What Can a Riparian Proprietor Do

Stanley V. Kinyon
WHAT CAN A RIPARIAN PROPRIETOR DO?

By STANLEY V. KINYON*

It has been said that natural streams exist by the bounty of Providence for the benefit of the lands through which they flow.¹ Be that as it may, the fact remains that riparian proprietors on such streams who desire to avail themselves of that benefit often find confusion and contradiction in the law as to their rights and privileges. Perhaps this is due to the inherent elusiveness of flowing water and the difficulty of applying accepted legal concepts to situations in which it is involved. Perhaps it is due more to a misunderstanding of fundamental principles, or to a lack of agreement among the courts as to the policy which the law ought to follow in respect to water resources. Whatever the source of this confusion, it might well be said:

"Unblessed is the riparian proprietor, for he knows not where he stands."

In many cases one finds statements to the effect that there is no ownership of flowing water—that riparian proprietors have "no property in the water itself, but a simple use of it while it passes along."² Such statements lead only to confusion since it is not apparent in what sense the terms "ownership" and "property" are used. What do you mean when you say that one owns something or has property in it? A volume could be written on that question alone. In the opinion of some authorities, ownership or the having of property in a thing merely means that one has an indefinite number of rights, powers, privileges and immunities in respect to it.³ In other words, one who has a right to the exclu-

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³Thus it was said in Transcontinental Oil Co. v. Emmerson, (1921) 298 Ill. 394, 131 N. E. 645: "Property itself, in a legal sense, is nothing more than the exclusive right of possessing, enjoying and disposing of a thing which of course, includes the use of a thing." And again: "According to these definitions of property there is no such thing as tangible property or corporeal property." In 1924 the Illinois court again had occasion to re-
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sive possession of a thing, or the privilege of using, occupying or enjoying it, or the power to dispose of it, or a combination of these and others, owns or has property in it. If this opinion is sound, then the statement that there can be no ownership of, or property in, flowing water is misleading, since it is uniformly admitted that under the common law four riparian proprietors on a watercourse do have rights, powers and privileges in respect to the use, appropriation and enjoyment of the flowing water. Perhaps these rights, powers and privileges are not as absolute or unqualified as one's rights, powers and privileges in respect to other things, but they arise out of the possession of riparian land, and are recognized and protected as property.

mark, in Shedd v. Patterson, (1924) 312 Ill. 371, 144 N. E. 5, that "In the law 'property' is not the material object itself but the right and interest which one has in it to the exclusion of others." In McInnes v. McKay, (1928) 127 Me. 110, 141 Atl. 699, the court said: "Property in legal conception is the total of rights and powers incident to a thing rather than the thing itself." See also the Restatement of the Law of Property, ch. I, Introductory Note.

A number of Western states have never adopted the common law principles of riparian rights, while others have partially or wholly repudiated them. A list of these states is to be found in Mr. Wiel's recent article, Fifty Years of Water Law, (1937) 50 Harv. L. Rev. 252, 259.

It is interesting to note that Blackstone, in speaking of such things as air and water, used this language: "A man can have no absolute permanent [italics added] property in these, as he may in the earth and land since these are of a vague and fugitive nature." Bl. Com., Book II, ch. XXV, P. 395. And in Union Mill & Min. Co. v. Ferris, (C.C. Nev. 1872) 2 Sawy. 176, Fed. Case No. 14,371, p. 601, it was said: "All have a usufruct; none have any absolute [italics added] property in the water, ... ." In McCarter v. Hudson County Water Co., (1905) 70 N. J. Eq. 695, 65 Atl. 489, the court said at page 707: "Such water [in lakes and streams] in its natural state (so far as respects private ownership thereof) is not personal, but real property, being as much a part of the land itself as the soil and rocks. In this aspect it is viewed by the common law, which holds that he who owns the soil owns all above it and all beneath it. But in view of the transient and flowing nature of water, the landowner's property therein is not absolute but qualified. In a sense he owns it while it is upon his land, but his ownership is limited to a usufructuary interest, without right to divert any from its natural course, saving for the limited uses that naturally and of necessity pertain to a riparian owner, ... ."

"His rights are not easements or appurtenances to his holdings. They are not the rights acquired by appropriation or by prescriptive use. They are attached to the soil and pass with it." Hargrave v. Cook, (1895) 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390. Similar statements are to be found in Elliott v. Fitchburg R. R., (1852) 10 Cush. (Mass.) 191; Benton v. Johnson, (1897) 17 Wash. 277, 49 Pac. 496; Union Mill & Min. Co. v. Dangberg, (C.C. Nev. 1877) 81 Fed. 73; Lawrie v. Silsby, (1904) 76 Vt. 240, 56 Atl. 1106.

