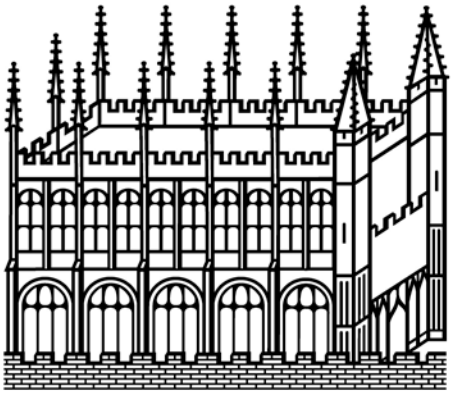

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A Treatise

ON THE

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POLLUTION & OBSTRUCTION

OF

WATERCOURSES;

TOGETHER WITH

A Brief Summary of the various

SOURCES OF RIVERS POLLUTION.

BY

CLEMENT HIGGINS, M.A., F.C.S.,

BARRISTER-AT-LAW,

Formerly Demonstrator of Chemistry at King's College, London.

LONDON:

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PREFACE.

It is to the interest of the public, and to the majority of riparian proprietors, to protect the purity of our rivers, whereas it is generally to the convenience of sanitary authorities and of manufacturers to pollute them.

An attempt is made in this book to place before the protectors of our rivers the nature of their rights and how they may best be protected, and before the polluters of our rivers the extent of their liabilities and how they may best be met.

The object of adding the brief summary of the various sources of rivers pollution is, that the relative importance of any particular act of pollution may become more evident to those who have to advise upon the institution of proceedings under the new Act, or to adjudicate upon those proceedings when brought.

1, Brick Court, Temple,
March, 1877.

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THE LAW

RELATING TO THE

Pollution & Obstruction of Watercourses.

PART I.

The Rivers Pollution Prevention Act, 1876
(39 & 40 Vict. c. 75).

CHAPTER I.

AS TO WHAT CONSTITUTES AN OFFENCE UNDER THE ACT.

THE Rivers Pollution Prevention Act, 1876, makes it an offence under the act (subject as in the act mentioned) to carry into any stream—(1) any solid matter so as to interfere with its due flow, or to *pollute* its waters; (2) any sewage matter; (3) any poisonous, noxious, or *polluting* liquid from any manufacturing process; and (4) any poisonous, noxious, or *polluting* solid or liquid matter proceeding from any mine. The successful working of the act will much depend upon the meaning placed upon the word "*polluting*" as therein used, by those with whom its interpretation rests. It may be comparatively easy to determine whether any particular manufacturing, mining, or other refuse is poisonous or noxious, but it is certainly far more difficult, on account of the different meanings placed upon the word, to say whether it is, or is not,

5-1

polluting (*a*). No attempt has been made by the framers of the act to define the word, but they are content to say merely that the term "*polluting*" shall not include innocuous discoloration (*b*).

Neither do the decisions of the judges, either in Courts of Law or Equity, furnish a definition of the word such as to meet the requirements of the act.

It is, however, requisite for the sake of uniformity, at any rate in principle, of the decisions hereafter to be given under the act, that this word should receive a definite, and, as far as possible, generally received interpretation.

It is with this view that a summary of the expressed opinion of scientific men, the only source of reliable information upon the subject, is here given.

Standards of Purity.

In 1868 a Rivers Pollution Commission was issued, the object of which was to ascertain how far the present use or abuse of rivers for the purpose of carrying off the sewage of towns, and the foul liquids of manufactories, can be prevented without injury to health, or to manufactures —to ascertain how these noxious products can be utilized— and to inquire into the water supply of the localities visited (*c*). In the conclusions and recommendations contained in the Fourth Report of the Commissioners, they say:—"It soon became evident that the question, how to prevent polluting liquids gaining access to running water, could not be successfully answered without first defining what is meant by noxious or *polluting* water. There is no such thing as absolutely pure water in nature, and the

(*a*) There are four chief methods of determining the amount of pollution of a stream, viz:—(1) Chemical analysis of its waters and deposits; (2) Observations upon aquatic plants and mollusks; (3) Microscopic examination of *algæ* and *infusoria*; (4) Estimation of amount of free oxygen in the water.

(*b*) Sect. 20.

(*c*) Rivers Pollution Commission, 4th Report, p. 103.

waters met with in our springs, wells, lakes, rivers, and sewers, form a series gradually increasing in dirtiness; there is actually no definite line of demarcation separating the purest spring water from the filthiest sewage.

"It is, therefore, obvious that, for the purposes of efficient legislation, an arbitrary line must be drawn between waters which are to be deemed *polluting* and inadmissible into streams, and such as may be considered innocuous, and, therefore, admissible into river channels. It will thus become easy, on the one hand, to convict careless or reckless corporations or manufacturers, and, on the other hand, which is equally important, to protect them from the incessant and uncertain litigation that must ensue if no definition of polluting liquids be adopted.

"The enactment of standards of purity, by which the line of demarcation may be arbitrarily drawn, will also ensure equal justice in connection with the subject, throughout all the manufacturing districts of the country. In their absence it is impossible to expect the same pressure to be exerted in a district where rivers are already almost hopelessly spoiled by an industry of enormous local importance, as in one where the evil is only growing out of its commencement, or upon a manufacturer who turns his drainage into a considerable stream, as upon one who at once succeeds in befouling a mere brook."

The standards of purity given at the conclusion of the *fourth* report were somewhat modified in the *fifth* report (that relating to pollutions arising from mining operations and metal manufactures), where they appear in the following form:—

"We recommend the following liquids be deemed polluting and inadmissible into any stream:—

1. *Any liquid which has not been subjected to perfect rest in subsidence ponds of sufficient size for a period of at least six hours,* or *which, having been so subjected to subsidence, contains* in suspension *more than one part by weight of dry organic matter in* 100,000 *parts*

by weight of the liquid, or *which, not having been so subjected to subsidence, contains* in suspension *more than three parts by weight of dry mineral matter, or one part by weight of dry organic matter in* 100,000 *parts by weight of the liquid.*"

The Commissioners say (*d*), with regard to this standard:—"In the case of collieries and coal-working establishments, it will be further necessary to regard coal from the popular point of view, as mineral matter; from an exclusively scientific point of view it is classified with organic substances, but, as far as pollution of rivers is concerned, the popular notion of coal is more pertinent, because the discharge of this substance into running water inflicts no more injury than that caused by the same quantity of sand or other non-poisonous mineral matter, the organic matter of coal being non-putrescible."

This and the two following tests have reference to the discharges from the sewers of towns, and from calico, woollen, linen, jute, silk, and paper works, and from skinneries and tanneries (*e*).

It has been objected to this test that it would be violated by many natural streams, which contain a larger amount of suspended matter (*f*).

From the two counties of Northumberland and Durham, the water poured from collieries into the various rivers amounts to about 70,000,000 gallons per day, the whole of which probably infringes this test (*g*).

Mr. Evans, on behalf of the paper-manufacturing interest, objected to this test, as a chalk water, used in boiling rags, might, by the mere act of boiling, deposit so much carbonate of lime as to render such boiled water a polluting liquid (*h*).

2. "*Any liquid containing* in solution *more than two*

(*d*) R. P. C. 1868, 5th Rep., p. 49.
(*e*) R. P. C. 1868, 4th Rep., p. 104.
(*f*) S. Com. of H. L. 1873, Mr. Crookes' Evid., p. 56.
(*g*) Ibid., Mr. Sanderson's Evid., p. 41.
(*h*) Ibid., p. 50.

parts by weight of organic carbon, or ·3 *parts by weight of organic nitrogen in* 100,000 *parts by weight.*"

This last applies especially to pollution by undefecated sewage, and is one of the most essential of the tests (*i*).

3. "*Any liquid which shall exhibit by daylight a distinct colour when a stratum of it one inch deep is placed in a white porcelain or earthenware vessel.*"

This test might be abandoned without injury to health; it provides against nuisance to the eye (*j*).

This test would prevent alkali manufacturers running the waste product from the manufacture of bleaching powder (mixed chlorides of manganese and iron) into streams; unless Mr. Weldon's process is used, which manufacturers object to being driven to, as it is the subject of a patent (*k*).

4. "*Any liquid which contains* in solution, *in* 100,000 *parts by weight, more than two parts by weight of any metal except calcium, magnesium, potassium, and sodium.*"

The Commissions recommend the suspension of this standard in regard to river pollution arising from mining operations.

One object in introducing calcium in this clause as an exception was, that, when an acid liquid is neutralized by running over limestone, *calcium chloride* is formed.

This test protects rivers from pollution by the residue from the manufacture of bleaching powder (iron and manganese chlorides).

It is said the Tonbridge and Harrogate waters would not comply with this test on account of the iron they contain (*l*).

5. "*Any liquid which in* 100,000 *parts by weight contains,* whether in solution or suspension, *in chemical com-*

(*i*) R. P. C. 1868, 4th Rep., p. 104.

(*j*) Ibid., p. 104.

(*k*) S. Com. H. L. 1873, Mr. Stevenson's Evid., p. 28.

(*l*) Ibid., Mr. Stevenson's Evid., p. 35.

bination or otherwise, more than ·05 *part by weight of metallic arsenic.*"

The refuse from printing works and dye works often contains arsenic (*m*), as do also the waters passing from some mines.

Mr. Stevenson, on behalf of the Alkali Manufacturers' Association, asserts that it would be impossible to comply with this test, on the ground that the iron and copper pyrites, from which they obtain their sulphur, and the muriatic acid, a bye-product of their manufacture, contain small portions of arsenic which it would be impossible to keep out of the rivers (*n*).

6. "*Any liquid which, after acidification with sulphuric acid, contains, in* 100,000 *parts by weight, more than one part by weight of free chlorine.*"

This test would meet the case of pollution by paper-makers, bleachers, and others who use bleaching powder.

Some rivers, as the *Aire*, at *Leeds*, it is said, would be much improved by the amount of free chlorine prohibited in this test, as it would destroy offensive organic matter (*o*). It would also prevent the purification of sewers by means of chloride of lime.

7. "*Any liquid which contains, in* 100,000 *parts by weight, more than one part by weight of sulphur, in the condition either of sulphuretted hydrogen or of a soluble sulphuret.*"

This test meets the case of pollution by the runnings from the waste sulphur heaps of alkali works.

It is objected that sulphur springs, such as those of Harrogate, would infringe this test (*p*).

8. "*Any liquid possessing an acidity greater than that which is produced by adding two parts by weight of*

(*m*) Ibid., p. 7; and see *Stockport Waterworks Co.* v. *Potter*, 31 L. J., Exch. 9.

(*n*) S. Com. H. L. 1873, p. 36.

(*o*) Ibid., Mr. Crookes' Evid., p. 58.

(*p*) Ibid., Mr. Stevenson's Evid., p. 36.

real muriatic acid to 1,000 *parts by weight of distilled water.*"

The Commissions introduced this and the following test in the interest of fish; but do not consider that they involve any injury to health (*q*).

Dr. Lyon Playfair considered this test too lax, as water of this acidity would kill fish, such as minnows, in five minutes (*r*).

The water running from some mines contains sufficient sulphuric acid to infringe this test. This was the case at the *Wingate Grange* Colliery, mentioned by *Mr. Sanderson* in his evidence before the Committee of the Lords (*s*).

Mr. Worthington, on behalf of canal owners generally, objected to this test, on the ground that it allowed an acidity which would destroy the lime in the masonry of canals, and the iron in the traders' boats, such as had actually occurred in the *St. Helen's* Canal (*t*).

9. "*Any liquid possessing an alkalinity greater than that produced by adding one part by weight of dry caustic soda to* 1,000 *parts by weight of distilled water.*"

This test has not been seriously objected to. Alkaline liquids have, however, in the presence of dissolved organic matter, a greater tendency to promote minute forms of life upon lands flooded by them.

10. "*Any liquid exhibiting a film of petroleum or hydrocarbon oil upon its surface, or containing in suspension, in* 100,000 *parts, more than* ·05 *part of such oil.*"

This provides against pollution by manufacturers of petroleum, paraffin oil, pyroligneous acid, animal charcoal, and gas.

The pollution by paraffin oil works, if it once occurs, cannot be remedied, either by irrigation or filtration (*u*).

(*q*) Ibid., Dr. Frankland's Evid., p. 26; R. P. C. 1868, 4th Rep., p. 105.

(*r*) S. Com. H. L. 1873, pp. 5 and 10.

(*s*) Ibid., p. 42.

(*t*) Ibid., p. 47.

(*u*) Ibid., Dr. Frankland's Evid., p. 17.

In any enactment for the correction of river pollution (the Commissioners say) the above standard may be safely qualified by the following proviso:—"*Provided always, that no effluent water shall be deemed polluting if it be not more contaminated with any of the above-named polluting ingredients than the stream or river into which it is discharged*" (*v*).

This proviso was doubtless added by the Commissioners on account of the suggestions made by Mr. Crookes. (*See post*, p. 11.)

In addition to the objection raised to each individual test the following *general objections* to the standards of purity have been put forward:—

(1.) They are wanting in elasticity (*x*):

(2.) They contain no stipulation respecting, and entirely disregard, the proportion between the *bulk* of the polluting liquid and of the river into which it flows (*y*):

To this objection it may be answered that to do so would be practically impossible, as the bulk both of the polluting liquids and of the river are continually changing.

(3.) That in some towns the river itself, as the *Aire*, does not come up to the requirements of these tests; so that a manufacturer, who simply pumped the river water through his works, without doing anything with it, would have infringed the standards of purity (*z*):

(4.) That manufacturers at the head of a stream, where the water is pure, and consequently where the act should be most stringently carried out, could evade it by pumping a little more pure river water through their works, thus diluting the polluting liquid down to the proper point, and sending that into the river (*a*):

(5.) That the standards are so severe that they should

(*v*) R. P. C. 1868, 5th Rep., p. 49.
(*x*) S. Com. H. L. 1873, Mr. Crookes' Evid., p. 56, and Mr. Stevenson's Evid., p. 30.
(*y*) Ibid., p. 59.
(*z*) Ibid., p. 62.
(*a*) Ibid., p. 55.

practically prevent the manufactures of the country being carried on (*b*):

(6.) That in foreign countries, with whose produce British manufacturers have to compete, no regulations, such as those indicated by the standards, exists, tending to hamper the action of foreign manufacturers in dealing with streams.

The answer given by the Rivers Pollution Commissioners to this objection is contained in the following note of the foreign law upon the subject:—

"In Prussia, though there are no special regulations for the inspection of factories in order to prevent the pollution of running waters, there are very simple means of interference in every separate case of pollution by manufacturing refuse. Thus, by the statute of July 1st, 1861, most of the processes which are likely to pollute water require a special police licence; and by a statute passed as far back as 1843, no water applied to dyeing, tanning, fulling, or other similar purposes, is to be suffered to enter a river, if thereby the means of procuring clean water be endangered to the neighbourhood; and by a regulation dating from October 28th, 1846, the owners of such works as impregnate the water used in any manufactory with materials hurtful to meadow land must, in accordance with the judgment and direction of the police authorities, precipitate their minerals in subsidence ponds, or otherwise, under penalty of a fine.

"In Belgium there are various local regulations, having the force of law, which impose a penalty upon those who pollute rivers either by throwing in solid materials which may impede the course of the stream, or by allowing liquid matter which may foul or corrupt the water to flow into it. Manufactories which produce such refuse are bound to construct reservoirs sufficiently large to contain a day's supply of this refuse, in order that sufficient settle-

(*b*) Ibid., Mr. Stevenson's and Mr. Crookes' Evid., pp. 27 and 54.

ment may take place, and the supernatant fluid only is allowed to be run off. In many districts weirs, either temporary or permanent, cannot be constructed without permission of the authorities.

"In France there are old regulations applicable generally to all *navigable* rivers, prohibiting the erection of mills and weirs, as well as the pollution of the water by solid refuse, such as gravel, straw, and dung; and power has been given to the local authorities to watch over the state of the smaller streams, and to prevent the pollution of the water by the steeping of flax and hemp, or by the refuse of manufacturing establishments" (*c*).

The standards of purity have received extensive support from chemists of eminence. Dr. Frankland gives, in his evidence before the Select Committee of the House of Lords, 1873, p. 18, the names of a number of chemists who agree that these standards are all perfectly practicable, and who, most of them, recommend them strongly, one or two only taking some unimportant exceptions. The following are the names mentioned:—Baron Liebig, M. Dumas, Dr. Hoffmann, Sir Benjamin Brodie, Dr. Williamson, Dr. Warren De-la-Rue, Dr. Odling, Mr. Abel, Dr. Russell, Professor M'Cleod, Dr. Alfred Hill, Mr. Valentin, and Mr. Railton. The Pollution of Rivers Bill, introduced into the House of Lords in 1873, contained a clause enforcing these standards of purity. The bill was referred to a Select Committee, who took the evidence of several scientific men, and in the result amended the bill by, *inter alia*, striking out the clause relating to these standards of purity.

In the Pollution of Rivers Bills of 1875 and 1876, these standards of purity did not again appear. The Marquis of Salisbury, in introducing the bill of 1875, said:—

"In the Bill of 1872, in accordance with the recom-

(*c*) R. P. C. 1868, 1st Rep., p. 42.

mendations of the Commissioners, ten standards were laid down in reference to the character of the ingredients of matter which might be thrown into streams, and it was made an offence to transgress any of those standards. The difficulty that was felt with regard to these tests was that they struck too far; and that on the one hand they would include water flowing from perfectly innocent sources, while on the other hand they were not sufficiently stringent to affect the very nuisances against which the legislation was directed. His view was, that in dealing with nuisances it was better to trust to the common sense of the tribunal to which the cases were referred, than to lay down a number of unwieldy chemical tests. The bill, therefore, proposed to forbid the pouring of filthy, noxious, and polluting liquids into streams, and to leave it to the county court judges to decide upon evidence what liquids possessed the forbidden qualities" (*d*).

Mr. William Crookes' Suggestions.

Among the gentlemen who gave evidence before the Committee of the House of Lords, in 1873, was Mr. William Crookes, who then and subsequently made suggestions as to what should be considered a polluting liquid, which are so simple and practicable, and at the same time would ultimately prove so effectual, that they may be safely followed by county court judges in their decisions under the act. *Mr. Crookes* proposes:—(1.) That the river itself should be the standard of purity. That no liquid should be allowed to be sent into a river if the liquid contains a greater per-centage of impurity than the river itself (*e*).

" Such a regulation will gradually work itself right; if this rule was adopted all over England, the rivers would gradually get purer and purer, and manufacturers would have time to increase their means of purification. At

(*d*) Hansard, Vol. 223, p. 1888. (*e*) S. Com. H. L. 1873, p. 55.

last, however, we should come to this: that the only person who really violated the act would be the first manufacturer at the head of the river, and in this case my rule would fail; but it would hold good until the natural working of the rule had so far purified the rivers of England as to have carried out, to all intents and purposes, the objects of the proposed act" (*f*).

(2.) That, if any standards are used, each river ought to have its own scale or scales as to the required purity.

(*f*) Ibid., p. 56.

CHAPTER II.

AS TO SOLID MATTERS.

SECT. 2 enacts, that "Every person who puts or causes to be put or to fall, or knowingly permits to be put or to fall or to be carried into any stream, so as either singly or in combination with other similar acts of the same or any other person to interfere with its due flow, or to pollute its waters, the solid refuse of any manufactory, manufacturing process or quarry, or any rubbish or cinders, or any other waste or any putrid solid matter, shall be deemed to have committed an offence against this act.

"In proving interference with the due flow of any stream, or in proving the pollution of any stream, evidence may be given of repeated acts which together cause such interference or pollution, although each act taken by itself may not be sufficient for that purpose."

Proceedings under this section may be instituted by any person aggrieved, and at any time after the passing of the act.

It will be observed that this provision does not relate to solid matters from mines, which are dealt with by section 5 (see p. 35).

No offence against the act under this section is committed unless the solid refuse, rubbish, cinders or other waste or putrid solid matter finding its way into the river results either in *interfering with its due flow*, or in *polluting* its waters. As to what is to be considered the "due flow" of a river, see post, Part II. Chap. VIII.; and as to what is polluting, see ante, Chap. I.

"Solid matter" shall not include particles of matter in suspension in water (*a*).

(*a*) Sect. 20.

Nor shall the act apply to or affect the lawful exercise of any rights of impounding or diverting water (*b*). As to the law relating to this subject, see post, Part II. As to the effect of a conviction for the commission of an offence under this section, see Chap. VI.

This section of the act is probably chiefly directed against the evils known as the "cinder tip" and the "slack tip." Manufacturers, especially in Lancashire and Yorkshire, have been in the habit of "tipping" the cinders produced at their manufacturies in heaps on the banks of rivers, for the purpose of having them carried away during flood times. Cinders in large quantities thus find their way into rivers, and in some cases the obstruction caused by them have given rise to serious inundations. The "slack tip" existed only at collieries, and is now much diminished by the washing of slack (see p. 37).

Speaking of the abuses which river *channels* suffer in being made the recipients of solid refuse, the Rivers Pollution Commissioners of 1868 say, "The actual position of the river course has in many places been diverted in this way to the injury of riparian proprietors. The millowners, who are the principal offenders, are also sufferers by the consequent raising of the river bed; towns and villages are injured by the higher level of the floods; lands are depreciated in value by the increased difficulty of draining them; and whole districts suffer by the destruction of the navigation" (*c*).

One of the conclusions arrived at by the Rivers Pollution Commissioners appointed in 1865 was, that "no ashes, cinders, slag, waste-earth, mud from canals, goits and reservoirs, road-scrapings, broken pottery and utensils, bricks and building rubbish, or any other solid calculated to impede the flow of water, raise the bed of the stream, or cause impurity, should be permitted to be cast in, or so to be disposed on the banks of a river as to be carried in by its waters" (*d*).

(*b*) Sect. 17. (*c*) 1st Rep., p. 42. (*d*) 3rd Rep., p. 14.

This quite agrees with the conclusions arrived at by the Commissions of 1868, who recommend "That the casting of any solid matter of whatever kind into rivers and running water, or the placing of solid refuse in such positions on the banks of rivers as to render it liable to be washed away by floods, be absolutely prohibited under adequate penalties; and that any act passed for this purpose be made to take effect immediately" (*e*).

The section forbids the casting of solid matter into any "*stream.*" Sect. 20 provides that in this act, if not inconsistent with the context, the word "'stream' includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board, by order published in the London Gazette. Save as aforesaid, it includes rivers, streams, canals, lakes, and watercourses, other than watercourses at the passing of this act mainly used as sewers, and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this act by such order as aforesaid."

The use of the word "*includes,*" in the above definition, enables a watercourse of a nature different from any specially named to be regarded as a "stream" within the meaning of the act.

As to the practical application of the words "river," "canal," and "lake," no difficulty is likely to arise. The applicability of the words "stream" and "watercourse" is not so clear. Many attempts have been made to acquire rights in surface and underground percolating water from long user, such as may be acquired, by way of easements, in natural streams or water-courses, and in some artificial channels.

Judges have, however, steadily refused to allow the word "watercourse" to be applied to water percolating through strata in no certain and defined course (*f*).

(*e*) 1st Rep., p. 136.

(*f*) See Chap. VIII.

Lord *Tenterden* has defined a watercourse as "water flowing in a channel between banks more or less defined" (*g*); and Mr. Justice *Christian*, in the case of *Briscoe* v. *Drought* (*h*), following the above definition, spoke of a watercourse as "a flow of water possessing that unity of character by which the flow on one person's land can be identified with that on his neighbour's. Water which squanders itself over an indefinite surface is not a proper subject-matter for the acquisition of a right by user. . . . . To determine the question of watercourse or no watercourse, you must look at the whole stream from its source to its discharge, and not merely to a particular part of it" (*i*).

Water of the nature here spoken of is the exclusive property of the owner of the soil, and, as such, may be applied by him to his own purposes (*k*); and cannot, therefore, be regarded as a watercourse, in the water of which he has no property but a simple usufruct while it passes along.

The statutory definition of a "stream" includes every collection of water which, prior to the act, constituted a "watercourse other than watercourses at the passing of the act mainly used as sewers, *and* emptying *directly* into the sea, or tidal waters which have not been determined to be streams within the meaning of this act."

It follows from this, that the "channel used, constructed, or in process of construction at the date of the passing of this act," spoken of in the 3rd and 4th sects. of the act, for the purpose of carrying sewage matter, or manufacturing pollution, into any river, will be a "stream" only when it does not empty itself "directly into the sea, or tidal waters which have not been determined to be 'streams' within the meaning of the act."

If such a watercourse is to be regarded as a "stream," on the ground of its emptying itself into a "stream,"

(*g*) *R.* v. *Inhabitants of Oxfordshire*, 1 B. & Ad. 301.
(*h*) 11 Ir. C. L. 271.
(*i*) Ibid., p. 272.
(*k*) *Acton* v. *Blundell*, 12 M. & W. 351.

whether it was, or was not, used mainly as a drain before the passing of the act, it, of course, becomes an offence under sect. 1, to interfere with its due flow, or to pollute its waters by solid refuse, or any other waste, or any putrid solid matter.

So, again, if the watercourse *does* empty itself into the sea or tidal waters, which are not "streams," but at the passing of the act was *not* mainly used as a sewer, it will be a "stream" and will receive the protection of the 1st section.

The question, whether any particular watercourse was mainly used as a sewer at the passing of the act, is one of fact, which will have to be determined by county court judges, but from whose decision an appeal lies to the High Court of Justice under sect. 11. A similar question of fact was raised in a recent case (*l*) before V.-C. *Bacon*, when it was sought to justify the creation of a nuisance by a local board, on the ground that the watercourse into which they passed sewage was a common sewer.

(*l*) *Att.-Gen.* v. *Hackney Local Board*, L. R., 20 Eq. 626.

CHAPTER III.

AS TO SEWAGE POLLUTIONS.

"EVERY person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream, any solid or liquid sewage matter, shall (subject as in this act mentioned) be deemed to have committed an offence against this act" (*a*).

As to what constitutes a stream, see *ante*, p. 15. No question arises under this section as to whether any sewage matter carried into a stream is or is not polluting. A person who has instituted proceedings has merely to establish the bare fact that sewage matter has been carried into the stream by the person proceeded against; its polluting nature is assumed. The burden of proof is then changed, and it then lies upon the defendant to show that the discharge of sewage matter, as proved by the other side, does not constitute an offence under the act. This he may do in four ways, by showing either (1) that the sewage matter is discharged by a channel used and constructed for the purpose at the date of the passing of the act, *and* that he is using the best "practicable and available means" to render such sewage matter harmless; or (2) that the Local Government Board have granted further time to a sanitary authority, during which sewage may be discharged through a channel used, constructed, or in process of construction, at the passing of the act, for the purpose of enabling them to adopt the best practicable and available means for rendering such sewage harmless; or (3) that the defendant, being a local authority, or urban or rural sanitary authority, are empowered or

(*a*) Sect. 3.

required by act of parliament to carry such sewage matter into the sea, or a tidal river; or (4) that the defendant, being other than a sanitary authority, has carried such sewage matter along a drain communicating with a sewer under the control and with the consent of a sanitary authority. These several defences we shall consider more in detail.

(1.) *Best practicable and available means of rendering Sewage Matter harmless.*

Sect. 3 enacts that—"Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction, at the date of the passing of this act, for the purpose of conveying such sewage matter, the person causing, or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this act if he shows to the satisfaction of the court having cognizance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream."

It will be observed that this provision affords no defence to the discharge of sewage matter in a stream through a channel not constructed, or in process of construction, at the date of the passing of the act (Aug. 1876). For such a discharge there is absolutely no justification or excuse, and it must inevitably be regarded as an offence against the act. When the discharge of sewage matter complained of takes place through a channel used, constructed, or in process of construction, at the date of the passing of the act, for the purpose of conveying such sewage, such discharge may be justified by proving that the defendant is using the best practicable and available means to render such sewage matter harmless.

Proof of this fact may be given (a) by the production of a certificate of an inspector of the Local Government

Board to that effect, which is conclusive; or (b), by the production of scientific evidence.

(a) *Inspector's Certificate.*

Sect. 12 enacts that—"A certificate granted by an inspector of proper qualifications appointed for the purposes of this act by the Local Government Board to the effect that the means used for rendering harmless any sewage matter or poisonous, noxious, or polluting solid or liquid matter falling or flowing or carried into any stream, are the best or only practicable and available means under the circumstances of the particular case, shall in all courts and in all proceedings under this act be conclusive evidence of the fact; such certificate shall continue in force for a period to be named therein, not exceeding two years, and at the expiration of that period may be renewed for the like or any less period."

The production of an inspector's certificate is a conclusive answer to a charge of committing any offence under the act, except that constituted by sect. 1, of putting solid matter in a stream so as "to interfere with its due flow, or to pollute its waters."

"All expenses incurred in or about obtaining a certificate under this section shall be paid by the applicant for the same."

"Any person aggrieved by the grant or the withholding of a certificate under this section may appeal to the Local Government Board against the decision of the inspector; and the board may either confirm, reverse, or modify his decision, and may make such order as to the party or parties by whom the costs of the appeal are to be borne as to the said board may appear just."

Every order for the payment of costs made by the board under this section may be made a rule of court (*b*).

By sect. 14,—"The Local Government Board may

(*b*) Sect. 14.

make orders as to the costs incurred by them in relation to inquiries instituted by them under this act, and as to the parties by whom such costs shall be borne; and every such order and every order for the payment of costs made by the said board under 12th sect. of this act may be made a rule of her Majesty's High Court of Justice."

The object of making such an order for the payment of costs a rule of court is, that the same may be recovered by a writ of *fi. fa.*

"Inspectors of the Local Government Board shall, for the purposes of any inquiry directed by the board under this act, have in relation to witnesses and their examination, the production of papers and accounts, and the inspection of places and matters required to be inspected, similar powers to those which the inspectors of the said board have under the Public Health Act, 1875, for the purposes of that act"(*c*).

The powers of the Local Government Board inspectors are regulated by sect. 296 of the Public Health Act, 1875, which enacts, that they "shall, for the purposes of any inquiry directed by the board, have in relation to witnesses and their examination, the production of papers and accounts, and the inspection of places and matters required to be inspected, similar powers to those which poor law inspectors have under the acts relating to the relief of the poor for the purposes of those acts."

The powers of the poor inspectors are regulated by 10 & 11 Vict. c. 109.

Sect. 21 enacts that—"The said inspectors may summon before them such persons as they may think necessary for the purpose of being examined before them upon any matter concerning the administration of the laws relating to the relief of the poor, or any other matter placed by law under the control or regulation of the commissioners, or for the purpose of producing and verifying upon oath any books,

(*c*) Sect. 15.

contracts, agreements, accounts, writings, or copies of the same, in anywise relating to such matter, and not relating to or involving any question of title to any lands, tenements, or hereditaments not being the property of any parish or union, and may examine any person whom they shall so summon, or who shall voluntarily come before them to be examined upon any such matter upon oath, which each of the said inspectors shall be empowered to administer, or instead of administering an oath, the inspector may require the party examined to make and subscribe a declaration of the truth of the matter respecting which he shall have been or shall be so examined; and all summonses made by any such inspector for any such purpose as aforesaid shall be obeyed by all persons as if such summons had been the summons and order of the commissioners, and the non-observance thereof shall be punishable in like manner; and the costs and expenses of such person so summoned shall be paid in such cases and in such manner as the costs and expenses of persons summoned under the authority of the first-recited act are now payable: Provided always, that no person shall be required in obedience to any such summons to go or travel more than ten miles from his place of abode."

Provision is also made by 26th sect. in the event of false evidence being given before the inspectors, or of the refusal or neglect of witnesses to attend in obedience to a summons, or of tampering with documentary evidence.

(b) *Scientific Evidence.*

If a county court is dissatisfied with the scientific evidence given in any case, or feels a difficulty in coming to a satisfactory conclusion upon it, or if, for any other reason, the court think fit, it may, before making any order, remit to skilled parties to report on the "best practicable and available means" of rendering any sewage discharge harmless, and the nature and cost of the works and apparatus required, and such skilled parties shall, in

all cases, take into consideration the reasonableness of the expense involved in their report (*d*).

(2.) *Extension of time by order of Local Government Board.*

"Where the Local Government Board are satisfied after local inquiry that further time ought to be granted to any sanitary authority, which at the date of the passing of this act is discharging sewage matter into any stream, or permitting it to be so discharged, by any such channel as aforesaid, for the purpose of enabling such authority to adopt the best practicable and available means for rendering harmless such sewage matter, the Local Government Board may by order declare that this section shall not, so far as regards the discharge of sewage matter by such channel, be in operation until the expiration of a period to be limited in the order.

"Any order made under this section may be from time to time renewed by the Local Government Board, subject to such conditions, if any, as they may see fit" (*e*).

(3.) *Sewage discharge empowered or required by Act of Parliament.*

Sect. 19 enacts that—"Where any local authority or any urban or rural sanitary authority has been empowered or required by any act of parliament to carry any sewage into the sea or any tidal waters, nothing done by such authority, in pursuance of such enactment, shall be deemed to be an offence against this act."

(4.) *Drainage by a Private Person with sanction of a Sanitary Authority.*

Sect. 3 enacts that—"A person other than a sanitary authority shall not be guilty of an offence under this section in respect of the passing of sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of any sanitary authority, provided he has the sanction of the sanitary authority for so doing."

