example by polluting the waters, his lands are injuriously affected for the purposes of the statute and he may recover compensation even though none of his land is taken.[204]

Occasionally, too, the courts will give a right of action for damages against a person for breach of a statutory duty. Thus in *Suzuki* v. *Ionian Leader*[205] an action was brought to recover damages to the plaintiff's fishing net from the discharge of oil from a stranded ship. The court upheld the claim, holding, *inter alia,* that the plaintiff had a right of action because of the defendant's breach of a statutory duty imposed by section 33 of the Fisheries Act, 1932 which prohibited the dumping of deleterious substances into fishing waters. The dumping of oil was also contrary to a by-law of the Harbour Commissioners of New Westminster made under their special Act, but the court found it unnecessary to decide whether a breach of a by-law gives rise to an action for damages.

One further point should be noted in relation to statutory powers. Where an organization is given the right to use a body of water for a particular purpose, it has substantially similar rights thereto as a riparian owner, whether or not it owns any riparian land. Thus in *City of Saint John* v. *Barker,*[206] where the city had statutory power to obtain its water supply from a river flowing out of Loch Lomond, Barker J. held that the city would have been entitled to an injunction against persons placing offensive material in the lake even if it had not been a riparian owner. He also referred to *Swindon Water Works* v. *Wilts and Berks Canal*[207] where a canal company was authorized by statute to take water from any source within 2,000 yards of the canal, but was unable to do so because of the large quantity of water taken by a riparian owner. The court held that the canal company was in a position similar to a riparian owner and could obtain an injunction against the upper riparian owner whether or not the canal company owned any adjacent land.

USES OF WATER

A riparian owner does not own the water in a running stream, but he may make use of it as it passes his property.[208] Since he does not own the water he cannot grant it, though he can grant an easement to another landowner to take

204. *Re Faraday Uranium Mines Ltd.,* [1962] O.R. 503.
205. [1950] Ex. C.R. 427.
206. (1906), 3 N.B. Eq. 358.
207. (1875), 7 H.L. 697.
208. *Howatt* v. *Laird* (1850), 1 P.E.I. 7; *Reg.* v. *Meyers* (1853), 3 U.C.C.P. 305; *Tucker* v. *Paren* (1858), 7 U.C.C.P. 269; *Hamilton* v. *Gould* (1864), 24 U.C.Q.B. 58; *Whelan* v. *McLachlan* (1865), 16 U.C.C.P. 269; *Keewatin Power Co.* v. *Town of Kenora* (1906), 13 O.L.R. 237; reversed on other grounds: (1908), 16 O.L.R. 184; *McKie* v. *The K.V.P. Co. Ltd.,* [1948] O.R. 398; affirmed with a variation: [1948] O.W.N. 812; affirmed with a variation: [1949] 4 D.L.R. 497 (S.Ct.Can.).

the water.[209] The extent of his rights depends on whether the use he makes of water may be classified as an ordinary or an extraordinary use.[210]

Ordinary uses are restricted to the use of water for drinking purposes, watering stock and other domestic purposes such as washing.[211] If in making use of water for ordinary purposes, a riparian owner completely exhausts the supply,[212] he is not liable to a lower riparian owner. The use must be closely related to the adjoining land.[213] Thus the use of water for the supply of locomotives is not an ordinary use.[214] It cannot be used for supplying water at a distance whether for persons or animals or industrial purposes. Accordingly, the supply of water from a stream for municipal purposes must be authorized by statute.[215]

A riparian owner may also make use of the water for extraordinary purposes. Here again, however, it must be incident to the enjoyment of his property.[216] What amounts to an extraordinary purpose will depend on the general conditions in the area and the uses to which the stream has previously been put. A common example is the use of water for running a mill.[217] Another is irrigation.[218] Unlike a person who uses water for ordinary purposes, one who uses it for extraordinary purposes must restore it to the stream substantially undiminished in quantity and quality.[219] There is no right of first appropriation.[220]

But the use of water for extraordinary purposes will frequently interfere with the manner in which it reaches land lower down the stream. If, for example, a riparian owner dams a stream, its flow will periodically be interrupted. For injury so caused he is liable if, having regard to all the circumstances, he has acted unreasonably. Whether the courts would hold that a particular use is reasonable or unreasonable cannot be easily predicted ahead of time.

Liability will also be incurred by a riparian owner who pollutes or otherwise alters the quality of the water, for example, in operating a pulp mill, or substantially reduces the volume of the water, for example, in irrigating his land. More-

209. *Wilson* v. *Sinclair* (1856), 8 N.B.R. 343; *Grand Hotel Co.* v. *Cross* (1879), 44 U.C.Q.B. 153; *McKay* v. *Bruce* (1891), 20 O.R. 709; *Cronkhite* v. *Miller* (1901), 2 N.B.R. 203; *Union Bank* v. *Foulds* (1924), 26 O.W.N. 179.