What is the nature of these property rights and privileges which a riparian proprietor has in respect to the flowing water on his land? Are they different from other rights and privileges in respect to the use of land and the things on or in it? It is often asserted that riparian proprietors have "equal rights" in the use and enjoyment of the watercourse. What is meant by that? Does it mean that every proprietor has an equal privilege to do what he pleases with the water while it is on his land? Does it mean that each is entitled to take the same quantity of water from the stream that each of the others takes? Does it mean that each has an equal right to have the stream continue flowing through his land unaffected by the acts of others? Or does it mean that all proprietors have equal privileges and equal rights in the use and enjoyment of the stream irrespective of who makes the first use? One cannot be sure just what each court has meant by its assertion that riparian proprietors have "equal rights," and it is quite certain that they have not all meant the same thing by it. One wonders if they do not, in general, mean this: (1) no proprietor has a better or greater privilege to use the water than has any other, irrespective of who made the first use; and (2) each proprietor is entitled to the same legal protection in his use of the water as is accorded every other proprietor. If this be the correct interpretation of "equal rights" as applied to riparian proprietors, the phrase simply means that the law recognizes no priorities or preferences among them and that it accords to each man the same freedom and protection in the use of his property that it accords to every other man.

It is also asserted that the rights and privileges of riparian proprietors are correlative, not absolute. In other words, a pro-

For tax purposes: San Francisco v. Alameda County, (1936) 5 Cal. (2d) 243, 54 P. (2d) 462.


The term "rights" apparently is used in most of the cases to mean both one's legal freedom to act (privilege) and one's legal claims in respect to the acts of others (rights). Keeping the term "rights" to its narrower meaning, and using the term "privileges" when speaking of a riparian proprietor's legal freedom to use water is a definite aid to clear thinking in dealing with the legal relations of riparian proprietors.

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A riparian proprietor is not absolutely free to do as he pleases with the water in the stream, but must have regard for the interests of the other proprietors. His privileges of use are qualified by the rights of the others, and their privileges of use are, in turn, qualified by his rights. In a sense, rights and privileges are not strictly correlative in the way that rights and duties are correlative. Privileges qualify rights or rights qualify privileges, depending on which way you look at the matter. But with this in mind it is perhaps permissible to speak of the rights and privileges of riparian proprietors as correlative. It has sometimes been thought that this principle of correlative rights and privileges is something unique and applicable only to the law of riparian rights. Such is not the case. Every landowner, in using his land, must have regard for his neighbor. If I own land, I am generally considered as being legally free to use it as I see fit. Nevertheless, my neighbor's recognized rights limit my privileges of use and subject me to liability if I blast on my land so as to bring his house down, or dig in my land so that his land subsides, or operate my factory so that noxious fumes from my chimney destroy his trees and flowers. Likewise, my (equal) rights operate as a limitation on his privileges in using his land, and give me a cause of action if his use is tortious in respect to me. Our rights and privileges are correlative, not absolute.

One physical fact, however, gives the principle of correlative rights and privileges a peculiar and added significance when applied to flowing water. That is the fact that flowing water is fugitive, not stationary. Soil, rocks, trees, houses, and the like normally stay in one place. A use of them, by the owner of the land where

252: "But the logical result from the correlative rights of riparian proprietors would seem to be that each must use his own right so as not to deprive the others of an equal enjoyment of their same rights."


11This idea is often expressed in the maxim: "Sic utere tuo ut alienum non laedas" use your own property in such a manner as not to injure that of another. But consider the remarks of Erle, J., in Bonomi v. Backhouse, (1858) El. Bl. & El., 96 Eng. Com. L. Rep. 622, 641: "The maxim, Sic utere tuo ut alienum non laedas, is mere verbiage. A party may damage the property of another where the law permits; and he may not where the law prohibits; so that the maxim can never be applied till the law is ascertained; and, when it is, the maxim is superfluous."

they are, sometimes affects his neighbor in some way; but such use does not ordinarily deprive the neighbor of the soil, rocks, trees, etc., on his land. Water, on the other hand, does not stay put. It has the urge to roam and, unless confined or frozen, flows from one parcel of land to another. It is not susceptible, in its natural state, of permanent division into separate tracts or plots. Each particle of water successively occupies the lands of all the proprietors on the watercourse. Consequently, any extensive use of water by one proprietor while it is on his land may not only affect his neighboring proprietor, but may actually deprive him of water which would otherwise come to his land. Although riparian proprietors on a stream are not tenants in common as that term is generally used, they have a common interest in the stream. This fact increases the regard which they must have for each other's interests. In a sense perhaps, it intensifies the correlative character of their rights and privileges. Riparian proprietors are necessarily more restricted in what they can do with water than in what they can do with other things on their land, but that does not mean that use of water and use of other things are governed by different principles of law. It simply means that the effects of the different uses on others are different, and that the principle of correlative rights and privileges imposes greater restrictions on one use than on another.