(*d*) Sect. 10. (*e*) Sect. 3.

CHAPTER IV.

AS TO MANUFACTURING POLLUTIONS.

"EVERY person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this act mentioned) be deemed to have committed an offence against this act.

"Where any such poisonous, noxious, or polluting liquid as aforesaid falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this act, or any new channel constructed in substitution thereof, and having its outfall at the same spot, for the purpose of conveying such liquid, the person causing or knowingly permitting the poisonous, noxious, or polluting liquid so to fall or flow or to be carried shall not be deemed to have committed an offence against this act if he shows to the satisfaction of the court having cognizance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream" (*a*).

This section applies only to *liquid* refuse; solid refuse is dealt with by section 2. As to what amounts to a polluting liquid, see Chapter I.

It will be observed, that under this section the intro-

(*a*) Sect. 4.

duction of manufacturing pollution into rivers from manufactories built, or commencing operations, subsequent to the passing of the act (15th Aug. 1876), will constitute an offence, even though "the best practicable and reasonably available means" of rendering it harmless are used.

The defence provided requires proof, by the manufacturer, not only of the erection and use of the channel carrying his polluting liquid to the river, or of a new channel in lieu thereof, having its outfall at the same spot, prior to the passing of the act, but *also* that he is using "the best practicable and reasonably available means" of rendering it harmless.

The only defence available to a manufacturer who passes the liquid refuse from his manufactory into a river through a channel not used, constructed, or in process of construction at the date of the passing of the act, or any new channel constructed in substitution thereof, and having its outfall at the same spot, is that such liquid refuse is not poisonous, noxious, or polluting.

It will be observed, that the manufacturer is placed in a more favourable position than sanitary authorities by the 3rd and 4th sects. of the act, inasmuch as the latter can only justify the discharge of sewage through an old channel after using "the best practicable and available" means of rendering it harmless; while the former can justify the discharge of liquid manufacturing refuse through an old channel, *or any new channel constructed in substitution thereof, and having its outfall at the same spot*, after using the "best practicable and *reasonably* available" means of rendering it harmless.

Whether this means that sanitary authorities are to use "the best practicable and available means," however *un*reasonable they may be, remains to be seen.

POLLUTION FROM MANUFACTURING REFUSE OTHER THAN THAT FROM METAL MANUFACTURES.

(1.) *Pollution by Dye, Print, and Bleach Works.*

The River Pollution Commissioners, appointed in 1868, say, in their *Fourth Report* (*b*), "We have shown that the most noxious part of these polluting liquids is, like that of sewage, organic matter; but the organic matter of dye water is much less highly nitrogenized than that of sewage, and is therefore presumably less putrescible and consequently less offensive. The polluting water of dye and print works also differs strikingly from sewage in containing much smaller proportions of ammonia and chlorine, which are the characteristic constituents of decomposed urine. Among the mineral polluting materials of these works, arseniate of soda is the most noxious."

And in their *First* Report (*c*), "Bleaching operations are usually carried on in calico printworks, but also, occasionally, in separate factories. The pollution arising from them appears to be of a comparatively slight character, consisting chiefly of alkaline and slightly soapy liquids, solution of chloride of calcium, sulphate of lime in suspension, and traces of chloride of lime in solution. These are so copiously diluted with the water used in washing the bleached calicoes as to be admissible at once into streams, unless the effluent water be turbid, in which case filtration will be necessary."

(2.) *Pollution by the Linen and Jute Industry.*

The chief operations in this branch of industry which affect running water are:—

First, the steeping of raw flax, which consists in keeping the sheaves in a pit filled with water until partial putrefaction of the stem occurs. The water thus becomes fouled with a large amount of organic carbon and nitro-

(*b*) p. 28. (*c*) p. 33.

gen (*d*) in solution, and of both mineral and organic matter in suspension; and "being much stronger in fertilizing ingredients than average town sewage, and more than twice as strong in polluting ingredients, ought not to be allowed to escape from the farm on which it is produced" (*e*).

Second, the bleaching of linen and jute, the waste-polluting products of which are caustic soda-ley, waste chloride of lime liquor, waste sulphuric acid liquor, and waste carbonate of soda and soap liquor. These liquors are highly polluted with dissolved organic carbon and nitrogen, and suspended mineral and organic matter.

Third, the dyeing of jute. This gives rise to the fouling of water used to wash the dyed goods with dissolved organic matter, and suspended organic and mineral matter, such as to infringe the standard of purity to a large extent.

(3.) *Pollution by Chemical Works.*

Under this head are included alkali, soap, colour, and oxalic acid manufactures.

In *alkali* works the waste products are alkali waste (calcium, oxysulphide), muriatic acid, burnt pyrites, manganese and iron chlorides, and calcium chloride. The muriatic acid, manganese and iron chlorides also contain arsenic in solution.

The alkali waste, which accumulates in large heaps near alkali works, under the influence of "weathering," yields a liquid containing calcium sulphide. This liquid flowing into a river, together with two other waste products, muriatic acid and manganese and iron chlorides, yields sulphuretted hydrogen (having the smell of putrid eggs), and calcium chloride (*f*). A portion of the sulphur

(*d*) The term "organic carbon and nitrogen" is used to distinguish the carbon and nitrogen of organic bodies from the carbon and nitrogen of *in*organic bodies, such as the carbonates, nitrates, &c.

(*e*) R. P. C. 1868, 4th Rep., p. 35.

(*f*) The formation of sulphuretted hydrogen from a similar decomposition in a drain was held to be a nuisance within the meaning of sect. 8 of 18 & 19 Vict. c. 121. *St. Helens Chemical Co.* v. *St. Helens*, L. R., 1 Exch. Div. 196.

of the calcium sulphide is also precipitated by the muriatic acid, while the arsenic brought into the river by that acid, and the manganese and iron chlorides, is thrown down in the form of a yellow precipitate by the sulphuretted hydrogen formed during the decomposition. A river receiving alkali pollution is always acid. The mud deposited in the *Sankey Brook*, near St. Helen's, has been found to contain no less than 2·26 per cent. of arsenic. The water of the Sankey Brook is so acid that iron fittings cannot safely be used in the barges and lock-gates.

Alkali waste may be utilized by *M. Ludwig Mond's* method, which consists of forcing air through it, then lixiviating and precipitating the sulphur with hydrochloric acid.

In *soap* works the polluting substances are glycerine and common salt, neither of them seriously detrimental.

From *colour* works the polluting matters are organic matter in solution and coloured matter in suspension.

From aniline works the waste liquors often contain arsenic.

The manufacture of *oxalic acid* is now conducted by acting on sawdust by caustic alkali. The chief polluting substance appears to be calcium sulphate, a substance only slightly soluble in water, and not, in itself, seriously objectionable.

(4.) *Pollution by Starch Manufacture.*

Starch is, for the most part, extracted from wheat, rice, and maize, but also in smaller quantity from potatoes and sago palm. The operation is conducted by two methods :—

First, by fermentation. The grain is ground, moistened, and allowed to ferment. In this way a portion of the gluten and cellular tissue of the grain undergoes putrefaction, and the rest is dissolved and thus separated from the starch. This liquid is highly polluting from the organic matter in solution and suspension.

Secondly, by dissolving away the gluten in a dilute

solution of caustic soda. The cellular tissue remains undissolved, and is separated from the starch by agitating the two in water, and allowing the former to subside. The alkaline liquor, on acidification with sulphuric acid, yields the gluten in a marketable form, and so saves any pollution to the neighbouring streams.

(5.) *Pollution by Paper Mills.*

The rags, after the "dusting" process, and esparto grass, from which paper is manufactured, are heated for several hours by super-heated steam with a strong solution of caustic soda, during which the silica contained in the raw material is dissolved together with any grease present. The dark brown liquid obtained from this process is soapy and highly polluting, as is also the water subsequently used in washing the boiled material. The pulp is bleached with a solution of chloride of lime. The preparation of this solution, as well as the caustic soda when made on the works, gives rise to a refuse consisting of lime and calcium carbonate.

The polluting materials from these works, therefore, are—

1. The products from the dusting process.
2. The refuse from making caustic soda.
3. Caustic soda waste.
4. Water used in working pulp.
5. Insoluble part of bleaching powder.

"There is no serious difficulty in arresting and diverting from the adjacent rivers all those matters which are at present, in many instances at least, a source of their pollution; and although some little inconvenience and expense may be incurred by paper makers, and such improvements may be protested against and resisted at first, there is good ground for believing that the manufacturers of paper will in the long run be rather benefited than injured by their enforced adoption" (*g*).

(*g*) R. P. C. 1868, 1st Rep., p. 22.

(6.) *Pollution by Woollen Works.*

The polluting liquids from woollen manufactures are—

1. Waste liquor from dye vats.
2. Waste liquor from wool scouring and washing.
3. Water which has been used for washing the dyed, scoured, or fulled goods.

The composition of these liquors differs so much at different works, and according to the dye stuff used, that it is impossible in this place to treat of the matter in detail.

The following substances, among others, are used at these works and find their way, in one form or another, and in varying quantities, into rivers, viz.:—carwood, logwood, fustin, madder, chrome, copper sulphate, tin chloride, argols.

(7.) *Pollution by Silk Works.*

Silk before dyeing contains about 25 per cent. of gum, which is removed by boiling in a solution of soap, 40 lbs. of soap being required for every 100 lbs. of silk. A soapy and polluting refuse liquid is thus obtained. Probably the only other polluting matter from these works is arsenic acid, aniline dyes being those chiefly used.

(8.) *Pollution by Tanneries.*

The waste liquors from tanneries are the result of the washing, soaking, and tanning of skins.

The water used for washing contains a large quantity of organic matter, and when East Indian hides are used, also considerable quantities of common salt used in preserving them. This usually passes directly into the rivers. The hides after washing are soaked in water containing lime to loosen the hair before scraping. This alkaline liquid, and the tan liquor, only find their way into rivers in small quantities.

The waste liquors from tanneries may for all practical

purposes be regarded as concentrated sewage, possessing from five to ten times the manure value of the latter. These liquors would, therefore, form an acceptable contribution to the contents of town sewers when the sewage is applied to irrigation (*h*).

(9.) *Pollution by Alcohol Distilleries.*

The Commissions of 1868 say:—

"There are three chief waste products in this manufacture, viz.—1st. The residual crushed grain left in the mashing tun, and technically called '*grains*,' which is sold to farmers and dairy-keepers as food for cattle. 2nd. The spent wash, that is to say, the wash from which the alcohol has been removed by distillation, and which in Scotland is called '*pot-ale*.' This liquor contains a considerable proportion of sugar, besides starch and nitrogenous organic matter. It forms a nutritious and fattening food for cattle if it be used while fresh, and it is, when possible, sold to farmers for this purpose. It soon, however, becomes sour, and consequently useless as food, and is then discharged into the next river or stream. 3rd. The spent lees from the rectifying still. . . . . Analytical results demonstrate the intensely-polluting powers of the liquid discharges from distilleries, and confirm the complaints which are frequently heard in Scotland, of the great damage done to streams whenever this liquor is discharged into them. The '*pot-ale*' from *Sancil* distillery has about thirty-six times the polluting power of average London sewage; but as its manure value is also equally high, the prohibition to cast it into running water would prevent a scandalous waste, whilst it hindered the utter spoiling of the stream, by polluting liquid containing such an enormous quantity of organic matter which is peculiarly prone to enter into rapid and disgusting putrefaction"(*i*).

(*h*) R. P. C. 1868, 1st Rep., p. 103.

(*i*) R. P. C. 1868, 4th Rep., p. 42.

(10.) *Pollution by Sugar Refining.*

Raw sugar, after being dissolved in lime water, is filtered through calico bags to remove mechanical impurities. In this way a large quantity of filthy matter accumulates in the bags, and is removed by washing. Speaking of the liquor from washing these bags the Commissions of 1868 say :—" It is at least one hundred times more potent than its own volume of town sewage in rendering running water foul and useless ; and as Messrs. John Walker & Co.'s factory discharges 2,500 gallons of this liquid daily, it is evident that a single sugar work must ultimately ruin any stream of moderate dimensions into which its filter-bag washings are allowed to flow in an unpurified condition" (*j*).

(11.) *Pollution by Paraffin Oil Works.*

" The waste and polluting products from these works are :—

1. The water separated from the oil after the removal of naphtha, retaining some oil in suspension.
2. The spent and blackened sulphuric acid used in the first purifying process.
3. The spent caustic soda and tarry matter resulting from the second process of purification.

All these liquids are highly polluting, and the taint which they communicate to water is of an exceedingly persistent character, and may be regarded as incurable. These discharges not only cover the stream into which they pass with an iridescent film of offensively-smelling oil, but the tainted water is capable of penetrating through the soil into wells, spoiling their contents for domestic purposes, unless submitted to the agency of fire. This oily matter, which is present in all the three discharges, is almost as indestructible as gold; it resists nearly all

(*j*) 4th Rep. p. 44.

chemical agents, and undergoes no oxidation either by exposure to the air, or filtration through porous soil" (*i*).

POLLUTION ARISING FROM METAL MANUFACTURES.

The Commissioners say, in their Fifth Report (*k*), that, "with the exception of the pollution caused by one or two metal trades, the rivers of this country suffer in an insignificant degree from operations of this character in comparison with the frightful damage which is inflicted upon them by the sewage of towns, and by the drainage from factories devoted to the various branches of industry connected with textile fabrics."

These sources of pollution are then treated of under the following heads:—

(1.) *Pollution by Nickel Works.*

The nickel ores (nickel sulphide, arsenide or oxide) are melted in a furnace, so as to form a regulus (concentrated nickel sulphide), then roasted and treated with acid. The nickel, with some cobalt, is precipitated from the solution so obtained by lime. By this process calcium chloride is obtained, and is the only liquid refuse from the works. It would not infringe any of the standards of purity.

(2.) *Pollution by Iron Works and Rolling Mills.*

The only water usually employed in these works is for the purpose of cooling the rolls. The bearings of these rolls are lubricated with tar or coarse grease, some of which is washed away together with scales of oxide from the iron. Such pollution is insignificant and entirely in suspension.

In some iron works the iron ore (iron carbonate) is calcined, crushed, and then washed. The water employed in this operation carries away a considerable quantity of mineral matter in suspension.

(*i*) R. P. C. 1868, 4th Rep. p. 45.
(*k*) R. P. C. 1868, 5th Rep. p. 29.

(3.) *Pollution by Cutlery Trade.*

These works contribute a considerable quantity of sandy mud, arising from the gradual wearing of the grindstones, to the neighbouring streams. It is to be seen on the river *Don* lying in high banks below the orifices through which the water from the grindstones passes, and is gradually carried away by the river.

(4.) *Pollution by Iron and Steel Wire, Tin Plate, and Galvanizing Works.*

This is the most serious source of pollution from metal working. In all the above-mentioned operations the iron is "pickled," that is, placed in a bath of dilute sulphuric or hydrochloric acid. In this way iron sulphate, or iron chloride is formed, the liquid always remaining strongly acid. The Commissions say—"It is the general practice to discharge the waste contents of the acid baths suddenly into rivers or sewers, rendering the water of the former unfit for many manufacturing purposes, and for the support of fish life, greatly damaging the brickwork of sewers by the corrosive action of the free acid, and in some cases rendering their contents unsuitable for irrigation without previous purification with lime" (*l*).

(5.) *Pollution by Brass Foundries.*

After manufacture, brass is often treated with dilute acid. Salts of copper and zinc are thus obtained; but, on account of the smallness of their bulk, are not usually serious sources of river pollution.

(6.) *Pollution by German Silver and Electro-plate Works.*

German silver articles, before being electro-plated, are "pickled" in dilute nitric or sulphuric acid. After being so "pickled" the articles are washed. The water used for this purpose contains polluting matters, but only to a very moderate amount. The acid bath itself is not usually thrown into the rivers.

(*l*) R. P. C. 1868, 5th Rep. p. 33.

CHAPTER V.

AS TO MINING POLLUTIONS.

"EVERY person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid matter from any mine in such quantities as to prejudicially interfere with its due flow, or any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine other than water in the same condition as that in which it has been drained or raised from such mine, shall be deemed to have committed an offence against this act, unless in the case of poisonous, noxious, or polluting matter he shows to the satisfaction of the court having cognizance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting matter so falling or flowing or carried into the stream"(*a*).

Under this section the plaintiff has to make out a *primâ facie* case either of a prejudicial obstruction, or of a pollution of the stream. The defendant may meet such a *primâ facie* case by showing either that the polluting water is in the same condition as that in which it comes from the mine, or that he has used the best practicable and *reasonably* available means to render such polluting liquid harmless. As to how such proof may be adduced, see ante, p. 19.

In treating of the pollution of rivers by mining operations the Rivers Pollution Commissioners of 1868, in their *Fourth* Report, issued in 1874, classify the sources of pollution under the several heads given below.

(*a*) Rivers Pollution Act, 1876, s. 5.

The first, second, fifth, and seventh sources of pollution, though unsightly, are not directly injurious to health. The other forms of pollution make the water injurious to the health of persons using it for domestic purposes, or to cattle grazing in fields flooded by such water. The polluting matters are nearly always in suspension, and render the water so repulsive in appearance that it is seldom used for drinking purposes. Not even a single case of injury to human health, and very few cases of injury to animals by drinking water fouled by mining operations was met with by the Commissioners (*b*).

(1.) *Pollution by Collieries and Coal Washing.*

Sulphur is present in coal in the form of iron pyrites, a compound of iron and sulphur, insoluble in water. By exposure to the air it is, by the absorption of oxygen, converted into copperas or iron *proto*-sulphate, which is soluble in water. When thus dissolved in water, it absorbs a further quantity of oxygen, and is thus converted into iron *per*-sulphate, which being insoluble in water is deposited as a reddish sediment. Sometimes, as in the *Rainton Meadow Colliery*, iron occurs in colliery water as a carbonate.

Both forms of pollution are fatal to fish, on account of the removal of the oxygen of the water, by the oxidation of the iron compound.

When a river is polluted by sewage matter, much improvement may be occasioned in the river by the addition of ferruginous matter, which has the property of precipitating organic matter. Some colliery water is fit for domestic purposes. Water contaminated with salts of iron would not, it seems, be an infringement of the *fifth* section of the act, as it flows in this form direct from the mine: although it commonly, if not usually, comes within the *first* and the *fourth* of the standards of purity (*c*).

(*b*) 5th Rep. p. 3. (*c*) Ante, pp. 3, 5.

Slack washing is a constant source of pollution. The purpose of this washing is to separate the coal-dust from the heavier shale and iron pyrites. The operation is often performed by placing the refuse coal upon large sieves of wire or perforated zinc, through which a stream of water is forced upwards in a succession of powerful pulses by the action of a steam-pump. The coal is carried to the surface while the shale remains below. The water, after passing through settling pits, commonly has been allowed to run into the rivers. Water thus contaminated with coal-dust is very injurious to grass, which, when grazed, is often fatal to cattle. Such polluted water may be purified by subsidence or filtration.

This form of pollution is usually an infringement of the *first* standard of purity (*d*).

(2.) *Pollution by Iron Mines*

is of very minor importance.

The Commissions report no case of pollution from iron mines working "blackband" (iron carbonate); and those occasioned by the working of hæmatite ores (iron-peroxide) are due solely to peroxide of iron in *suspension,* which is entirely removed by subsidence or filtration. Water charged with peroxide in suspension would infringe the first standard only (*e*).

(3.) *Pollution by Lead, Copper, Zinc, and Arsenic Mines.*

Of all forms of mining industry, the Commissions say, lead mining is the one which causes the most serious river pollution.

British lead mines yield chiefly *galena* (lead sulphide), but also a smaller quantity of lead phosphate.

Lead carbonate, which is extremely poisonous, also occurs in small quantities, and, being incapable of profitable extraction, finds its way into the rivers.

(*d*) Ante, p. 3. (*e*) Ante, p. 3.

In the process of extraction the ore, after being sorted and crushed, is subjected to a process of washing called "*jigging*." During this process the matrix rises near the surface and when removed is known as "*skimpings*." These "skimpings" are often "tipped" in the stream, to the great destruction of fish and poultry. The ore thus obtained often requires to be again crushed and washed. The rocky matrix, thus reduced to the condition of mud, is carried to settling pits called "slime pits," where the coarser metalliferous portion is deposited, while the finer particles pass away with the water into the nearest watercourse. The "slime" from these pits is again mixed with water and allowed to flow upon machines called "*buddles*," where it is subjected to a slow stream of water by which the heavier galena is removed from the lighter portions of the mud, which pass away, like the result of former washings, into the nearest watercourse.

Thus the ore is subjected to two, three, and sometimes even more, consecutive washings, the water from each of which carries the finer portions of galena, together with probably all the lead carbonate present in the ore, and large quantities of mud, into the neighbouring streams. Speaking of the streams which run into the sea near *Aberystwith* the Commissioners say (*f*), "All these streams are turbid, whitened by the waste of the lead mines in their course; and flood-water in the case of all of them bringing down poisonous "*slimes*" which, spreading over the adjoining flats, either befoul or destroy the grass, and thus either injure cattle and horses grazing on the dirtied herbage, or, by killing the plants whose roots have held the land together, render the shores more liable to abrasion and destruction on the next occasion of high water."

Lead mines also often contain blend (zinc sulphide), copper pyrites (iron and copper sulphide), and mundic or iron pyrites (iron disulphide).

(*f*) 5th Rep. p. 15.

The blend usually passes away with the rest of the washings from the galena.

The mundic usually accumulates in heaps, and being decomposed by "weathering" often yields arsenical runnings, which find their way into the neighbouring streams. Copper, however, does not often find its way into the rivers. The waters from copper mines do, however, sometimes infringe the standard as to the amount of suspended matter, and arsenic, but not the 5th section of the act, unless they are treated after leaving the mine and before entering the river, which is sometimes the case, for the purpose of extracting portions of copper in solution. This is done by the action of scrap iron, which precipitates the copper in the metallic form, the water becoming at the same time charged with an equivalent quantity of iron salt. It was held in the case of *Wright* v. *Williams* (*g*), that a custom to pour the water as charged with metallic salts by this process into a river was a reasonable one and good at law.

The mine water after this treatment often contains arsenic in addition to the iron added during the process. The effect of this may therefore be, that where the mine water is allowed to run direct from the mine into the river, largely charged with copper, no infringement of the act occurs; but if this poisonous substance be removed, then the effluent, containing the same amount of arsenic as before treatment, if allowed to pass into the rivers, would render the mine owner liable to a penalty under the act.

The standards usually infringed by lead mines are the *first* and *fifth*.

(4.) *Pollution by Tin Mines.*

The "tin stone" of Cornwall occurs associated with iron peroxide and copper pyrites. The ore is stamped in water to a fine powder, and the tin stone is separated from the crushed matrix by the action of water. The only

(*g*) 1 M. & W. 77.

usual pollution caused by these mines is by the very large amount of solid matter or "slime" carried during these washings into the rivers.

The copper pyrites is, however, sometimes oxidized to copper sulphate, and so find its way into the rivers.

No injury to health appears to result from tin mine pollution, though fish are frequently destroyed, and the due flow of rivers interfered with.

(5.) *Pollution by Manganese Mines.*

The Commissions say (*h*), they have met with only one case of pollution from mines of this character, viz.:—at *Chillaton*, near Tavistock, and in that case only from suspended matter.

(6.) *Pollution by Baryta Mines.*

Baryta occurs in British mines in two forms—viz., as barium sulphate, and barium carbonate. The former compound, being insoluble in water, is harmless. The latter may, however, become dissolved by carbonic acid in solution in the water, and then is dangerously poisonous. The Commissioners say (*i*),—"In our opinion carbonate of baryta is, in respect of running water, one of the most dangerous minerals mined in this country; fortunately, however, injury to water can in this case result only from gross carelessness; but, if carbonate of baryta be stamped or ground with galena or other ore, the preservation of the neighbouring streams from poisonous pollution would be much more difficult."

(7.) *Pollution by China Clay Works*

arises only from suspended matter, the water used for washing the clays carrying off the finest particles, which give a milky whiteness to the streams receiving them. Grass may, however, be injured by being flooded with water largely charged with these fine particles of clay.

(*h*) R. P. C. 1868, 5th Rep. p. 24. (*i*) Ibid. p. 26.

CHAPTER VI.

AS TO THE INSTITUTION OF PROCEEDINGS.

PROCEEDINGS for an offence against the act may, subject to the restrictions therein contained, be instituted (1) by any person aggrieved by the commission of such offence; (2) by a sanitary authority, in relation to any stream within or passing through or by any part of their district; (3) by the Conservancy Board constituted under the Lee Conservancy Act, 1868, within the area of their jurisdiction (*a*). These we shall consider more in detail.

Of the restrictions above mentioned three apply equally to all persons instituting proceedings.

These are as follows:—(1.) Where the Local Government Board have given further time to a sanitary authority to render their sewage harmless proceedings cannot be instituted, for a pollution by sewage, until such time has expired. This restriction is contained in 3rd sect. of the act, where it is enacted, that "where the Local Government Board are satisfied after local inquiry that further time ought to be granted to any sanitary authority, which, at the date of the passing of this act, is discharging sewage matter into any stream, or permitting it to be so discharged," along a channel used, constructed, or in process of construction at the date of the passing of this act for the purpose of conveying such sewage matter, "for the purpose of enabling such authority to adopt the best practicable and available means for rendering harmless such sewage matter, the Local Government may by order declare that

(*a*) Sects. 8, 9. See Appendix.

this section shall not, so far as regards the discharge of sewage matter by such channel, be in operation until the expiration of a period to be limited in the order.

"Any order made under this section may be from time to time renewed by the Local Government Board, subject to such conditions, if any, as they may see fit."

(2.) Proceedings shall not be taken under the act against any person for any offence against the provisions of Parts II. and III. of the act until the expiration of twelve months after the passing of the act; nor shall proceedings in any case be taken under this act for any offence against the act until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender, nor shall proceedings under the act be taken for any offence against the act while other proceedings in relation to such offence are pending (*b*).

(3.) The act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water (*c*).

Institution of Proceedings by a Person aggrieved by the Commission of an Offence under the Act.

Proceedings may, subject to the restrictions in the act contained, be instituted in respect of any offence against the act by any person aggrieved by the commission of such offence (*d*).

"Person" includes any body of persons, whether corporate or unincorporate (*e*).

The restrictions here spoken of are, in addition to those already referred to, as follows:—A person aggrieved cannot prosecute for a manufacturing or mining pollution under the 4th and 5th sects., but can only apply to a sanitary authority and require them to do so. There is an appeal from the refusal of a sanitary authority to the Local Government Board.

(*b*) Sect. 13.
(*c*) Sect. 17.
(*d*) Sect. 8.
(*e*) Sect. 20.

These provisions are contained in sect. 6, which is as follows:—"Unless and until parliament otherwise provides the following enactments shall take effect, proceedings shall not be taken against any person under this part of this act save by a sanitary authority, nor shall any such proceedings be taken without the consent of the Local Government Board: Provided always, that if the sanitary authority, on the application of any person interested alleging an offence to have been committed, shall refuse to take proceedings, or apply for the consent by this section provided, the person so interested may apply to the Local Government Board, and if that board on inquiry is of opinion that the sanitary authority should take proceedings, they may direct the sanitary authority accordingly, who shall thereupon commence proceedings.

"The said Board, in giving or withholding their consent, shall have regard to the industrial interests involved in the case, and to the circumstances and requirements of the locality.

"The said Board shall not give their consent to proceedings by the sanitary authority of any district which is the seat of any manufacturing industry, unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry.

"Any person within such district as aforesaid, against whom proceedings are proposed to be taken under this part of this act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the sanitary authority to such proceedings being taken, and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken, so far as the same relate to

his works or manufacturing processes. The sanitary authority shall thereupon allow such person to be heard by himself, agents, and witnesses, and after inquiry such authority shall determine, having regard to all the considerations to which the Local Government Board are by this section directed to have regard, whether such proceedings as aforesaid shall or shall not be taken; and where any such sanitary authority has taken proceedings under this act, it shall not be competent to other sanitary authorities to take proceedings under this act, till the party against whom such proceedings are intended shall have failed in reasonable time to carry out the order of any competent court under this act."

Institution of Proceedings by a Sanitary Authority.

Every sanitary authority shall, subject to the restrictions in the act contained, have power to enforce the provisions of the act in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against the act which causes interference with the due flow within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person, whether such offence is committed within or without the district of the first-named sanitary authority (*f*).

The restrictions here referred to are as follows:—

(1.) Where the Local Government Board have granted further time to a sanitary authority for the adoption of the best practicable and available means for rendering their sewage harmless under 3rd sect.

(2.) A sanitary authority alone can institute proceedings for a manufacturing or mining pollution under 4th sect., and then only with consent of the Local Government Board; sect. 6.

(*f*) Sect. 8.

(3.) When one sanitary authority has taken proceedings, and obtained an order, against a manufacturing or mining pollution, other sanitary authorities shall not take proceedings under the act before the lapse of a reasonable time; sect. 6.

(4.) A sanitary authority has no power to institute proceedings under the act within the area of the jurisdiction of the Lee Conservancy Board; sect. 9.

(5.) No proceedings under act to be taken, except under Part I., before August 15, 1877; nor, in any case, until after the expiration of two months after written notice; nor where other proceedings relating to the same offence are pending; sect. 13.

(6.) Act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water; sect. 17.

(7.) Nothing done by any local, urban, or sanitary authority in pursuance of any act of parliament, empowering or requiring them to carry sewage into the sea or a tidal river, shall be an offence under the act; sect. 19.

Expenses.

Any expenses incurred by a sanitary authority in the execution of the act shall be payable as if they were expenses properly incurred by that authority in the execution of the Public Health Act, 1875 (*q*).

The Public Health Act, 1875, does not extend to the metropolis, so that no provisions are made by this section for the payment of expenses incurred in the execution of this act in the metropolis.

The payment of expenses incurred in the execution of

(*g*) Sect. 8.

the Public Health Act, 1875 (38 & 39 Vict. c. 55), is regulated by sects. 207, 208 and 229 of that act.

Section 207 provides, that all expenses incurred or payable by an *urban authority* in the execution of this act, and not otherwise provided for, shall be charged on and defrayed out of the district fund and general district rate leviable by them under this act, subject to the following exceptions:

That if in any district the expenses incurred by an urban authority (being the council of a borough) in the execution of the sanitary acts were at the time of the passing of this act payable out of the borough fund or borough rate, then the expenses incurred by that authority in the execution of this act shall be charged on and defrayed out of the borough fund or borough rate; and

That if in any district the expenses incurred by an urban authority (being improvement commissioners) in the execution of the sanitary acts were at the time of the passing of this act payable out of any rate in the nature of a general district rate, leviable by them as such commissioners throughout the whole of their district, then the expenses incurred by that authority in the execution of this act shall be charged on and defrayed out of such rate; and for the purpose of this section the council of the borough of Folkestone shall be deemed to be improvement commissioners; and

That where at the time of the passing of this act the expenses incurred by an urban authority in the execution of certain purposes of the sanitary acts were payable out of the borough fund and borough rate, and the expenses incurred by such authority in the execution of the other expenses of the said acts were payable out of a rate or rates leviable by that authority throughout the whole of their district for paving, sewering, or other sani-

tary purposes, then the expenses incurred by that authority in the execution of the same or similar purposes respectively under this act shall respectively be charged on and defrayed out of the rate or rates leviable as aforesaid.

Sect. 208. Where at the time of the passing of this act the expenses incurred by an *urban authority* for sanitary purposes are payable otherwise than in the manner provided by the Local Government Acts, the Local Government Board may, on the application of such authority, or of any ten persons rated to the relief of the poor within the district, declare by provisional order that the expenses of such authority incurred in the execution of this act shall be defrayed out of a district fund and general district rate to be levied by them under this act, subject to the provisions of this act with respect to the mode of defraying in certain cases the expenses of the repair of highways.

Sect. 229. The expenses incurred by a *rural authority* in the execution of this act shall be divided into general expenses and special expenses. General expenses (other than those chargeable on owners and occupiers under this act), shall be the expenses of the establishment and officers of the rural authority, the expenses in relation to disinfection, the providing conveyances for infected persons, *and all other expenses not determined* by this act or by order of the Local Government Board *to be special expenses.*

General expenses shall be payable out of a common fund, to be raised out of the poor rate of the parishes in the district, according to the rateable value of each contributory place, in manner in this act mentioned.

Institution of Proceedings by the Lee Conservancy Board.

The Conservancy Board constituted under the Lee Conservancy Act, 1868, within the area of their jurisdiction,

have, to the exclusion of any other authority, the powers for enforcing the provisions of this act which sanitary authorities have under this act (*h*).

The area of the jurisdiction of the Lee Conservancy Board is thus defined by sections 3 and 4 of the Lee Conservancy Act, 1868 (31 & 32 Vict. c. cliv).