210. *Miner* v. *Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *Graham* v. *Northern Ry.* (1863), 10 Gr. 259; *Keith* v. *Corry* (1877), 17 N.B.R. 400; *North Shore Ry.* v. *Pion* (1899), 14 A.C. 612; *Brown* v. *Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *Bras D'Or Lime Co.* v. *Dominion Iron & Steel Co.* (1911), 9 E.L.R. 348; *Watson* v. *Jackson* (1914), 31 O.L.R. 481; *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188.

211. *Keith* v. *Corry* (1877), 17 N.B.R. 400; *North Shore Ry.* v. *Pion* (1889), 14 A.C. 612; *Brown* v. *Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188.

212. *Keith* v. *Corry* (1877), 17 N.B.R. 400; *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188.

213. *Maughn* v. *G.T.R.* (1904), 4 O.W.R. 287; *Graham* v. *Northern Ry.* (1863), 10 Gr. 259.

214. *Maughn* v. *G.T.R.* (1904), 4 O.W.R. 287.

215. *Graham* v. *Northern Ry.* (1863), 10 Gr. 259; *Watson* v. *Jackson* (1914), 31 O.L.R. 481.

216. *Brown* v. *Bathurst Electric and Water Power Co.* (1907), 3 N.B. Eq. 543; *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188.

217. *Keith* v. *Corry* (1877), 17 N.B.R. 400.

218. See *Howatt* v. *Laird* (1857), 1 P.E.I. 157; *Miner* v. *Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *McLean* v. *Crosson* (1873), 33 U.C.Q.B. 448; *Keith* v. *Corry*, (1877), 17 N.B.R. 400; Re *Burnham* (1895), 22 O.A.R. 40; *James* v. *Town of Bridgewater* (1915), 49 N.S.R. 188.

219. See pp. 206, 208.

220. *Graham* v. *Burr* (1853), 4 Gr. 1; *Miner* v. *Gilmour* (1858), 12 Moo. P.C. 131; 14 E.R. 861; *McLean* v. *Davis* (1865), 11 N.B.R. 266; *McKie* v. *The K.V.P. Co. Ltd.*, [1948] O.R. 398; affirmed with a variation: [1948] O.W.N. 812; affirmed with a variation: [1949] 4 D.L.R. 497 (S.Ct.Can.).

over, once water is drawn from the stream, it becomes surface water, and liability may result in accordance with the law regulating the flow of such water.[221]

A riparian owner's right to use water is subject to the similar rights of other riparian owners.[222] It is also subject to the public rights of navigation, floating and fishing, and to the rights of the owner of the bed.[223]

The truth is that the common law is geared to simpler times when there were small sawmills, grist mills and the like, not to the modern technological age. For this, and other reasons, it is usual to obtain statutory power whenever it is desired to undertake works of considerable magnitude, as for example, a pulp mill or hydro-electric development on a river. But the provision of even one such statutory permission may well destroy the underpinnings of the common law system of water allocation. For if, for example, water reaches a lower riparian owner's land in a polluted state owing to a pulp mill and he cannot bring action against the owners of the pulp mill because of a statutory exemption, there will usually be little point in bringing action against other persons who may pollute the stream, and so these others acquire the right to do so by prescription. In time many thus acquire the right as against other riparian owners to pollute streams. The same is true, perhaps to a lesser extent, of interferences with the rate and regularity of flow.

ACCRETION

Nature and Rationale

The owner of land bounded by any body of water, whether it be the sea[224] or a tidal river[225] or lake,[226] or an inland river[227] or lake[228], is entitled to any extension of land on the side of the water arising by accretion. There are two types of accretion. One is created by the gradual and imperceptible deposit of alluvium on the banks of a riparian owner's land.[229] The other results from the gradual and