Assuming that riparian proprietors have "equal rights," whatever that may mean, and that their rights and privileges are correlative, there is still to be considered the extent of these rights and privileges. What rules or principles have the courts adopted in determining the extent of the individual rights and privileges of each proprietor? What facts must exist before one proprietor can be heard to complain of another's use? When does one proprietor's use cease to be within his privilege and constitute an invasion of another's right? It is in trying to answer these questions that the courts have met with their greatest difficulty. In discussing them it should be observed that no question of public rights and privileges in respect to navigation and public use of waters is involved. We are dealing with the rights and privileges of riparian proprietors inter se. It should further be noted that the discussion involves only those rights and privileges which riparian proprietors have by virtue of the fact that they possess riparian land, and does not involve rights and privileges arising by grant, prescription or eminent domain.
THE "NATURAL FLOW" IDEA

"Aqua currit et debet currere, ut currere solebat." "Water flows, and ought to flow as it has been wont to flow." This is the touchstone or philosophy which a number of courts have adopted in framing their rules as to the extent of individual riparian rights and privileges. The idea seems to be that God made streams and put them on land, and that when man acquires that land he also acquires, by the law of nature (jure naturae), the right to have the streams continue flowing in their natural quantity and quality. According to this view each riparian proprietor on a watercourse is regarded as having a right that the stream continue to flow over and through his land in its natural condition, undiminished and unpolluted by others. This right, however, is not wholly unqualified since, if it were, the proprietor at the mouth of the stream would be the only one to have any substantial privilege of using it. All others would be limited to those uses which did not affect the natural flow or quality of the stream in any way. Thus the courts which adopt this view of riparian rights hold that each proprietor's right to the natural flow of the stream is qualified by certain limited privileges of use in the others.

The first and greatest of these privileges is the privilege to make "natural" or domestic uses. What could be more natural

\[^{15}\] Kent, Comm. 439. Chancellor Kent's language in reference to this maxim was quoted in full by Baron Parke in the classic English case of Embrey v. Owen, (1851) 6 Exch. 353, 20 L. J. Ex. 212, and has since been referred to in many cases.


\[^{17}\] The earliest case the writer has found in which this privilege is mentioned is Perkins v. Dow, (1793) 1 Root (Conn.) 535. The two cases most frequently cited are Miner v. Gilmore, (1858) 12 Moore, P. C. 131; and Evans v. Merriweather, (1842) 4 Ill. 492. Other cases are cited in footnote 18. The courts have not been in entire agreement as to what are and what are not "natural" or domestic uses of water. Thus in City of Canton v. Shock, (1902) 66 Ohio St. 19, 63 N. E. 600, it is apparently held that diversion of water by the city for the use of its inhabitants is a "natural" use. And in Filbert v. Dechert, (1903) 22 Pa. Sup. 362, a diversion of water to supply the needs of some 800 inmates of an asylum located on the banks of the stream was held to be a domestic use. On the other hand it was definitely held in City of Emporia v. Soden, (1881) 25 Kan. 410, that supplying the inhabitants of a city located on the banks of a
than a natural privilege qualifying a natural right? Although it is often said that this privilege is unqualified and that a proprietor can use water for his "natural" or domestic purposes even though he thereby consume the whole stream,\(^\text{18}\) it has been suggested that his use must not be wasteful or unnecessarily extensive.\(^\text{19}\)

In addition to his privilege to make "natural" uses, each proprietor is regarded under this view as having a limited privilege to make "artificial" or "extraordinary" (i.e., non-domestic) uses of water for such purposes as irrigation, manufacturing, generation of power and the like.\(^\text{20}\) One limitation on this privilege is the requirement that the use be made on or in connection with the use of the proprietor's riparian land.\(^\text{21}\) Another limitation on this privilege to make non-domestic uses is the requirement that they must not cause "any interruption of or interference with the stream was not a domestic or "natural" use. In some of the early cases in the semi-arid western states it was argued that use of water for irrigation was a "natural" or domestic use. See Rhodes v. Whitehead, (1863) 27 Tex. 304. But this argument has not been adopted. See Stacy v. Delery, (1909) 57 Tex. Civ. App. 242, 122 S. W. 300.