"For the purposes of this act the Lee shall be taken to be the River Lee from its rise in the county of Bedford to certain stones or boundary marks placed on each side of the Bow Creek in the counties of Essex and Middlesex, to be called the South Boundary Stones, to be placed two hundred feet below the centre of the Barking Road iron bridge, including not only the ancient course of the river, and the Limehouse Cut, but also all cuts, canals, creeks, and streams, whether tidal or not, having formed or forming at any time before or after the passing of this act part of the course or channel of the river, or of the navigation commonly called the River Lee Navigation (except so much of the Manifold Ditch as shall from time to time be required by the New River Company for the conveyance of pure water); and the tributaries of the Lee shall be taken to be the rivers or brooks following, namely, —the Stort, Mimram, Beane, Rib, Quin, Ash, Pincey Brook, Cobbins Brook, Turkey Street Brook, Edmonton Brook, Salmon Brook, Moselle, Lynch, Stone Bridge Brook, and the Carbuncle, and such diversions, if any, of those rivers or brooks as are affected by the intercepting drain made under the powers of the East London Waterworks Act, 1853, and that intercepting drain and all streams flowing mediately or immediately into the Lee, or into any of the rivers or brooks aforesaid."

"The jurisdiction of the Lee Conservancy Board shall not extend below, and the jurisdiction of the Conservators of the River Thames shall not extend above, the South Boundary Stones."

"The said Conservancy Board may also enforce the

(*h*) Sect. 9.

provisions of the Lee Conservancy Act, 1868, under the head or division 'Protection of Water,' by application to the county court having jurisdiction in the place in which any offence is committed against those provisions, and such court may by summary order require any person to abstain from the commission of any such offence; and the provisions of this act with respect to summary orders of county courts and appeal therefrom shall apply accordingly."

The portions of the Lee Conservancy Act, 1868, which refer to the constitution of the board, and the "provisions" which this section enables them to enforce, are given in Appendix, p. 182. The provisions authorize the board to preserve and maintain the purity of the water of the Lee and its tributaries, and (subject to rights of taking and impounding water) its due flow; to prosecute as an offence under the act the opening into the Lee any new sewer, or the passing of sewage or other offensive matter through old sewers into the Lee; to order the discontinuance of the flow of sewage into the Lee; to prosecute any person who places a manure heap or other collection of offensive or injurious matter on the banks of the Lee or its tributaries, so that any offensive or injurious matter may drain into the same.

Jurisdiction of County Court.

Power is given to the county court, having jurisdiction in the place where any offence against the act is committed, to restrain the same by summary order.

Sect. 10 enacts, that "The county court having jurisdiction in the place where any offence against this act is committed may by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this act, may require him to perform such duty in manner in the said order specified; the court may insert in any order such

conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think fit, and generally may give such directions for carrying into effect any order as to the court seems meet. Previous to granting such order the court may, if it think fit, remit to skilled parties to report on the 'best practicable and available means' and the nature and cost of the works and apparatus required, who shall in all cases take into consideration the reasonableness of the expense involved in their report.

"Any person making default in complying with any requirement of an order of a county court made in pursuance of this section shall pay to the person complaining, or such other person as the court may direct, such sum, not exceeding fifty pounds a day for every day during which he is in default, as the court may order; and such penalty shall be enforced in the same manner as any debt adjudged to be due by the court; moreover, if any person so in default persists in disobeying any requirement of any such order for a period of not less than a month or such other period less than a month as may be prescribed by such order, the court may in addition to any penalty it may impose appoint any person or persons to carry into effect such order, and all expenses incurred by any such person or persons to such amount as may be allowed by the county court shall be deemed to be a debt due from the person in default to the person or persons executing such order, and may be recovered accordingly in the county court."

If, after a county court has made an order under this section, requiring any person to abstain from the commission of an offence, or to perform some duty, that person makes default, an application should be made to the county court judge to inflict a penalty as here provided. This penalty may be enforced in the same manner as any debt

adjudged to be due by the court, that is to say, by execution against the goods of the defaulter (*i*).

Where any breach of an order in the nature of an injunction has been made, the registrar must, upon application by the party interested in the enforcement of the order, issue to the high bailiff, or to such person for service by his solicitor, a notice under the seal of the court, requiring the person who has been guilty of the breach of the order to appear at the court, to be held on a day to be named therein, to show cause why he should not be committed for contempt for having disobeyed the said order (*k*).

The *expenses* incurred in carrying into effect an order of the county court, it will be observed, are not to be recovered in the same manner as the penalties referred to in the section, but by action in the county court. This may be done irrespective of their amount.

An *appeal* is granted as of right from the decision of the county court to the High Court of Justice in the form of a special case.

Sect. 11 enacts that—"If either party in any proceedings before the county court under this act feels aggrieved by the decision of the court in point of law or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice.

"The appeal shall be in the form of a special case to be agreed upon by both parties or their attorneys, and, if they cannot agree, to be settled by the judge of the county court upon the application of the parties or their attorneys.

"The court of appeal may draw any inferences from the facts stated in the case that a jury might draw from facts stated by witnesses.

"Subject to the provisions of this section, all the enact-

(*i*) 9 & 10 Vict. c. 95, s. 94; County Court Ord. 1875, XIX. r. 1.

(*k*) County Court Orders, 1875; Ord. XIX. r. 30.

ments, rules and orders relating to proceedings in actions in county courts, and to enforcing judgments in county courts and appeals from decisions of the county court judges, and to the conditions of such appeals, and to the power of the superior courts on such appeals, shall apply to all proceedings under this act, and to an appeal from such action, in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the court."

Appeals from county courts are heard by a divisional court of the High Court of Justice, composed of judges assigned for the purpose of hearing appeals from inferior courts (*l*).

The party appealing by special case must, within ten days after the determination or direction in the county court, give notice to the other party or his attorney (*m*).

The ten days within which this notice may be given are reckoned exclusive of the day of trial (*n*).

The notice of appeal must be in writing, and must state the grounds on which the party appeals (*o*).

It must also be signed by the appellant, his attorney or agent, and it must be served on the registrar, as well as on the successful party, by post or otherwise (*p*).

The party appealing must also, within ten days, give security, to be approved of by the registrar of the court, for the costs of the appeal (*q*).

The security may be either a bond (*r*) or a deposit of money (*s*).

The case must be presented to the judge for signature at the court next after the parties shall have agreed upon

(*l*) Judicature Act, 1873, s. 45; Rules of the Supreme Court, Ord. LVIII. r. 19.

(*m*) 13 & 14 Vict. c. 61, s. 14.

(*n*) C. C. Ord. 1875, XXIX. r. 2.

(*o*) Ibid. r. 3; and see *Cannon* v. *Johnson*, 21 L. J., Q. B. 164; *Evans* v. *Matthews*, 26 L. J., Q. B. 166.

(*p*) Ibid. r. 3; but see *Parkgate Iron Co.* v. *Coats*, L. R., 5 C. P. 634.

(*q*) 13 & 14 Vict. c. 61, s. 14.

(*r*) 19 & 20 Vict. c. 108, s. 70.

(*s*) Ibid. s. 71.

it, and, if approved, will then be signed by him, and be sealed with the seal of the court. If he does not approve, the parties are to be summoned and heard, and the case settled by the judge and sealed (*t*).

When signed and sealed, one copy of the case must be deposited with the registrar, and another sent by the appellant to the successful party, by post or otherwise, within three clear days next after the time of its being signed and sealed (*u*).

The appellant must, within three days next after the case is signed and sealed, transmit it, and a sealed copy, by post or otherwise, to the Crown Office. Notice of such transmission must forthwith be given by the appellant to the successful party by post or otherwise (*x*).

The divisional Court of Appeal having heard the case argued may order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, or otherwise give the proper judgment, as the case may be (*y*). No appeal lies from this judgment without leave (*z*).

When the Court of Appeal has pronounced judgment, either party may deposit the original order of the Court of Appeal with the registrar of the county court, and thereupon the judgment is to be filed and enforced as if it had been made by the county court (*a*). If the order of the Court of Appeal is, that the judgment shall be entered for either party, then such judgment must be entered accordingly, and the successful party is at liberty to proceed thereupon, as if upon an original judgment of the county court (*b*).

(*t*) C. C. Ord. 1875, XXIX. r. 5.
(*u*) Ibid. r. 7.
(*x*) 13 & 14 Vict. c. 61, s. 15; C. C. Ord. 1875, XXIX. r. 8.
(*y*) 13 & 14 Vict. c. 61, s. 14; 28 & 29 Vict. c. 99, s. 18.
(*z*) Judicature Act, 1873, s. 45.
(*a*) C. C. Ord. 1875, XXIX. r. 9.
(*b*) Ibid. r. 11.

Removal of Plaint into High Court of Justice.

Any plaint entered in a county court under the act may be removed into the High Court of Justice by leave of any judge of the said High Court, if it appears to such judge desirable in the interests of justice that such case should be tried in the first instance in the High Court of Justice, and not in a county court, and on such terms as to security for and payment of costs, and such other terms (if any) as such judge may think fit (*c*).

(*c*) Sect. 11.

CHAPTER VII.

AS TO FACILITIES FOR FACTORIES DRAINING INTO SEWERS.

"EVERY sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers:

"Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers, or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view:

"Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority" (*a*).

A "sanitary authority," as defined by sect. 20, means—"In the metropolis, as defined by the Metropolis Management Act, 1855, any local authority acting in the execution of the Nuisances Removal for England Act, 1855, and the acts amending the same."

Sanitary or other Local Authority.

The first consideration which arises in the practical application of this section is, what is the sanitary or other local authority to which application must be made by

(*a*) Sect. 7.

manufacturers wishing to avail themselves of the facilities here required to be given to them?

It will be found by reference to the statutory provisions that the *main* sewers in the metropolis (including the city of London and the liberties thereof) are vested in and are under the control of the Metropolitan Board of Works. That all other sewers in the metropolis are vested in and are under the control of the vestries and district boards.

The local authority acting in the execution of the Nuisances Removal Act, 1855, are, in the city of London and the liberties thereof, the Commissioners of Sewers; and for the metropolis the vestries and district boards.

Under sects. 7 and 20 of the act it is only a sanitary authority that has the sewers under its control, *and* is a local authority under the Nuisances Removal Act, 1855, that is required to give facilities for the use of sewers. It would seem, therefore, that the Metropolitan Board of Works, having the control over the *main* sewers of the metropolis, but *not* being a local authority under the Nuisances Removal Act, 1855, cannot, as a sanitary authority, authorize manufacturers to carry their liquid refuse into the *main* sewers.

The vestries, however, being both the sanitary authorities for the metropolis, and the local authorities for the execution, in the metropolis, of the Nuisances Removal Act, 1855, have the power and are required to give such facilities in respect of all sewers, not being main sewers. The Metropolitan Board of Works not being a "sanitary authority" in the metropolis, as defined by the act, the question arises whether it comes within the expression "or other local authority having sewers under their control."

As the object of sect. 7 is to give facilities, it may be that the Board of Works, which is a corporate body (*b*), will be held to be a "local authority" for the purposes of

(*b*) 18 & 19 Vict. c. 120, s. 43.

the act, as otherwise many difficulties would arise in the application of this section.

In the Sewage Utilization Act, 1867 (30 & 31 Vict. c. 113), the term "sewer authority" was extended so as to include any corporate body authorized to deal with sewers, &c.; but it remains to be seen whether, without any similar statutory provisions, the court will extend the meaning of "local authority" so as to include the Metropolitan Board of Works.

It is further to be observed that the definition of a "sanitary authority," given in sect. 20, shall obtain "if *not inconsistent with the context.*" It may be that the object of sect. 7 being to give facilities, and sect. 20 giving a definition of a "sanitary authority," which would prevent the authority having the *main* sewers in the metropolis under its control, giving those facilities, the definition in the latter section may be held to be "inconsistent with the context" and therefore inapplicable.

The statutory provisions referred to are as follows:—

Sect. 250 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), enacts, that in the construction of the act "the metropolis" shall be deemed to include the city of London, and the parishes and places mentioned in schedules A., B. and C. to this act (*c*); "the city of London" shall be deemed to include all parts now within the jurisdiction of the Commissioners of Sewers for the city of London (*d*).

By sect. 135 (*e*), the sewers mentioned in schedule D. (*f*), being the main sewers then vested in the Commissioners of Sewers of the city of London, and in the Metropolitan Commissioners of Sewers, are vested in the Metropolitan Board of Works.

The Board were required by this section to make such *new* sewers as were required to prevent the sewage of the metropolis from passing into the *Thames* in or near the metropolis. By the Amendment Act of 1858 (21 & 22

(*c*) Appendix, p. 171.
(*d*) Ibid.
(*e*) Ibid. p. 167.
(*f*) Ibid. p. 172.

Vict. c. 104), sect. 1, the Board were also required to execute the necessary improvement of the main drainage for preventing the sewage of the metropolis from passing into the *Thames* within the metropolis (*f*).

Under these powers the existing system of intercepting sewers have been constructed on either side of the *Thames*. These, as well as the sewers mentioned in Schedule D., are vested in the Metropolitan Board.

By sect. 68 (*g*), all sewers vested in the Metropolitan Commissioners of Sewers which are situate in any parish mentioned in Schedule A. (*h*), except such sewers as are mentioned in Schedule D. (*i*), are vested in the vestry of such parish; and all sewers vested in the said Metropolitan Commissioners which are situate within any district mentioned in Schedule B. (*k*), except as before excepted, are vested in the Board of Works for such district.

Sect. 134 (*l*) enacts, that every vestry and district board shall execute within their respective parish or district all the duties exerciseable under the Nuisances Removal Act, 1855, and sect. 6 of the Nuisances Removal Amendment Act, 1860 (23 & 24 Vict. c. 77); provided that, as regards the metropolis, the vestries and district boards under the above act shall *continue* to be the local authorities for the execution of the Nuisances Removal Act.

Sect. 69 gives power to vestries and district boards, with the approval of the Metropolitan Board of Works, to construct new sewers; and by sect. 89 (*m*) a vestry or district board may transfer their powers and duties in relation to sewerage to the Metropolitan Board of Works, and the sewers of the parish or district become vested in the latter body, but this can only be done after obtaining the consent of the Metropolitan Board (*n*); and by sect. 44 of the Metropolis Management Amendment Act, 1862,

(*f*) Appendix, p. 173.
(*g*) Ibid. p. 165.
(*h*) Ibid. p. 171.
(*i*) Ibid. p. 172.
(*k*) Ibid. p. 171.
(*l*) Ibid. p. 167.
(*m*) Ibid.
(*n*) 25 & 26 Vict. c. 102, s. 28.

owners and occupiers of land are authorized to execute works of drainage. And see sects. 45—48, and sect. 61 of the same act.

The Metropolitan Board of Works, under sect. 137 (*o*), may declare any sewers to be main sewers, and thereupon the same shall vest in and be under the management of the Board, and take under their jurisdiction sewerage matters under the jurisdiction of vestries and district boards; and by the following section (*p*) the Metropolitan Board is required to make general and special orders for the guidance and control of vestries and district boards in the exercise of their powers and duties in relation to sewerage. And see sect. 83 of 25 & 26 Vict. c. 102.

Elsewhere in England "sanitary authority" shall mean any urban or rural sanitary authority acting in the execution of the Public Health Act, 1875 (*q*).

By reference to the section of the Public Health Act, 1875, set out below, it will be found that the urban and rural sanitary authority (also termed the local authority) are either the town council, improvement commissioners, local boards, or guardians of unions.

All existing and future sewers within the district of a local authority shall vest in and be under the control of such local authority, except (1) sewers made by any person or company for their own profit; or (2) made and used for draining or irrigating land under a local or private act; or (3) sewers under the authority of any commissioners of sewers appointed by the Crown; and (4) (subject to any agreement to the contrary) sewers constructed by or transferred to some other local authority, sewage board or other authority empowered under any act of parliament to construct sewers.

Town councils, improvement commissioners, local boards, or guardians of unions, as the case may be, being the sanitary authorities having sewers under their control, are the bodies to whom application must be made by

(*o*) Appendix, p. 169.
(*p*) Ibid.
(*q*) Sect. 20 of R. P. P. A. App. 199.

manufacturers wishing to use the sewers for the discharge of their manufacturing refuse.

With regard to sewers coming within the 2nd, 3rd and 4th exceptions above referred to, it is suggested that the bodies in whom those sewers are vested were intended to come within the expression "or other local authority" used in sect. 7, and that they also are required to give facilities for the use of the sewers vested in them.

Urban and rural sanitary authorities are constituted under the following sections of the Public Health Act, 1875 (38 & 39 Vict. c. 55):—

Sect. 5 enacts that, "For the purposes of this act England, except the metropolis, shall consist of districts to be called respectively,—

"(1) Urban sanitary districts; and

"(2) Rural sanitary districts (in this act referred to as urban and rural districts); and such urban and rural districts shall respectively be subject to the jurisdiction of local authorities, called urban sanitary authorities and rural sanitary authorities (in this act referred to as urban and rural authorities), invested with the powers in this act mentioned."

Sect. 6. "Urban districts shall consist of the places in that behalf mentioned in the first column of the table in this section contained, and urban authorities shall be the several bodies of persons specified in the second column of the said table in relation to the said places respectively."

Urban District.	Urban Authority.
Borough constituted such either before or after the passing of this act.	The Mayor, Aldermen and Burgesses acting by the Council.
Improvement act district constituted such before the passing of this act, and having no part of its area situated within a borough or local government district.	The Improvement Commissioners.
Local government district constituted such either before or after the passing of this act, having no part of its area situated within a borough, and not coincident in area with a borough or improvement act district.	The Local Board.

"Provided that—

"(1.) Any borough, the whole of which is included in and forms part of a local government district or improvement act district, and any improvement act district which is included in and forms part of a local government district, and any local government district which is included in and forms part of an improvement act district, shall for the purposes of this act be deemed to be absorbed in the larger district in which it is included, or of which it forms part; and the improvement commissioners or local board, as the case may be, of such larger district shall be the urban authority therein; and

"(2.) Where any improvement act district is coincident in area with a local government district, the improvement commissioners and not the local board shall be the urban authority therein; and

"(3.) Where any part of an improvement act district is situated within a borough or local government district, or where any part of a local government district is situated within a borough, the remaining part of such improvement act district or of such local government district so partly situated within a borough shall for the purposes of this act continue subject to the like jurisdiction as it would have been subject to if this act had not been passed, unless and until the local government board by provisional order otherwise directs.

"For the purposes of this act the boroughs of Oxford, Cambridge, Blandford, Calne, Wenlock, Folkestone, and Newport, Isle of Wight, shall not be deemed to be boroughs, and the borough of Cambridge shall be deemed to be an improvement act district, and the borough of Oxford to be included in the local government district of

Oxford. So much of the borough of Folkestone as is not included within the local government district of Sandgate shall be an urban district, and shall be under the jurisdiction, for the purposes of this act, of the authority for executing 'The Folkestone Improvement Act, 1855.'"

Sect. 9. "The area of any union which is not coincident in area with an urban district nor wholly included in an urban district (in this section called a rural union), with the exception of those portions (if any) of the area which are included in any urban district, shall be a rural district, and the guardians of the union shall form the rural authority of such district."

Sect. 13. "All existing and future sewers within the district of a local authority, together with all buildings, works, material, and things belonging thereto,

"Except

"(1.) Sewers made by any person for his own profit, or by any company for the profit of the shareholders; and

"(2.) Sewers made and used for the purpose of draining, preserving, or improving land under any local or private act of parliament, or for the purpose of irrigating land; and

"(3.) Sewers under the authority of any commissioners of sewers appointed by the Crown,

shall vest in and be under the control of such local authority:

"Provided that sewers within the district of a local authority which have been or which may hereafter be constructed by or transferred to some other local authority, or by or to a sewage board or other authority empowered under any act of parliament to construct sewers, shall (subject to any agreement to the contrary) vest in and be under the control of the authority who constructed the same or to whom the same have been transferred."

By sect. 14, "Any local authority may purchase or otherwise acquire from any person any sewer, or any right

of making or of user or other right in or respecting a sewer within their district. A right of user in any sewer so purchased shall be retained by the person who acquired such right before the purchaser."

By sect. 15, they are required to make such sewers as are necessary for effectually draining their district; and sect. 28 enables local authorities to agree, with the sanction of the local government board, to allow their sewers to communicate.

Certain provisions relating to the use of sewers are made by the Public Health Act, 1875, see sects. 21—23, Appendix, p. 189; and the Metropolis Management Amendment Act, 1862, see Appendix, p. 176.

Mandamus.

It would seem from the wording of the 7th section, that the sanitary or other local authority having sewers under their control *shall* give the facilities therein mentioned unless the same would (1) prejudicially affect the *sewers;* or (2) prejudicially affect the *sewage;* or (3) be injurious from a *sanitary* point of view; or (4) where the sewers are only sufficient for the requirement of their district; or (5) would interfere with any order of any court of competent jurisdiction.

An applicant under this section must be prepared to prove, to the satisfaction of the authority, that neither of, at any rate the three first of, these objections will result from the introduction of the refuse of his manufacturing process into the sewers.

Notwithstanding that this involves the proof of a negative proposition, or of a series of negative propositions, the *onus probandi* will, in practice, necessarily lie on the applicant.

With regard to the last two provisional circumstances, the means of knowledge being chiefly or exclusively with the local authority, an applicant need not trouble himself about them.

The determination of the matters of fact necessarily involved in every application under this section is left by the act exclusively in the hands of the authority itself; and, so far as the act is concerned, no appeal therefrom is provided.

Under these circumstances the only mode of reviewing their decision would seem to be by writ of mandamus.

By sect. 25, subsect. 8 of the Judicature Act, 1873 (*t*), a mandamus may be granted by an interlocutory order of any of the superior courts of law in all cases in which it shall appear to the court to be just or convenient that such order should be made. The courts, in the exercise of this very extensive power, will doubless be guided by the same principles upon which the common law courts have acted heretofore.

In the enforcement of statutory provisions it is a general rule, that whenever an act of parliament gives power to, or *imposes an obligation on*, a particular person, to do some particular act or duty, and provides no specific legal remedy on non-performance, the court will, in order to prevent a failure of justice, grant a mandamus to command the doing of such act or duty (*u*).

If the return made to a writ of mandamus were in substance an assertion of the existence of any of the provisional circumstances mentioned in the section, the court has power to direct an issue to be tried before a judge at the assizes, or at the sittings in Middlesex or London, as to the truth of such return (*x*); and upon the finding of such matter of fact would be guided in granting or in refusing a peremptory mandamus.

And when the Local Government Board has directed a sanitary authority to commence proceedings in respect of a manufacturing or mining pollution under sect. 6, a

(*t*) 36 & 37 Vict. c. 66.

(*u*) Tapping on Mandamus, p. 30.

(*x*) Judicature Act, 1873, s. 29; Rules of Court, 1875, Ord. XXXVI. r. 29.

mandamus would seem to be the proper remedy in the event of such order being disobeyed.

The writ of *mandamus* is, however, a prerogative writ and not a writ of right, and it is in this sense in the discretion of the court whether it shall be granted or not. And where the right in respect of which a rule for a *mandamus* has been granted appears to be doubtful, upon showing cause, the court will sometimes grant a mandamus in order that the rights may be tried upon the return in the manner already mentioned. The discretion of the court so exercised cannot be questioned.

But when the court grants a peremptory mandamus, which is a determination of the right, and not a mere dealing with the writ, the decision is subject to review (*y*).

Recommendation of Commissioners.

The Rivers Pollution Commissions, appointed in 1868, recommend that power should be given to all manufacturers in *towns*, except those of gas, paraffin oil, pyroligneous acid, animal charcoal, tin plate and galvanized iron, to discharge their drainage waters into the town sewers under suitable regulations (*z*).

(*y*) *R.* v. *Wigan*, L. R., 1 App. Cas. 611.

(*z*) See 5th Rep. p. 50.

PART II.

Riparian Rights and their Protection.

SECT. 16 of the Rivers Pollution Prevention Act, 1876, enacts, that "The powers given by this act shall not be deemed to prejudice or affect any other rights or powers now existing or vested in any person or persons by act of parliament, law, or custom, and such other rights or powers may be exercised in the same manner as if this act had not passed; and nothing in this act shall legalize any act or default which would but for this act be deemed to be a nuisance or otherwise contrary to law: Provided, nevertheless, that in any proceedings for enforcing against any person such rights or powers the court before which such proceedings are pending shall take into consideration any certificate granted to such person under this act."

It is, therefore, still necessary to consider the rights of riparian proprietors, so far as they relate to the subject of the pollution and obstruction of rivers, independently of the Rivers Pollution Prevention Act; and their powers of enforcing those rights.

Riparian rights arise either *ex jure naturæ*, by way of *easements, or custom;* their infringement may be prevented by *injunction*, compensated by an *action for damages*, or punished by *indictment*.

CHAPTER VIII.

AS TO RIPARIAN RIGHTS ARISING "EX JURE NATURÆ."

EVERY proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of other proprietors above or below on the stream, whether he exercise those rights or not, and may begin to exercise them whenever he will (*a*).

In the case of *Williams* v. *Morland* it was held that running water is originally *publici juris*, and an individual can only acquire a right to it by applying so much of it as he requires for a beneficial purpose, leaving the rest to others, who, if they acquire a right to it by subsequent appropriation, cannot lawfully be disturbed in the enjoyment of it (*b*). But it is *publici juris* in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only (*c*).

In *Mason* v. *Hill* (*d*), Chief Justice *Denman*, delivering the considered judgment of the Court of King's Bench, said:—

"The position, that the first occupant of running water

(*a*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 611.

(*b*) 4 D. & R. 583; 2 B. & C. 901; and see *Liggins* v. *Inge*, 7 Bing. 682; *Bealey* v. *Shaw*, 6 East, 208; *Saunders* v. *Newman*, 1 B. & Ald. 258.

(*c*) *Embrey* v. *Owen*, 20 L. J. (N. S.) Exch. 212. See also *Wood* v. *Waud*, 3 Exch. 775; *Tyler* v. *Wilkinson*, 4 Mason, U. S. R. 397.

(*d*) 5 B. & Ad. 1.

for a beneficial purpose, has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrong-doer; and the owner of the land who applies the stream that runs through it, to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill: *The Earl of Rutland* v. *Bowler* (*e*). But it is a very different question whether he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil, even when unapplied; and deprives him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall, within its limits, might at any time be taken away; and by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another.

"We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealy* v. *Shaw* (*f*); *Saunders* v. *Newman* (*g*); *Williams* v. *Moreland* (*h*). It appears to us, also, that the doctrine of Blackstone and the dicta of learned judges, both in some of those cases and in that of *Cox* v. *Matthews* (*i*), have been misconceived" (*k*). After reviewing the above cases and dicta, and the authorities in the *Roman* law, the learned judge continues:—"The *Roman* law considered running water,

(*e*) Palmer, 290.
(*f*) 6 East, 208.
(*g*) 1 B. & Ald. 258.
(*h*) 2 B. & C. 910.
(*i*) 1 Ventr. 137.
(*k*) 5 B. & Ad. 18.

not as *bonum vacans*, in which any one might acquire a property; but as public or common, *in this sense only*, that all might drink it, or apply it to the necessary purposes of supporting life, and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession; and during the time of such possession only. We think that no other interpretation ought to be put upon the passage in *Blackstone*, and that the dicta of the learned judges above referred to, in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor, so far as we know, in the *Roman* law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below, of the special benefit and advantage of the natural flow of water therein" (*l*).

And in *Chasemore* v. *Richards* (*m*), Lord *Wensleydale* said:—"The right of the proprietor to the enjoyment of a watercourse on the surface is a natural right, and not acquired by occupation of the stream itself, or presumed grant. And the expressions used by Mr. Justice *Bayley* in *Williams* v. *Moreland*, and by Lord Chief Justice *Tindal* in *Liggins* v. *Inge*, that water flowing in a stream is *publici juris*, and the property of the first occupier, are founded on a mistake between the property in the water itself and the right to have its continual flow" (*n*).

"All that a riparian proprietor is entitled to is *flumen aquæ*; but no atom of the water belongs exclusively to him" (*o*).

Primâ facie, the proprietor of each bank of a stream is

(*l*) Ibid. p. 24. And see *Tyler* v. *Wilkinson*, 4 Mason, U. S. R. 397; *Bliss* v. *Hall*, 4 Bing. N. C. 183; *Embrey* v. *Owen*, 6 Exch. 369.

(*m*) 7 H. L. Cas. 349.

(*n*) Ibid. p. 384.

(*o*) *Medway Co.* v. *Earl of Rumney*, 9 C. B., N. S. 586.

the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of other proprietors, who may be affected by his operations; no proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below (*p*), nor throw the water back upon the proprietors above. Every proprietor who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or licence from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years (*q*).

The right does not depend on the ownership of the soil covered by the water, but is appurtenant to the ownership of the bank (*r*).

The right to have a stream running in its natural course is *not* by a presumed grant from long acquiescence on the part of the riparian proprietors above and belong, but it is *ex jure naturæ*, and an incident of property as much as the right to have the soil itself in its natural state, unaltered by the acts of a neighbouring proprietor, who cannot dig so as to deprive it of the support of his land (*s*).

(*p*) Except when required for domestic purposes. See *Miner* v. *Gilmour*, 12 Moo. P. C. 156; *Lord Norbury* v. *Kitchin*, 9 Jur., N. S. 132; *Nuttall* v. *Bracewell*, L. R., 2 Exch. 9.

(*q*) *Wright* v. *Howard*, 1 S. & S. 203; *Mason* v. *Hill*, 5 B. & Ad. 1; *Acton* v. *Blundell*, 13 L. J. (N. S.) Exch. 300.

(*r*) *Wood* v. *Waud*, 3 Exch. 748; *Lord* v. *The Commissioners of Sydney*, 12 Moo. P. C. 473; *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300; *Lyon* v. *Fishmongers' Co.*, L. R., 1 App. Cas. 662, per Lord Selborne, p. 683.

(*s*) *Dickinson* v. *The Grand Junction Canal Co.*, 7 Exch. 299; and see *Mason* v. *Hill*, 5 B. & Ad. 1; *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Tyler* v. *Wilkinson*, 4 Mason,

"The observations of Lord Chief Justice *Tindal* in the case of *Acton* v. *Blundell,* and of Mr. Justice *Maule* in *Smith* v. *Kenrick,* as to the origin of the right to the continual flow of a superficial stream, being the presumed acquiescence of the proprietors above and below, and which is the foundation of the distinction made by the Lord Chief Justice between those streams and subterranean watercourses, cannot be supported" (*t*).

The rights of riparian proprietors to flowing water, as laid down in Kent's Commentaries, is quoted, approved and followed in many of the English cases, in which those rights have come in question (*u*). The law is thus most perspicuously stated:—"Every proprietor of land on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. '*Aqua currit et debet currere*' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all

U. S. R. 397; *Wood* v. *Waud,* 3 Exch. 775; *Shury* v. *Pigott,* 3 Bulstr. 339; *Lyon* v. *Fishmongers' Co.,* 1 L. R. App. Cas. 682.

(*t*) Per Lord *Wensleydale* in *Chasemore* v. *Richards,* 7 H. L. Cas. 384.

(*u*) See *Embrey* v. *Owen,* 6 Exch. 369; *Wood* v. *Waud,* 3 Exch. 775.

the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him. Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land a stream passes is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish or affect the application of the water by the proprietors above or below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbours. Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule must not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietor. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would

become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman law:—'*Sic enim debere quem meliorem agrum suum facere, ne vicini deteriorem faciat*'" (*x*).

Navigable and Tidal Rivers.

Landowners on the banks of a navigable river possess the ordinary rights of riparian proprietors, controlled by the public rights of navigation (*y*).

"A riparian owner on a navigable river has superadded to his riparian rights the right of navigation over every part of the river; on the other hand, his riparian rights must be controlled in this respect, that whereas, in a non-navigable river, all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public right of navigation would intervene, and would prevent this being done. But the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land: but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation" (*z*).

It makes no difference in this respect whether the navigable river be tidal or non-tidal (*a*). "The most material differences between the stream above and the stream below the limit of the tides are, that in an estuary or arm of the sea there exists by the common law public rights in respect of navigation and otherwise, which do not generally (in this country), exist in the non-tidal

(*x*) 3 Kent's Comm. s. 3, p. 439.

(*y*) *Lyon* v. *Fishmongers' Co.*, L. R., 1 App. Cas. 662; *Rose* v. *Groves*, 5 Man. & Gr. 613; *Att.-Gen.* v. *Thames*, 1 H. & M. 1.

(*z*) Per Ld. *Cairns*, L. C., *Lyon* v. *Fishmongers' Co.*, L. R., 1 App. Cas. 673.

(*a*) Ibid. p. 673.

parts of the stream; and that the *fundus* or bed of the non-tidal parts of the stream belong, generally, to the riparian proprietors, while in the estuary it belongs generally to the Crown" (*b*).

Stream at its Source.

If a stream flows at its source by the operation of nature, that is, if it is a natural stream, the rights and liabilities of the party owning the land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man, that is, if it is an artificial stream, the owner of the land at its source or the commencement of its flow is not subject to any rights or liabilities towards any other person in respect of the water of that stream (*c*).

Where the water from a spring flowed in a gully, or natural channel, to a stream on which was a mill, and the spring having been cut off at its source and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose, it was held, that an action lay by the mill owner against the person so obstructing the water (*d*). Pollock, C. B.:— "The real question is, whether there is a natural watercourse which, but for the acts done by the defendant, would have conveyed water to the stream, and from thence to the mill of the plaintiff. If there is a natural spring, the water from which flows in a natural channel, it cannot be lawfully diverted by any one to the injury of the riparian proprietors. It is otherwise when nothing is known as to the sources of supply; in that case, as no right can be acquired against the owner of the land under which the spring exists, he may do as he pleases with it, and if, in mining or draining his land, he tops a spring, he cannot be made responsible" (*e*).