221. *McBryan* v. *C.P.R.* (1899), 29 S.C.R. 359. See pp. 379-81, 382-7, 388-98, 402-4.
222. *Dickson* v. *Carnegie* (1882), 1 O.R. 110; see also the cases dealing with flow at pp. 206-15, 218-20.
223. See Chapters Eight and Ten.
224. *Esson* v. *Mayberry* (1841), 1 N.S.R. 186; *McDougall* v. *McDougall* (1915), 49 N.S.R. 101; *Paul* v. *Bates* (1934), 48 B.C.R. 473; *Attorney-General of British Columbia* v. *Neilson,* [1956] S.C.R. 819.
225. *Municipality of Queen's Co.* v. *Cooper,* [1946] S.C.R. 584.
226. *McDougall* v. *McDougall* (1915), 49 N.S.R. 101.
227. *Flewelling* v. *Johnston* (1921), 59 D.L.R. 419; *Clarke* v. *City of Edmonton,* [1930] S.C.R. 137; *Re Maile and Toronto,* [1932] O.R. 75; *Bruce* v. *Johnson,* [1954] 1 D.L.R. 571.
228. *Throop* v. *Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857) 2 O.A.R. 212*n*; *Buck* v. *Cobourg and Peterboro Ry.* (1857), 5 U.C.C.P. 552; *Burke* v. *Niles* (1870), 13 N.B.R. 166; *Dixson* v. *Snetsinger* (1873), 23 U.C.C.P. 235; *McCormick* v. *Municipal Corp. of Pelée* (1890), 20 O.R. 288; *Herrimon* v. *Pulling & Co.* (1906), 8 O.W.R. 149; *Stover* v. *Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Toronto General Trusts Corp.* v. *Delany* (1908), 12 O.W.R. 1116; *Fares* v. *R.,* [1932] S.C.R. 78; *Volcanic Oil and Gas Co.* v. *Chaplin* (1914), 31 O.L.R. 364; *Re Snow and City of Toronto* (1924), 56 O.L.R. 100; *Re Bulman* (1966), 57 D.L.R. (2d) 658.
229. *Doe d. McDonald* v. *Cobourg Harbour* (1844), Rob. & Harr. Dig. 148; Can. Abridg., vol. 1, col. 18; *Throop* v. *Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857) 2 O.A.R. 212*n*; *Standly* v. *Perry* (1879), 3 S.C.R. 356; *Flewelling* v. *Johnston* (1921), 59 D.L.R. 419; *Re Snow and City of Toronto* (1924), 56 O.L.R. 100; *Clarke* v. *City of Edmonton,* [1930] S.C.R. 137; *Municipality of Queen's County* v. *Cooper,* [1946] S.C.R. 584; *Wolfe* v. *B.C. Elec. Co.,* [1949] 1 W.W.R. 1123; *Bruce* v. *Johnson,* [1954] 1 D.L.R. 571; *Attorney-General of British Columbia* v. *Neilson,* [1956] S.C.R. 819.

imperceptible recession of the waters to a lower level.[230] In either case, the additional dry land belongs to the adjoining owner.[231] Correspondingly the gradual erosion of the land or the encroachment of the water upon it will vest the ownership of the land thus covered with water in the owner of the bed.[232]. Accretion and erosion will also affect ownership even where the riparian owner owns *ad medium filum aquae,* for the centre will vary as the river changes its course.[233]

Different judges have perceived varying reasons for the doctrine. Some believe the rule rests on the impossibility of identifying the change,[234] others in the idea that the owner is entitled to all the natural advantages of his land,[235] and others in the general utility of giving it to the adjoining owner so that it may be turned to useful purposes.[236] Others still see in it a principle of reciprocity: the owner is entitled to all accessions to his land since he must bear the burden of encroachments,[237] but as Rand J. has stated, the owner always has the power to take steps to prevent corrosion but it is difficult to see how the Crown or other owner of the bed can prevent withdrawal of land from water.[238] Though the Supreme Court of Canada has stated that the right of access does not underlie the rule,[239] it must have played a part in its creation. In any event, these underlying reasons form no part of the rule, whatever part they may have played in establishing it.[240]

The right of accretion is, as mentioned, one of the riparian rights naturally incident to land bordering on water. On a conveyance of the land, therefore, it passes to the grantor without specific mention even though it took place before the grant.[241]

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230. *Throop* v. *Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212*n*; *Buck* v. *Cobourg and Peterboro Ry.* (1857), 5 U.C.C.P. 552; *Burke* v. *Niles* (1870), 13 N.B.R. 166; *McDougall* v. *McDougall* (1915), 49 N.S.R. 101; *Cuthill* v. *Lloyd* (1920), 18 O.L.R. 352; *Flewelling* v. *Johnson* (1921), 59 D.L.R. 419; *Fares* v. *R.*, [1932] S.C.R. 78; *Municipality of Queen's County* v. *Cooper*, [1946] S.C.R. 584; *Bruce* v. *Johnson*, [1954] 1 D.L.R. 571; *Attorney-General of British Columbia* v. *Neilson*, [1956] S.C.R. 819.

231. See the cases cited in notes 224 to 230. In *Re Maile and Toronto*, [1932] O.R. 75, the Ontario Court of Appeal sought to make a distinction between accretion by alluvial deposit and by recession, but such a distinction is untenable in the light of the many cases above cited.

232. *Throop* v. *Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212*n*; *McCormick* v. *Municipal Corp. of Pelée* (1890), 20 O.R. 288; *Volcanic Oil and Gas Co.* v. *Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364; *Fares* v. *R.*, [1929] Ex. C.R. 144; reversed on other grounds: [1932] S.C.R. 78; *Municipality of Queen's County* v. *Cooper*, [1946] S.C.R. 584; *Bruce* v. *Johnson*, [1954] 1 D.L.R. 571; *Attorney-General of British Columbia* v. *Neilson*, [1956] S.C.R. 819.