\(^\text{18}\)Canton v. Shock, (1902) 66 Ohio St. 19, 63 N. E. 600; Spence v. McDonough, (1889) 77 Iowa 460, 42 N. W. 371; and Filbert v. Dechert, (1903) 22 Pa. Super. 362, seem to be the only cases in which this proposition has actually been held. The statements in Miner v. Gilmore and Evans v. Merriweather, (Supra, footnote 17) were obiter as were the statements in the following cases: Stein v. Burden, (1856) 29 Ala. 127; Ferrea v. Knipe, (1865) 28 Cal. 341; Arnold v. Foote, (1834) 12 Wend. (N.Y.) 330; Hazzard v. Case, (1879) 46 Wis. 391, 1 N. W. 66; Nielson v. Sponer, (1907) 46 Wash. 14, 89 Pac. 155; Chatfield v. Wilson, (1858) 31 Vt. 358; People v. Hulbert, (1902) 131 Mich. 155, 91 N. W. 211.


the rights of the lower riparian owner."\textsuperscript{22} It does not clearly appear in the cases exactly what is meant by this requirement, but, since the right of other proprietors is to have the stream flow in its natural condition, it would seem that the privilege extends only to those non-domestic uses which do not materially or unreasonably retard, diminish or pollute the natural flow of the stream.\textsuperscript{23} What constitutes a material or unreasonable retardation, diminution or pollution is not entirely clear. In some jurisdictions any perceptible or noticeable effect on the stream seems to be regarded as material and unreasonable, while in others a more substantial effect seems to be necessary.\textsuperscript{24}

In those jurisdictions which adopt this "right to the natural flow" view of riparian rights and privileges, the situation would seem to be this:

(1) Each riparian proprietor on the watercourse has a right in respect to the other proprietors thereon that the stream continue to flow through his land in its natural condition, not perceptibly\textsuperscript{25} retarded, diminished or polluted except by the privileged uses of the others. Or, to put it another way, each proprietor has a right that the others shall not make unprivileged uses which perceptibly affect the stream.

(2) Each riparian proprietor on the watercourse has a privilege in respect to the other proprietors thereon to use the water for his own domestic ("natural") purposes, and for such non-

\textsuperscript{22}The phrase quoted in the text is taken from the following passage in Pennsylvania R. R. v. Miller, (1886) 112 Pa. St. 34, 41, 3 Atl. 780, "The principle established by a long line of decisions is that the upper riparian owner has the right to the use of the stream on his land for any legal purpose, provided he returns it to its channel uncorrupted and without any essential diminution; that in all such cases the size and capacity of the stream is to be considered and that any interruption of or interference with the rights of the lower riparian owner [italics added] is an injury for which an action will lie, unless too trifling for the law to notice."


\textsuperscript{24}In many of the more recent cases it is not clear whether the court is talking about unreasonable diminution of the "natural flow" or unreasonable use under the "reasonable use" doctrine discussed below. See for example the opinions in Meng v. Coffee, (1903) 67 Neb. 500, 93 N. W. 713; and Harvey Realty Co. v. Wallingford, (1930) 111 Conn. 352, 150 Atl. 60.

\textsuperscript{25}In Kensit v. Great Eastern Ry., (1883) L. R. 23 Ch. Div. 566, L. R. 27 Ch. Div. 122, the court held that although defendant was making a wholly unprivileged (non-riparian) use, he was not liable because his use had no sensible or perceptible effect on the stream.
domestic purposes on or in connection with the use of his riparian land as do not materially or unreasonably retard, diminish or pollute the natural flow of the stream.

This "natural flow" principle of riparian rights and privileges leads to the following results:

(a) An unprivileged use of water—a "non-riparian" use, for example—which perceptibly affects the natural flow of the stream on another's land, violates that other's right and is actionable by him even though it interferes with no use that he is making and causes him no harm whatsoever.26

(b) The cause of action arises at the time the natural flow is affected by the unprivileged use, and the period of prescription starts running from that time.27

(c) If the unprivileged use is continuous or recurrent, an injunction may properly be granted to prevent the acquisition of a prescriptive privilege even though no harm has been caused.28

(d) Since his privilege of use is limited to uses made on or in connection with the use of the riparian land, a riparian proprietor cannot create in a non-riparian a privilege of use which will be valid as against other proprietors.29 In other words, he cannot


27The best discussion of this point is found in Half Moon Bay Co. v. Cowell, (1916) 173 Cal. 543, 160 Pac. 675; and Pabst v. Finmand, (1922) 190 Cal. 124, 211 Pac. 11, in connection with the court's discussion of non-riparian uses. The present state of the law in California on this point is discussed in footnote 54.