(*b*) Ibid. per Lord *Selborne*, p. 682.

(*c*) *Gaved* v. *Martyn*, 19 C. B., N. S. 759.

(*d*) *Dudden* v. *Clutton Union*, 1 H. & N. 627.

(*e*) Ibid. p. 630.

In *Ennor* v. *Barwell* (*f*), decided in 1860, V.-C. *Stuart* said,—"I do not find it laid down in any case, if the very source of the water is so close to the boundary of his neighbour's wall that, from the nature of that source and at the very commencement of the flow of the water, it wells through without forming any regular or defined channel, that the right of the proprietor upon whose land it would flow but for the interruption is in the least degree to be intercepted any more than if it had come down from a higher source and on steeper ground, where it might have a defined channel even at the very source" (*g*).

Underground Streams.

The right to a natural stream flowing in a definite channel is not confined to streams of the surface; but the right to an underground stream flowing in a known and definite channel is equally a right *ex naturâ*, and an incident to the land itself, as a beneficial adjunct to it (*h*).

Underground percolating Water.

The principles which apply to flowing water in streams or rivers, the right to the flow of which in its natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates (*i*). And it is now well

(*f*) 2 Giff. 410.

(*g*) Ibid. 426. On appeal the Lords Justices varied the V.-C.'s order, but agreed that there was no difficulty upon the law, but only upon the evidence; 4 L. T. Rep., N. S. 597.

(*h*) *Wood* v. *Waud*, 3 Exch. 748; *Chasemore* v. *Richards*, 7 H. L. Cas. 384; *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 300, per *Pollock*, C. B.

(*i*) *Chasemore* v. *Richards*, 7 H. L. Cas. 349; and see *Rawstron* v. *Taylor*, 11 Exch. 382; *Broadbent* v. *Ramsbotham*, Ibid. 602, 615; *Acton* v. *Blundell*, 12 M. & W. 324; *Bolston* v. *Bensted*, 1 Camp. 462; *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 282; *Popplewell* v. *Hodkinson*, L. R., 4 Exch. 248; *Grand Junction Canal* v. *Shugar*, L. R., 6 Ch. 483.

established that the disturbance or removal of the soil in a man's own land, though it is the means (by process of natural percolation) of drying up his neighbour's spring or well, does not constitute the invasion of a legal right, and will not sustain an action. And further, that it makes no difference whether the damage arise by the water percolating away, so that it ceases to flow along channels through which it previously found its way to the spring or well; or whether, having found its way to the spring or well, it ceases to be retained there (*k*).

In the case of *Acton* v. *Blundell* (*l*), it was held that the owner of land through which water flows in a subterraneous course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. *Tindal*, C. J., in delivering the considered judgment of the Court of Exchequer Chamber, said: "We think, on considering the grounds and origin of the law which is held to govern running streams, the consequence which would result if the same law is made applicable to springs beneath the surface, and, lastly, the authorities to be found in the books (*m*), so far as any inference can be drawn from them bearing on the point now under discussion, that there is a marked and substantial difference between the two cases, and that they are not to be governed by the same rule of law" (*n*). In later decisions (*o*) the "grounds

(*k*) *Ballacorkish Mining Co.* v. *Harrison*, L. R., 5 P. C. 61; *Stainton* v. *Metropolitan Board of Works*, 26 L. J., Ch. 300.

(*l*) 12 M. & W. 324; and see *New River Co.* v. *Johnson*, 2 E. & E. 435; *R.* v. *Metropolitan Board of Works*, 3 B. & S. 726; *Galgay* v. *G. S. & W. Railway Co.*, 4 Ir. C. L. 456; *Stainton* v. *Woolrych*, 23 Beav. 225.

(*m*) The authorities commented upon were *Cooper* v. *Barker*, 3 Taunt. 99; *Partridge* v. *Scott*, 3 M. & W. 230; Dig., lib. 39, tit. 3, s. 12.

(*n*) See p. 349.

(*o*) *Chasemore* v. *Richards*, 7 H. L. Cas. 384; *Wood* v. *Waud*, 3 Exch. 775.

and origin of the law," as laid down in this case, have not been approved. The rest of the judgment has, however, been approved, and is well worthy of attention. His Lordship continues: "But the difference between the two cases with respect to the consequences, if the same law is to be applied to both, is still more apparent. In the case of the running stream, the owner of the soil merely transmits the water over its surface; he receives as much from his higher neighbour as he sends down to his neighbour below; he is neither better nor worse; the level of the water remains the same. But if the man who sinks the well in his own land can acquire by that act an absolute and indefeasible right to the water that collects in it, he has the power of preventing his neighbour from making any use of the spring in his own soil which shall interfere with the enjoyment of the well. He has the power, still further, of debarring the owner of the land in which the spring is first found, or through which it is transmitted, from draining his land for the proper cultivation of the soil; and thus, by an act which is voluntary on his part, and which may be entirely unsuspected by his neighbour, he may impose on such neighbour the necessity of bearing a heavy expense, if the latter has erected machinery for the purpose of mining, and discovers, when too late, that the appropriation of the water has already been made. Further, the advantage on one side, and the detriment on the other, may bear no proportion. The well may be sunk to supply a cottage, or a drinking place for cattle; while the owner of the adjoining land may be prevented from winning metals and minerals of inestimable value. And, lastly, there is no limit of space within which the claim of right to an underground spring can be confined; in the present case, the nearest coal pit is at the distance of half a mile from the well; it is obvious the law must equally apply if there is an interval of many miles" (*o*).

(*o*) p. 351.

"We think the present case is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle, which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action" (*p*).

And Lord *Wensleydale*, in delivering judgment in the House of Lords, in the case of *Chasemore* v. *Richards* (*q*), said:—"What, then, is the distinction between superficial streams and subterranean water? With respect to underground waters percolating the strata, two considerations arise which make a material difference between them and the right to superficial streams. In the first place, these subterranean waters cannot be actually enjoyed (and all things are given to be enjoyed) without artificial means. The water must be reduced into possession before it can be used, and some mode of reducing into possession must be permitted by law. If there be no such right, underground water is comparatively useless. A man may, therefore, dig for his own supply, or make a well for his own use and that of his family, and, in so doing, he may deprive his neighbour's land of moisture, and even tap a copious spring and prevent it from following to his neighbour's close. In the second place, as the great interests of society require that the cultivation of every man's land should be encouraged, and its natural advantages made fully available, the owner must be permitted to

(*p*) p. 353. (*q*) 7 H. L. Cas. 349.

dig in his own soil, and, in doing so, he can very rarely avoid interfering with the subterraneous waters flowing or percolating in his neighbour's land. . . . . We come, then, to the conclusion, that every man has a right to the natural advantages of his soil—the plaintiff to the benefit of the flow of water in the river and its natural supplies, the defendant to the enjoyment of his land, and to the underground waters on it, and he may, in order to obtain that water, sink a well. But according to the rule of reason and law, '*sic utere tuo ut alienum non lædas*,' it seems to hold that he ought to exercise his right in a reasonable manner, with as little injury to his neighbour's rights as may be" (*r*). His Lordship did not consider the digging of a well by a landowner on his own ground for the supply of a large district to be a reasonable use (*s*).

Lord *Hatherley*, when Lord Chancellor, referred to the decision in *Chasemore* v. *Richards* in these terms:—" Mr. Justice *Wightman* there laid down the law very plainly in giving the opinion of the judges upon the subject, and the distinction was there drawn—and, I should have thought, firmly established—between water which comes no one knows exactly whence, and flows no one knows exactly how, either underground or on the surface, unconfined in any channel, either as rainfall or from springs of the earth, which may vary from day to day, or spring up from beneath the surface in a direction which no one knows—between that species of water and water once confined in a regular channel. When I say 'once,' of course I mean for such a period of time as that there can be no difficulty raised with reference to the rights of the parties. . . . . As far as regards the support of the water, all one can say is this: I do not think *Chasemore* v. *Richards*, or any other case, has decided more than this—that you have a right to all the water which you can draw from the different sources which may percolate under

(*r*) Ibid. 386. (*s*) Ibid.

ground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined surface channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity (*t*).

Upon the same principle it has been held that the holder of a mining lease is not liable to make compensation for the withdrawal by percolation into his mine of water which would otherwise have flowed into, or having flowed into, would have been retained in the wells and springs of the superjacent land (*u*). Lord *Penzance*, in delivering judgment in this Privy Council case, said:— "The grant of the surface cannot carry with it more than the absolute ownership of the entire soil would include. That absolute ownership is held not to include a right to be protected from loss of water by percolation into openings made in the soil of a neighbouring owner. How, then, can the grant of the surface only be held to include such a protection? To hold otherwise might not improbably result in rendering the reservation of mines and minerals wholly useless. Percolation of water into mines to some extent is an almost necessary incident of mining, and if the grant of the surface carries with it a right to be protected from any loss of surface water by this percolation, the owner of the surface would hold the owner of the mines at his mercy, for he would be entitled by injunction to inhibit the working of the mines at all. It is not at variance with this view that the case of *Whitehead*

(*t*) *Grand Junction Canal Co.* v. *Shugar*, L. R., 6 Ch. 486.

(*u*) *Ballacorkish Mining Co.* v. *Harrison*, L. R., 5 P. C. 49.

v. *Park* (*x*) was decided, because in that case there was a lease and a distinct grant of the injured springs *eo nomine*, and the injury was the act of one who claimed under the lessor, so that the question resolved itself into the meaning and construction of the words used in the lease, and did not depend on the rights to be assigned by the law to persons standing in certain relations of title to one another, the law holding that by the terms of the lease the lessor had so far assured to the lessee the continuance of the springs in question, that he could not lawfully, by any act of his own, diminish them" (*y*).

But a person has a right of action when the defendant by his works fouls an underground stream which flows into the plaintiff's mill stream (*z*), or into his colliery (*a*).

So, also, when a well is supplied with water which percolates through the earth, and does not flow through any defined channel, although the owner of the well is not entitled to the water until it actually enters his well, the owner of the adjoining property will be restrained from using a cesspool therein in such a manner as to pollute the water coming through his property and supplying the well (*b*).

(*x*) 2 H. & N. 870.

(*y*) L. R., 5 P. C. p. 63; and see *Popplewell* v. *Hodkinson*, L. R., 4 Exch. 248.

(*z*) *Hodgkinson* v. *Ennor*, 4 B. & S. 229; and see *Wood* v. *Waud*, 3 Exch. 748.

(*a*) *Turner* v. *Mirfield*, 34 Beav. 390. But see *Brown* v. *Ilius*, 25 Conn. (Amer.) 583.

(*b*) *Womersley* v. *Church*, 17 L. T. Rep., N. S. 190.

CHAPTER IX.

AS TO RIPARIAN RIGHTS ARISING BY WAY OF EASEMENTS AND BY CUSTOM.

RIPARIAN proprietors, in addition to their rights *ex jure naturæ*, may acquire other rights known as easements (*a*).

An easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged *to suffer*, or *not to do* something on his own land, for the advantage of the dominant owner (*b*).

If the exercise of the easement obliges the servient owner to *suffer something* on his own land, which, but for the existence of the right, would be a cause of action, it is called an *affirmative* easement; but if it only obliges him *not to do* something on his own land, then it is a *negative* easement.

Easements acquired in watercourses are exclusively *affirmative*.

By the law of England, the origin of rights of this kind is referred either to an express contract between the parties, or to a similar contract implied from the peculiar relation of the parties at the time they became possessed of their respective tenements, or from the long-continued exercise of the right, from which a previous contract between them may be inferred (*c*).

(*a*) Rights so acquired may still be enjoyed, notwithstanding the Rivers P. P. Act, 1875. See s. 16.

(*b*) Termes de la Ley, tit. Easements; *Monsey* v. *Ismay*, 3 H. & C. 497.

(*c*) Gale on Easements, 5th ed., p. 3.

Easements then arise,

(1.) By express grant;
(2.) By implied grant.

Easements acquired by Express Grant.

An easement in a watercourse can only be created by an instrument under seal (*d*). A parol agreement may, however, give rise to an equitable interest (*e*), and may extinguish an existing easement (*f*). Where rights to water are created under a deed, the rights which the parties would have had as riparian proprietors or otherwise cannot be taken into consideration; but the nature and extent of their interest must be regulated wholly by the deed; and a grantor cannot derogate from his deed (*g*).

This rule of law applies equally, whether the water flows in a natural watercourse, an artificial channel (*h*), or is mere surface or percolating water (*i*).

Thus, where the owner of land, through which a stream runs, grants by deed to a neighbouring landowner and his assigns, over whose land the stream flows, that the stream shall be in the control of him and his assigns, and shall flow in a free and uninterrupted course through a channel described in the deed, and afterwards the grantor and grantee both assign their lands, the assignee of the grantor cannot justify a diversion of the stream, although he does not thereby deprive the assignee of the grantee of the use of any water (*j*).

(*d*) *Hewlins* v. *Shippam*, 5 B. & C. 221; *Cocker* v. *Cowper*, 1 C. M. & R. 418; but see *Tayler* v. *Waters*, 7 Taun. 374.

(*e*) *Duke of Devonshire* v. *Elgin*, 14 Beav. 530; *East India Co.* v. *Vincent*, 2 Atk. 83.

(*f*) *Liggins* v. *Inge*, 7 Bing. 682.

(*g*) *Northam* v. *Hurley*, 1 E. & B. 665; *Whitehead* v. *Parks*, 2 H. & N. 878; *Sharp* v. *Waterhouse*, 7 E. & B. 816; *Walker* v. *Stewart*, 2 Macq. Sco. App., per Lord *Cranworth*, L. C., p. 430; *Rawstron* v. *Taylor*, 11 Exch. 384; *Tipping* v. *Eckersley*, 2 K. & J., per V.-C. *Wood*, p. 273.

(*h*) *Rawstron* v. *Taylor*, 11 Exch. 369.

(*i*) *Whitehead* v. *Parks*, 27 L. J., Exch. 169.

(*j*) *Northam* v. *Hurley*, 1 E. & B. 665.

A demise of a certain farm "and all streams of water that may be found" in four closes part thereof, excepted, out of the demise, "all mines, minerals, &c., and all streams of water except those above granted, now being or hereafter to be found in or upon the premises," with power for the grantor to enter upon the premises to search for minerals, &c., and "to divert or alter the course of any river, brook, spring, or water." There was only one stream on the surface, upon the banks of which the four closes were situated, in which closes, however, certain wells were then in existence, and others were subsequently found.

It was held that these wells and all water in the four closes passed by the grant, and that the grantor could not work the mines so as to interfere with the springs (*i*).

Martin, B.: "Looking at the surrounding circumstances I should say that the words do not refer to surface streams, because there were none except *Elton Brook* on the property. 'All streams' means 'all water in the closes in question.' The demise is really a demise of the springs. The water to which the grantee was to be entitled was of the same character as that to which the grantor was to be entitled in other parts of the premises in which he reserves to himself 'all streams of water except those above granted, now being or hereafter to be found in or upon the premises demised'" (*k*).

Where a grantor conveys land with liberty to take water from a river for the use of the grantee's works by a pipe not exceeding twelve inches in diameter, without any stipulation guaranteeing the quantity of water the grantee shall receive, the grantor gives to the grantee incidentally the power to do all that is necessary to secure a twelve-inch pipe for conveying whatever water may flow therein, but not all that is necessary for making the water always flow to the extent of filling that twelve-inch pipe (*l*).

(*i*) *Whitehead* v. *Parks*, 2 H. & N. 870.

(*k*) Ibid. p. 879.

(*l*) *Walker* v. *Stewart*, 2 Macq. Scot. App. 431.

By indenture between plaintiff and defendant it was recited that plaintiff was possessed of closes A. and B., and that defendant was proprietor of a mill from which was produced a quantity of refuse; that defendant had, by plaintiff's licence, made a reservoir on A. for the reception of the refuse, in order to filter it, and drains for conveying it away from the reservoir, and had agreed with plaintiff for licence to convey the refuse down the drains on to B.; and in consideration of such licence defendant agreed to give to the plaintiff the "liberties and privileges" after mentioned, and to supply him with pure water. And it was witnessed that the plaintiff, in consideration of being supplied with pure water, and of receiving for his own the refuse "which may from time to time be found" in the reservoir and drains, and of the privilege of using it for manuring his land, covenanted to license the defendant to use the reservoir and drains for the purpose aforesaid, and that the plaintiff would scour and cleanse the reservoir and drains when necessary. And the defendant covenanted to supply the plaintiff with pure water, sufficient to supply his cattle on A. and B.; and that it should be "lawful" for the plaintiff to cleanse and scour the reservoir and drains made by the defendant, "and to take" the refuse "away therefrom, to and for his and their own use and benefit." *Held*, that the covenant to supply the plaintiff with pure water ran with the closes, the cattle on which were to be supplied with water; but that there was no covenant, express or implied, compelling the defendant to send the refuse to the first-mentioned reservoir or drain (*m*).

The owner of two farms, A., situate on a natural stream, and B., not so situate, conveyed B. to defendant, and subsequently conveyed A. to plaintiff. At the time the farm B. was conveyed to the defendant the water of the stream flowed through it by means of a culvert (having been previously so diverted under an agreement between

(*m*) *Sharp* v. *Waterhouse*, 7 E. & B. 816.

defendant, who owned land lying between the brook and the farm B. and the owner of B.), and thence to other land of the defendant and certain dye works of his. So much of the water as was required for the use of the farm B. was taken by means of a pipe, and the rest flowed on to the dye works, and was so used and enjoyed at the time of the conveyance of B. to the defendant. This conveyance contained the words together with "all waters, watercourses, easements and appurtenances belonging to or held, used, occupied or enjoyed with the premises."

The plaintiff sued the defendant for the diversion of the natural stream, but the court held that the conveyance passed to the defendant the right to have the accustomed flow of the water, and to use the same for the farm B. and for his dye works (*n*).

Williams, J.: "Inasmuch as unity of ownership extinguishes an easement, a right of way cannot pass as simply appurtenant to the land to which it was formerly attached, though it continues to exist in point of user. But, though it does not exist as a right, it will pass by a conveyance of the land, if proper words be used to pass it, as, if all ways 'used and enjoyed' with the land are conveyed. Applying this doctrine to the question before us, it seems to me that the right to the watercourse here in dispute passed to the defendant under the words of the conveyance" (*o*).

The plaintiff also contended that, inasmuch as the right to the watercourse was originally dependent, not merely on the acquiescence of the owner of B., but also upon the assent of the owner of land between the stream and B., a right so subject to the capricious interruption of a third party could not, at law, be the subject of a conveyance.

This objection the court answered thus: suppose the land between the stream and B. had belonged to a third person; the conveyance of B., being by the owner of A.

(*n*) *Wardle* v. *Brocklehurst*, 1 Ell. & Ell. 1058. (*o*) Ibid. p. 1065.

and B., and including all that had been enjoyed with B. by the owner, would have amounted to a grant of B. together with a right to divert the water from the brook; so that after that conveyance the vendor would have had no right to complain of that diversion, in respect of his being the owner of A. To perfect the right thus granted, it would have been necessary to have a conveyance from the owner of the intervening land. It so happens here that such a conveyance is unnecessary, because the party to whom B. was conveyed was himself the owner of the intervening land (*p*).

It was further contended that the above conveyance of B. could only grant such an enjoyment of the water as was commensurate with the requirements of the farm. To this the court said: "When the case is first looked at, it certainly seems a strong thing to say that, by buying the land through which the conduit pipe passed, the defendant acquired a right to use the water, not only for his farm, but for his manufactory. But clearly that is so. By purchasing the farm, as well as the right of having the water flow through it, he has acquired the right to the watercourse as it existed at the time of the purchase. At that time, it is true, the enjoyment of the water on the farm was by means of the pipe from the culvert only; but the water could not continue to be enjoyed by that same mode without the existence and continuance of the culvert. And the right conveyed being the right to enjoy in the way that the owner of B. had theretofore enjoyed the water, which way was by the flow of the water through the culvert, the defendant is entitled to the continuance of that flow" (*q*).

Where a corporation constructed a watercourse or conduit, under the provisions of an act of parliament, for certain public purposes specified in the act, and subsequently conveyed away one-fourth "of or in the leat or

(*p*) Ibid. p. 1066. (*q*) Ibid. p. 1067.

watercourse," it was held that the purchaser acquired no interest in the water, other than such part as remained after supplying the public purposes for which the leat was authorized to be made (*r*).

For upwards of twenty years water had flowed through an old drain of the defendant's land, and along an ancient watercourse, and thence along a close of the defendant called *Lower Gin Bank*, and had thence contributed to supply the plaintiff's mills after their erection in 1845. In that year the defendant by deed conveyed to the plaintiff the above-mentioned close, "together with all ways, watercourses, liberties, privileges, rights, members, and appurtenances to the same close belonging or appertaining," subject to the proviso that it shall be lawful for the defendant to use, for any manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of the defendant unto and into the close *Lower Gin Bank*, returning the surplus, or so much as remained, after being used for the purposes aforesaid, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the aforesaid close. The defendant erected a lock-up-tank upon his land, and caused the water which arose on his land, near to the said close, and which had previously been accustomed to flow along the old drain and ancient watercourse into the said close, and he caused the water to be conveyed from the tank to a lower part of his land to be used by his tenants. The water was used by them for the purposes mentioned in the proviso in the deed, but the surplus could not be returned to the close. *Held*, that by the deed the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso, and that by locking it up he had diverted it, and was liable to an action for a breach of his covenant by reason of such diversion (*s*).

(*r*) *Att.-Gen.* v. *Plymouth*, 9 Beav. 67.

(*s*) *Rawstron* v. *Taylor*, 11 Exch. 369.

In all the cases cited above the questions decided under the deeds of grant arose between the grantor and grantee. As between the parties to the deed water rights may be granted irrespective of the occupation by the grantee of land abutting on the stream, but such a grantee will not become a riparian proprietor so as to be able to enforce his rights as against third parties (*t*).

Easements by Implied Grant.

Easements in water by implied grant may arise in two ways: 1st, upon severance of tenements; 2ndly, by prescription.

(1.) *By Severance of Tenements.*

When two properties are possessed by the same owner, and there has been a severance made of part from the other, any thing which was used, and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant (*u*).

Thus, the owner of two mills on the same stream leased the upper mill to *Pullan*, who there carried on the business of a bleacher.

Seven times each fortnight *Pullan* discharged the refuse of his works into the stream. *Pullan* surrendered his lease, and a new lease was granted to the defendant. In this lease the defendant was described as a bleacher, and the demise was of the premises "late in the occupation of *Pullan*."

Subsequently the plaintiff purchased both mills. The defendant discharged the refuse from the mill in the same manner as *Pullan* had formerly done. It was held, that an action by the plaintiff could not be maintained against

(*t*) *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 300; *Laing* v. *Whaley*, 3 H. & N. 675; *Hill* v. *Tupper*, 2 H. & C. 121.

(*u*) *Ewart* v. *Cochrane*, 4 Macq. 122, per Lord *Campbell*, L. C.; and see *Pyer* v. *Carter*, 1 H. & N. 916.

the defendant for thus polluting the stream, on the ground that there was an implied grant by the former owner, from whom the plaintiff derived his title, to use the stream for the purpose of his business of bleaching in the same manner as had been done by the former lessee (*x*).

Martin, B.: "Where there is a demise of premises with which certain rights have been *usually enjoyed*, it must be taken that the lessor has granted those rights" (*y*).

Wilde, B.: "I by no means mean to say that in every case of a new demise the premises may be used with all the liberties and privileges enjoyed by the former lessee. It seems to me that, in cases of implied grant, the implication must be confined to a *reasonable use* of the premises for the purpose for which, according to the obvious intention of the parties, they are demised. Some uses are obvious enough. A demise of a brewery would carry with it the right to use the premises for brewing, although that might be a nuisance to the lessor or his assigns. So, if a mill were demised the lessee would have a right to grind there, although the noise might annoy the lessor or his assigns. If so, why, in the case of a demise of bleaching premises, may there not be an implied grant that they may be used, as they have been theretofore used, for the purpose of bleaching? Each case must depend on its own circumstances and the intention of the parties, to be ascertained from the character, state and use of the premises at the time of the grant, and in this case there is no doubt of the intention of the parties to be derived from the existing circumstances" (*z*).

(2.) *By Prescription.*

Easements by implied grant are more commonly acquired by prescription, that is to say, possession claimed

(*x*) *Hall* v. *Lund*, 1 H. & C. 676; and see *Nicholas* v. *Chamberlain*, Cro. Jac. 121.

(*y*) Ibid. p. 684.

(*z*) Ibid. p. 685.

as of right, with uninterrupted enjoyment for a period fixed by law.

In order to acquire a title to an easement at common law the period of enjoyment must have been from "time immemorial, or time whereof the memory of man runneth not to the contrary." This by law was considered to denote the whole period from the reign of Richard the First.

To obviate the inconvenience which arose from allowing long enjoyment to be defeated by showing that it had not had a continuous existence during the whole period of legal memory, a new kind of title was introduced by the presumption of a grant made and lost in modern times. In this way a title might be acquired by an enjoyment for twenty years.

When the claim was by prescription, the length of enjoyment constituted a title; where, on the other hand, the right was claimed by "lost grant," the long enjoyment afforded but a presumption of title (*a*).

A person having lands on the margin of a flowing stream may, by usage, acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (*b*).

A presumption of a grant from long-continued enjoyment, however, only arises when the person against whom he claimed might have interrupted or prevented the exercise of the subject of the supposed grant (*c*).

(*a*) Gale on Easements, 5th ed., p. 162.

(*b*) *Sampson* v. *Hoddinott*, 1 C. B., N. S. 590.

(*c*) *Webb* v. *Bird*, 13 C. B., N. S. 841; and see *Murgatroyd* v. *Robinson*, 7 E. & B. 391.

Lord *Ellenborough*, C. J., in *Bealey* v. *Shaw*, said:— "The general rule of law as applied to this subject is, that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration. But an adverse right may exist founded on the occupation of another. And though the stream be either diminished in quantity, or even corrupted in quantity, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream, subject to such adverse right. I take it that twenty years' exclusive enjoyment of the water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or act of parliament" (*d*).

Title to an easement may now be acquired, not only by prescription or "lost grant," but also under the provisions of the Prescription Act, 2 & 3 Will. 4, c. 71.

By sects. 2 and 4 of this act it is provided that no claim which can be lawfully made at common law (*e*) to any watercourse, or the use of any water over or from any land, actually enjoyed by any person claiming right thereto without interruption for twenty years before the commencement of some suit or action (*f*), in which the claim has been brought in question, without interruption acquiesced in for a year, shall be defeated or destroyed by showing that the same was first enjoyed prior to such period of twenty years.

When an act of parliament, making an act illegal, comes into force while the prescription to do that act is running, semble, per *Brett*, J., that the prescription when

(*d*) 6 East, 214; and see *Wright* v. *Howard*, 2 S. & S. 203.

(*e*) *Gaved* v. *Martyn*, 19 C. B., N. S. 732.

(*f*) *Cooper* v. *Hubbuck*, 12 C. B., N. S. 467.

acquired by due lapse of time will be an answer to an individual, suing for damages, and not under the provisions of the act, notwithstanding the statutory illegality (*g*).

The acquisition of new rights to water by long user comes within the provisions of the Prescription Act, 2 & 3 Will. 4, c. 71.

Thus a claim by an owner of a copper mine to sink pits on his own land, to fill such pits with iron, and to cover the same with water pumped from the mine, for the purpose of precipitating the copper contained in such water, and afterwards to let off the water impregnated with metallic substances into a watercourse upon the land of another, is a claim to a watercourse within the Prescription Act (*h*).

Watson, B., in the case of *Carlyon* v. *Lovering* (*i*), delivered the following judgment of the court:—"The declaration was for fouling, and sending rubbish down a natural stream of water running through the plaintiff's land. The effect of the fifth, ninth and tenth plea was, that the defendant was possessed of a tin mine higher up the stream than plaintiff's land, and in respect thereof had used as of right the privilege of washing away, by means of the stream above the plaintiff's land, the sand, stone, rubble, and other stuff which became dislodged or severed in the course of the working of the tin mine and using the tin and tin ore. The user in some pleas was alleged to have been for twenty years; others of these pleas were founded on an user of forty years. We are of opinion that these pleas are good in law. . . . . This alleged privilege was a claim to a watercourse under the Prescription Act (*Wright* v. *Williams*); but it was contended that such a privilege could not be the subject-matter of grant, inasmuch as excessive user might injure

(*g*) *Millington* v. *Griffiths*, 30 L. T. Rep., N. S. 65.

(*h*) *Wright* v. *Williams*, 1 M. & W. 77.

(*i*) 1 H. & N. 784; and see *Gaved* v. *Martyn*, 19 C. B., N. S. 732.

the plaintiff's property to such an extent as to exclude the plaintiff from the entire enjoyment of his land.

"The question is, whether such a privilege as that set forth in these pleas could be the subject-matter of a grant, for if it could not the pleas would not be supported.

"The plaintiff, as a riparian proprietor, has a right to have the water of this natural stream run through his land in its accustomed purity, without being polluted by any riparian proprietor or other higher up the stream, but that right he may abandon by allowing an user to have continued for twenty or forty years; or, he may grant the privilege to an owner higher up the stream, for his advantage, of invading that right, to the detriment of the water flowing through the plaintiff's land. We can see no reason why such a privilege, although injurious to the plaintiff to a great extent, might not be granted. In the above-cited case of *Wright* v. *Williams,* pleas of a similar kind to the present were held good on demurrer. Many cases have occurred where similar pleas have been pleaded and verdicts passed upon them without objection. . . . .

"The pleas founded on alleged custom admit of other considerations. The question is, whether or not the custom as pleaded is good in law. It is settled that a custom to be valid in law must be reasonable, certain and defined. It was objected that the custom as pleaded in the present case was unreasonable and indefinite, as the exercise of the custom might go to the destruction of the plaintiff's land adjoining the stream; that there was no limit to the user as to times of user or extent of user.

"No doubt if that were so the pleas would be bad; but we think they are not open to these objections. The exercise of the privilege as claimed was in respect of working a mine and winning the ore where the stream passed through the defendant's land. Thus the user is limited to the necessary working of the mine and the quantity of water sent down, although not expressly so

alleged. . . . . It is not to take the land or any part of it, but merely to pollute the water of this stream in the course of working the mine. We do not see that this has a tendency to destroy the plaintiff's land or exclude the plaintiff from the use of his land, except to a partial extent. We think that the custom alleged is sufficiently definite and is not unreasonable. It is possible more stuff from the mine may come down at one time than at another; but that does not show that the custom is bad" (*k*).

It seems somewhat doubtful, on the authorities, how far a right to foul a stream with *sewage* can be acquired by prescription. This does not, however, give rise to any practical difficulty, as in nearly all cases of sewage pollution there is an increasing pollution, which a court of equity will restrain if it gives rise to a nuisance (*l*).

V.-C. *Wood* has, however, said (*m*): "It has been decided, both at law and in this court, that no person is entitled, on the ground of ancient custom or privilege, to collect a mass of sewage matter, and pour it in, at one point, into a stream in such a quantity, that the river cannot dilute it, on its passage down to the lower riparian proprietors, as the effect of such an act is to create an evil which must be illegal, being such as no custom can authorize" (*n*).

A local board, constituted in 1848, was held eight years after, being then a modern corporation, to have no prescriptive rights, although they carried into the river sewage matter which had been, for a long time previously, conveyed there by private persons. The extent of the nuisance was, however, greater since the existence of the board on account of the increased amount of sewage dealt with (*o*).

(*k*) 1 H. & N. 797.

(*l*) See *Goldsmid* v. *Tunbridge Wells*, L. R., 1 Eq. 161; *Att.-Gen.* v. *Leeds*, L. R., 5 Ch. 583; *Att.-Gen.* v. *Luton*, 2 Jur., N. S. 180; *Att.-Gen.* v. *Birmingham*, 4 K. & J. 528; *Att.-Gen.* v. *Kingston*, 34 L. J., Ch. 485.

(*m*) *Att.-Gen.* v. *Richmond*, L. R., 2 Eq. 306.

(*n*) Ibid. p. 311.

(*o*) *Att.-Gen.* v. *Luton Local*

In a recent case (*p*) a bill was filed to restrain the pollution of a brook which flowed through and supplied a lake on the plaintiff's estate, by the defendants who were the commissioners empowered by a private act to drain the town of Tunbridge Wells, to make sewers, and to turn any drain or sewer into any common ditch or watercourse.

It was proved to the satisfaction of the Master of the Rolls, (1) that the plaintiff's property was injured by the present polluted state of the brook; (2) that the pollution was occasioned by the sewage discharged from the town; and (3) that the pollution had been of slow and gradual growth, that it was still increasing, and would ultimately become an absolute nuisance.

It was contended, that, though a legal right might accrue to the occupier of a single house by its drainage being carried into the lake for twenty years, yet that could not be the case with a town, and no prescriptive right could be acquired by the occupiers residing in it.