233. *Shey* v. *McHeffey* (1868), 7 N.S.R. 350; *McKay* v. *Huggan* (1892), 24 N.S.R. 514; *Massey-Harris Co.* v. *Elliott* (1902), 1 O.W.R. 65; *Cummings* v. *Dundas* (1907), 13 O.L.R. 384; *Purity Springs Water Co.* v. *R.* (1920), 17 O.W.N. 455; affirmed: (1921), 19 O.W.N. 287. (In these cases the boundary line was not altered because the alteration of the river's course was sudden and perceptible.) See also *Boyd* v. *Fudge* (1965), 46 D.L.R. 679.

234. *Cummings* v. *Dundas* (1907), 13 O.L.R. 384; *Volcanic Oil and Gas Co.* v. *Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364; *Municipality of Queen's County* v. *Cooper* [1946] S.C.R. 584; *Attorney-General of British Columbia* v. *Neilson* [1956] S.C.R. 819.

235. *Brenner* v. *Bleakley* (1923), 54 O.L.R. 233.

236. *Attorney-General of British Columbia* v. *Neilson*, [1956] S.C.R. 819, *per* Rand J.

237. *Esson* v. *Mayberry* (1841), 1 N.S.R. 186; *Mayor, etc., of St. John* v. *Smith* (1854), 8 N.B.R. 103; *Reg.* v. *Lord* (1864), 1 P.E.I. 245; *Throop* v. *Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212n; *Volcanic Oil and Gas Co.* v. *Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364.

238. *Attorney-General of British Columbia* v. *Neilson*, [1956] S.C.R. 819.

239. *Municipality of Queen's County* v. *Cooper*, [1946] S.C.R. 584.

240. *Attorney-General of British Columbia* v. *Neilson*, [1956] S.C.R. 819.

241. *Wolfe* v. *B. C. Elec. Ry.*, [1949] 1 W.W.R. 1123.

Change Must be Gradual

To give rise to an accretion, the change must take place gradually and imperceptibly. And the same is true of an erosion. Imperceptible here means imperceptible in its progress, not imperceptible at the end of a period. A piece of accreted or eroded land may be quite extensive and so perceptible in that sense, but it may be impossible from hour to hour or day to day to perceive its development, and so it is imperceptible in that sense. The key word is "gradual".[242] Thus accretion must be distinguished from a sudden change in the course of a stream or the level of the sea or other water resulting in the creation of new areas of dry land or in the encroachment by water on what was formerly *terra firma.* In such a case, the boundary does not change, but remains as it was before. This applies where the boundary is the median line of a river [243] as well as where the boundary is at the edge of water.[244] Land so swallowed up, even by the sea, continues to belong to the owner, however long it may remain covered, so long as it can be ascertained by reasonable marks or the quantity can be known, though perhaps after a great length of time it may be considered as abandoned. Accordingly the owner may take steps to reclaim the land, or if it later naturally becomes dry land it belongs to him.[245]

It is easy enough to characterize avulsions or irruptions, or the sudden changing of the course of a river as a result of a flood, freshet or the breaking of a dam or other violent changes as not being gradual or imperceptible. But in some cases it is difficult to draw the line. In *Yukon Gold Co.* v. *Boyle Concessions Ltd.*,[246] the waters of a river encroached on the land at the rate of 25 feet per year. This was owing to the fact that the land was principally composed of muck and so could not resist the action of the water caused by melting snow. It was argued that the erosion was gradual and imperceptible since the bank was gradually and imperceptibly undermined, though the surface itself suddenly gave way. But the argument was rejected because it is through gradual undermining that sudden erosion commonly takes place. In *Mahon* v. *McCully,*[247] the proprietors of dyke land had built a breakwater to reclaim land covered by navigable waters and in ten or eleven years a considerable area had been reclaimed and, in fact, in three years the proprietors had begun to reap the benefit of their work. It was held that

242. *Throop* v. *Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212*n; Shey* v. *McHeffey* (1868), 7 N.S.R. 350; *Massey-Harris Co.* v. *Elliott* (1902), 1 O.W.R. 65; *Flewelling* v. *Johnston* (1921), 59 D.L.R. 419; *Clarke* v. *City of Edmonton,* [1930] S.C.R. 137.

243. *Shey* v. *McHeffey,* (1868), 7 N.S.R. 350; *McKay* v. *Huggan* (1892), 24 N.S.R. 514; *Massey-Harris* v. *Elliott* (1902), 1 O.W.R. 65; *Cummings* v. *Dundas* (1907), 13 O.L.R. 384.

