A History of Water Rights at Common Law

JOSHUA GETZLER

OXFORD UNIVERSITY PRESS
# Contents

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

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 *Injuria* and *Damnum* 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 Institutionalist Distinctions 65  
Common Ownership Contrasted with *Res Communes* 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 *in Rem* Actions 74  
*Ius* and *Ius in Re Aliena* 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  
*Usucapio* 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
### Contents

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

Ancient Use 117
The Use of the Maxim *Sic Utere Tuo ut Alienum non Laedas* 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 *Injuria Sine Damno* 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 *Commentaries on the Laws of England* 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
## Contents

Rights of Common

Ways

Prior Appropriation, Competition, and Monopoly—The Case of Franchises

‘Transient’ Property and Title by Prior Appropriation—The Case of Water

Water as Personal Property with Real Qualities

Water as ‘Qualified Property’

Hale’s *De Jure Maris*

‘Concerning the Interest of Fresh Rivers’—Ownership of Soil of Streams

‘Of the Right of Prerogative in Private of Fresh Rivers’—Royal Franchises and Supervision

‘Concerning Publick Streams’—Public Law Rights in Rivers as Highways

The Doctrine of Dedication of Private Goods to Public Use

Blackstone’s Analysis of Remedial Law

Tort Remedies for Possession and Property

The Complexity of Remedy-based Common Law

Romanizing the Forms of Action

Injuries to Real Rights: Disseisin

Injuries to Property Enjoyment: Trespass

Injuries to Property Enjoyment: Nuisance

Nuisance to Corporeal Hereditaments

Protection of Incorporeal Rights of Grant from Nuisance

The Forms of Action for Nuisance

Self-help to Abate the Nuisance

5. Appropriation Theory in the Courts

Natural Right and Prescription Ideas in the Courts at the Time of Blackstone

The Modern Doctrine of Prescription and Presumed Grant

Prescription for Incorporeal Property and 1189

Reasonableness and Necessity in Presumptions of Grant

Reasonableness and the Status of the Presumed Grant

The Fiction of the Lost Modern Grant

The Policy of Prescription Doctrine

*Brown v. Best*

Blackstonian Prior Appropriation Theory in the Courts

Kames’ Riposte—Romanist Natural Rights

English Appropriation Doctrine c.1800
## Contents

*Bealey v. Shaw* 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—*Mason v. Hill* 226

Rights in Artificial Watercourses 232

*Arkwright v. Gell* 232

*Magor v. Chadwick* 238

*Wood v. Waud* 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 *Sic Uttere Tuo* before the Rule of *Rylands v. Fletcher* 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

*Tyler v. Wilkinson* and the Story Doctrine 274

A Closer Look at *Sic Uttere Tuo* 276

After *Tyler v. Wilkinson* 279

The Role of Gale's *Law of Easements* 282

A Doctrinal Terminus 282

*Embrey v. Owen*: The Arguments 283

*Embrey v. Owen*: The Decision 287

Acceptance and Elaboration of the *Embrey* Doctrine 290

Affirmation by the House of Lords: *Miner v. Gilmour* 292

The *Embrey* Test and Jury Directions 294

Completing the Structure of Water Law: Subterranean Waters; Indefinite Surface Waters; and Assignability 296