29Stockport Waterworks Co. v. Potter, (1864) 3 H. & C. 300; Ormerod v. Todmorden Mill Co., (1883) L. R. 11 Q. B. D. 155; Harvey Realty Co. v. Wallingford, (1930) 111 Conn. 352, 150 Atl. 60; Hendrix v. Roberts Marble Co., (1932) 175 Ga. 389, 165 S. E. 223; Roberts v. Martin, (1913) 72 W. Va. 92, 77 S. E. 535; Gould v. Eaton, (1897) 111 Cal. 639, 117 Cal. 539, 49 Pac. 577. A series of California decisions following a dictum in Anaheim Union Water Co. v. Fuller, (1907) 150 Cal. 327, 88 Pac. 978, established the anomalous rule that when a part of a tract of riparian land not in contact with the stream is severed by conveyance from the rest of the tract, the grantee of this severed parcel will get riparian rights and privileges in the stream if the conveyance expressly so provides, but not otherwise. Strong v. Baldwin, (1908) 154 Cal. 150, 97 Pac. 178; Miller &
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grant a normal easement or profit in the use of the stream good as against third persons unless the grantee limits his use under such grant to the grantor's riparian land.30

This "natural flow" theory or principle of riparian rights, which may have had its origin in French or Civil Law, was first expounded in this country by Justice Story and Chancellor Kent; and it has been pointed out that their views were subsequently adopted by the English courts.31 Whatever may be its origin and history, it is the basis of the present law of riparian rights in England,32 and has a substantial following in this country.33 Even in jurisdictions which, in actual result, do not adopt this theory of the law, cases can be found which echo and re-echo the classic language in which Story and Kent expressed their opinions. In fact, this parrot-like tendency of some courts to quote passages from leading cases without due regard for the real significance of the language quoted has undoubtedly led to much of the confusion in the law.

This "natural flow" view has the practical advantage of being

Lux v. J. G. James Co., (1919) 179 Cal. 689, 178 Pac. 716. The recent constitutional amendment in California relating to water rights, discussed in footnote 54 infra, undoubtedly affects the rule of Gould v. Eaton (supra) but does not necessarily affect this anomalous situation.

30Duckworth v. Watsonville Water Co., (1907) 150 Cal. 520, 110 Pac. 927. In discussing the non-riparian plaintiff's rights under the conveyance, the court said at page 526: "Grimmer [the riparian grantor] could not by a transfer of his riparian rights sell to the plaintiff, as against third persons having interests in the water, the right to use the water upon any land, riparian or non-riparian, except his own, to which it originally attached. His deed operated to prevent him from complaining of a diversion, but it did not affect other parties. It follows therefore, that Duckworth [the plaintiff] did not obtain anything by the Grimmer deed except the right to use the water of the outlet upon the Grimmer land [italics added]. . . . It did not in any respect add to his right to take water from the land for use on the Duckworth land, as against the defendants [other proprietors], or as against anyone except Grimmer and his successors in interest."

31Wiel, Waters; American Law and French Authority, (1919) 33 Harv. L. Rev. 133. Mr. Wiel develops the idea that our present American and English law had its origin in the writings of Story and Kent, and that they, in turn, probably got many of their ideas from the French and Civil Law with which they were well acquainted.

32See the English cases in footnotes 26 and 29.

fairly definite in some of its legal consequences. Under it, each riparian proprietor can know within certain limits what he can and cannot do with the water on his land. A serious objection to this view, however, is that it is non-utilitarian in objective. It prohibits many beneficial, non-harmful uses simply because they materially diminish or pollute the natural flow of water. It permits a riparian proprietor to play "dog in the manger," not using the water himself but insisting that his neighbor above refrain from making a valuable use of it.

THE "REASONABLE USE" IDEA

In some jurisdictions a fundamentally different view or principle of riparian rights and privileges prevails. This is the so-called "reasonable use" view. The idea underlying this view is that natural streams exist primarily for the use and benefit of mankind, not merely to be maintained in their natural state. This view emphasizes the riparian proprietor's privilege of use rather than his right to have the stream flow in any particular way. Each proprietor is regarded as having a privilege to use the water for any beneficial purpose, provided such use is reasonable in respect to the other proprietors on the stream, and does not unreasonably interfere with their beneficial uses. Reasonable use is the sole measure or test of riparian privileges, and, since a use cannot be said to be unreasonable in respect to another unless it causes him some harm or inconvenience, a use is always privileged when it causes no harm.