244. *Reg.* v. *Lord* (1864), 1 P.E.I. 245; *Attorney-General* v. *Perry* (1865), 15 U.C.C.P. 329; *Standly* v. *Perry* (1877), 2 O.A.R. 195; affirmed: (1879), 3 S.C.R. 356; *County of York* v. *Rolls* (1900), 27 O.A.R. 72; *Volcanic Oil and Gas Co.* v. *Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364; *Purity Springs Water Co.* v. *R.* (1920), 17 O.W.N. 455; affirmed: (1921), 19 O.W.N. 387; *Flewelling* v. *Johnston* (1921), 59 D.L.R. 419; *Clarke* v. *City of Edmonton,* [1930] S.C.R. 137; *Municipality of Queen's County* v. *Cooper,* [1946] S.C.R. 584; *Attorney-General of British Columbia* v. *Neilson,* [1956] S.C.R. 819.

245. See *Volcanic Oil and Gas Co.* v. *Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364.

246. [1919] 3 W.W.R. 144, *per* Fitzpatrick C.J., and see in the court below; (1916), 23 B.C.R. 103, *per* Galliher J.A.

247. (1868), 7 N.S.R. 323.

the reclaimed land was not an accretion. The court compared this with *R.* v. *Yarborough*[248] where an addition to land from natural causes of 5½ yards annually over a period of twenty-six or twenty-seven years was held to be an accretion.

The fact that the extension to land takes place at particular times of the year does not prevent it from constituting an accretion. In *Clarke* v. *City of Edmonton*[249] it was held immaterial that the additional land may have resulted from seasonal floods occurring during a few days each year where such floods were a normal occurrence, even though the additional land was created in a relatively short period—twelve to fifteen years. The process being imperceptible from moment to moment, the riparian owner gained the additional land from day to day as an accretion.

Artificially Induced Accretion

Accreted land belongs to a riparian owner notwithstanding that it may have been contributed to by artificial works such as wharves.[250] Some cases assert that this is so notwithstanding that the work was intentionally created to produce accretion,[251] but others deny the character of accretion to extensions of land resulting from artificial works constructed for the purpose.[252] It is probably a question of degree. It is one thing for a man to construct a cribwork on the foreshore to detain seaweed or other substances which may, over time, be incorporated into dry land.[253] It is another to dump quantities of material into an area which becomes dry land by the combined accumulation of the material and accretions by the operation of nature.[254] As in other cases the determining factor is probably whether the land is formed gradually and imperceptibly, or whether it is formed at a rate that can more aptly be characterized as sudden.[255] The case of *Mahon* v. *McCully*,[256] already discussed, where alluvium penned back by a breakwater resulting in land that became useful in three years and completely dry in ten was held not to constitute an accretion, is helpful in indicating the line of demarcation. It goes without saying, too, that there may be cases where it is difficult to say whether new formed land is primarily the result of accretion or of dumping, artificial works and the like.[257]

248. (1824), 3 B. & C. 91; 107 E.R. 668; affirmed: (1828), 2 Bligh (N.S.) 147; 4 E.R. 1087.
249. [1930] S.C.R. 137.
250. *Doe d. Macdonald* v. *Cobourg Harbour* (1844), Rob & Harr. Dig. 148; Can. Abridg., vol. 1, col. 18; *Throop* v. *Cobourg* and *Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212*n*; *Reg.* v. *Lord* (1864), 1 P.E.I. 245; *Standly* v. *Perry* (1879), 3 S.C.R. 356; *Coleman* v. *Robertson* (1880), 30 U.C.C.P. 609; *Clarke* v. *City of Edmonton,* [1930] S.C.R. 137; *Bruce* v. *Johnston,* [1954] 1 D.L.R. 571.
251. *Throop* v. *Cobourg and Peterboro Ry.* (1856), 5 U.C.C.P. 509; affirmed: (1857), 2 O.A.R. 212*n*; *Reg.* v. *Lord* ((1864), 1 P.E.I. 245.
252. *Coleman* v. *Robertson* (1880), 30 U.C.C.P. 609; *Clarke* v. *City of Edmonton,* [1930] S.C.R. 137; *Bruce* v. *Johnston,* [1954] 1 D.L.R. 571.
253. See *Reg.* v. *Lord* (1864), 1 P.E.I. 245.
254. *Mayor, etc. of St. John* v. *Smith* (1854), 8 N.B.R. 103; *Standly* v. *Perry* (1879), 3 S.C.R. 356; *Haggerty* v. *Latreille* (1913), 14 D.L.R. 532; *Twin City Ice Co.* v. *Ottawa* (1915), 34 O.L.R. 358.
255. *Mahon* v. *McCully* (1868), 7 N.S.R. 323; *Standly* v. *Perry* (1879), 3 S.C.R. 356; *Cummings* v. *Dundas* (1907), 13 O.L.R. 384.
256. (1868), 7 N.S.R. 323; see also *Attorney-General* v. *Perry* (1865), 15 U.C.C.P. 329.
257. *Mayor, etc. of St. John* v. *Smith* (1854), 8 N.B.R. 103; *Standly* v. *Perry* (1879), 3 S.C.R. 356.