Sir *J. Romilly*, M. R., said :—" My opinion is, that any person who has a watercourse flowing through his land, and sewage which is perceptible is brought into that watercourse, has a right to come here to stop it; and that when the pollution is increasing, and gradually increasing, from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him" (*q*). On appeal Sir *G. J. Turner* said :—" In the course of the argument it was suggested on the part of the plaintiff, that unless this court interposed, a prescriptive right to discharge the sewage into the stream, to the prejudice of the plaintiff's estate, might be acquired by the defendants; to which

Board, 2 Jur., N. S. 180; and see *Goldsmid* v. *Tunbridge Wells*, L. R., 1 Ch. 349; *Att.-Gen.* v. *Birmingham*, 4 K. & J. 528.

(*p*) *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L.R., 1 Eq. 161; L. R., 1 Ch. 349.

(*q*) L. R., 1 Eq. 169.

it was answered on the part of the defendants, that such prescriptive right, if it could at all be acquired, had been already acquired by them. I am of opinion that the defendants have not acquired any such prescriptive rights. I assume, but without meaning to give any opinion on the point, that such a right might well be acquired, but then I think that it could be acquired only by a continuance of the discharge of the sewage *prejudicially affecting* the estate, at least to some extent, for a period of twenty years, and I think that the evidence sufficiently shows that the discharge has not prejudicially affected the estate for so long a period" (*r*).

A right to pollute a stream with the refuse of a *tannery* may be acquired by an user for the prescribed period (*s*).

So, also, may the right of placing cinders and other refuse of works on the banks and bed of a stream (*t*).

A prescriptive right may also be acquired to go upon the land of another for the purpose of cleansing a watercourse, or for the purposes connected therewith, under a claim of right to a watercourse itself (*u*).

Underground percolating Water.

No right to underground water, percolating through strata, can be acquired by mere user of a river into which it ultimately passes. *Wightman*, J., in delivering the unanimous opinion of the judges, in the case of *Chasemore* v. *Richards* (*x*), said: "Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters, depending upon the quantity of rain

(*r*) L. R., 1 Ch. 352.

(*s*) *Moore* v. *Webb*, 1 C. B., N. S. 673.

(*t*) *Murgatroyd* v. *Robinson*, 7 E. & B. 391.

(*u*) *Peter* v. *Daniel*, 5 C. B. 568; *Beeston* v. *Weate*, 5 E. & B. 986.

(*x*) 7 H. L. Cas. 349.

falling or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water? The Court of Exchequer, indeed, in the case of *Dickinson* v. *The Grand Junction Canal Co.* (*y*), expressly repudiates the notion that such a right as that in question can be founded on a presumed grant, but declares that with respect to running water it is *jure naturæ*.

"If so, *à fortiori*, the right, if it exists at all, in the case of subterranean percolating water, is *jure naturæ*, and not by presumed grant, and the circumstance of the mill being ancient would in that case make no difference" (*z*).

Artificial Watercourses.

The right to artificial watercourses as against the party creating them depends on the character of the watercourse, whether it be of a permanent or a temporary nature, and upon the circumstances under which it was created (*a*).

Hughes, B.: "The meaning I attribute to the words 'temporary' and 'occasional' is that when the volume or duration is dependent on the will or convenience of individuals it is to be considered temporary or occasional; but if it is proved that rain water forms itself, from the nature of the locality upon which it descends, into a visible stream, and as far back as memory can extend has pursued a fixed and definite channel for its discharge, in my

(*y*) 25 L. J., Exch. 122.

(*z*) 7 H. L. Cas. 370; and see *Briscoe* v. *Drought*, 11 Ir. C. L. 271.

(*a*) *Wood* v. *Waud*, 3 Exch. 748; *Broadbent* v. *Ramsbotham*, 11 Exch. 611; *Magor* v. *Chadwick*, 11 A. & E. 571; *Lord Blantyre* v. *Dunn*, 10 Dec. of Ct. Sess., 2nd Series, 509.

opinion 'the volume' of the stream may be 'occasional' and 'temporary,' but its course is neither 'occasional' nor 'temporary'" (*b*).

Arkwright v. *Gell* (*c*) decided that a party receiving water drained from a mine could acquire no right to compel the owners of the mine to continue such discharge. Lord *Abinger*, C. B., said: "This was an artificial watercourse, and the sole object for which it was made was to get rid of a nuisance to the mines, and to enable their proprietors to get the ores which lay within the mineral field drained by it, and the flow of water through that channel was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine owners required it, and in the ordinary course it would most probably cease when the mineral ore above it should have been exhausted . . . . An user for twenty years or a longer time would afford no presumption of a grant of the right to the water in perpetuity, for such a grant would in truth be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals below the level drained by that sough, and to keep the mines flooded up to that level in order to make the flow of water constant for the benefit of those who had used it for some profitable purpose . . . . It remains to be considered whether the statute (2 & 3 Will. 4, c. 71) gives the plaintiff any such right, and we are clearly of opinion that it does not. The whole purview of the act shows that it applies only to such rights as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods '*without interruption*,' and therefore necessarily imports such an user as could be *interrupted* by some one 'capable of resisting the claim,' and it also requires it to be 'of right.' But the use of the water in this case could not be the subject of an

(*b*) *Briscoe* v. *Drought*, 11 Ir. C. L. 263. (*c*) 5 M. & W. 203.

action at the suit of the proprietors of the mineral field lying below the level of the *Cromford* Sough, and was incapable of interruption by them at any time during the whole period by any reasonable mode, and as against them it was not 'of right,'—they had no interest to prevent it" (*d*).

So, again, where water has flowed in an artificial and covered watercourse for more than sixty years from a colliery into an immemorial and natural stream, upon whose banks the plaintiff's mills are situated, the plaintiff, in such case, has no right for *diversion* of the water of such artificial watercourse against a party through whose land it passes, but who does not claim under or who is unauthorized by the colliery owner. It would seem, however, that an action could be maintained for the *pollution* of such a watercourse (*e*).

Pollock, C. B., in delivering the considered judgment of the Court of Exchequer in this case, said :—" We are satisfied that the principles laid down in *Arkwright* v. *Gell* (*f*) as governing that case are correct, and were properly acted upon in it, by deciding that no action lay for the injury by the diversion of an artificial watercourse, where, from the nature of the case, it was obvious that the enjoyment of it depended upon temporary circumstances, and was not of a permanent character, and where the interruption was by the party who stood in the situation of the grantor. The Court of Queen's Bench, in a subsequent case (*Magor* v. *Chadwick*) (*g*), supported a verdict for the plaintiff for the disturbance of a right to the enjoyment of a stream under circumstances somewhat similar; but in that case the action was not brought against the party in whose land the artificial watercourse commenced, nor any one claiming under him, and he had not put an end to it by altering the mode of working his mines; but, what is

(*d*) Ibid. p. 231.

(*e*) *Wood* v. *Waud*, 3 Exch. 748; and see *Wardle* v. *Brocklehurst*, 1 Ell. & Ell. 1058.

(*f*) 5 M. & W. 203.

(*g*) 11 A. & E. 571.

more important, the action was not brought for abstracting, but for fouling—a species of injury which does not stand on the same footing; for, although the possessor of the mine might stop the stream, it does not follow that he, or any other, could pollute it while it continued to run; and, besides, from the course which the cause took at *nisi prius*, the precise question which we have now to consider does not appear to have called for decision. The two cases are, therefore, distinguishable; and the expressions used by the learned judges in that case, as to the similarity of natural and artificial streams, are to be understood as applicable to the particular case. We entirely concur with Lord *Denman*, C. J., that 'the proposition, that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water if proved to have been originally artificial, is quite indefensible;' but, on the other hand, the general proposition that, *under all circumstances*, the right to watercourses arising from enjoyment is the same whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person's property, and presumably of a temporary character and liable to variation (*h*).

"The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof.

(*h*) See this passage cited and commented upon by *Willes*, J., in *Gaved* v. *Martyn*, 19 C. B., N. S. 753.

The flow of water from a drain, for the purposes of agricultural improvement, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of his drains for the greater improvement of the land. The state of circumstances in such cases show that one party never intended to give, nor the other to enjoy, the use of the stream *as a matter of right*" (*i*).

The latter part of the above dictum was followed in the case of *Greatrex* v. *Hayward* (*k*), where it was expressly held, that the flow of water from a drain for the purposes of agricultural improvements, for twenty years, does not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drain for the improvement of his land.

These cases were quoted and the same law was applied in *Rawstron* v. *Taylor* (*l*), where the facts were as follows :— The land of the plaintiff and defendant was contiguous, and on the outside of the defendant's land, and near to it, was a wet springy spot, where at most seasons of the year some water rose to the surface, and collected in sufficient quantity to flow down the slope of the land. In times of wet a great body of water flowed down, and after a long drought there was hardly any, and sometimes none. There was no regularly-formed ditch or channel for the water, the place where it flowed being constantly trodden in by cattle. The water which was not absorbed (and, except in time of drought, all of it was not absorbed) ran into an old watercourse of the plaintiff, which led into a reservoir of the plaintiff. The water had so flowed for upwards of twenty years. The defendant, for the purpose of draining his land, and of supplying some part of his property with water, diverted this water from the plaintiff's reservoir.

(*i*) 3 Exch. 776; *In Rawstron* v. *Taylor*, 11 Exch. 378, 384, *Martin*, B., said that the intention was quite immaterial.

(*k*) 8 Exch. 291.

(*l*) 11 Exch. 369.

At another spot on the plaintiff's land, as long ago as any one could recollect, water had always risen to the surface. There had generally been a drinking-place for cattle formed with stones, and the overflow of the water went down a ditch, and thence into a watercourse to the plaintiff's reservoir. It was held, that the defendant was not liable to the plaintiff for having deprived him of the use of such waters, he having diverted them by draining his land for the purpose of getting rid of the water, and of supplying another portion of his property with it.

In *Broadbent* v. *Ramsbotham* (*m*), decided the following year, the plaintiff's mill had, for more than fifty years, been worked by a brook which was supplied by the water of a pond filled by rain, a shallow well supplied by subterraneous water, a swamp, and a well formed by a stream springing out of the side of a hill, the waters of all which occasionally overflowed and ran down the defendant's land in no definite channel into the brook. It was held, that the plaintiff had no right, as against the defendant, to the natural flow of any of the waters.

For upwards of fifty years the rain-fall and drainage of the main street of a town had run down through channels on each side of the street into a culvert, which connected the channels at the end of the street, and discharged its contents into an open lane (also used as a thoroughfare), the property of the defendant, through which they flowed into the plaintiff's drain, and were then used by him for agricultural purposes, the surplus flowing off into the *Shannon*. There was no definite channel for the stream of water and sewage to flow in through the lane, which, being lower on one side than the other, the stream flowed along the lower side, and in floods covered the entire surface. The defendant diverted the stream into his own drains. It was held that there was evidence of a watercourse, and that the inhabitants of the town had, as

(*m*) 11 Exch. 602.

against both the plaintiff and the defendant and all intervening proprietors, acquired an easement of having their drainage transmitted through the lane into the *Shannon;* but that neither the plaintiff nor defendant, nor any other intermediate proprietor, could, as against the inhabitants of the town, insist on the continuance of the flow of water and sewage, if the inhabitants, or any of them, chose to stop or divert its flow, or alter their system of drainage.

The plaintiff, however, was held to have acquired a right, as against the defendant, to have the stream continue to flow into his drain, and the defendant to have acquired a correlative right against the plaintiff.

Where a stream is of artificial origin only in the sense that it is obtained from a natural stream, instead of from surface waters, by artificial means, an easement may be acquired in it (*n*).

Thus, where the plaintiff and defendant occupied contiguous portions of land, and for more than forty years the occupier of plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land, and of damming up the brook, when necessary, so as to force the water into an old artificial watercourse which ran across defendant's land to plaintiff's land, and was there used for supplying their cattle with water, except when the owner of defendant's land used the water, as they did at certain seasons of the year, for irrigation; it was held, that the jury were warranted in inferring an user as of right by the occupiers of plaintiff's land of the easement on defendant's land, and that, for the interruption of such easement, an action might be maintained (*o*).

The judgment of the court was delivered by Lord *Campbell,* C. J., who said: "The defendant's counsel, in arguing that the plaintiff ought to have been non-

(*n*) *Briscoe* v. *Drought,* 11 Ir. C. L. R. 250.

(*o*) *Beeston* v. *Weate,* 5 E. & B. 986.

suited, relied mainly on *Arkwright* v. *Gell*, *Wood* v. *Waud*, and *Greatrex* v. *Hayward*. We entirely concur in these decisions, thinking that the plaintiff did not in any of them support his allegation as to the easement claimed. In none of them was there any reasonable ground for inferring that the easement had been acquired by prescription or grant. But we do not consider that the cases lay down any such rule as that enjoyment and acts which, without the existence of the easements, would be tortious and actionable may not be evidence of the right to the use of water, although it flows in an artificial cut. . . . . In the cases referred to, regard was had to the water being obtained artificially by the owner of the servient tenement, rather than to the water running through an artificial cut" (*p*).

In *Gaved* v. *Martyn* (*q*) the plaintiff claimed rights in three artificial watercourses. To one, which was constructed by the plaintiff's predecessor under a licence from the owner of the stream supplying the water, he was held not entitled. *Willes*, J.: "I apprehend it would clearly be competent, in answer to such a claim, to show that the enjoyment originated under an agreement with the tenant or owner of the servient tenement, and therefore was precarious, and not as of right (*r*)." To the second he was held entitled on the ground of adverse enjoyment for twenty years.

The third was a stream brought to the surface artificially by the operation of miners, and conveyed to a brook in an open adit, but had not been abandoned by the miners. The plaintiff's claim to this was not sustained, although he had enjoyed the uninterrupted use of it as of right for more than twenty years.

Erle, C. J.: "We are of opinion that the plaintiff acquired no right to this stream by the user thereof for

(*p*) Ibid. p. 995; and see *Peter* v. *Daniel*, 5 C. B. 568.

(*q*) 19 C. B., N. S. 732.

(*r*) Ibid. p. 746.

twenty years, because the stream was an artificial stream made to flow over the defendant's land by the operation of miners, and the miners had not permanently abandoned their right of control over the water in the stream when the plaintiff diverted it" (*s*).

Where an artificial watercourse had been used from time immemorial by tin bounders for working their mines, they were held to have acquired an easement in it by prescription (*t*). *Turner*, L. J., said: "The defendants attempted to maintain their case upon the ground of the stream from which the water in question flows having originally been an artificial stream, and they relied much upon the case of *Gaved* v. *Martyn*.

"But there is abundant authority to show that rights may well be acquired to the use of water in streams which may originally have been artificial, and the case of *Gaved* v. *Martyn* is plainly distinguishable from the present. The decision in that case, so far as it is in any way favourable to the defendants' case, seems to have proceeded upon the ground that there had been no permanent abandonment by the miners of their right of control over the stream; but in this case there can be no doubt that all such right of control has long been abandoned" (*u*).

Where a canal company diverted a portion of the water from a natural watercourse, which flowed through the plaintiff's land, for a period of more than forty years, and then restored to the brook the water so diverted, and so caused the plaintiff's land to be flooded, owing to the bed of the river having become silted up; it was held that, there being no obligation imposed upon the canal company to continue the diversion, the plaintiff had no right of action.

Per *Blackburn* and *Hannen*, JJ.: On the ground that, though the claim to have the water, which would

(*s*) Ibid. p. 757.
(*t*) *Ivimey* v. *Stocker*, L. R., 1 Ch. 396.
(*u*) Ibid. p. 409.

otherwise have come down to the plaintiff's land, diverted over other land was a claim to a watercourse within the Prescription Act, yet the enjoyment was not *as of right*, and, therefore, though for more than forty years, conferred no right on the plaintiff.

Per *Cockburn*, C. J., on the ground that the plaintiff, the owner of the servient tenement, should acquire, by the mere existence of the easement, no right as against the owner of the dominant tenement to the continuance of the diversion (*x*).

In *Nuttall* v. *Bracewell* (*y*) *Channell*, B., said: "It seems to me that a groit is to all intents and purposes a mere stream, and any person having land upon it would have the rights of a riparian proprietor, viz. to use the water in any way not interfering with others. I see no reason why the law applicable to ordinary running streams should not be applicable to such a stream as this, for it is a natural stream or flow of water, though flowing in an artificial channel. It may be that the case of an entirely artificial stream, as one flowing from a mine for instance, would be different; but that an artificial stream may be on the same footing as a natural one as regards the rights of riparian proprietors is held in *Sutcliffe* v. *Booth*" (*z*). This decision was quoted and followed in the recent case of *Holker* v. *Poritt* (*a*). In that case a natural stream divided itself at a point called E. into two branches; one branch ran down to the river Irwell; the other, which appeared to have been made by artificial means, passed into a farm-yard, where it supplied a watering-trough, and the overflow from the trough was formerly diffused over the ground, and found its way ultimately into the Irwell. The owner of the land through which the second branch flowed and on which the watering-trough stood, and thence down to the Irwell, collected the overflow into

(*x*) *Mason* v. *Shrewsbury and Hereford Ry. Co.*, L. R., 6 Q. B. 578.

(*y*) L. R., 2 Exch. 1.

(*z*) Ibid. p. 14.

(*a*) L. R., 8 Exch. 107.

a reservoir, and conducted it by a culvert to a mill situated on the banks of the Irwell. It was held that an action, against a riparian owner on the stream above E. for obstructing the flow of the water, could be maintained. *Martin*, B., said: "Walker (the owner of the land as above mentioned) was entitled to have the stream flow in its ordinary course down to the place where the trough stood, and beyond which, twenty-five years ago, it was not continued in a defined channel to the Irwell, but was allowed to dissipate itself over the surface of the ground. Now that state of things was exactly as if a stream lost itself in the marsh or swamp, a haunt of snipe and wild fowl, but not turned to any agricultural purpose. And I am of opinion that if a proprietor in such a case expends his labour in cutting a course for the water, he acquires a right analogous to that which he would have if that course had been a natural stream, and that no distinction can be made between a natural stream and a watercourse made to drain land and to carry down the water to its natural destination" (*b*).

Canals.

The rights of the proprietors of a canal company to the water of their canal, and the creation of adverse rights by long user, were much considered in the case of *The Staffordshire and Worcestershire Canal* v. *Birmingham Canal* (*c*).

The appellants' canal, lying at a lower level than and being in communication with the respondents' canal by means of locks, had, for a period of seventy years, received a certain quantity of water at the passage of each barge. The appellants proposed to change the construction of their machinery so as to diminish the quantity of water that flowed from the one canal into the other.

(*b*) Ibid. 116.

(*c*) L. R., 1 H. L. 254; and see *Mason* v. *Shrewsbury and Hereford Ry. Co.*, L. R., 6 Q. B. 578; *Laing* v. *Whaley*, per *Crompton*, J., 3 H. & N. 682.

Lord *Chelmsford*, L. C.: "The 2nd section of the *Prescription* Act applies to a claim to the use of water, which may be lawfully made at the common law, by custom, prescription, or grant. Custom and prescription are here out of the question, and if the respondents could not have granted the use of the water to the appellants the act is wholly inapplicable; but the respondents have not the water in their canal with an absolute power of dealing with it at their pleasure. When the canal was made, under the provisions of the act of 8 Geo. 3, the public had a right to use it upon payment of toll, and the respondents were bound to keep and maintain the canal in an efficient state for the passage of the traffic along it. They could not bind themselves that for all time to come a certain quantity of water should be discharged from their canal into that of the appellants, because it was impossible for them to know whether all the water beyond what was necessary to keep open the communication between the two canals would not be wanted for the purpose of their own canal. . . . . Besides, the appellants' interest in the water of the respondents' canal depends upon the act of parliament, the 8 Geo. 3, and is limited by it" (*d*).

Lord *Cranworth:* "The water passing from the Wolverhampton Level to the Antherley Junction is not a natural or even artificial stream in the sense in which those words are understood in the many cases in which the law relating to flowing water has been considered. The water in this canal is not flowing water. It is water accumulated under the authority of the legislature in what is in fact only a tank or reservoir which the respondents are bound to economize and use in a particular manner for the convenience of the public. It never flows. It is let down artificially for the convenience of persons wishing to pass with boats by what are called steps till it reaches the

(*d*) Ibid. p. 267.

Antherley level, and so enables the boats to pass into the appellants' canal. To such water none of the doctrines either as to natural or artificial streams is applicable, and the only way in which the appellants could have obtained a right to insist on having a lock full of water, at whatever level, discharged into their canal, must be by express grant or covenant by the respondents, giving to them such a right. Of the existence of such a grant or covenant there is no trace whatever, and it cannot be presumed. To have entered into any such engagement would have been a clear breach of duty on the part of the respondents. But even independently of that consideration arising out of the public parliamentary character of the respondents, I do not think that the facts of this case would justify a jury in presuming a grant, even if the respondents' canal had been private property subject to no statutable duty. Such presumptions are made when, without them, enjoyment long continued or acquiesced in cannot be reasonably accounted for. But here there is no occasion for any presumption whatever. The circumstances in evidence make it impossible to presume any contract, such as is contended for, to have been made at the original formation of the canal of communication, and when the line of locks had once been made, it was the interest no less of the respondents than of the appellants that the lowest lock should be opened from time to time to let the boats through, and this of necessity gave a supply of water to the appellants. There is no reason for presuming any contract by, or obligation on the respondents, because the transit of boats could not otherwise be affected" (*e*).

The right of property in a canal was considered in *Rochdale Canal Co.* v. *King* (*f*), where *Parke*, B., delivering the judgment of the Exchequer Chamber affirming the decision of the Q. B., said that the declaration

(*e*) Ibid. p. 272.

(*f*) 14 Q. B. 122; and see *Medway* v. *Earl of Rumney*, 9 C. B., N. S. 575.

which averred that the company had made the canal in pursuance of the statute authorizing them to make and maintain such canal, and that before and at the time of the committing of the grievances, the canal was maintained by the company for the purposes of the statute, sufficiently showed, *primâ facie*, that the company were in possession of the canal; that the statute treats them as proprietors of the projected canal, and it was to be assumed that, as such proprietors, they had all the ordinary rights of proprietorship, except so far as these might be qualified either expressly or impliedly by the provisions of their statutes (*g*).

In the court below *Erle*, J., said: "Such a company has all the rights and remedies which an individual owner of private property has, unless the statute contains some provision to take them away" (*h*).

The proprietors of this same canal (*i*) the following year brought an action against another millowner for a wrongful use of the water of their canal, in which the defendant set up a prescriptive right to use the water in a manner inconsistent with the provision of the statutes under which the canal company acted. *Erle*, J., said: "This is a claim to impose a servitude upon the canal by virtue of twenty years' user. The party seeking to establish such a claim must show a grant by a person capable of making the grant relied upon. Now the grant here is by persons having no distinct ownership of the water, but entitled only to the flow of it for the purpose of the navigation, having no right to the surplus. If it had appeared, by direct evidence, that the company had made a grant to the purport now supposed, setting out their title, that grant would have appeared to be against the right of

(*g*) Ibid. p. 137.

(*h*) Ibid. p. 135.

(*i*) *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287; and see *National Manure Co.* v. *Donald*, 4 H. & N. 8; and *Mason* v. *Shrewsbury and Hereford Ry. Co.*, L. R., 6 Q. B. 583.

the public, and void upon the face of it. The twenty years' user, therefore, could establish no right"(*k*).

It would seem that as soon as a canal company ceases to use the water of its canal for the purposes authorized by their act, that the riparian owners below have a right to insist that the water shall be allowed to flow in its old natural course for their benefit (*l*).

Where a corporation are empowered by act of parliament to construct a watercourse for the purpose of providing for the public objects contemplated by the act, they are not justified in applying, or permitting to be applied, any of the water in such watercourse for private purposes other than that which remains after the public purposes are fully satisfied (*m*).

A right to foul artificial watercourses may be acquired by user. Thus, where the owners of a mine made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing, it was held that he thereby gained a right to the enjoyment of the water free from pollution (*n*).

And where, in an action brought for fouling a watercourse, the judge told the jury that if it was merely an artificial stream made by the hand of man for the use of man the plaintiff had no right in respect of it, the court held this to be a misdirection; for, although it may have been an artificial watercourse, it may still have been originally made under such circumstances and have been so used as to give all the rights that the riparian

(*k*) Ibid. p. 315.

(*l*) *National Manure Co.* v. *Donald*, 4 H. & N. 8; *Mason* v. *Shrewsbury and Hereford Ry. Co.*, per *Blackburn*, J., L., R. 6 Q. B. 582; per *Cockburn*, C. J., ibid. p. 588.

(*m*) *Att.-Gen.* v. *Plymouth*, 9 Beav. 67.

(*n*) *Magor* v. *Chadwick*, 11 A. & E. 571; and see *Wood* v. *Waud*, 3 Exch. 748.

proprietors would have had, had it been a natural stream (*o*).

Limit of Right.

The right to foul or otherwise disturb a watercourse acquired by user must be limited by the amount of enjoyment proved to have been had. Thus, in the case of *Crossley* v. *Lightowler* (*p*), Lord *Chelmsford*, L. C., said: "The user which originated the right must also be its measure, and it cannot be enlarged to the prejudice of any other person" (*q*).

For example, where the owner of a mill on a river sued an upper mill owner for obstructing the flow of water by allowing the cinders and refuse of his works to find their way into his pond, and the defendant justified under an user for twenty years; it was held no defence, because he failed to show that he had during twenty years of right caused the refuse to go *into the plaintiff's pond*, but only *into the channel of the river* (*r*).

Where a person had acquired a right by prescription to divert water from a river into pits upon his land, it was held, that although he was justified in cleansing them he was not in altering or *enlarging* them (*s*).

So, again, the owner of land through which a river runs cannot, by enlarging a channel of certain dimensions through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other landowner lower down the river who had at any time before such enlargements appropriated to himself the surplus water which did not escape by the former channel (*t*).

A prescriptive right for private individuals to allow the

(*o*) *Sutcliffe* v. *Booth*, 32 L. J. (N. S.) Q. B. 136.

(*p*) L. R., 2 Ch. 478.

(*q*) Ibid. p. 481.

(*r*) *Murgatroyd* v. *Robinson*, 7 E. & B. 391; and see *Moore* v. *Webb*, 1 C. B., N. S. 673.

(*s*) *Brown* v. *Best*, 1 Wils. 174.

(*t*) *Bealey* v. *Shaw*, 6 East, 208.

drains of their house to pass into a river cannot be taken advantage of to justify a more extensive system of drainage, resulting in an increased nuisance to riparian owners (*u*).

Neither does the fact of about one half of a town having passed their sewage into a river establish a prescriptive right in the corporation to construct drains having an outfall into the river, which would carry a much larger quantity of sewage into the river, to the injury of others (*x*).

In an action for obstructing a drain, the plaintiff alleged in his declaration a right to carry off by it "*foul* water and other *filth*," but failed to prove an user, except for the drainage of surface and ordinary refuse water. It was held, that the judge at *Nisi Prius* was right in directing a verdict for the defendant (*y*).

But if the right be not extended, the *mode* of enjoyment may be varied.

In *Saunders* v. *Newman* (*z*), it was held that the occupier of a mill may maintain an action for forcing *back* water and injuring his mill, although he has not enjoyed it precisely in the *same state* for twenty years; and that it is no defence to such an action that the occupier had, within a few years, erected in his mill a wheel of different dimensions, but requiring less water than the old one, although the declaration stated the plaintiff to be possessed of a mill, without alleging it to be an ancient mill.

Abbott, J., said: "When a mill has been erected upon a stream for a long period of time, it gives to the owner a right that the water shall continue to flow to and from the mill in the manner in which it has been accustomed to flow during all that time. The owner is not bound to use the water in the same precise manner, or to apply it to the

(*u*) *Att.-Gen.* v. *Luton*, 2 Jur., N. S. 180; *Att.-Gen.* v. *Birmingham*, 4 K. & J. 528.

(*x*) *Att.-Gen.* v. *Kingston*, 34 L. J., Ch. 485; and see *Att.-Gen.* v. *Leeds*, L. R., 5 Ch. 583.

(*y*) *Cawkwell* v. *Russell*, 26 L. J. (N. S.) Exch. 34; and see *Millington* v. *Griffiths*, 30 L. T. Rep., N. S. 65.

(*z*) 1 B. & Ald. 258; and see *Cooper* v. *Barber*, 3 Taunt. 99; *Blanchard* v. *Baker*, 8 Greenl. (Amer.) 253.

same mill; if he were, that would stop all improvements in machinery. If, indeed, the alterations made from time to time prejudice the right of the lower mill, the case would be different; but here the alteration is by no means injurious, for the old wheel drew more water than the new one (*a*).

In *Hall* v. *Swift* (*b*), *Tindal*, C. J., said: "The declaration states a general right in the plaintiff to the use of the water, which long before and at the time of the grievances committed by the defendant ought to have run and flowed, and still ought to run and flow unto and into the lands of the plaintiff; it appears that the water in question flowed into the plaintiff's land from the defendant's, but that some alterations had been made in the course of the stream at a spot above the plaintiff's premises; and it is said that that is an answer to the right set up in the declaration. If so, any alteration, however slight, would destroy the right, however long established. No authority has been cited in support of such a proposition, and I think it cannot be sustained" (*c*).

Where the defendant, the owner of an ancient paper mill where the paper had been made from rags, introduced a new vegetable fibre, and carried on the works upon the same scale for making paper from this new material, and for more than twenty years before this change the refuse arising from the paper manufacture had been discharged into a stream which ran past the plaintiff's house, it was held that the easement to which the defendant was entitled was to be presumed to be, not a right to foul the stream by discharging into it the washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not in-

(*a*) Ibid. p. 261; and see 1 Rolle, Abr. 107, pl. 16.

(*b*) 4 Bing., N. C. 381.

(*c*) Ibid. p. 383; and see *Thomas* v. *Thomas*, 2 Cr., M. & R. 34.

creasing the pollution, and that the onus lay on the plaintiff to prove any increase of pollution (*d*).

Abandonment.

Easements acquired by user may be lost by non-user, from which abandonment may be inferred. The question of abandonment is one of intention, and must be decided upon the facts of each particular case (*e*).

This subject was much considered in the case of *Crossley* v. *Lightowler* (*f*), where it was held that actual disuser of an easement for twenty years, during which others have acquired adverse rights, destroys the right to the easement.

Wood, V.-C., in delivering judgment, said: "The mere non-user of a privilege or easement of this description (to foul a stream) is not, in itself, an abandonment that in any way concludes the claimant; but the non-user is evidence with reference to abandonment. The question of abandonment is a question of fact that must be determined upon the whole of the circumstances of the case. . . . . It has been always held to be of considerable importance that a person in possession of a certain right, and leaving the right wholly unused for a long period of time, and having given so far an encouragement to others to lay out their money, on the assumption of that right not being used, should not be allowed at any period of time to resume his former rights, to the damage and injury of those who themselves have acquired a right of user, which the recurrence to their long-disused easement will interfere with. . . . . It appears to me that if that were allowed, no man would be safe on any river in the kingdom; for I suppose there is hardly a

(*d*) *Baxendale* v. *McMurray*, L. R., 2 Ch. 790.

(*e*) Easements may also be extinguished by unity of possession of the dominant and servient tenements.

(*f*) L. R., 3 Eq. 279; L. R., 2 Ch. 478; and see *Drewett* v. *Sheard*, 7 C. & P. 465; *Carr* v. *Foster*, 3 Q. B. 581; *Hall* v. *Swift*, 4 Bing., N. S. 381.

river in the kingdom where there has not been, at some time or other, a work which might be detrimental to a riparian proprietor lower down. If the right can be revived after twenty-five years, why not after fifty? or why not after a hundred? Why, after any lapse of time, may not a right be resumed which would make the river utterly unfit for the purposes for which it was used in the interval? It must be taken to be within your knowledge that other persons are spending their capital on a business which has been long established. You, all the time, lying by, and taking no steps whatever till the expiration of that time. Looking at the authorities I certainly find none that would bear out such a proposition as the above. . . . . Conceding at once that very strong evidence must generally be given of abandonment, yet such evidence need be much less strong when you have allowed (I will not say induced) any other person to assert rights which will be seriously and irremediably damnified by the re-assertion of yours after so long a period; and I take the law to be, that you cannot, after a period exceeding by five years the time in which the right may be acquired by any other person, when other persons have, in the meantime, acquired rights of user of the water, re-establish your right to resume works again, which you have for that period left wholly unoccupied by a business of a similar description"(*g*). On appeal Lord *Chelmsford*, L. C., said: "The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long-continued suspension may render it necessary for the person claiming the right to show that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided upon the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind. The case of *Reg.* v.

(*g*) L. R., 3 Eq. 292.

Chorley (*h*) shows that time is not a necessary element in a question of abandonment, as it is in the case of the acquisition of a right" (*i*).

Reservation of an Easement.

The law will not reserve anything out of a grant in favour of a grantor, except in case of necessity.

The owners of a piece of land on the banks of a stream had been in the habit of discharging dirty water into the stream which flows by the same. Upon a sale of the piece of land, it was held that there was no implied reservation of the right to discharge the dirty water (*k*).

Custom.

Certain water rights have their origin in local customs.

Lord *Mansfield* thus points out the difference between a custom and a prescription: "Where an individual has enjoyed a right time out of mind, without being able to trace the origin or foundation of his right, a grant is presumed; and therefore, if the occupier of a certain messuage has enjoyed it, he must claim it by prescription; but when the claim depends on a general rule of property within certain limits, it is alleged as a custom, or *lex loci.* All local or real property must be governed by such law; and it has no relation to persons out of the limit" (*l*).