34"The fundamental principle upon which the authorities all go is this: That every proprietor of land through or by which a stream of water flows, may make a reasonable use of it for any [italics added] useful purpose." Union Mill & Min. Co. v. Ferris, (C.C. Nev. 1872) 2 Saw. 176, Fed. Cas. No. 14,371.

35"But the logical result from the correlative rights of riparian proprietors would seem to be that each must use his own right so as not to deprive the others of an equal enjoyment of their same rights. [citations] It would seem to follow that reasonable use is the only limit that can be set to the exercise of these rights [italics added]. This is the rule in New Hampshire, where they repudiate the English doctrine, and hold it to be a question of fact whether the use of the water made by a riparian owner for his own purposes is, in all the circumstances, a reasonable use." Lawrie v. Silsby, (1904) 76 Vt. 240, 252, 56 Atl. 1106. See also Bassett v. Salisbury, (1862) 43 N. H. 569; Red River Roller Mills v. Wright, (1883) 30 Minn. 249, 15 N. W. 167.

36That the plaintiff, to recover, must show actual damage or harm as a result of defendant's use of the stream has been held in the following cases: Cooper v. Hall, (1832) 5 Ohio 321; McElroy v. Gable, (1856) 6 Ohio St. 187; Elliott v. Pitchburg R. R., (1852) 10 Cush. (Mass.) 191; Stratton v. Mt. Hermon Boys' School, (1913) 216 Mass. 83, 103 N. E.
The determination of the reasonableness or unreasonableness of a use under this view is generally regarded as a question of fact, to be determined by court or jury in each particular case on the facts of that case. It is a question to be determined from an objective standpoint, taking into consideration the interests of both parties and also the interests of the community. The question is not whether the use is reasonable from the user's point of view, but whether, in view of the consequences of the use, it is one which reasonable men generally would regard as proper.

Some of these cases are definitely based on the theory that a use which causes no harm is reasonable. Others are based on the theory that an action against a riparian proprietor for wrongful use of the stream is trespass on the case, and that actual damage to plaintiff is therefore an essential element of his cause of action. Both theories, however, are inconsistent with the "natural flow" and "material diminution, etc." principle.

When a court or jury determines that a use is reasonable or unreasonable it is, strictly speaking, drawing a conclusion from facts rather than determining a fact. Determining unreasonableness is much like determining negligence in this respect; and although the courts seldom do so, it would be more accurate to say that it is a mixed question of law and fact. See Cason v. Florida Power Co., (1917) 74 Fla. 1, 76 So. 535 (case involving use of subterranean water and the application of the principle of "reasonable use" thereto).

In determining what is a reasonable use, regard must be had to the subject matter of the use; the occasion and manner of its application; the object, extent, necessity, and duration of the use; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury to the other party; the state of improvement of the country in regard to mills and machinery, and the use of water as a propelling power; the general and established usages of the country in similar cases; and all the other and ever varying circumstances of each particular case, bearing upon the question of the fitness and propriety of the use of the water under consideration." Mitchell, J., in Red River Roller Mills v. Wright, (1883) 30 Minn. 249, 253, 15 N. W. 167. See also the other cases cited in footnote 38.
under the circumstances. Determining reasonableness is thus essentially an evaluating and weighing process. On one side of the scales, figuratively speaking, is the utility or total objective value of the use complained of. This is determined from a consideration of such facts as the social importance and necessity of the use, its purpose, its extent in view of the size of the stream and the needs of others, the manner in which it is being made, and its suitability to the size and character of the stream. On the other side of the scales is the gravity or objective seriousness of the harm ensuing from the use. This depends upon such facts as the amount or degree of harm, the social importance and necessity of the interests harmed, and whether the proprietor who is harmed could avoid the harm without much difficulty. If, in view of all the facts, the utility or total objective value of the use outweighs the gravity or seriousness of the harm which it causes, the use is reasonable; otherwise it is not.

In those jurisdictions which adopt this "reasonable use" view of riparian rights and privileges, the situation is apparently this:

(1) Each riparian proprietor on a watercourse has a privilege in respect to the other proprietors thereon to use the water for any purpose he wishes, provided his use is reasonable in respect to such other proprietors.