Accretion at Formative Stage

Land in the process of formation does not belong to the riparian owner until the process is completed.[258] It must have ceased to form part of the bed and become attached to the bank; it must be connected with the riparian owner's land. Until then it continues to belong to the owner of the bed.[259] Any channel or other barrier between the upland and the new formed land prevents accretion.

The stage at which accretion is completed in an inland river or lake is a question of fact. On the sea or other tidal waters, there is the further qualification that the new land must be above high water mark. *Attorney-General of British Columbia* v. *Neilson*[260] provides a strong example. There by alluvial action land had been raised from the bed of the sea extending a considerable distance from the riparian owner's land. The land was marshy at low tide but at high tide it was covered by two inches to two feet of water, though the part bordering on the sea formed a rampart of higher ground and there was higher ground bounding the channels in which the water penetrated inland. The trial judge and the British Columbia Court of Appeal concluded that the land constituted an accretion. The high water mark test in their view was not decisive, the real test being whether the land was cultivable (which it was held this was), and while ordinarily the question of cultivability could be determined by reference to the high water mark, this was not always so. This conclusion was reversed by the Supreme Court of Canada. The test of high water mark, then, is an absolute test on tidal waters. The underlying policy of the rule may well be that the high water mark ordinarily forms the line of cultivable land, but that policy forms no part of the rule itself.[261] The rampart could not be created as an accretion because it was separated from the riparian owner's land by the marsh property, which still constituted part of the bed. Locke and Nolan JJ., however, raised, without pronouncing themselves, a difficulty inherent in early English authority: whether the land above high water mark belongs to the adjoining owner because it is cultivable—or maniorable (manurable) to use the language of the early authorities—or whether it is necessary for the adjoining owner to enter on the land and improve it, thus gaining title by occupation. It is suggested that requiring the owner to occupy the additional land would raise all sorts of difficulty in determining the exact line of demarcation, and Rand J.'s approach of regarding the high water mark rule as arbitrary seems much the better one and more consistent with the underlying reasons for the rule discussed earlier.

Islands

It follows from the fact that new lands must be connected to the riparian lands to constitute an accretion, that newly formed islands continue to belong to

258. *Williams* v. *Pickard* (1908), 15 O.L.R. 655; reversed on other grounds: (1908), 17 O.L.R. 547; *Attorney-General of British Columbia* v. *Neilson,* [1956] S.C.R. 819; *Re Bulman* (1966), 57 D.L.R. (2d) 658.

259. *Dixson* v. *Snetsinger* (1873), 23 U.C.C.P. 235; *Dunphy* v. *Williams* (1874), 15 N.B.R. 350; *Bruce* v. *Johnson,* [1954] 1 D.L.R. 571; *Attorney-General of British Columbia* v. *Neilson,* [1956] S.C.R. 819; *Re Bulman* (1966), 57 D.L.R. (2d) 658.

260. [1956] S.C.R. 819; reversing [1955] 5 D.L.R. 56, which affirmed (1954), 13 W.W.R. (N.S.) 241.

261. See also *Re Bulman* (1966), 57 D.L.R. (2d) 658.

the owner of the bed.[262] But the presence of islands can give rise to special problems. In *Municipality of Queen's County* v. *Cooper*, [263] the municipality owned an island in the Saint John River where it is tidal and navigable and the respondent, Cooper, owned lands on the river above the head of the island. At the time of the grant there was a narrow channel between Cooper's land and the island and he had access to the water. By accretion, however, Cooper's land had extended upstream into a junction with the easterly part of the island, which had also been extended by alluvium. The junction was now indicated by a wet, though apparent, depression. Cooper claimed title to the entire accretion on both sides of the depression as an accretion to the mainland, or in the alternative, that he was entitled to rights over it to maintain his riparian privileges. But the Supreme Court of Canada upheld the municipality's contention that it owned the accreted land on its side up to the depression, notwithstanding that the effect was to cut Cooper's access to the water and thereby deprive him of his former riparian privileges. In the court's view a riparian owner's privilege was subject to changes of nature; the right of access was not the underlying basis of accretion.