Thus the inhabitants of a district may, by custom, have a right to go upon the soil of another to take or to use the water of a spring (*m*).

The rights of tin-bounders, according to the customary law of Cornwall, to the use of water within their tin-bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under the 2 & 3 Will. 4, c. 71, to the enjoyment of the water by a twenty years' user (*n*).

(*h*) 12 Q. B. 515.

(*i*) L. R., 2 Ch. 482.

(*k*) *Crossley* v. *Lightowler*, L. R., 2 Ch. 478.

(*l*) *Clarkson* v. *Woodhouse*, 5 T. R. 414, n.

(*m*) *Race* v. *Ward*, 4 Ell. & Bl. 702.

(*n*) *Gaved* v. *Martyn*, 19 C. B., N. S. 732.

CHAPTER X.

AS TO THE PROTECTION OF RIPARIAN RIGHTS BY INJUNCTION.

NUISANCES to water may be either of a public or private nature. A public nuisance is an injury to the property of all persons who come within its influence, while a private nuisance is an injury to the property of an individual (*a*).

Nuisances to water may be restrained by injunction.

If the nuisance be public, by information at the suit of the Attorney-General, if private, at the suit of the person suffering special injury. The fouling of a public river so as to render it unfit for the use of man is also an indictable offence (*b*).

Where the legal title to a right in water has been established, whether the right arises "*ex jure naturæ*" by grant, or by custom, an injunction will, in a suitable case, be granted for its protection (*c*).

And when a plaintiff has proved his right to an injunction against a nuisance, such as the pollution of a stream, it is no part of the duty of the court to inquire in what way the defendant can best remove it. The plaintiff is

(*a*) *Att.-Gen.* v. *Sheffield Gas Co.*, 3 D. M. & G. 320, per *Turner*, L. J.; *Soltau* v. *De Held*, 2 Sim., N. S. 142; *Att.-Gen.* v. *Thames*, 1 H. & M. 1; *Squire* v. *Campbell*, 1 M. & C. 486.

(*b*) *R.* v. *Medley*, 6 C. & P. 292. A public river is a highway, any obstruction of which, whereby its use as a highway is impeded, is an indictable offence. For the law relating to this subject, see Russell on Crimes, Vol. I., p. 520, 5th ed.; and Roscoe's Dig. of Evid. in Crim. Cas., 8th ed., p. 596.

(*c*) *Lond* v. *Murray*, 17 L. T. Rep. 248; and see cases there reviewed; *Finch* v. *Resbridger*, 2 Vern. 390; *William* v. *Heath*, 1 L. T. Rep., N. S. 267; *Tipping* v. *Eckersley*, 2 K. & J. 264.

entitled to an injunction, unless the removal of the injury is physically impossible; and it is for the defendant to find his way out of the difficulty, whatever inconvenience or expense it may put him to. Consequently in such a case a reference, before the decree, to an expert under the 15 & 16 Vict. c. 80, s. 42, as to the existence of the injury, or as to the best mode of removing it, is improper; but when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time, with liberty to the defendants to apply for an extension of time (*d*).

Contempt.

On proof of a wilful contempt of an injunction to abate a nuisance a writ of sequestration will be issued.

Thus, where an injunction was granted restraining a local board from causing or permitting sewage to pass through drains under their control into a river, to the injury of the plaintiff, after a day named, and the defendants failed to comply with the order, but alleged that they had not yet succeeded in discovering a mode of deodorizing the sewage; that compliance with the order was practically impossible without stopping the drainage of the town, which would expose them to hostile proceedings at law and equity, and compel them to infringe an act of parliament; that there had been no wilful default; and that a sequestration would be ineffectual, as the property of the board was all public property, injurious to the public, as preventing the board from discharging its duties, and futile, as it would compel the members of the board to resign,—the court held that there was wilful contempt, and ordered sequestration to issue (*e*).

Compensation.

Where the legislature has authorized certain works to be done, and in the lawful execution of them damage is

(*d*) *Att.-Gen.* v. *Colney Hatch*, L. R., 4 Ch. 146.

(*e*) *Spokes* v. *Banbury*, L. R., 1 Eq. 42.

suffered, the only remedy is by compensation; but where the powers given by the legislature are overstepped, and damage results, the remedy is by an action for damages and an injunction.

Thus, where a local board interfered with a watercourse in a manner not authorized by the *Local Government Act* (21 & 22 Vict. c. 98), s. 68, art. 3, they were restrained from so doing, and the person injured was not left to his remedy under the compensation clause of the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 144 (*f*).

And where a private act, incorporating the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), authorized, and under certain circumstances required, a waterworks company to construct a compensation reservoir, and gave the company powers to acquire, by *consent*, lands for its construction:—*Held* (reversing the judgment of *Malins*, V.-C.) that a riparian owner, whose rights to use the water of the stream, except as declared by the act, were reserved to him by the private act, could obtain redress, either by action for damages or by injunction, for the fouling of the stream by the company, and was not obliged to seek compensation under the compensation clause of the Waterworks Clauses Act (*g*).

The diversion of a stream is a "taking and using it" within the meaning of the 85th section of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), which is incorporated in the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17). The latter act places the taking of streams upon the same footing as the taking of lands under the former act. Lord *Romilly*, M. R., granted an injunction restraining the defendants, a waterworks company acting under the Act of 1847, from diverting a stream belonging to the plaintiff until the value of the stream

(*f*) *Grand Junction Canal Co.* v. *Shugar*, L. R., 6 Ch. 483; *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R., 7 H. L. 706, per *Cairns*, L. C.

(*g*) *Clowes* v. *Staffordshire Potteries Waterworks Co.*, L. R., 8 Ch. 125.

was ascertained and secured to the owner of the land through which it passed (*h*).

Grounds for the Interference of the Court.

It is not in every case of nuisance that the court will interfere. It ought not to do so in cases in which the injury is merely temporary and trifling, but it ought to do so in cases in which the injury is permanent and serious (*i*).

The conditions under which a court of equity will interfere by injunction to restrain a nuisance were much considered in the case of *Wood* v. *Sutcliffe* (*k*). And in delivering judgment, *Kindersley*, V.-C., said: "If parties have established such a legal right as the plaintiffs in this case have established, and another person comes and erects on the same stream, above their works, and, by his manufacturing process, so fouls the water of the stream as seriously and continuously to obstruct the effective carrying on of their manufacture; and, if the granting of an injunction will restore or tend to restore those parties to the position in which they previously stood, and in which they have a right to stand; and if the injury complained of is of such a nature that damages will not be an adequate compensation—that is, such a compensation as will in effect, though not in *specie*, place them in the position in which they previously stood; and if, moreover (for there are several conditions), they use due diligence in vindicating their rights, they have in general a right to come to a court of equity and say: 'Do not leave us to bring action after action for the purpose of recovering damages; but interfere, with a strong hand, and prevent the continuance of the acts we complain of,

(*h*) *Ferrand* v. *Bradford*, 21 Beav. 412; and see *Lyon* v. *Fishmongers' Co.*, L. R., 1 App. Cas. 670, and cases there cited.

(*i*) *Att.-Gen.* v. *Sheffield Gas Consumers Co.*, 22 L. J., Ch. 811; *Goldsmid* v. *Tunbridge Wells*, L. R., 1 Eq. 161; *Lillywhite* v. *Trimmer*, 36 L. J., Ch. 525; *Att.-Gen.* v. *Gee*, L. R., 10 Eq. 131; *R.* v. *Darlington*, 5 B. & S., per *Blackburn*, J., p. 527.

(*k*) 2 Sim., N. S. 163.

in order that our legal right may be protected and preserved to us.' I say, in general; because, whenever a court of equity is asked for an injunction in cases of such a nature as this, it must have regard not only to the dry strict rights of the plaintiff and defendant, but also to the surrounding circumstances; to the rights or interests of other persons which may be more or less involved: it must, I say, have regard to those circumstances before it exercises its jurisdiction (which is unquestionably a strong one) of granting an injunction. I have used the terms, 'seriously obstruct,' because I cannot assent to the proposition that, on the mere dry fact of the plaintiffs having the abstract right, a court of equity will, as a matter of course, on that right being established at law, grant an injunction if the right be infringed ever so minutely. On the other hand, I am far from saying that because, in the action at law, the jury has given only a shilling or a farthing damages, *that* is a ground for concluding that the injury is not serious, and that the case is one in which an injunction ought not to be granted. I have used, also, the terms 'continuously obstruct,' by which I mean to indicate, 'obstruction frequently occurring,' not 'never ceasing'" (*l*).

In the more recent case of *Goldsmid* v. *Tunbridge Wells* (*m*), *Turner*, L. J., said: "If the fouling of the stream by the defendants amounts to a nuisance at law, and if this nuisance seriously affects the estate, this court ought to interfere to prevent it. . . . . I adhere to the opinion which was expressed by me and by the Lord Chancellor (Lord *Cranworth*) in *The Attorney-General* v. *Sheffield Gas Consumers' Company* (*n*), that it is not in every case of nuisance that this court should interfere. I think that it ought not to do so in cases in which the injury is merely temporary and trifling; but I think that it ought to do so in cases in which the injury is permanent

(*l*) Ibid. p. 165.
(*m*) L. R., 1 Ch. 349.
(*n*) 3 D. M. & G. 304.

and serious; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it. In this particular case I think that regard must be had not merely to the comfort or convenience of the occupier of the estate, which may only be interfered with temporarily and in a partial degree, but that regard must also be had to the effect of the nuisance upon the value of the estate, and upon the prospect of dealing with it to advantage; and I cannot but think that the value of this estate, and the prospect of advantageously dealing with it, is and will be affected by the continuance of this nuisance. Upon this ground, and upon the ground of the water of the brook being rendered unfit for the use of the tenants and occupiers of the estate, I think that the interference of the court in this case was due" (*o*).

Legal Title.

An injunction will only be granted to protect a legal title.

A defendant, against whom an injunction is prayed to be restrained from diverting a watercourse, has a right to have the alleged right of the plaintiff established by means of an action at law; and the court will not grant such an injunction, in the meantime, where the balance of convenience or inconvenience in the attendant circumstances would be against the defendant's rights to do the thing sought to be restrained (*p*).

Thus, an injunction was refused by *Wood*, V.-C., to restrain the draining of gravel pits into a stream, which injured the plaintiff's watercress beds, where the plaintiff did not show any prescriptive right to the use of the stream in a pure state for that purpose (*q*).

And where the owners of premises on the banks of a river, having by arrangement with the owners of land

(*o*) L. R., 1 Ch. 352.

(*p*) *William* v. *Heath*, 1 L. T. Rep., N. S. 267.

(*q*) *Weeks* v. *Heward*, 10 W. R. 557.

higher up the stream for some years obtained and used water flowing through pipes laid down in the land of the latter, but not having proved the time when they began to use such artificial supply, were held not to be entitled, in respect of such user, to a right as riparian proprietors, to restrain the fouling of the water which entered the pipes from works situated higher up the stream (*r*).

So, where a railway company had become owners of a canal, and were bound by statute to keep it open and navigable, and the plaintiff was owner of a mill abutting upon a sort of bay in the canal, and the company built a wall across the bay so as to make the canal of the same width there as in other parts, V.-C. *Parker* granted an injunction restraining them from doing more, until it had been determined by an action at law, whether the bay formed a part of the canal or not, this being asserted by the plaintiff, and denied by the defendants. The Vice-Chancellor said, that he had no power to make the company undo anything actually done (*s*).

Proof of Damage to the Plaintiff.

In order to induce the court to restrain the pollution of a watercourse, it is necessary to show that the plaintiff has, or will hereafter, thereby sustained some substantial damage. Thus, where the defendant diverted a stream as it passed through his premises, but restored it undiminished in quantity to its former channel before it reached the premises of the plaintiff, and the defendant also employed the stream in a way which rendered it unfit for ordinary uses, but it did not appear that the plaintiff sustained any actual damage from the presence of noxious ingredients when it reached him, Lord *Cottenham*, L. C., dissolved an injunction restraining the defendant from diverting and using the water (*t*).

(*r*) *Crossley* v. *Lightowler*, 36 L. J. (N. S.) Ch. 584.

(*s*) *Bradbury* v. *Manchester, Sheffield and Lincolnshire Ry. Co.*, 15 Jur. 1167.

(*t*) *Elmhirst* v. *Spencer*, 2 Mac. & G. 45.

Consequently, it is necessary, in an order for an injunction restraining a defendant from polluting a stream, to insert the words "to the injury of the plaintiff," in order to establish a ground for the interference of the court, and to prevent its authority being invoked for trivial purposes (*u*).

And in *Elwell* v. *Crowther*, the plaintiff was entitled to the supply of water from a stream for the working of his mill. This stream flowed over the defendant's land, where, by mining operations, he had caused the bed of the river and the adjoining land to sink to the extent of four feet. The defendant had, however, by the construction of banks on either side of the stream, prevented the diminution of water at the plaintiff's mill. Upon a bill for injunction, Lord *Romilly*, M. R., said that if the parties had not settled the matter amicably, the plaintiff would have been entitled to an injunction to restrain the working of the mine in such a manner as to *obstruct, diminish, alter, or interfere with the flow of the water* along the watercourse. Upon the defendant undertaking not to work his mines in such a manner as to interfere with the flow of water along the watercourse, further proceedings were stayed, with liberty to the plaintiff to apply, but without giving costs (*x*).

Where the defendants demised to the plaintiff a plot of land, one-half of an adjoining brook, a cotton mill, and steam-engine, and the use of a weir below the mill for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook at a bridge above the mill, "and the free use and enjoyment of so much of the stream of water which usually flows down the brook adjoining the plot of land as should be necessary for effectually supplying with water and working the said steam-engine." Shortly afterwards the defendants, having erected a mill and steam-engine above the plaintiff's mill,

(*u*) *Lingwood* v. *Stowmarket Co.*, L. R., 1 Eq. 77, 336.

(*x*) 31 Beav. 163.

discharged heated water from their mill into the brook, and so increased on one occasion the temperature of the water which the plaintiff had to use for condensing the steam of his engine 11° F.; and on another occasion the increased temperature of the water diminished the number of strokes worked by the engine per minute, V.-C. *Wood* being of opinion that the plaintiff was entitled under the demise to the free use and enjoyment of so much of the stream in its *natural state* as it usually flowed as was necessary for effectually working the engine, and that a *material interference* with the quality of the water had been proved, granted a perpetual injunction restraining the defendant from discharging heated water into the stream so as to increase the temperature of the water which the plaintiff used for condensing (*y*).

Where the sewage of a town had for many years been drained by commissioners acting under a local act of parliament into a stream passing through the plaintiff's land, which was beyond their district, without perceptibly polluting it; but for some years before the filing of the bill, in consequence of the increase of the town, the stream became perceptibly polluted and continued to increase in impurity, Lord *Romilly*, M. R., granted an injunction restraining the commissioners from draining the town into the stream so as to pollute the water to *the injury of the plaintiff* (*z*).

In the case of *Bidder* v. *Croydon* (*a*) also, V.-C. *Wood* granted an injunction against the *Croydon* Local Board, restraining them from passing sewage matter into the Wandle to the injury of the plaintiff. The sewage passed into the river a mile above the plaintiff's property, and

(*y*) *Tipping* v. *Eckersley*, 2 K. & J. 264.

(*z*) *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L. R., 1 Eq. 161: affirmed on appeal, L. R., 1 Ch. 349; see comments on the case in *Lillywhite* v. *Trimmer*, 36 L. J., Ch. 530.

(*a*) 6 L. T. Rep., N. S. 778.

upon certain occasions a great number of fish were killed; and it was held to be immaterial that the fish were killed above and floated down to the plaintiff's portion of the river, as he was entitled to have the fish as they circulated from one part of the river to another.

Lord *Romilly*, M. R., also restrained a local board of health from polluting surface water which flowed by an open gutter into a canal by diverting it into a sewer, and then passing the sewage together with the surface water by an old covered drain into the canal (*b*).

And if sewage percolates from a cesspool through the soil into a well on an adjoining property the court will restrain the use of the cesspool in such a manner as to pollute the water in the well (*c*).

But where an information was instituted at the relation of the conservators of the River *Thames*, to restrain the corporation of *Kingston-on-Thames* from altering their drains so as to discharge a greatly-increased quantity of sewage into the river; the court considering upon the evidence that neither the present nuisance, nor probability of immediate prospective nuisance, had been proved, dismissed the information (*d*).

An encroachment on the alveus of a running stream may be complained of without the necessity of proving that damage has been sustained or is likely to be sustained. But where upon a balance of testimony it appears that the quantity of water sent on to the plaintiff's works will not, in all probability, be substantially diminished in quantity or quality, by the means adopted by the defendants with that object, the court will not proceed by mandatory injunction but leave the plaintiffs to their remedy at law (*e*).

Neither is it necessary, upon an information filed by

(*b*) *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Worksop*, 23 Beav. 198.

(*c*) *Womersley* v. *Church*, 17 L. T. Rep., N. S. 190.

(*d*) *Att.-Gen.* v. *Kingston*, 34 L. J., Ch. 481.

(*e*) *Edleston* v. *Crossley*, 18 L. T. Rep., N. S. 15.

the Attorney-General to restrain a public body from transgressing powers conferred by an act of parliament to prove that injury to the public will result from the acts complained of (*f*).

By the 45th, 46th, and 145th sections of the Public Health Act, 1848, it was provided that a local board of health might make necessary sewers through or under any lands whatever, and cause them to be emptied into such places as may be fit and necessary, provided that nothing in the act shall authorize the board to use, injure, or interfere with any watercourse, stream, river, &c., in which the owner of any lands may be interested, without the consent of such owner. The Lords Justices, acting upon the written opinion of *Cresswell* and *Williams*, JJ., that persons having a right to watering-places in a river adjoining their lands for the use of their cattle, but not being owners of the soil of the river, nor of the water, but having only the aforesaid right in it, are interested in the river within the meaning of the proviso, but would not be able to maintain an action for an interference with their rights, unless they were injured by such interference, and that the works of a local board, producing an outflow of the sewage of a town above such watering-place, was such an interference as to cause injury to the landowners, but that whether this was so or not, it ought (if not consented to by them) to be restrained by injunction, being the act of a public body exceeding its powers (*g*).

A court of equity will have regard to whether a nuisance, which it is sought to restrain, is an *increasing* nuisance.

Where the corporation of a borough, acting as a local board of health, constructed a sewage system which resulted in a gradual increasing nuisance to the plaintiffs and the public generally, on it being represented on

(*f*) *Att.-Gen.* v. *Cockermouth*, L. R., 18 Eq. 172.

(*g*) *Oldaker* v. *Hunt*, 6 D. M. & G. 376; and see *Att.-Gen.* v. *Luton*, 2 Jur., N. S. 180.

their behalf that the evil could only be dealt with effectually by a comprehensive scheme, and that no such scheme could prudently be adopted pending a parliamentary inquiry into the whole subject, the court granted an immediate injunction against any extension of the system, and restrained the continuance of the existing nuisance from and after the expiration of one year from the filing of the bill (*h*).

Sir *G. J. Turner*, referring to the question of prospective nuisance, said: "I am satisfied upon the evidence that the nuisance in this case has been and is increasing, and in all probability will continue to increase; and, although I am not prepared to say that, if this case rested upon prospective nuisance only, enough is proved to warrant the interference of this court, I am by no means disposed to think that where some degree of nuisance is proved to exist, and to have been increasing, the court in determining whether it should interfere ought not to have regard to the prospect of its further continuance and increase. The interference of the court in cases of prospective injury very much depends, as I apprehend, upon the nature and extent of the apprehended mischief, and upon the certainty or uncertainty of its arising or continuing; and the fact of the nuisance having commenced raises a presumption of its continuance"(*i*).

In the case of *The Attorney-General* v. *Cockermouth*(*k*) a bill was filed by the local board of Workington to restrain an alleged nuisance committed by the local board of Cockermouth by the pollution of the River Derwent.

Workington is situated at the mouth of the Derwent, about eight miles below Cockermouth, and derives its

(*h*) *Att.-Gen.* v. *Halifax*, 39 L. J., Ch. 129. The form of the order made in this case is to be taken as a model. *North Staffordshire Ry. Co.* v. *Tunstall*, 39 L. J., Ch. 131.

(*i*) *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L. R., 1 Ch. 354.

(*k*) L. R., 18 Eq. 172.

supply of water for domestic purposes from that river. The defendants discharged sewage into the river so as to pollute the river at the point of discharge; but chemical analysis failed to detect any pollution at the intake of the Workington waterworks. Dr. *Frankland* gave evidence on behalf of the plaintiffs to the effect, that although the deterioration of the water at Workington, for washing and manufacturing purposes, might be insignificant, yet for drinking and cooking purposes it might be dangerous, because sewage matter is not perceptibly altered in its character by a flow of seven miles, and scarcely diminished in quantity. That the failure of chemical analysis to detect any deleterious ingredients does not indicate that danger is absent, since the nature of the noxious ingredients which propagate small-pox, scarlet fever, typhoid fever, or cholera, is unknown, and chemical analysis is powerless to detect these ingredients. That there can be no doubt that the prevalence in Cockermouth of epidemics which are propagated by water, such as cholera and typhoid fever, would seriously imperil the health of Workington.

The defendants gave evidence tending to show that their views were not shared by other scientific men. *Jessel*, M. R., in delivering judgment, said: "I cannot find any evidence of nuisance caused by the defendants' acts. The sewage is thrown into the river in comparatively small quantities, at a distance of eight or nine miles from the town of Workington. The water has been carefully analyzed at the intake at Workington, and no trace of the sewage can be discovered; that is to say, from some cause or other that which was polluted water at or near the outfall ceased to be polluted water by the time it arrives at Workington. That I take to be the effect of the evidence, and if the plaintiff board can only sue on the ground of nuisance, and they cannot prove nuisance, it follows that their bill must be dismissed" (*l*).

(*l*) Ibid. p. 179.

But where the pollution of a river by sewage matter has *actually resulted* in the injury of the public health an injunction will be granted.

V.-C. *Wood* said, in *The Attorney-General* v. *Kingston* (*m*): "I have a clear conviction that anything seriously injurious to health ought to be restrained, as I held in the case of the *Lee* river, and I do not think there was any appeal from that decision. I believe there a fever had actually broken out in consequence of what was done, and I should be justified in holding that anything of that kind would be a nuisance whether the river was navigable or not" (*n*).

It is not, however, necessary, in order to induce the court to grant an injunction, to show that a present injury is suffered, where, by the continuance of the act sought to be restrained, an adverse right would be acquired.

Thus, in *Crossley* v. *Lightowler*, *Wood* V.-C., said: "A riparian proprietor has the right to the use of the water, whenever he may want to enjoy it. It is quite true that at this moment it is not made use of by the plaintiffs for watering their cattle, or for any other purpose, but they have a right to the user and a right to interfere with anything that injures that right of user in such a manner as that if not interrupted for twenty years, the person so injuring the right would acquire a title" (*o*).

After referring to the judgment of Lord *Cranworth* in *Bickett* v. *Morris* (*p*) the Vice-Chancellor continued: "Lord *Westbury* concurs in this judgment entirely, and the principle, one sees at once, is applicable to the present case. It is this: 'You, as a riparian proprietor, see something done which is not at all to your detriment now, but may hereafter be greatly to your detriment, though you cannot precisely point out how, or to what extent; if you do not interfere, a right will be acquired against you,

(*m*) 34 L. J., Ch. 481.

(*n*) Ibid. p. 487; and see *Goldsmid* v. *Tunbridge Wells*, L. R., 1 Eq. 169.

(*o*) L. R., 3 Eq. 296.

(*p*) L. R., 1 Sc. App. H. L. 47

by which you will hereafter be affected; and you have a right to say, things shall remain exactly as they were.' That applies with equal, if not with greater force, to the case where a person says, 'I am at this moment not using the water for the purpose of watering cattle, or of wool washing, or for any other purpose; but it is to a certain extent clear and undefiled, and you are pouring in an immense quantity of foul water into the river in front of my property; therefore I seek to restrain that which, in twenty years' time, will become a right.' I think on this part of the case there can be no doubt at all" (*q*).

And where a canal company having under their act power to supply their canal with water from the neighbouring streams, bought a mill and turned the mill stream into the canal; and subsequently a waterworks company diverted part of the mill stream, and thereby supplied a town with water, it was held that this was an unlawful user of the water by the waterworks company, as riparian proprietors, and that as they claimed a right so to use the water, the plaintiffs were not obliged to prove actual damage to their canal (*r*).

It is no answer to an information for the purpose of restraining the pollution of a river by the sewage of a town that the river was foul before receiving the sewage, or that it would remain so if such pollution were to cease, for two reasons:

1. The addition of the sewage aggravates the evil:
2. The former nuisance might terminate, and it is not right that when one nuisance terminates there should be another brought into existence (*s*).

And where a canal company drew foul water into their canal, so as to make the canal a public nuisance, it was held no answer to the prayer for an injunction to prove

(*q*) L. R., 3 Eq. 298.

(*r*) *Wilts and Berks Canal Co.* v. *Swindon Waterworks Co.*, L. R., 9 Ch. 451: affirmed in House of Lords, L. R., 7 H. L. 697.

(*s*) *Att.-Gen.* v. *Leeds Corporation*, L. R., 5 Ch. 583; and see *Wood* v. *Sutcliffe*, 2 Sim., N. C. 166.

that the foulness of the water was caused, not by the company, but by other persons, they having the power to draw it or not into their canal, as they pleased; nor to show that by granting an injunction a worse nuisance would be created in the stream (*t*).

And it is no answer to an information at the relation of a local board of health to abate a nuisance arising from sewage, that the board has power itself to remedy the evil by making sewers, because it is the duty of the board to prevent a nuisance arising in its district instead of putting the ratepayers to the expense of additional works (*u*).

Nuisances resulting from Works authorized by Parliament.

The creation of a public nuisance cannot be justified by the provisions of an act of parliament, and private nuisances will, in some cases, be restrained although they result from acts authorized by statutory provisions.

Thus the authority over sewers, and the drainage powers given by parliament to local boards, do not justify the committal of a nuisance by the boards in the exercise of such powers (*x*).

And if a public body, which has powers given it by statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute (*y*).

The right of drainage into the sea and public rivers, conferred by the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34, see s. 24), is subject to the condition that no nuisance be created (*z*).

(*t*) *Att.-Gen.* v. *Proprietors of Bradford Canal*, L. R., 2 Eq. 71; 35 L. J., Ch. 619.

(*u*) *Att.-Gen.* v. *Colney Hatch*, L. R., 4 Ch. 147.

(*x*) *Att.-Gen.* v. *Hackney Local Board*, L. R., 20 Eq. 626; *Bidder* v. *Croydon*, 6 L. T. Rep., N. S. 778.

(*y*) *Att.-Gen.* v. *Colney Hatch*, L. R., 4 Ch. 147.

(*z*) *Att.-Gen.* v. *Kingston*, 34 L. J., Ch. 481.

The court will restrain the members of a highway board (being the local authority for carrying out the provisions of the *Nuisances Removal Acts*) from allowing any fresh communications to be made with a sewer constructed by their predecessors in office which occasions a nuisance to the inhabitants of the adjoining parish, by draining into a stream flowing through such parish, although, from the limited nature of their powers, no order can be made against the board which will have the effect of compelling them to abate the nuisance altogether by stopping up the sewer and ceasing to drain into the stream (*a*).

The Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), sect. 4, enabled local boards to execute works without their districts for the purpose of the outfall or distribution of sewage, subject to the following proviso (*b*): "That nothing herein contained shall give, or be construed to give, power to any local board to construct or use any outfall, drain, or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity or quality of the water in such stream or watercourse."

Jessel, M. R., referring to this proviso, said: "I think the meaning is pretty plain, and it means this: 'You shall not send your sewage water into a natural stream until you have made it wholesome water—until you have got rid of all the noxious matter in it.' . . . . The next point is, what water is it that is not to be affected or deteriorated? You are not to affect or deteriorate the water in the river; what portion of the water? I cannot

(*a*) *Att.-Gen.* v. *Richmond*, L. R., 2 Eq. 306.

(*b*) This section is, in substance, re-enacted by sect. 17 of Public Health Act, 1875 (38 & 39 Vict. c. 55) by which the Act of 1861 is repealed.

accede to the argument of the defendants that it merely means that you must not poison the whole river; for a river may be hundreds of miles long. I think it must mean that you are not to affect or deteriorate the water in the river at the point where the outfall is, and that if you at that point pollute the water you shall not enjoy the privilege given to you by this act of parliament of making an outfall outside your district" (*c*).

By the Leeds Improvement Amendment Act, 1848, it was provided that the clauses of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), as to making and maintaining public sewers and the drainage of houses should be incorporated with and form part of the act, "except so far as they or any of them are inconsistent with the provisions of this act, or are expressly varied or excepted by this act;" and by sect. 6 of the local act the corporation of Leeds were authorized to construct one or more trunk or other sewer or sewers, sufficiently capacious to receive the foul and drainage water and filth of the town and to convey the same into the River Aire:—*Held*, that the power to drain into the river was controlled by sect. 24 of the Towns Improvement Clauses Act, which is one of the sections relating to sewers; and also by sect. 107, one of the sections under the division relating to the prevention of nuisances, although that clause was not expressly incorporated in the local act; and that the corporation were not authorized by sect. 6 of the local act to create a nuisance by drainage into the river (*d*).

The defendants, by their private act, had compulsory powers for acquiring land, streams and springs for their undertaking, and were required, under certain circumstances, to construct a compensation reservoir, for which they had powers to acquire land by *consent*. The act

(*c*) *Att.-Gen.* v. *Cockermouth*, L. R., 18 Eq. 177.

(*d*) *Att.-Gen.* v. *Leeds Corporation*, L. R., 5 Ch. 583.

contained a reservation of the rights of the owners and occupiers of any lands, mills, or works to the use of the waters of the stream, except so far as provided and declared by the act. A subsequent private act recognized this reservoir as a sufficient compensation reservoir for the millowners, and directed it to be maintained.

The owner of dye works situate on the river below the reservoir filed a bill against the company complaining that the effect of the reservoir was to make the river more muddy than it was before its construction, and to render it unfit for the process of dyeing, and praying for an injunction to restrain the defendants from fouling the stream. These allegations being established, it was held (reversing the decision of *Malins*, V.-C.), that the acts gave the defendants no power to foul the water. Injunction granted (*e*).

Wood, V.-C., held that the council of the borough of *Birmingham*, although bound by a local act of parliament, incorporating the Towns Improvement Clauses Act (10 & 11 Vict. c. 34), effectually to drain the town, were not justified in so carrying on their operations for this purpose as to drive away fish, and prevent cattle from drinking the water of a river at a part seven miles below the town where it belonged to the plaintiff (*f*).

Public and Private Interests.

Private interests are not to be sacrificed because important public interests are involved. However desirable public improvements may be, if they cannot be effected without interfering with private rights, private rights must prevail, and those who desire public improvements must effect them as best they can without interfering with those private rights. In all such cases regard must be had to the balance of inconvenience; and if the extent of

(*e*) *Clowes* v. *Staffordshire Potteries Waterworks Co.*, L. R., 8 Ch. 125.

(*f*) *Att.-Gen.* v. *Birmingham*, 4 K. & J. 528; and see *Spokes* v. *Banbury*, L. R., 1 Eq. 42.

the inconvenience sustained by a plaintiff is of a trifling nature, such as may be readily compensated for in money, he ought not and cannot interfere with the rights of others, in a matter of so much importance as the drainage of a town. The court will, however, restrain a nuisance which materially diminishes the enjoyment of health, or the value of property (*g*).

Referring to this subject (*h*), Sir *J. Romilly* said: "It has been suggested to me in argument, as a matter which ought to be regarded, that private interests must give way to public interests, that the court ought to regard what the advantage to the public is, and that some little sacrifice ought to be made by private individuals. I do not assent to that view of the law on the subject; and I apprehend that the observations which were quoted to me of V.-C. Sir *W. P. Wood*, in *The Attorney-General* v. *The Mayor of Kingston*, are perfectly accurate, and that private rights are not to be interfered with. But my firm conviction is, that in this, as in all the great dispensations and operations of nature, the interests of individuals are not only compatible with, but identical with, the interests of the public; and although in this case I have only to consider an injury to a private individual—the plaintiff on the present occasion—yet I believe that the injury to the public may be extremely great by polluting a stream which flows for a considerable distance, the water of which cattle are in the habit of drinking, the exhalations from which persons who reside on the banks must necessarily inhale, and this at a time when the attention of the public and the court is necessarily called to the fact that the most scientific men who have examined the subject are unable to say whether great diseases among cattle, and contagious diseases affecting human

(*g*) *Lillywhite* v. *Trimmer*, 36 L. J., Ch. 525.

(*h*) *Goldsmid* v. *Tunbridge Wells*, L. R., 1 Eq. 161; and see *Att.-Gen.* v. *Birmingham*, per *Wood*, V.-C., 4 K. & J. 538; *Spokes* v. *Banbury*, L. R., 1 Eq. 42.

beings, such as cholera or typhus, and the like, may not in a great measure be communicated or aggravated by the absorption of particles of feculent matter into the system, which are either inappreciable or scarcely appreciable by the most minute chemical analysis. It is impossible in that state of things to say what amount of injury may be done by polluting even partially a stream which flows a considerable distance" (*i*).

Laches and Acquiescence.

A court of equity will not interfere where there has been gross laches in enforcing a right, or long and unreasonable acquiescence in the assertion of an adverse right.

Thus where, by a canal act, mill owners were empowered to use the canal water merely for "condensing" steam, and the defendant being about to erect a mill, applied to the company for leave to take water for "generating" also, and the company did not refuse the application, but their engineer allowed pipes for the purpose to be laid down, Lord *Romilly* M. R., refused to restrain the defendants from using the water for "generating" after the mill had been built and the water so used for twenty-four years, although the plaintiffs had established their right at law. An injunction was, however, granted against another defendant whose user had not been acquiesced in by the company (*k*).

In the case of *Wood* v. *Sutcliffe* (*l*) an injunction to restrain the defendants from pouring into a river filthy, noxious or offensive substances, so as to render the water of the stream foul and unfit for the use of the plaintiffs' mill, for the purpose of washing wool, and generating and condensing steam, was refused, although the plaintiffs had established at law their right to use the water for the above purposes, and that the defendants had infringed it;

(*i*) Ibid. p. 169.
(*k*) *Rochdale Canal Co.* v. *King*, 16 Beav. 630.
(*l*) 2 Sim. N. S. 163.

on the ground that the plaintiffs did not use due diligence in vindicating their rights, having stood by while the defendants constructed their works, and allowed them to use their works for five years without giving them any hint that they were doing anything that they had not a lawful right to do; and on the ground that an injunction would not tend to restore the plaintiffs to the enjoyment of their right; that the injury might be compensated by money, and that the injunction would inflict serious damage upon the defendants.

When a person finds that the legislature has authorized a work to be done, such as to construct a sewer to carry the sewage of a town into a river, he is right in presuming that the body authorized will not do anything unlawful, such as to create a nuisance. Until an actual nuisance results no person can sue. The mere fact of a person bearing for a certain time an evil would not alone prevent the court from saying that the evil may be arrested; and this is still more so where the evil is a continually-increasing one.

Therefore, where sewers constructed under parliamentary powers, had been completed at a cost of 207,355*l.*, and had been in operation sixteen years before proceedings were taken, the court will interfere at the suit of landowners injuriously affected (*m*).

Where an information by the Attorney-General sought to restrain defendants from polluting their canal by allowing sewage or polluted matter to pass into it so as to be a public nuisance, *Wood*, V.-C., in delivering judgment, said: "It is said the public have submitted to this evil for about ten years, and during that time they have allowed the company to go on drawing the water. If they had interfered earlier the company might have limited their capital; they might have seen what difficulties they would

(*m*) *Att.-Gen.* v. *Leeds Corporation*, L. R., 5 Ch. 583; and see *Att.-Gen.* v. *Birmingham*, 4 K. & J. 528; *Att.-Gen.* v. *Colney Hatch*, L. R., 4 Ch. 160.

have to encounter. Mr. *Amphlett* says, that barges and boats have been built and stock and capital increased upon the faith of no interference taking place. Possibly he might have added that persons have bought shares in the undertaking upon the faith that, having been allowed to go on for ten years doing this, they would never be interfered with. Now I do not doubt that there may be cases such as Lord *Eldon* put in the case of *The Attorney-General* v. *Johnson* (2 Wils. C. C. 87), in which laches might be imputed to the public through the medium of the Attorney-General, cases of large expenditure incurred in buildings which are seen by the public and are allowed to go on without the slightest complaint on the part of any one . . . . But the case here is of a totally different description. It has been described in the defendants' evidence as a gradual and growing evil. The company are not sought to be restrained from using their canal. The legislature and the parties both desire that the canal should be kept open, but it is not desired that any nuisance should be created to other persons by dirty water being used for that purpose. My own decision in the *Kingston Case* (11 Jur., N. S. 596) a short time since has been pressed upon me. It is said, 'a person is complained of if he comes too soon, and if he delays coming he is said to be guilty of laches.' Now, that in cases of this kind persons are obliged to wait for a considerable time before it can be ascertained that a case has arisen for them to put themselves in motion and come to the court, is an argument which certainly applies more reasonably to the general public whose interests are to be protected than to a single individual who may file a bill in this court as soon as he is aggrieved. The public wait no doubt for a certain time to see whether the evil will diminish. In this instance they waited to see whether it might not be diminished by a certain state of the weather when the flush of the stream came in, and then there came in these two last hot summers when the evil became

intolerable and led to the litigation. Now, is it an answer to that to say that money has been spent upon the faith of the undertaking going on? I cannot conceive that such an answer can be given to a case of that description, or that a defence founded on their faith in being allowed to continue the nuisance can be supported" (*n*).

Evidence.

In order to restrain the pollution of a river by a person who has a prescriptive right to foul, it is necessary to show an increase in the pollution and consequent injury, and the onus of proof lies upon the plaintiff notwithstanding the fact that a recent change in the nature of the pollution has resulted from the introduction of a new material in the manufacture from which the fouling arises (*o*).

But the onus of proving a prescriptive right to foul a stream, and that the stream is in such a foul state from other works as to be unaffected by that sought to be restrained, is upon a defendant, but the proof of an abandonment of a prescriptive right lies on the plaintiff (*p*).

With regard to the weight of scientific evidence the remarks of Sir *G. J. Turner*, L. J., in *Goldsmid* v. *Tunbridge Wells* (*q*), are important. His Lordship said: "I think that in cases of this nature (injunction to restrain the pollution of a stream) much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are, no doubt, in such cases of great value in aid or in explanation and qualification of the facts which are proved, but in my judgment it is upon the facts which are proved, and not upon such conclusions, the court ought in these cases mainly to rely. I think so the more strongly in this particular case, because

(*n*) *Att.-Gen.* v. *Bradford Canal*, L. R., 2 Eq. 81.

(*o*) *Baxendale* v. *McMurray*, L. R., 2 Ch. 790.

(*p*) *Crossley* v. *Lightowler*, L. R., 2 Ch. 482.

(*q*) L. R., 1 Ch. 349.

it is obvious that the scientific examinations which have been made of the water of this brook must have depended much upon the state of circumstances which existed at the time when those investigations took place. They might well have been affected by the force of the stream at the time of investigation, and probably by the state of the weather, as tending or not tending to the diffusion or dispersion of noxious smells. In my view of this case, therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts" (*r*).

Where a public body is, under an act of parliament, entrusted with powers for a public purpose, the court will give credit to them as being the best judges of what they want for the purpose. Thus a railway company was restrained from taking a large quantity of water for the use of their station from a river under the control of conservators, credit being given to the evidence on their part that taking such water would impede the navigation, against the evidence on the part of the company that taking such water would produce no appreciable effect (*s*).

(*r*) Ibid. p. 353.

(*s*) *Att.-Gen.* v. *Great Eastern Ry. Co.*, L. R., 6 Ch. 572.

CHAPTER XI.

AS TO AN ACTION FOR DAMAGES FOR AN INFRINGEMENT OF RIPARIAN RIGHTS.

Parties to an Action.

A RIPARIAN proprietor cannot grant away his water rights apart from his estate, so as to place the grantee in the same position with respect to the other riparian proprietors as he occupied himself, or so as to enable him to sustain an action against a person for polluting the water. This is the effect of the decision in the case of *The Stockport Waterworks Company* v. *Potter* (*a*), a case which has been much discussed but never overruled. *Pollock*, C. B., in delivering judgment, with which *Channell*, B., and *Wilde*, B., agreed, said: "There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water rights, and at the same time transfer those rights, or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant. It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor, and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to

(*a*) 3 H. & C. 300; and see *Wilts and Berks Canal Navigation Co.* v. *Swindon*, L. R., 9 Ch. 451.

this is, that he can have them against the grantor, but not so as to sue other persons in his own name for an infringement of them. The case of *Hill* v. *Tupper* (*b*) is an authority for the proposition that a person cannot create by grant new rights of property so as to give the grantee a right of suing in his own name for an interruption of the right by a third party. The case where a riparian proprietor makes two streams instead of one, and grants land on the new stream, seems to us analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights" (*c*).

In *Nuttall* v. *Bracewell* (*d*), which was distinguished from the above case, *Channell*, B., said: "I consider that the rights of a riparian proprietor, with respect to the stream, are limited only by those of persons in a similar or analogous position with respect to the stream as himself. These rights he can easily ascertain, and by that means ascertain his own. But he has no means of ascertaining who may be grantees, or what may be the value of their grant. If, therefore, a riparian proprietor grants to some one, not such a proprietor, a right to abstract water from the stream, as in the *Stockport Waterworks case*, I think the grantee can sue only the grantor for any interference with him" (*e*).

In both the above cases, however, Mr. Baron *Bramwell* held that a riparian landowner can grant to a non-riparian landowner the flow of water from the stream to his premises, and that the grantee may sue for a disturbance of his enjoyment, such as the pollution of the water" (*f*).

(*b*) 2 H. & C. 121.
(*c*) 3 H. & C. 326.
(*d*) L. R., 2 Exch. 1.
(*e*) Ibid. 13; see also *Holker* v. *Poritt*, L. R., 8 Exch. 107.
(*f*) *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 318; *Nuttall* v. *Bracewell*, L. R., 2 Exch. 11; and see observations of *Martin*, B., ibid. pp. 7, 10.

A canal company, created by act of parliament, for the purpose of making and maintaining a canal, can hold a riparian tenement; and such riparian tenement, in their hands, has all the incidents and accompaniments which it would have had in the hands of a private individual (*g*).

Where an upper riparian landowner grants certain water rights to a lower riparian landowner "and his assigns," the assignee may sue for a disturbance of such rights, provided he claim them by reason of his possession of land (*h*).

Where the plaintiff declared that he was possessed of a mill, and *by reason thereof* was entitled to certain water rights; and the jury found that the defendant had disturbed those rights *as they existed before the mill was erected*, the court held that this finding did not support the claim, and ordered the verdict to be entered for the defendant (*i*).

Mere possession of water, it would seem, is not enough to enable the possessor to maintain an action for polluting it; but where a *licensee* has a right to the use of the water, and claims under such right, he may, under certain circumstances, maintain the action. *Crompton*, J., said, in the case of *Laing* v. *Whaley* (*k*): "Where a man has the permission of the owner of a pond to get water from it for his cattle, and a defendant, knowing of such permission and knowing the probable and natural effect and consequence of his act, poisons the water of such pond so as that the cattle are injured, probably an action would lie. Such an action is founded, not on the title or right to the water, but on the injury to the property of the plaintiff (*l*).

(*g*) *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R., 7 H. L. 706; and see *Rochdale Canal Co.* v. *King*, 14 Q. B. 122.

(*h*) *Northam* v. *Hurley*, 1 E. & B. 665; 22 L. J. (N. S.) Q. B. 183.

(*i*) *Frankum* v. *Earl of Falmouth*, 2 Ad. & E. 452; *Wood* v. *Waud*, 3 Exch. 773.

(*k*) 3 H. & N. 675, 901; and see per *Bramwell*, B., in *Stockport Waterworks Co.* v. *Potter*, 3 H. & C. 312, 318, 322; *Nuttall* v. *Bracewell*, per *Bramwell*, B., L. R., 2 Exch. 11; and per *Martin*, B., pp. 7, 10; *Hill* v. *Tupper*, 2 H. & C. 121.

(*l*) *Laing* v. *Whaley*, 3 H. & N. 681.

In the case of *Oldaker* v. *Hunt*, Lord Justice *Turner* said: "The learned judges, who have been kind enough to give us the benefit of their assistance in this case . . . have stated their opinion to be that the plaintiffs not being owners of the soil of the river, nor of the water, but having only certain rights in it, would not be able, unless their rights were injured, to maintain any action against the defendants in respect of their user of, or interference with, the river (*m*).

A person, also, who has a *customary* right to the use of water may sue a riparian proprietor who, by the diversion of a stream from which such water is derived, has caused an abstraction of the water (*n*).

Where a lessor creates a continuing nuisance, either the lessor or lessee may be made answerable (*o*). Thus, where a canal company, under powers of an act of parliament, diverted, for the purposes of their canal, a considerable part of the water from a brook, on which the plaintiff was a riparian proprietor, and subsequently the defendants, a railway company, who were so empowered by act of parliament, purchased the canal, and discontinued it, so that the water of the brook flowed back through their old channel and flooded the plaintiff's premises, it was held that the defendants were rightly made defendants notwithstanding that they had conveyed away the portion of the canal in question to a purchaser in fee (*p*).

Damages.

Wherever an actual infringement of a riparian *right* has taken place, whether in a private or a navigable river (*q*), or in an artificial watercourse (*r*), an action will

(*m*) 6 De G., M. & G. 388.

(*n*) *Harrop* v. *Hirst*, L. R., 4 Exch. 43.

(*o*) *Roswell* v. *Prior*, 12 Mod. R. 635.

(*p*) *Mason* v. *Shrewsbury and Hereford Ry. Co.*, L. R., 6 Q. B. 578.

(*q*) *Lyon* v. *Fishmongers' Co.*, L. R., 1 App. Cas. 662.

(*r*) *Rochdale Canal Co.* v. *King*, 14 Q. B. 122.

lie, and the plaintiff will be entitled to a verdict with nominal damages, although no *actual* damage has been sustained.

In *Embrey* v. *Owen* the court said: "It is only for an unreasonable and unauthorized use of this common benefit (the flow of all the water of a stream in its natural state) that an action will lie; for such an use it will, *even though there may be no actual damage to the plaintiff* (*s*).

In *Wood* v. *Waud*, Chief Baron *Pollock*, delivering the judgment of the court, said: "The fact, as found by the jury, is, that the defendants (whose works have been erected within twenty years, and who have no right, by long enjoyment or grant so to do) have fouled the water of the natural stream by pouring in soap suds, woolcombers' suds, &c., but that pollution of the natural stream has done no actual damage to the plaintiff, because it was already so polluted by similar acts of mill owners above the defendants' mills, and by dyers still further up the stream, and by some sewers of the town of Bradford, that the wrongful act of the defendants made no practical difference, that is, that the pollution by the defendants did not make it less applicable to useful purposes than such water was before. We think, notwithstanding, that the plaintiffs have received damage in point of law. They had a right to the natural stream flowing through the land, in its natural state, as an incident to the right to the land on which the watercourse flowed; and that right continues, except so far as it may have been derogated from by user or by grant to the neighbouring landowners. This is a case, therefore, of an injury to a *right*. The defendants, by continuing the practice for twenty years, might establish the right to the easement of discharging into the stream the foul water from their works. If the dye works and other manufactories and other sources of pollu-

(*s*) 6 Exch. 369; and see *Sampson* v. *Hoddinott*, 1 C. B., N. S. 607; *Rochdale Canal Co.* v. *Radcliffe*, 18 Q. B. 287.

tion above the plaintiffs' should be afterwards discontinued, the plaintiffs, who would otherwise have had, in that case, pure water, would be compellable to submit to this nuisance, which would then do serious damage to them" (*t*).

In *Rochdale Canal Company* v. *King*, Mr. Justice *Coleridge* thus enunciates the principle: "Although no appreciable damage may be sustained, in the particular instance, by the wrongful act, yet, as the repetition of such an act might be made the foundation of claiming a right to do the act hereafter, a damage in law has already been sustained, in respect of which an action is maintainable" (*u*).

The decision in the case of *Northam* v. *Hurley* (*x*) shows that, upon the same principle, no damage need be proved when the riparian rights are acquired by grant or user as when they are acquired *ex jure naturæ*.

In that case it was stipulated by deed between A. and B., that B. should have the use of a stream of water for irrigation for ten days in every month, and that at all other times the stream should be under the control of A., and should flow in an uninterrupted course through a channel therein described into the land of A.:—Held, that the deed operated as a grant of the easement of the watercourse, and that the defendant (the assignee of B.) was liable to an action for altering the specified channel and diverting the stream in his own land, although the stream entered the land of the plaintiff (the assignee of A.) at the same point as before, and in the same quantity, and no damage whatever was sustained by the plaintiff.

The same principle applies to the case of an artificial watercourse in which riparian rights are owned (*y*).

(*t*) 3 Exch. 772; and see *Dickinson* v. *Grand Junction Canal Co.*, 7 Exch. 305; *Webb* v. *Portland Manufacturing Co.*, 3 Sumn. (Amer.) 189.

(*u*) 14 Q. B. 135; and see *Bower* v. *Hill*, 1 Bing. N. C. 555; *Crossley* v. *Lightowler*, per *Wood*, V.-C., L. R., 3 Eq. 296.

(*x*) 1 E. & B. 665; see also *Rawstron* v. *Taylor*, 11 Exch. 369.

(*y*) *Rochdale Canal Co.* v. *King*, 14 Q. B. 122.

The question arose again in the more recent case of *Harrop* v. *Hirst* (*z*), where the plaintiffs, in common with the other inhabitants of a particular district, enjoyed a customary right at all times to have water from a certain spout in a highway in the district for domestic purposes. The defendant, a riparian owner on the stream whereby the spout was supplied with water, on various occasions prevented such large quantities of water from reaching the spout as to render what remained insufficient for the needs of the inhabitants. The plaintiffs had not themselves ever suffered any actual personal damage or inconvenience:— Held, that an action for diverting the water was nevertheless maintainable. *Channell*, B., said: "It is conceded that where an indictment may be maintained there is no remedy by action without proof of individual damage. But the same principle does not apply where the injury complained of is not one affecting the public generally, but only a particular class or section of persons. It is also conceded that the infringement of a right furnishes a cause of action, but it is said there must be damage of some sort proved, particularly to the person who sues. Now, here the jury have found that the inhabitants of the district in question, and the plaintiffs among them, have a right, and also that the defendant has at times interfered with that right, but they have also found that the plaintiffs have personally suffered no loss, either pecuniarily or by waste of time in going to fetch water in vain, or otherwise. Neither in time nor money have they incurred any appreciable inconvenience. It is, however, admitted that any inhabitant who had actually been injured by the circumstance that the supply of water had been lessened might have maintained an action. But it appears to me that the mere fact of abstracting from time to time the supply of water to which the inhabitants of the district were justly entitled might furnish some evidence in derogation of the

(*z*) L. R., 4 Exch. 43.

rights of those inhabitants, whether on this or that particular occasion they suffered actual damage or not. On that ground I think the plaintiffs are entitled to recover in this action,—on the ground, that is to say, that the act of the defendant was one which derogated, or might hereafter derogate, from their legal right. Therefore this action at their suit is maintainable, in my opinion, without proof of actual individual loss or inconvenience" (*a*).

Where the injury to a riparian right is of a public nature, so as to support an indictment, an action can only be maintained on proof of *actual* damage suffered by the plaintiff (*b*), although the proof of *special* damage is not necessary (*c*).

Cause of Action.

As it is only for the unreasonable and unauthorized user of a stream that is actionable (*d*); and as what amounts to an unreasonable user depends upon the circumstances of each particular case (*e*); it becomes necessary to review the decisions upon the subject in detail.

In determining whether any particular user of water is reasonable, regard must be had to the magnitude of the stream (*f*).

An action may also be sustained for the excessive user of a right by way of easement in a watercourse, which results in a nuisance. Where such a right to the flow of water has been used in excess, so as to cause a nuisance or create a right of action, the entire flow may be obstructed, where the excessive flow cannot be obstructed without obstructing the whole, and no action will lie for such

(*a*) Ibid. p. 47.

(*b*) *Harrop* v. *Hirst*, L. R., 4 Exch. 43, per *Channell*, B.; and see *Winterbottom* v. *Lord Derby*, L. R., 2 Exch. 316, where the authorities are discussed.

(*c*) *Rose* v. *Groves*, 5 M. & Gr. 613.

(*d*) *Embrey* v. *Owen*, 6 Exch. 369.

(*e*) Ibid. 372.

(*f*) *Swindon Waterworks Co.* v. *Wilts and Berks Canal Co.*, L. R., 7 H. L. 704.

obstruction until the flow has been reduced to that justified by the right (*g*).

Use for Domestic Purposes.—In the case of *Miner* v. *Gilmour* (*h*), Lord *Kingsdown* says: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of the proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of the mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury" (*i*).

In the case of *Lord Norbury* v. *Kitchin*, a rule nisi was obtained for a new trial, on the ground that the learned judge had misdirected the jury in propounding the above passage as a guide to their decision. In discharging this rule Lord Chief Baron *Pollock* said: "The meaning of the rule is this—if the stream be shrunk to so slender a thread, that there is only a glass of water, the riparian proprietor may take it all. . . . . This water is used for domestic purposes. The moment you come to using anything for trade, you are on new ground. But assuming objects of domestic use, you are not confined to those which were known at the time when riparian rights commenced" (*k*).

The same passage from *Miner* v. *Gilmour* was also

(*g*) *Cawkwell* v. *Russell*, 26 L. J. (N. S.) Exch. 34; *Tapling* v. *Jones*, 11 H. L. Cas. 290.

(*h*) 12 Moo. P. C. 131.

(*i*) Ibid. p. 156.

(*k*) 9 Jur., N. S. 132.

cited with approval by *Martin* and *Channell*, BB., in the later case of *Nuttall* v. *Bracewell* (*l*).

In the recent case of *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, Lord *Cairns*, L. C., said: "Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use" (*m*).

Use for Purposes resulting in Pollution.—An action may be maintained for fouling water whether it flows in a natural or artificial watercourse (*n*), whether private or navigable (*o*), or as surface or underground percolating water (*p*).

In *Wood* v. *Waud*, *Pollock*, C. B., delivering the judgment of the court, said: "If the stream were only used by the riparian proprietor and his family, by drinking it, or for the supply of domestic purposes, no action would lie for this ordinary use of it; and it may be conceived, that if a field be covered with houses, the ordinary use by the inhabitants might sensibly diminish the stream, yet no action would, we apprehend, lie, any more than if the air was rendered less pure and healthy by the increase of inhabitants in the neighbourhood, and by the smoke

(*l*) L. R., 2 Exch. 9, 13; and see *Hood* v. *Williamson*, 23 Dec. of Crt. of Sess., 2nd Series, 496; *Lord Melville* v. *Denniston*, 4 Dec. of Crt. of Sess., 2nd Series, 1231; *Elliott* v. *Fitchbury Ry. Co.*, 10 Cush. (Amer.) 193. The fact of the river being navigable makes no difference; *Att.-Gen.* v. *Kingston*, 34 L. J., Ch. 485.

(*m*) L. R., 7 H. L. 704.

(*n*) *Magor* v. *Chadwick*, 11 A. & E. 571; *Wood* v. *Waud*, 3 Exch. 748; *Manchester and Lincolnshire Ry. Co.* v. *Worksop Board of Health*, 23 Beav. 199; *Laing* v. *Whaley*, 3 H. & N. 675.

(*o*) *Lyon* v. *Fishmongers' Co.*, L. R., 1 App. Cas. 662.

(*p*) *Hodgkinson* v. *Ennor*, 4 B. & S. 229; *Womersley* v. *Church*, L. T. Rep., N. S. 190; and see *Turner* v. *Mirfield*, 34 Beav. 390.

issuing from the chimneys of an increased number of houses. But, on the other hand, as the establishment of a manufacture rendering the air sensibly impure, by emitting noxious gases, would be actionable, so it would be if it rendered the water less pure by the admixture of noxious substances; and if a mode of enjoyment, quite different from the ordinary one, is adopted, by which the water is diverted into a reservoir, and there delayed for the purposes of a manufacture, an action seems to us to be maintainable; and so, if by that mode of dealing with the water it is sensibly diminished in quantity" (*q*).

In *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, Lord *Cairns*, L. C., said: "It may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such an use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water" (*r*).

It is no defence to an action for polluting a stream, to prove that others have so fouled the stream, that the acts of the defendant have not materially added to the evil (*s*).

Lord *Chelmsford*, L. C., delivering judgment in the case of *Crossley* v. *Lightowler* (*t*), said: "The defendants contend that the plaintiffs have no right to complain of any pollution of the *Hebble* occasioned by them, because there are many other manufacturers who pour polluting matter

(*q*) 3 Exch. 781; and see *Edleston* v. *Crossley*, 18 L. T. Rep., N. S. 15.

(*r*) L. R., 7 H. L. 704.

(*s*) *Wood* v. *Sutcliffe*, 2 Sim., N. S. 166; *Tipping* v. *St. Helen's Smelting Co.*, 11 H. L. Cas. 642; *Crossley* v. *Lightowler*, L. R., 3 Eq. 279; L. R., 2 Ch. 478.

(*t*) L. R., 2 Ch. 478.

into the stream above the plaintiffs' works, so that they could never have the water in a fit state for use, even if the defendants altogether ceased to foul it. The case of *St. Helen's Smelting Co.* v. *Tipping* (11 H. L. C. 642) is, however, an answer to this defence. Where there are many existing nuisances, either to the air, or to water, it may be very difficult to trace to its source the injury occasioned by any one of them; but if the defendants add to the former foul state of the water, and yet are not to be responsible on account of its previous condition, this consequence would follow, that if the plaintiffs were to make terms with the other polluters of the stream so as to have water free from impurities produced by their works, the defendants might say, 'we began to foul the stream at a time when, as against you, it was lawful for us to do so, inasmuch as it was unfit for your use, and you cannot now, by getting rid of the existing pollution from other sources, prevent our continuing to do what, at the time when we began, you had no right to object to'" (*u*).

Neither is it an answer to an action against a manufacturer for fouling a stream that the trade is a lawful trade, and is carried on in a reasonable and proper manner, and in a proper place (*x*).

A district board of works constituted under the Metropolis Local Management Act (18 & 19 Vict. c. 120), are not empowered by that act to pollute water flowing through the land of another person, and are therefore liable to an action at the suit of the owner of the land through which it flows, who is consequently not bound to proceed for redress, by seeking compensation under that statute. It makes no difference in this respect, that the works executed by the district board were necessary for the abatement of a nuisance even in the land of the party injured; nor that the water thus polluted lay

(*u*) Ibid. 481.

(*x*) *Stockport Waterworks Co.* v. *Potter*, 7 H. & N. 160; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642.

outside the district over which the authority of the district board extended (*y*).

Use for Irrigation.—Whether a riparian proprietor may use the water for the purpose of irrigation, if he again return it into the river, with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case. But where the irrigation was intermittent and the loss of water amounted to 5 per cent. only, resulting in no damage to the defendant's mill, and no diminution of water perceptible to the eye, the court held the use to be reasonable (*z*).

In the case of the *Swindon Waterworks Co.* v. *Wilts and Berks Navigation Canal Co.*, Lord *Cairns*, L. C., in delivering judgment in the House of Lords, said: "Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered in a volume substantially equal to that in which it passed before" (*a*).

In *Sampson* v. *Hoddinott*, *Cresswell*, J., said: "Irrigation is a riparian right, to be exercised subject to the rights of the other riparian proprietors" (*b*).

The permanent diversion by a riparian proprietor of a portion of a natural stream is an illegal user and will support an action (*c*).

A *detention* of the water of a natural stream may also

(*y*) *Cator* v. *Lewisham Board of Works*, 5 B. & S. 115.

(*z*) *Embrey* v. *Owen*, 6 Exch. 353; and see *Nuttall* v. *Bracewell*, per *Pigott*, B., L. R., 2 Exch. 9.

(*a*) L. R., 7 H. L. 704.

(*b*) 1 C. B., N. S. 603; and see *Blanchard* v. *Baker*, 8 Greenl. R. (Amer.) 253.

(*c*) *Luttrel's Case*, 4 Co. Rep. 86 b; *Bealey* v. *Shaw*, 6 East, 208.

be actionable. Thus, in *Shears* v. *Wood* (*d*) an action was sustained where the defendant, by the erection of a dam across the stream, had prevented the water from being *regularly* supplied to the plaintiff's mill, although the stream was not diverted, as the dam was erected above the mill, and the water returned to its regular course long before it reached the mill, and there was no waste of water occasioned by its erection.

In *Sampson* v. *Hoddinott* (*e*) the facts were these: The plaintiff had immemorially enjoyed the benefit of irrigating certain meadows with the water of the Yeo, subject to the right of the occupier of a mill to detain the water for the use of his mill; and, although the natural flow of the river was prevented by the exercise of the miller's right, the water came down at such times that the plaintiff was enabled to irrigate his meadows effectually. But, of late, the defendant had, for the purpose of irrigating his own adjacent land, from time to time diverted the water after it had passed the mill and before it reached the plaintiff's meadows; and, although it did not appear that the quantity of water which ultimately reached the plaintiff's meadows was thereby sensibly diminished, yet the effect was that the water was *detained* by the process of irrigation, and did not arrive till so late in the day that the plaintiff was deprived of the power to use it fully:—*Held*, that this *detention* of the water by the defendant was an use of it which was in its character necessarily injurious to the natural rights of the plaintiff as a riparian proprietor, and a ground of action.

Acceleration of Flow.—It would seem that any act of a higher riparian proprietor which results in the *acceleration* of the flow of the river, causing damage to a lower proprietor, is actionable (*f*).

(*d*) 7 Moo. 345; and see *Webb* v. *Portland Manufacturing Co.*, 3 Sumn. (Amer.) 189; *Williams* v. *Moreland*, 2 B. & C. 910.

(*e*) 1 C. B., N. S. 590; and see *Blanchard* v. *Baker*, 8 Greenl. (Amer.) 253.

(*f*) *Williams* v. *Morland*, 2 B. & C. 910.

Sale of Water.—It would seem that a riparian proprietor is not entitled to take water from a stream for the purpose of selling it. Thus, where the directors of a water company purchased a mill so as to become riparian owners, and used the water not only for the purposes and in the manner allowed by law to every riparian owner, but collected it into a permanent reservoir for the supply of an adjacent town, it was held that this was not a reasonable use of the stream such as could justifiably be made by an upper riparian owner (*g*).

This decision was followed in the case of *Owen* v. *Smith* (*h*), where the Master of the Rolls restrained a board of health, who were riparian owners, from diverting the water of a stream into their reservoir.

The ordinary flow of the stream was 77,000 gallons per day, though in summer it was often dry; the Board of Health had constructed a pipe which would have carried away 67,000 gallons a day to their reservoir.

And in *Wilts and Berks Canal Navigation Co.* v. *Swindon Waterworks Co.*, Lord Justice *Mellish* said:—"I agree that they (the canal company) have no right to take the water of the stream for the purposes, such as for the purpose of selling it; and that, if they do so, any person lower down the stream who was prejudiced by being deprived of the water would probably have a right of action at law against them. But I think that if they took the water into their canal really for the purposes of navigation and then happened to have a surplus quantity of water in any particular place, it would be very difficult to say that they might not legally sell that surplus quantity" (*i*).

And see judgment of Lord *Hatherley* in the House of Lords in the same case (*k*).

(*g*) *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*, L. R., 7 H. L. 697: affirming the judgment of the Lords Justices, L. R., 9 Ch. 451.

(*h*) W. N. 1874, p. 175.

(*i*) L. R., 9 Ch. 460.

(*k*) L. R., 7 H. L. 712.

Use of the Alveus.—It is not a reasonable use of a river for a riparian proprietor to erect a permanent building in the channel of a stream, and the opposite proprietor may maintain an action against him for so doing without proof of actual damage (*l*). Lord *Chelmsford*, L. C., said, in *Bickett* v. *Morris*, that the result of the opinions of the judges in the Scotch court below was, "That a riparian proprietor has no right to erect any building *in alveo fluminis;* and if he does so, although the opposite proprietor may be unable to prove that any damage has actually happened to him by the erection, yet, if the encroachment is not of a slight and trivial but of a substantial description, it must always involve some risk of injury." His Lordship continued: "These views appear to me to be perfectly sound in principle and to be supported by authority. The proprietors upon the opposite banks of a river have a common interest in the stream, and although each has a property in the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water . . . . The proprietors on the banks of a river are entitled to protect their property from the invasion of the water by building a bulwark, *ripæ muniendæ causâ*, but even in this necessary defence of themselves they are not at liberty so to conduct their operations as to do any actual injury to the property on the opposite side of the river. In this case mere apprehension of danger will not be sufficient to found a complaint of the acts done by the opposite proprietor, because, being on the party's own ground, they were lawful in themselves, and only became unlawful in their consequences, upon the principle of *sic utere tuo ut alienum non lædas.* But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore the act being

(*l*) *Bickett* v. *Morris*, L. R., 1 H. L., Sc. & D. App. 47; *Lord Norbury* v. *Kitchin*, 15 L. T. Rep., N. S. 501.

primâ facie an encroachment, the *onus* seems properly to be cast upon the party doing it to show that it is not an injurious obstruction" (*m*). Lord *Cranworth* said in the same case: "It was said in argument, 'Then, if I put a stake in the river am I interfering with the rights of the riparian proprietors?' To this I should answer, *de minimis non curat prætor.* But further, it might be demonstrated in such a case, not that there was an extreme improbability, but that there was an impossibility of any damage resulting to any one from the act" (*n*). Lord *Westbury* added: "This is a case of very considerable importance, because, as far as I know, it will be the first decision establishing the important principle that an encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor, without the necessity of proving either that damage has been sustained, or that it is likely to be sustained, from that cause . . . . I am, however, convinced that the proposition is one that is founded in good sense and ought to be established as a matter of law" (*o*).

A riparian proprietor has no more right to construct a permanent erection on the *alveus* of tidal, than of a non-tidal river (*p*).

Sir *R. Malins*, V.-C., in delivering judgment, said: "Supposing this not to be a tidal river, or that the rights of riparian proprietors on tidal and non-tidal rivers are the same, the law is now settled that no riparian proprietor can, without the consent of the opposite proprietor, erect any building or make any change in the *alveus* of a river."

On this point the recent case of *Bickett* v. *Morris* is conclusive. The same law was laid down by the House of Lords in *Menzies* v. *Earl of Breadalbane* (*q*), and Lord

(*m*) Ibid. p. 55.
(*n*) Ibid. p. 59.
(*o*) Ibid. p. 60.
(*p*) *Att.-Gen.* v. *Earl of Lonsdale*, L. R., 7 Eq. 377.
(*q*) 3 Wils. & Shaw, 235; 3 Bli. (N. S.) 414.

Eldon there said it was not competent for the proprietors of land on either side of a river to disturb the ordinary course of the stream to the prejudice of the opposite proprietor; the ordinary course of a river being that which it takes at ordinary times. . . . .

Does, then, the fact of the river being a tidal one make any difference? I am of opinion that it does not. It was strongly contended by the counsel for the defendant that the place where the jetty is erected is an estuary, and therefore an arm of the sea, and that the defendant has, consequently, all the rights of protecting his land which he would have had if it had been on the sea-shore instead of the River *Eden;* and *Rex* v. *Pagham Commissioners of Sewers* (*r*) was cited to show that a proprietor of land on the sea-shore has a right to erect any works he thinks proper, for the purpose of protecting it against the inroads of the sea, though such works may be injurious to a neighbouring proprietor, and that case is undoubtedly authoritative on that subject. This would have been conclusive for the defendant if his land had been on the sea-shore; but is this principle applicable to a riparian proprietor on a navigable river? It must be borne in mind that the greatest work of man must be insignificant as compared with the power of the sea, but that this is not so with reference to a navigable river. If the principle contended for were sustainable, it would follow that every riparian proprietor on a navigable river, however distant from the sea, and however gentle the flow of the tide at the place, might throw any works into the *alveus* that he might deem necessary for his protection, however injurious such works might be to the adjoining or opposite proprietor; and thus, taking the Thames for an example, any riparian proprietor between Vauxhall Bridge and Teddington, where the tide ceases, might by such works obstruct the navigation at his pleasure, because the Thames is there a tidal

(*r*) 8 B. & C. 355.

river, and therefore an estuary or arm of the sea. In a sense, there is no doubt that every water which flows and reflows is called an arm of the sea, as stated in *Vin.* Abr., 'Prerog. of the King' (*s*). But I find no authority for the proposition contended for; on the contrary, all the cases, including those cited by the defendants' counsel, tend in the opposite direction. In both the cases of *Rex* v. *Russell* (*t*) and *Rex* v. *Ward* (*u*), the Rivers Tyne and Medina, in which the navigation was impeded, were tidal rivers; and it does not appear to have been suggested either at the bar or by the bench, that the parties indicted for the nuisances had any greater right in these rivers than they would have had if they had been non-tidal. The same principle was acted upon in *Attorney-General* v. *Johnson* (*x*). I am, therefore, of opinion, upon principle and authority, that a riparian proprietor on a tidal and navigable river has no greater rights against an adjoining or opposite riparian proprietor than such a proprietor on a private or non-tidal river, and that the defendant cannot therefore justify the erection of the jetty in question on this ground" (*y*).

A riparian proprietor may remove shoals, which are merely casual obstructions, so long as he does not impede the navigation or diminish the flow of the river, without giving any right of action. This can, however, only be lawfully done so long as they remain casual shoals, and not after they have become a part of the natural bed of the river (*z*).

(*s*) Vol. XVI. p. 574, B. A. pl. 5.
(*t*) 6 B. & C. 566.
(*u*) 4 Ad. & E. 384.
(*x*) 2 Wils. C. C. 87.
(*y*) L. R., 7 Eq. 387.
(*z*) *Rhodes* v. *Airedale Drainage Commissioners*, L. R., 1 C. P. D. 402.

APPENDIX.

SOME STATUTORY PROVISIONS RELATING TO WATERCOURSES AND THE VESTING OF SEWERS, &c. (*a*)

The Index will be found a sufficient guide to the Statutes contained in the Appendix.

3 & 4 WILL. 4, c. 22.

An Act to amend the Laws relating to Sewers.

Regulates qualification of Commissioners, their jurisdiction and powers.

10. All defences against the sea and all rivers, &c., which are or may be navigable, or in which tide does or may ebb and flow, or which do or may communicate with such navigable or tide rivers, &c., and all works relating thereto, are within the jurisdiction of Commissioners of Sewers for the district.

NOTE.—The jurisdiction of commissioners is derived from the Statute of Sewers (23 Hen. 8, c. 5), which was made perpetual by 2 & 3 Edw. 6, c. 8.

10 VICT. c. 17.

The Waterworks Clauses Act, 1847.

Extent of the Act.]—**1.** This act shall extend only to such waterworks as shall be authorized by any act of parliament hereafter to be passed which shall declare that this act shall be incorporated therewith, and all the clauses of this act, save so far as they shall be expressly varied or excepted by any such act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking; and shall, with the clauses of every other act which shall be incorporated therewith, form part of such act, and be construed as forming one act.

(*a*) The *local* acts relating to the subject are so numerous that it has been found impossible, within reasonable space, to deal with them in this Appendix. Consequently no *local* acts are referred to except those mentioned in the 18th section of the Rivers Pollution Prevention Act.

Penalties for causing the Water of the Undertakers to be fouled, &c.]—**61.** Every person who shall commit any of the offences next hereinafter enumerated shall, for every such offence, forfeit to the undertakers a sum not exceeding 5*l.* (that is to say):

Every person who shall bathe in any stream, reservoir, aqueduct, or other waterworks belonging to the undertakers, or wash, throw, or cause to enter therein any dog or other animal;

Every person who shall throw any rubbish, dirt, filth, or other noisome thing into any such stream, reservoir, aqueduct, or other waterworks as aforesaid, or wash or cleanse therein any cloth, wool, leather, or skin of any animal, or any clothes or other thing;

Every person who shall cause the water of any sink, sewer, or drain, steam-engine, boiler, or other filthy water belonging to him or under his control, to run or be brought into any stream, reservoir, aqueduct, or other waterworks belonging to the undertakers, or shall do any other act whereby the water of the undertakers shall be fouled:

And every such person shall forfeit a further sum of 1*l.* for each day (if more than one) that such last-mentioned offence shall be continued.

Penalty for permitting Substances produced in making Gas to flow into Undertakers' Works.]—**62.** Every person making or supplying gas within the limits of the special act who shall at any time cause or suffer to be brought or to flow into any stream, reservoir, aqueduct, or waterworks belonging to the undertakers, or into any drain communicating therewith, any washing or other substance which shall be produced in making or supplying gas, or who shall wilfully do any act connected with the making or supplying of gas whereby the water in any such stream, reservoir, aqueduct, or waterworks shall be fouled, shall forfeit to the undertakers for every such offence the sum of 200*l.*; and such penalty shall be recovered, with full costs of suit, in any of the superior courts; but such penalty shall not be recoverable unless it be sued for during the continuance of the offence, or within six months after it has ceased.

Daily Penalty during the Continuance of the Offence.]—**63.** In addition to the said penalty of 200*l.*, and whether such penalty shall have been recovered or not, the person making or supplying gas as aforesaid shall forfeit to the undertakers the sum of 20*l.*, to be recovered in like manner for each day during which such washing or substance shall be brought or shall flow as aforesaid, or during which the act shall continue by which such water is fouled, after the expiration in either case of twenty-four hours from the time when notice of the offence has been served on such person by the undertakers.

Penalty on Gas Makers causing Water to be fouled.]—**64.** Whenever the water supplied by the undertakers shall be fouled by the gas of any person making or supplying gas within the limits of the special act, such person shall forfeit to the undertakers for every such offence a sum not exceeding 20*l.*, and a further sum not exceeding 10*l.* for each day during which the offence shall continue after the expiration of twenty-four hours from the service of notice of such offence.

10 & 11 Vict. c. 65.

The Cemeteries Clauses Act, 1847.

Penalty for allowing Water to be fouled.]—**20.** If the company (the persons authorized by special act to construct the cemetery) at any time cause or suffer to be brought or to flow into any stream, canal, reservoir, aqueduct, pond, or watering-place, any offensive matter from the cemetery, whereby the water therein shall be fouled, they shall forfeit for every such offence the sum of 50*l.*

Penalty to be sued for within Six Months.]—**21.** The said penalty, with full costs of suit, may be recovered by any person having right to use the water fouled by such offensive matter, in any of the superior courts, by action of debt or on the case: provided always, that the said penalty shall not be recoverable unless the same be sued for during the continuance of the offence or within six months after it has ceased.

In Addition to Penalty 50*l.*, *a daily Penalty during the Continuance of the Offence.*]—**22.** In addition to the said penalty of 50*l.* (and whether such penalty is recoverable or not), any person having right to use the water fouled by such offensive matter may sue the company in an action on the case in any court of competent jurisdiction, for any damage specially sustained by him by reason of the water being so fouled, or, if no special damage be alleged, for the sum of ten pounds for each day during which such offensive matter is brought or flows as aforesaid, after the expiration of twenty-four hours from the time when notice of the offence is served on the company by such person.

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18 & 19 Vict. c. 120.

The Metropolis Management Act, 1855.

"*Vestry*" *in following Provisions to mean Vestry of a Parish in Schedule* (*A.*)]—**67.** Where in the provisions hereinafter contained any expression is used referring to the vestry of a parish, such expression shall be construed as referring only to the vestry of a parish mentioned in Schedule (A.) to this act, unless such construction be repugnant to the context.

Sewers (*except Main Sewers*) *vested in Vestries and District Boards.*]—**68.** Upon the commencement of this act all sewers vested in the Metropolitan Commissioners of Sewers which are situate in any parish mentioned in Schedule (A.) to this act (except such sewers as are mentioned in Schedule (D.) to this act), with the walls, defences, banks, outlets, sluices, flaps, penstocks, gullies, grates, works, and things thereunto appertaining, and the materials thereof, with all rights of way and passage used and enjoyed by such commissioners over or to such sewers, works and things, and all other rights concerning or incident to such sewers, works and things, shall become vested in the vestry of such parish; and all sewers vested in the said Metropolitan Commissioners which are situate within any district mentioned in Schedule (B.) to this act, except as before excepted, with all such works and things as aforesaid appertaining thereto, and all rights of way and passage used and enjoyed by such

commissioners over or to such sewers, works and things, and all other rights concerning or incident to such sewers, works and things, shall become vested in the board of works for such district; and all sewers made and to be made within any such parish or district, except sewers and works vested or to be vested in the Metropolitan Board of Works, as hereinafter mentioned, shall be vested in such vestry and board respectively.

NOTE.—As to the vesting of a marsh wall, see *The Poplar Board* v. *Knight*, 28 L. J., M. C. 37.

Vestry and District Board to cause offensive Ditches, Drains, &c. to be cleansed or covered.]—**86.** Every vestry and district board shall drain, cleanse, cover, or fill up, or cause to be drained, cleansed, covered, or filled up, all ponds, pools, open ditches, sewers, drains, and places containing or used for the collection of any drainage, filth, water, matter, or thing of an offensive nature, or likely to be prejudicial to health, which may be situate in their parish or district; and they shall cause written notice to be given to the person causing any such nuisance, or to the owner or occupier of any premises whereon the same exists, requiring him, within a time to be specified in such notice, to drain, cleanse, cover, or fill up such pond, pool, ditch, sewer, drain, or place, or to construct a proper sewer or drain for the discharge of such filth, water, matter, or thing, or to do such other works as the case may require; and if the person to whom such notice is given fail to comply therewith, the vestry or board shall execute such works as may be necessary for the abatement of such nuisance, and may recover the expenses thereby incurred from the owner of the premises in manner hereinafter mentioned: provided always, that it shall be lawful for such vestry or board, where they think it reasonable, to defray all or any portion of such expenses, as expenses of sewerage are to be defrayed under this act: provided also, that where any work by any vestry or district board done or required to be done in pursuance of the provisions of this act, interferes with or prejudicially affects any ancient mill, or any right connected therewith, or other right to the use of water, full compensation shall be made to all persons sustaining damage thereby, in manner hereinafter provided, or it shall be lawful for the vestry or board, if they think fit, to contract for the purchase of such mill or any such right connected therewith, or other right to the use of water; and the provisions of this act with respect to the purchases by the vestry or board hereinafter authorized shall be applicable to every such purchase as aforesaid.

NOTE.—The Metropolitan Board of Works constructed a sewer on the high road, and the Lewisham District Board made a branch sewer running into it.

The combined effect of the two was to drain an ornamental pond and rivulet in the adjoining lands of the plaintiff:—*Held* (1) that neither of the boards was, in respect to the diversion of the water, to be treated as clothed with the rights or obligations of adjoining landowners; (2) that they had not exceeded their statutory right, so as to be liable to be restrained by injunction; (3) that if either of the boards was producing injury to the plaintiff by the unskilful or improper construction of the sewer, the court will interfere to prevent it; (4) that such not being the case, the rights of the plaintiff were limited to a claim for compensation

under the above section, and 11 & 12 Vict. c. 112, s. 50. *Stainton* v. *Woolrych*, 23 Beav. 225; and see *Hughes* v. *Metropolitan Board of Works*, 7 Jur., N. S. 986.

Power to Vestries and District Boards to fill up Ditches by the Side of Roads, and substitute Pipes.]—**87.** It shall be lawful for any vestry or district board, where they think fit, to cause the ditches at the sides of or across public roads and byeways and public footways to be filled up, and to substitute pipe or other drains alongside or across such roads and ways, with appropriate shoots and means of conveying water from such roads and ways thereinto, and from time to time to repair and amend the same; and the surface of land gained by filling up such ditches may, if the vestry or board so think fit and direct, be thrown into such roads and ways, and be repairable as part thereof, and be under the control of the surveyors of the highways, or other person in charge of such roads, byeways, or footways.

Vestries and District Boards may transfer their Powers as to Sewerage to the Metropolitan Board of Works.]—**89.** If any vestry or district board desire to transfer to the Metropolitan Board of Works the powers and duties vested in such vestry or district board in relation to sewerage and drainage, and a resolution for so transferring such powers and duties be passed by a majority at a meeting of such vestry or district board, specially convened for the purpose of considering the question of such transfer, of which not less than fourteen days' notice shall have been given, and at which there shall be present not less than two-thirds of the whole number of such vestry or board, then such powers and duties, and all sewers and property vested in such vestry or board under this act, for the purposes of or in connexion with such powers and duties, shall, at the expiration of one month after notice from such vestry or board shall have been given under their seal to the said Metropolitan Board of such resolution having been passed as aforesaid, become vested in the said Metropolitan Board, and the provisions of this act for defraying expenses incurred by such board in the execution of this act shall extend to expenses incurred by them in the execution of the powers and duties so transferred to them.

NOTE.—This section is amended by sect. 28 of 25 & 26 Vict. c. 102, which provides that, notwithstanding the provision of the above section, "it shall not be lawful for any vestry or district board to transfer to the Metropolitan Board of Works any such powers or duties (as above mentioned) without the previous consent in writing of the said Metropolitan Board."

Vestries and District Boards to be the Local Authorities to execute the Nuisances Removal Acts.]—**134.** Every vestry and district board under this act shall execute, within their respective parish or district, all the duties and powers exerciseable under the Nuisances Removal and Diseases Prevention Act, 1848, and the Nuisances Removal and Diseases Prevention Act, 1849, by any commissioners or other body, or any officers having under any act powers of cleansing, and shall be the local authority to execute any act passed or to be passed in the present session amending or repealing the said acts, or either of them.

Main Sewers vested in the Metropolitan Board of Works, and Power to such Board to make Sewers.]—**135.** The sewers mentioned in Schedule (D.) to this act, being the main sewers now vested in the

Commissioners of Sewers of the city of London and in the Metropolitan Commissioners of Sewers respectively, with the walls, defences, banks, outlets, sluices, flaps, penstocks, gullies, grates, works, and things thereunto belonging, and the materials thereof, with all rights of way and passage used and enjoyed by such commissioners respectively over and to such sewers, works, and things, and all other rights concerning or incident to such sewers, works and things, shall be vested in the Metropolitan Board of Works, and such board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, and shall cause such sewers and works to be completed on or before the thirty-first day of December, one thousand eight hundred and sixty, and shall also make all such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under this act, as they may from time to time think necessary for the effectual sewerage and drainage of the metropolis, and shall discontinue, close up, or destroy such sewers for the time being vested in them under this act as they may deem unnecessary, and such board shall from time to time repair and maintain the sewers so vested in them, or such of them as may not be discontinued, closed up, or destroyed as aforesaid; and for the purposes aforesaid such board shall have full power and authority to carry any such sewers or works through, across, or under any turnpike road, or any street or place laid out as or intended for a street, as well beyond as within the limits of the metropolis, or through or under any cellar or vault under the carriageway or pavement of any street, and into, through or under any lands whatsoever within or beyond the said limits, making compensation for any damage done thereby as hereinafter provided, and all sewers and works from time to time made by the said board shall vest in them; and the said board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary, and may cause the sewage and refuse from such sewers to be sold or disposed of as they may see fit, but so as not to create a nuisance, and the money arising thereby shall be applied towards defraying the expenses of such board.

NOTE.—Further powers were conferred by the Amendment Act, 1858 (21 & 22 Vict. c. 104), sect. 1, *post*, p. 173.

The powers conferred by this section may be exercised without purchasing lands affected thereby or any easements in them. *North London Ry. Co.* v. *Metropolitan Board*, 28 L. J., Ch. 909.

Where works were executed by the Metropolitan Board of Works, acting under the powers conferred by this section, whereby the plaintiff's premises were injured, and the jury found that by proper care and skill the injury could have been avoided:—*Held*, that to recover compensation for this injury an action would lie, and that the plaintiff was not precluded from maintaining such action by sect. 225, which provides for the determination of cases of disputed compensation by arbitration in accordance with the provisions contained in the Lands Clauses Consolidation Act, 1845. *Clothier* v. *Webster*, 31 L. J., C. P. 316. And see note to sect. 86, *ante*, p. 166.

The Metropolitan Board has no power under this section to erect any works on the bed or soil of the Thames, without first obtaining the consent of the admiralty, pursuant to 21 & 22 Vict. c. 104, and of the conservators of the river; and consequently the board is liable to an action by an owner of a vessel which sustains damage from grounding upon a pile negligently placed on the foreshore by a contractor employed by the board. *Brownlow* v. *Metropolitan Board*, 31 L. J., C. P. 140: affirmed on appeal, 33 L. J., C. P. 233.

Neither is the board authorized by this section to turn into a navigable river or stream the sewage of an entire district, so as to create a nuisance. *Att.-Gen.* v. *Metropolitan Board*, 11 W. R. 820.

A mere temporary obstruction of access to premises, though it may cause some inconvenience and loss of business to the occupier, is not a damage in respect of which he is entitled to claim compensation under this section. *Herring* v. *Metropolitan Board*, 19 C. B., N. S. 510.

The provisions of 25 & 26 Vict. c. 102, s. 106, requiring one month's notice to be served before instituting any proceeding against the Metropolitan Board of Works, or any district board in respect of anything done or intended to be done under their parliamentary powers, do not affect the right of a riparian owner, whose stream is being polluted by the drainage works of a district board, to summary relief by injunction. *Att.-Gen.* v. *Hackney Local Board*, 44 L. J., Ch. 545.

Neither is a proceeding for settling by arbitration the compensation to be paid by the board for damage caused by their sewage works within this section. *Delany* v. *Metropolitan Board*, 37 L. J., C. P. 59; *Doust* v. *Slater*, 38 L. J., Q. B. 159.

Metropolitan Board may declare Sewers to be Main Sewers, and take under their Jurisdiction Sewerage matters under Jurisdiction of Vestries and District Boards.]—**137.** In case it appear to the Metropolitan Board of Works that any sewers in the metropolis, not hereinbefore vested in such board, ought to be considered main sewers, and to be under their management, it shall be lawful for such board, by an order under their seal, to declare the same to be main sewers, and thereupon the same shall vest in and be under the management of the said board; and it shall also be lawful for the said board by any such order to take under their jurisdiction and authority any other matters in relation to sewerage and to drainage with respect to which jurisdiction or authority is by this act vested in any vestry or district board.

Metropolitan Board to make Orders for controlling Vestries and District Boards in Construction of Sewers, &c.]—**138.** The Metropolitan Board of Works shall, from time to time, in order to secure the efficient maintenance of the main and general sewerage of the metropolis, make such general or special order as to them may seem proper for the guidance, direction and control of the vestries of parishes and district boards in the level, construction, alteration, and maintenance and cleansing of the sewers in their respective parishes or districts, and for securing the proper connection and intercommunication of the sewers of the several parishes and districts, and their communications with the main sewers vested in the said Metropolitan Board, and generally for the guidance, direction and control of vestries and district boards in the exercise of their powers and duties in relation to sewerage; and all such orders shall be binding upon such vestries and boards.

Or may place a Street in different Parishes under the Management of one Vestry, or Part of a Parish under the Management of Vestry of adjoining Parish.]—**140.** It shall be lawful for the Metropolitan Board of Works, where it appears to them that any street or line of street, being in more than one parish or district, should be placed under the exclusive management of one vestry or district board for the purposes of paving, lighting, watering and cleansing, or any of them, or for the purposes of sewerage and drainage, or for all the purposes of this act, to order that the same shall be under the management of such vestry or board accordingly; and it shall also be lawful for the said Metropolitan Board, where it appears to them that any part of any parish or district is so detached or situate that it would be convenient for the purposes of sewerage or drainage that the same should be placed under the management of the vestry or district board of any adjoining parish or district, to order that such part shall, for such purposes, be under the management of such vestry or district board.

Property vested in Metropolitan Commissioners of Sewers (except Sewers transferred to Vestries and District Boards) transferred to the Metropolitan Board of Works.]—**148.** All property, matters, and things whatsoever vested in the Metropolitan Commissioners of Sewers, except such sewers as are hereby vested in any vestry or district board, and except such sewers as are not within the limits of the parishes and places mentioned in the schedules to this act, shall be vested in the Metropolitan Board of Works; and all persons who then owe any money to the said Commissioners of Sewers, or to any person on behalf of such commissioners, shall pay the same to the Metropolitan Board of Works, or as they may direct; and all monies then due and owing by or recoverable from the said commissioners shall be paid by or recoverable from the Metropolitan Board of Works; and all contracts, agreements, bonds, covenants, and securities theretofore made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants, and securities made or entered with or in favour of or by any former or other commissioners, which under the said act of the eleventh and twelfth years of her Majesty were to take effect in favour of, against, and with reference to the said Metropolitan Commissioners of Sewers, and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against, and with reference to the Metropolitan Board of Works, as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against, and with reference to the said Metropolitan Commissioners of Sewers if this act had not been passed, and the powers of such commissioners had continued in full force; and any retiring pension or allowance granted under section twenty-seven of the said act of the eleventh and twelfth years of her Majesty shall continue payable on the like terms by the said Metropolitan Board of Works.

Penalty on Persons sweeping Dirt into Sewers.]—**205.** No scavenger or other person shall sweep, rake, or place any soil, rubbish, or filth, or any other thing, into or in any sewer or drain, or over any grate communicating with any sewer or drain, or into any dock or inlet communicating with the mouth of any sewer or drain, or into which

any sewer or drain may discharge its contents, or into the River Thames contiguous thereto; and every scavenger or other person who shall so offend shall for every such offence forfeit and pay any sum not exceeding five pounds.

Saving of Powers of City Commissioners of Sewers over certain Parts of Parishes in Schedule (B.)]—**242.** Nothing in this act shall divest the Commissioners of Sewers of the city of London of any powers or property vested in them in relation to such parts of any of the parishes mentioned in Schedule (B.) to this act as are within the city of London, nor shall such parts be subject to be rated or assessed by any district board, but shall be subject to all the powers of the Metropolitan Board of Works as other places in the city of London.

Interpretation of Terms: "the Metropolis"—"the City of London"—"Parish"—"Drain"—"Sewer."]—**250.** In the construction of this act "the metropolis" shall be deemed to include the city of London, and the parishes and places mentioned in the Schedules (A.), (B), and (C.) to this act; "the city of London" shall be deemed to include all parts now within the jurisdiction of the Commissioners of Sewers for the city of London; and the word "parish" shall include any place mentioned in Schedule (A.) to this act, and any place or combination of places mentioned in Schedule (B.) to this act, for which one or more member or members is or are to be elected to any district board; the word "drain" shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word "sewer" shall mean and include sewers and drains of every description, except drains to which the word "drain," interpreted as aforesaid, applies.

Schedule (A.)

(The Vestries of these parishes are "Sanitary Authorities.")

Saint Marylebone; Saint Pancras; Lambeth; Saint George, Hanover Square; Islington, Saint Mary; Shoreditch, Saint Leonard; Paddington; Saint Matthew, Bethnal Green; Saint Mary, Newington, Surrey; Camberwell; Saint James, Westminster; Saint James and Saint John, Clerkenwell, to be considered one parish; Chelsea; Kensington, Saint Mary Abbot; Saint Luke, Middlesex; Saint George the Martyr, Southwark; Bermondsey; Saint George in the East; Saint Martin in the Fields; Hamlet of Mile End Old Town; Woolwich; Rotherhithe; Saint John, Hampstead.

Schedule (B.)

(The District Boards of the following districts are "Sanitary Authorities.")

Whitechapel; Westminster; Greenwich; Wandsworth; Hackney; Saint Giles; Holborn; Strand; Fulham; Limehouse; Poplar; Saint Saviour's; Plumstead; Lewisham; Saint Olave's.

SCHEDULE (C.)

The Close of the Collegiate Church of Saint Peter; the Charter House; Inner Temple; Middle Temple; Lincoln's Inn; Gray's Inn; Staple Inn; Furnival's Inn.

SCHEDULE (D.)

Main Sewers of the Metropolis.

(Vested in Metropolitan Board of Works.)

North side of the Thames.

Stainford Brook (east and west branch); Brook Green Sewer; Fulham Sewer; Eel Brook Sewer; Irongate Sewer; Nightingale Lane Sewer; Hermitage Street Sewer; Old Gravel Lane Sewer; Wapping Wall Sewer; Shadwell Basin Sewer; Pennington Street Sewer; Ratcliffe Highway Sewer (east, west and north-east branches); Limekiln Dock Sewer; Great Sluice and Drunken Dock Sluice; Blackwall Sluice; Eastern Counties Railway Sewer; Regent Street Sewer (east and west branches); Northumberland Street Sewer (east and west branches); Savoy Street Sewer; Norfolk Street Sewer; Essex Street Sewer (east and west branches); Fleet Sewer; Goswell Street Sewer; London Bridge Sewer (City Road, Balls Pond Road and Shoreditch branches); Counters Creek Sewer (main line, west and east branches and Kensington branch); Sewer to the Metropolitan Sewage Manure Works; Millman's Row Sewer; Church Street Sewer; Queen Street Sewer; Smith Street Sewer; Ranelagh Sewer; King's Scholars' Pond Sewer (and Pall Mall branch); Grosvenor Ditch; Horseferry Road Sewer; Wood Street Sewer; Victoria Street Sewer; Hackney Brook Sewer (main line and Wick Lane branch).

South side of the Thames.

Beverley Brook; Sewer between parishes of Putney and Wandsworth; Wandle River; Falcon Brook; Lord Spencer's Sewer; Heath Wall Sewer (main line and Clapham Rise branch); Effra Sewer (and Upper Norwood branch); Duffield and Battle Bridge Sewers; Limekiln Sluice; Globe Stairs Sewer; Sewer at Durand's Wharf (Rotherhithe); Rotherhithe Pier Sewer; Earl Sewer (main line, Wyndham Road and White Post Lane branches); Royal Dockyard Sewer; Ravensbourne and Sydenham Sewer; Ravensbourne and Lee Green Sewer; Horseferry Road (Greenwich).

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18 & 19 VICT. C. 121.

Nuisances Removal Act, 1855.

8. The word "nuisance" under this act shall include any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain or ashpit so foul as to be a nuisance or injurious to health.

NOTE.—The formation of sulphuretted hydrogen in a sewer by the reaction of two refuse liquids from chemical works, is a nuisance within the meaning of this section. *St. Helen's Chemical Co.* v. *St. Helen's*, L. R., 1 Exch. D. 196. This act is repealed, except as to the metropolis. See Schedule V., Public Health Act, 1875.

Penalty for causing Water to be corrupted by Gas Washing.]—**23.** Any person or company engaged in the manufacture of gas who shall at any time cause or suffer to be brought or to flow into any stream, reservoir or aqueduct, pond or place for water, or into any drain communicating therewith, any washing or other substance produced in making or supplying gas, or shall wilfully do any act connected with the making or supplying of gas whereby the water in any such stream, reservoir, aqueduct, pond or place for water shall be fouled, shall forfeit for every such offence the sum of two hundred pounds.

NOTE.—This applies to the metropolis only. And see sect. 68 of P. H. Act, 1875, and note thereto, *post*, p. 190.

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20 & 21 VICT. C. CXLVII.

The Thames Conservancy Act, 1857.

Recites the several acts which grant power to the mayor, aldermen and commons of the city of London for the conservation of the Thames and the port of London, and to levy tolls and rates; recites an agreement for terminating a suit instituted against them by the Crown, and the powers of the Trinity House as to lastage and ballastage; and that further regulations are needed for the preservation of the Thames from encroachments and for the security and convenience of the public.

The act provides for the incorporation of the conservators, their proceedings, powers, &c.

Penalty for casting Ballast into River.]—**101.** No ballast shall be unladen or thrown from or out of any vessel, barge, or lighter into the River Thames, and the master of any vessel, barge, or lighter in the River Thames who shall throw or cause or suffer to be thrown any ballast out of any such vessel, barge, or lighter into the River Thames, or shall place or cause or suffer to be placed any such ballast on any shore or ground below the high water mark in the River Thames, shall forfeit for every such offence any sum not exceeding the sum of 20*l.*

Penalty for placing Rubbish below High Water Mark.]—**102.** Every person who shall unload, put, or throw into any part of the River Thames, or on any shore or ground below high water mark of the River Thames, any rubbish, earth, ashes, dirt, mud, soil, or other matter, or allow any offensive matter to flow into the River Thames, shall forfeit for every such offence any sum not exceeding 20*l.*

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21 & 22 VICT. C. 104.

The Metropolis Management Amendment Act, 1858.

The Metropolitan Board of Works to improve Main Drainage of Metropolis.]—**1.** The Metropolitan Board shall cause to be commenced as soon as may be after the passing of this act, and to be carried on and completed with all convenient speed, according to such plan as to them may seem proper, the necessary sewers and

works for the improvement of the main drainage of the metropolis, and for preventing, as far as may be practicable, the sewage of the metropolis from passing into the River Thames within the metropolis.

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23 & 24 Vict. c. 112.

The Defence Act, 1860.

Power to alter Course of Brooks, &c.]—**41.** It shall be lawful for the Secretary of State to alter the course and level of any river not navigable, brook, stream, or watercourse, and any branch of any navigable river (such branch not itself being navigable) within or adjoining such lands, making compensation for any damage sustained by reason of the exercise of such powers, such compensation to be determined and paid in like manner as other compensation under this act, or as near thereto as circumstances admit.

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24 & 25 Vict. c. 97.

The Malicious Injuries to Property Act, 1861.

Destroying any Sea Bank or Wall of a Canal.]—**30.** Whosoever shall unlawfully and maliciously break down or cut down or otherwise damage or destroy any sea bank or sea wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool or marsh, whereby any land or building shall be or be in danger of being overflowed or damaged, or shall unlawfully and maliciously throw, break or cut down, level, undermine, or otherwise destroy, any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work belonging to any port, harbour, dock or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years (now five years, 27 & 28 Vict. c. 47, s. 7), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (see 24 & 25 Vict. c. 97, s. 75), and, if a male under the age of sixteen years, with or without whipping.

Note.—This offence is *not* triable at quarter sessions, 5 & 6 Vict. c. 38, s. 1.

Removing the Piles of any Sea Bank, &c., or doing any Damage to obstruct the Navigation of a River or Canal.]—**31.** Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in

penal servitude for any term not exceeding seven years, and not less than three years (now five years, 27 & 28 Vict. c. 47, s. 2), or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (see 24 & 25 Vict. c. 97, s. 75), and, if a male under the age of sixteen years, with or without whipping.

Injuries to Ponds.

Breaking down the Dam of a Fishery, &c., or Mill Dam, or poisoning Fish.]—**32.** Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein; or shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam or floodgate of any mill pond, reservoir, or pool, shall be guilty of a misdemeanour, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three (now five years, 27 & 28 Vict. c. 47, s. 2) years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement (see 24 & 25 Vict. c. 97, s. 75), and, if a male under the age of sixteen years, with or without whipping.

NOTE.—The provisions of this section, so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words "or in any salmon river" were inserted in the said section in lieu of the words "private rights of fishery" after the words "noxious material in any such pond or water." 36 & 37 Vict. c. 71, s. 13.

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24 & 25 VICT. C. 109.

The Salmon Fishery Act, 1861.

Penalty on mixing Poisonous Substances in Rivers.]—**5.** