

A History of Water Rights at Common Law

JOSHUA GETZLER

OXFORD
UNIVERSITY PRESS

Contents

<i>Table of Cases</i>	xxi
<i>Table of Statutes</i>	xxxv
<i>Regnal Years</i>	xxxvii
<i>Abbreviations</i>	xxxix
Introduction	1
The Significance of Riparian Doctrine	1
The Economic Consequences of the Law	3
Doctrinal and Empirical Case-studies	6
1. The Exploitation of Water in Historical Perspective	8
Landscape and Industry	8
Water Use in the Ancient World—The ‘Hydraulic Society’ Hypothesis	9
Water for Power in the Ancient World	12
A Technically Simple Society?	12
Culturalist Explanations of Technological Stagnation	15
Medieval Water Use and Power Technology	16
Feudal Milling Monopolies	19
Early Legislative Control of Water Use	21
The Modern Age of Water Power	22
The Arkwrights and the New Industrialism	25
The Genesis of the Factory: Water Power and Monopoly	27
Water Supply, Water Rights, and Industrial Location	31
Other Uses of Water in the Industrial Age	37
Legal Conflict over Water Rights	39
The Doctrinal History of Water Rights	43
2. Servitude Doctrine in Early Law	46
The Forms of Action	46
Actions for Rights and Wrongs	47
Romanism in Early English Property Actions	49

Nuisance, Water Rights, and the Forms of Action	52
Disseisin and Nuisance Forms of Action	55
The Form of Action for Defence of Servitudes and User	56
Bracton's Exposition of the Assize of Nuisance	58
The Real Form of the Nuisance Action	58
The Doctrine of Appurtenance	59
Real and Personal Remedies	60
Seisin and Title	61
Bracton's Analysis of <i>Injuria</i> and <i>Damnum</i>	61
The Forms of Action after Bracton	63
The Rise of Trespass	64
Bracton, Roman Law, and the Substantive Nature of Water Rights	65
Ownership and Incorporeal Rights: Some Institutional Distinctions	65
Common Ownership Contrasted with <i>Res Communes</i> Ideas	67
Natural Water Rights as 'Servitudes Imposed by Law'	69
Servitudes as Praedial Rights over Another's Property	70
The Distinction Between Servitudes and Natural Rights, and the Unity of Remedy	70
Roman Servitude Doctrine	72
Servitudes as Proprietary Land-use Rights	72
The Praedial Doctrine	72
Servitudes Asserted by <i>in Rem</i> Actions	74
<i>Ius</i> and <i>Ius in Re Aliena</i>	74
Bracton's Adoption of Specific Roman Water Doctrines	75
The Natural Source Doctrine	76
Standards of Reasonableness in the Exercise of Rights	76
Reasonable Extensions of Right	76
Reasonable Restraints of Right	77
Constitution of Rights of Grant by Livery and Use	79
Rules for the Constitution of Incorporeal Rights	81
Prescription	84
Roman Prescription Precedents	84
<i>Usucapio</i>	85
Extinctive Prescription	86
Bracton's Doctrine of Prescription for Servitudes	86
Modern Analysis of Bractonian Prescription	88
F. W. Maitland	88
J. W. Salmond	92
The Later Medieval Law: From Bracton to Coke	97
The Exclusion of Romanism from Legal Reasoning	97
The Rise of the Action on the Case for Nuisance	100

Trespass to Land and Trespass on the Case for Nuisance	101
Public or Common Nuisance and the Action on the Case	107
Water as Public Property Defended by Mixed Nuisance Actions	109
Dominance of Action on the Case for Nuisance	111
The Nature of Water Incidents—A Confusion of Theories	113
Injury and Damage	114
3. The Common Law of Riparian Rights 1580–1750	117
Ancient Use	117
The Use of the Maxim <i>Sic Utere Tuo ut Alienum non Laedas</i> to Explain Natural Rights	122
Protection of Immemorial Flow	127
The Triumph of Natural-Right Analysis	129
Pleading and Substance in the Late Seventeenth Century	140
The Nature of the Interest	140
Maximalist Pleadings	140
Minimalist Pleadings	141
The Extent of Protection—Damage or Title?	142
The Theory of <i>Injuria Sine Damno</i>	146
Direct and Indirect Causation: New Conceptualizations of Trespass and Case	148
4. Blackstone’s and Hale’s Doctrines of Land and Water Use	153
Institutionalists and the Development of the Modern Law	153
The Theory of Water Rights in Blackstone’s <i>Commentaries on the Laws of England</i>	154
Natural Law, Positivism, and Property Theory	155
The Relationship of Common Law and Custom	156
Custom and Time Immemorial	157
Absolute and Relative Property and Social Contract Theory	158
Property as an Absolute Personal Right or Natural Right	159
The Natural Basis of Property Titles in Use and Occupation	160
The Distinction between Use and Title	160
Occupation as the Natural Source of Title	160
Explaining the Creation and Vesting of Titles	163
The Taxonomy of Title Rights	164
Incorporeal Hereditaments	165
Definition of Incorporeal Property	166
The Nature of Incorporeal Rights—Advowsons	166

Rights of Common	167
Ways	169
Prior Appropriation, Competition, and Monopoly—The Case of Franchises	169
‘Transient’ Property and Title by Prior Appropriation—The Case of Water	172
Water as Personal Property with Real Qualities	174
Water as ‘Qualified Property’	175
Hale’s <i>De Jure Maris</i>	177
‘Concerning the Interest of Fresh Rivers’—Ownership of Soil of Streams	178
‘Of the Right of Prerogative in Private of Fresh Rivers’— Royal Franchises and Supervision	179
‘Concerning Publick Streams’—Public Law Rights in Rivers as Highways	179
The Doctrine of Dedication of Private Goods to Public Use	180
Blackstone’s Analysis of Remedial Law	180
Tort Remedies for Possession and Property	181
The Complexity of Remedy-based Common Law	181
Romanizing the Forms of Action	182
Injuries to Real Rights: Disseisin	182
Injuries to Property Enjoyment: Trespass	183
Injuries to Property Enjoyment: Nuisance	184
Nuisance to Corporeal Hereditaments	185
Protection of Incorporeal Rights of Grant from Nuisance	188
The Forms of Action for Nuisance	189
Self-help to Abate the Nuisance	191
5. Appropriation Theory in the Courts	193
Natural Right and Prescription Ideas in the Courts at the Time of Blackstone	193
The Modern Doctrine of Prescription and Presumed Grant	194
Prescription for Incorporeal Property and 1189	194
Reasonableness and Necessity in Presumptions of Grant	195
Reasonableness and the Status of the Presumed Grant	196
The Fiction of the Lost Modern Grant	197
The Policy of Prescription Doctrine	201
<i>Brown v. Best</i>	201
Blackstonian Prior Appropriation Theory in the Courts	204
Kames’ Riposte—Romanist Natural Rights	204
English Appropriation Doctrine c.1800	207

<i>Bealey v. Shaw</i> and the Adoption of Prior Appropriation Theory	207
Applications of the Blackstonian Doctrine	213
Equity Leads the Law	217
Blackstonian Appropriation Theory Revived in the Court of King's Bench	220
The Generalization of Appropriation Theory	222
Reform of the Prior Appropriation Theory— <i>Mason v. Hill</i>	226
Rights in Artificial Watercourses	232
<i>Arkwright v. Gell</i>	232
<i>Magor v. Chadwick</i>	238
<i>Wood v. Waud</i>	241
Artificial Conduits and Artificially Obtained Water	243
Local Custom and Rights in Artificial Channels	245
Non-riparian Statutory Rights to Water: The Canal and Utility Cases	252
Refining the Factual Presumption of Prescriptive Title	258
Liability for Escapes and <i>Sic Utere Tuo</i> before the Rule of <i>Rylands v. Fletcher</i>	259
Fault Liability for Flooding	260
Subterranean Watercourses and the Plenitude of Ownership	261
6. The Establishment of the Modern Riparian Doctrine	268
The Influence of Civilian and American Riparian Doctrine in the Nineteenth Century	268
Roman Doctrine and the Rise of Treatise Literature	268
Romanism in the Modern Courts	270
American Civilianism and Riparian Law	271
<i>Tyler v. Wilkinson</i> and the Story Doctrine	274
A Closer Look at <i>Sic Utere Tuo</i>	276
After <i>Tyler v. Wilkinson</i>	279
The Role of Gale's <i>Law of Easements</i>	282
A Doctrinal Terminus	282
<i>Embrey v. Owen</i> : The Arguments	283
<i>Embrey v. Owen</i> : The Decision	287
Acceptance and Elaboration of the <i>Embrey</i> Doctrine	290
Affirmation by the House of Lords: <i>Miner v. Gilmour</i>	292
The <i>Embrey</i> Test and Jury Directions	294
Completing the Structure of Water Law: Subterranean Waters; Indefinite Surface Waters; and Assignability	296

Rights in Underground Watercourses—Theorizing in the Court of Exchequer	296
Rights in Indefinite Surface Waters	300
<i>Chesmore v. Richards</i> : Indefinite Waters and Assignability	302
<i>Bradford Corporation v. Pickles</i> : Motive and the Exercise of Property Rights	315
Assignability of Water Rights and the Appurtenancy Rule	316
Bramwell’s Commodification Experiment Rejected	320
Physical Interference with River Channels	324
Lord Blackburn and the Scots Theory of Riparianism	325
Conclusion	328
Internal and External Interpretation of the Law	328
Harnessing Possession and Usufruct	329
The Economic Ideology Account	331
The Transaction Costs Account	336
Evidence and Doctrine: ‘Fact’ Becomes ‘Law’	343
Institutional Design and the ‘Tragedy of the Commons’	346
Public Power and Private Rights	350
<i>Bibliography</i>	353
<i>Index</i>	391