In the *Queen's County* case, the island had been in existence at the time of the original grant and had been conveyed to the riparian owner. In *Bruce* v. *Johnson*,[264] however, gradual accretion had extended a riparian owner's land bordering on a navigable river, and at some time an island was formed. Under Ontario law the bed of the river, being navigable, was vested in the Crown. Later accretions joined the island to the mainland and the river flowed on the other side. Haldiman, County Court Judge of Kinnear County, Ontario, held the plaintiff owned the entire accretion including the island. The same sort of reasoning would seem applicable to sand bars on the sea shore. However, in *Re Bulman*,[265] a different attitude appears to have been taken by Ruttan J. of the Supreme Court of British Columbia. There sand bars were formed at the junction of a river and a lake from the dropping of material in suspension when the river water was slowed on its entrance to the lake. Bulman's land adjoined the area, but since the sand bars were not connected to his land, the court concluded the land did not belong to him. In the course of his judgment, however, Ruttan J. spoke of accretion as contemplating a process of building up against the land and he doubted whether accretion by alluvium, as opposed to recession, could occur by accretion in a large inert lake such as that in question. This would appear to indicate that if the sand bar had grown until it extended to the defendant's land, it would not be held to be an accretion to that land.

Accretion and Owners of Water Lots

Thus far we have been principally concerned with the rights of riparian owners whose lands extend up to the water. Others who may be affected by accretion are owners of the shore (i.e. the land between high and low water

262. *Attorney-General* v. *Perry* (1865), 15 U.C.C.P. 329; *Dixson* v. *Snetsinger* (1873), 23 U.C.CP. 235; *Dunphy* v. *Williams* (1874), 15 N.B.R. 350.
263. [1946] S.C.R. 584.
264. [1954] 1 D.L.R. 571.
265. (1966), 57 D.L.R. (2d) 658.

mark), or the bed, or others owning land under water bounded either by the high or low water mark. In all these cases, the boundary is a fluid one which follows the changes wrought by nature as the shore is increased or diminished.[266]

Fixed Boundaries

Accretion is inapplicable where the boundary is not a water line. Specifically described lands, therefore, continue their former boundaries whether the adjoining water rises or recedes.[267] However, it should not be forgotten that lands bounded by non-tidal waters are presumed to extend *ad medium filum*, and waters bounded by the sea are presumed to extend to high water mark, notwithstanding their description by metes and bounds or by a plan.[268]

A few instances of specifically described lands may be given.[269] In *Yukon Gold Co.* v. *Boyle Concessions Ltd.*,[270] Idington J. of the Supreme Court of Canada stated that a grant of mineral under a specifically described parcel of land could not be affected by the erosion of the bank of a river. In *Volcanic Oil and Gas Co.* v. *Chaplin*,[271] the waters of a lake encroached gradually on riparian land and finally completely absorbed it and encroached on the adjacent non-riparian lot which had been described in the deed by metes and bounds. It was held that the entire adjacent lot remained the property of its owner notwithstanding that part of it was now covered by water.

Protection Against Erosion

The owner of land on a body of water has a right to have the natural barriers against encroachment on his land maintained. Accordingly he has an action against anyone who removes sand or gravel in front of his property, even when the sand is taken from an area, such as the bed, owned by some other person, if this would result in encroachment on his land.[272] The removal need not be intentional. Thus an owner of riparian land was held entitled to damages from a railway company which, in building its line of railway, had without statutory authorization constructed an embankment which had the effect of throwing the water with such force against the riparian owner's land as to wash away the sand and gravel.[273]

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266. *Esson* v. *Mayberry* (1841), 1 N.S.R. 185; *Clarke* v. *City of Edmonton*, [1930] S.C.R. 137; *Wells* v. *Mitchell*, [1939] O.R. 372; *In re Quieting of Titles Act and Neilson* (1954), 13 W.W.R. (N.S.) 241; reversed on facts: *Attorney-General of British Columbia* v. *Neilson*, [1956] S.C.R. 819; *Georgian Cottagers Ass'n.* v. *Tp. of Flos and Kerr*, [1962] O.R. 429.
267. *Volcanic Oil Co.* v. *Chaplin* (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364; *Yukon Gold Co.* v. *Boyle Concessions Ltd.*, [1919] 3 W.W.R. 144 (S. Ct. Can.); *Re Maile & Toronto*, [1932] O.R. 75; *Municipality of Queen's County* v. *Cooper*, [1946] S.C.R. 584; *Bruce* v. *Johnson*, [1954] 1 D.L.R. 571.
268. See pp. 239-47. *Re Maile & Toronto*, [1932] O.R. 75, seems inconsistent with the weight of authority on this point.
269. See also pp. 240, 242-3.
270. [1919] 3 W.W.R. 144.
271. (1912), 27 O.L.R. 34, 484; reversed on facts: (1914), 31 O.L.R. 364.
272. *Stover* v. *Lavoia* (1906), 8 O.W.R. 398; affirmed: (1907), 9 O.W.R. 117; *Kennedy* v. *Husband*, [1923] 1 D.L.R. 1069.
273. *Caldwell and Fleming* v. *Canadian Pacific Ry.* (1916), 37 O.L.R. 412.