(2) Each riparian proprietor on a watercourse has a right that other proprietors thereon shall not make uses of the water which are unreasonable in respect to him. Or, to put it another way, each proprietor has a right that the others shall not unreasonably interfere with his reasonable use of the stream.

This "reasonable use" principle leads to the following results:

(a) No proprietor has a right to have the mere natural integrity of the stream maintained.42

(b) One is subject to no liability for making a use of water unless that use causes harm to another.43

40 For the purpose of ascertaining what is reasonable, both sides of the question must be looked at. It is not sufficient to ask, is the person who does what is complained of using his property reasonably? The question is, is he using it reasonably, having regard to the fact that he has a neighbor? Theobald, the Law of Land, 62.

41 This rule is not expressly stated in any of the decided cases. It seems to the writer, however, to be a sound conclusion from the cases cited, and is analogous to the rule stated in 2 Restatement of Torts, sec. 291, in respect to the unreasonableness of the risk of harm in determining negligence.

42 The cases cited in footnote 36, holding that a riparian proprietor is not liable for using the stream unless his use causes actual damage or harm, seem to lead to this conclusion.

43 Cases cited in footnote 36.
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(c) A use of water, whether for "riparian" or "non-riparian" purposes, is privileged so long as it is reasonable.44

(d) A cause of action does not arise in respect to a use until that use causes harm and is unreasonable; and the period of prescription does not start running until that time.45

(e) Since his privilege of use is not wholly limited to uses made on or in connection with the use of the riparian land, a riparian proprietor can make reasonable "non-riparian" uses and can grant to non-riparians a privilege as against other proprietors to do the same.46 In other words, a riparian proprietor can grant to non-riparians a normal easement or profit in the use of the stream.47

This "reasonable use" theory or principle apparently was first fully developed in New Hampshire,48 Minnesota49 and Vermont50. Some other jurisdictions, notably California51 and Washington,52

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44 In a few cases the courts have made no distinction between "riparian" and "non-riparian" uses. See Lawrie v. Silsby, (1904) 76 Vt. 240, 56 Atl. 1106; Gillis v. Chase, (1892) 67 N. H. 161, 31 Atl. 18; Atchison Ry. v. Shriver, (1917) 101 Kan. 257, 166 Pac. 519. In other cases the courts distinguish between "riparian" and "non-riparian" uses, and hold that the latter are unreasonable as a matter of law when they cause harm to another. See Stratton v. Mt. Hermon Boys' School, (1913) 216 Mass. 83, 103 N. E. 87; Garwood v. New York Cent. & H. R. R., (1881) 83 N. Y. 400; Jones v. Conn, (1901) 39 Or. 30, 64 Pac. 855, 65 Pac. 1068; Texas Co. v. Burkett, (1927) 117 Tex. 17 Tex. 16, 296 S. W. 273; Brown v. Chase, (1923) 125 Wash. 542, 217 Pac. 23. These cases are to be distinguished from those which follow the "natural flow" doctrine and hold that a "non-riparian" use is wholly unlawful and actionable even when it causes no harm. (See footnote 26.)


47 "It would seem to follow that if the right to take water from a spring or a stream is an interest in the land itself, that such right is grantable as a right in gross or appurtenant, and is assignable, descendent, and devisable; and such, we think, has always been the view entertained and practiced upon in this State." Lawrie v. Silsby, (1904) 76 Vt. 240, 56 Atl. 1106.


49 Red River Roller Mills v. Wright (1883) 30 Minn. 249, 15 N. W. 167; Pinney v. Luce, (1890) 44 Minn. 367, 46 N. W. 561; St. Anthony Water-Power Co. v. Minneapolis, (1889) 41 Minn. 270, 43 N. W. 56; Meyers v. Lafayette Club, (Minn. 1936) 266 N. W. 861.


51 Lux v. Haggin, (1886) 69 Cal. 255, 10 Pac. 674.

52 Benton v. Johncox, (1897) 17 Wash. 277, 49 Pac. 495.
started out with the "natural flow" idea but sought to liberalize it by expanding the privilege of making "extraordinary" or non-domestic uses on riparian land. Use for irrigation of riparian land, for example, was held to be privileged although it materially diminished the natural flow of the stream, provided such use was reasonable under the circumstances of the case. However, such jurisdictions continued until recently to hold that non-riparian uses were wholly unlawful and unprivileged. In a number of other states the cases seem to be more in accord with this view than with the "natural flow" doctrine, but the language in many of these cases is confusing.

It has sometimes been assumed that the "natural flow" principle is the common law principle, and that the "reasonable use" idea is simply a modification of that principle. Careful analysis, however, would seem to indicate that such is not the case. Perhaps the "reasonable use" view was developed after the "natural flow" doctrine, but it is not merely a variation of it. The two


54 In 1923 the supreme court of Washington in Brown v. Chase, 125 Wash. 542, 217 Pac. 23, extensively reviewed its prior decisions and held that there was no liability for non-riparian diversion unless it caused harm to some riparian proprietor. In 1928 a constitutional amendment was passed in California, article 14, sec. 3, which was construed by the California supreme court in Gin S. Chow v. Santa Barbara, (1933) 217 Cal. 673, 22 P. (2d) 5, to mean that there is no liability for making a non-riparian use of water from a stream unless that use impairs another proprietor's present or prospective reasonable use of the stream. The Oregon Water Code, passed in 1909, (Oregon, 3 Code Ann., sec. 47-101 et seq.), established a comprehensive system of water appropriation and greatly restricted riparian rights and privileges. See In Re Hood River, (1924) 114 Or. 112, 227 Pac. 1065, appeal dismissed in (1926) 273 U. S. 647, 47 Sup. Ct. 245, 71 L. Ed. 821; California Oregon Power Co. v. Beaver Portland Cement Co., (C.C.A. 9th Cir. 1934) 73 F. (2d) 555, affirmed in (1934) 295 U. S. 142, 55 Sup. Ct. 725, 79 L. Ed. 1356.


views spring from fundamentally different concepts as to what people ought to do or refrain from doing with flowing water. They seek to achieve different ends. One view emphasizes the right to the flow of the stream, and seeks to maintain, as nearly as possible, the status quo of nature. The other emphasizes the privilege of use, and seeks to promote the fullest beneficial use of streams by the proprietors thereon.

Those who adopt the "natural flow" principle apparently look at the situation from the standpoint of the stream itself, regarding it as a mystical, non-owned unit in the "negative community" of things, which must be maintained in substantially its natural state and used only for certain traditionally important purposes. The "natural flow" idea finds its source in natural law philosophy. It assumes that the law should follow nature and that each proprietor on a stream has and should have the right to have the stream continue flowing in substantially its natural state through his land. Is this a sound assumption? Should we strive, through the law, to maintain the natural order of things as nearly as possible; or should we strive to change that natural order to suit the social and economic order we desire to establish? Do we, in other branches of the law dealing with the conflicting interests of neighboring landowners, assume that each landowner has and should have the right to compel his neighbor to maintain the natural order of things? Do I, for example, have any right that you, my neighbor, shall not plow up the field of wild flowers on your land whose delightful natural perfume is wafted to me on each natural breeze? Or do we assume that each landowner has the privilege to develop, use, and enjoy his land as he sees fit, so long as he does not unreasonably interfere with his neighbor in the exercise of his equal privilege to do likewise?

Those who adopt the "reasonable use" principle, apparently look at the situation, not from the standpoint of the stream itself, but from the standpoint of the individual proprietors through whose land the stream passes. They regard the stream as an unfixed, transitory part of the land of each proprietor to be used by him, just like any other part of his land, with due regard for the interests of his neighbor.

The "reasonable use" idea is entirely utilitarian in its objective. It places no restraint on beneficial use for any purpose unless that use unreasonably harms another. Its very flexibility makes it adaptable to all sorts of uses in all manner of situations.

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68 See Wiel, Running Water, (1908) 22 Harv. L. Rev. 190.
and permits the solution of each particular case on its own merits under the particular circumstances. It is a principle under which conflicts between riparian proprietors in any locality can be settled according to the standard of the objective reasonable man.

It may be argued that to measure riparian rights and privileges solely on the principle of "reasonable use" is to abandon the determination of individual property rights and privileges to the whim and caprice of juries. If the power of courts to direct, control and set aside verdicts is taken into account, this is true. What then? Are not a great majority of our personal and property rights and privileges determined in the same way under the principles of the law of negligence? Aside from intentional harms and malicious or ultra-hazardous conduct, do we not generally apply to most acts the standard of "reasonable conduct under the circumstances" in determining rights and privileges in respect to person or property?

There are few, if any, "thou shalt"s or "thou shalt nots" under the "reasonable use" doctrine. Under it the riparian proprietor knows only that what he does with the water on his land must be reasonable in respect to other proprietors. His only guide is his sense of fairness and consideration for others. This may, perhaps, be intolerable to those who desire specificity in the law, but it seems to be the situation in an increasing number of jurisdictions.