The owner of land adjoining water, whether on the sea or on inland streams or lakes, may take steps to protect his property from being washed away or invaded by water.[274] In fact, where a stream suddenly alters its course, owing for example to an extraordinary flood, a landowner whose land has been washed away may, until prescriptive rights have been established against him, divert the stream back to its original course; but he may not, of course, divert it otherwise than to its original channel.[275]

Though a riparian owner is entitled to protect his property from the invasion of the water by building a bulwark, dyke or embankment, he is not at liberty to do so in such a way as to do injury to the property of the riparian owner on the other side.[276] Thus in *Lorraine* v. *Norrie,*[277] the plaintiff and defendant lived on opposite sides of a river with low banks. The defendant, to prevent inundation, built a wing dam diagonally into the river which had the effect of directing the water towards the plaintiff's lot, thereby causing damage. The defendant was held liable for the damage. At the same time a riparian owner is entitled to protect his land from floods by building an embankment either on the water's edge or some distance back even though the result may be to injure land on the other side of the river; he must, however, exercise reasonable care and skill not to injure his neighbour and do no more than is necessary to protect himself.[278]

Problems relating to accretion resulting from dykes have already been discussed.[279]

Road Allowances

Several problems arise respecting roads and road allowances circling or leading into waters. Such roads, like other property, are subject to the doctrines of accretion and erosion.[280] If a municipality or other body is under a duty to repair a road leading to water, it will be liable to repair additions to it by accretion, and conversely when the road has sufficiently eroded as to vest title in the owner of the bed, the municipality will cease to be subject to that duty.[281] Where a road runs along a body of water any accretion vests in the owner of the road. Accordingly where the Crown owns the road, it vests in the Crown,[282] but if the road vests in the adjoining owners subject to any easement in the public to pass and repass, the accretion belongs to the adjoining owners.[283] If a road allowance

274. *Reg.* v. *Lord* (1864), 1 P.E.I. 245; *County of York* v. *Rolls* (1900), 27 O.A.R. 72; *Lorraine* v. *Norrie* (1912), 46 N.S.R. 177; *Gerrard* v *Crowe,* [1921] 1 A.C. 395; *Kennedy* v. *Husband,* [1923] 1 D.L.R. 1069; *Attorney-General of British Columbia* v. *Neilson,* [1956] S.C.R. 819, *per* Rand J.

275. *County of York* v. *Rolls* (1900), 27 O.A.R. 72.

276. *McLean* v. *Crosson* (1873), 33 U.C.Q.B. 448; *Lorraine* v. *Norrie* (1912), 42 N.S.R. 177; see also *Caldwell and Fleming* v. *Canadian Pacific Ry* (1916), 37 O.L.R. 412.

277. (1912), 42 N.S.R. 177.

278. *Gerrard* v. *Crowe,* [1921] 1 A.C. 395.

279. See p. 227.

280. *Cockburn* v. *Eager* (1876), 24 Gr. 409; *Standly* v. *Perry* (1879), 3 S.C.R. 356; *McCormick* v. *Municipal Corp. of Pelée* (1890), 20 O.R. 288; *Massey-Harris* v. *Elliott* (1902), 1 O.W.R. 65; *Herrimon* v. *Pulling & Co.* (1906), 8 O.W.R. 149.

281. *Standly* v. *Perry* (1877), 2 O.A.R. 195; affirmed: (1879), 3 S.C.R. 356.

282. *Cockburn* v. *Eager* (1876), 24 Gr. 409.

283. *Massey-Harris Co.* v. *Elliott* (1902), 1 O.W.R. 65.

is said to run along a body of water and there is an accretion, it would depend on an interpretation of the instrument creating the allowance whether it was intended to follow the boundary of the water as it shifted.[284]

Boundaries of Adjoining Owners

There may at times be considerable difficulty in determining the boundary of lands of two adjacent owners in relation to accreted lands. There are few Canadian cases. In *Paul* v. *Bates*[285] where there had been an accretion to lands on the open sea, it was held that as between adjoining owners the manner of division was to take a line representing the line of the shore drawn at such distance seaward as to clear the sinuosities of the coast and let fall a perpendicular from the end of the land boundary dividing the properties in dispute. By the line of shore was there meant a line fairly representing the average line of the shore extending on either side of the disputed land, not a line drawn along the whole coast of the bay where the land was situate.

Another problem is mentioned in the judgments of Locke and Nolan JJ. in *Attorney-General of British Columbia* v. *Neilson*.[286] Suppose a curving strip of lands begins on one landowner's land, and then curves in front of another's land, what are the rights of these landowners? The judges gave no answer but if the test in *Paul* v. *Bates* is applied, the first landowner would get that portion of the strip in front of his property. But the portion in front of the second landowner's would continue to belong to the Crown or other owner of the bed; there would be no accretion to the second landowner's property unless it was connected.

284. See *Herrimon v. Pulling & Co.* (1906), 8 O.W.R. 149.
285. (1934), 48 B.C.R. 473.
286. [1956] S.C.R. 819.

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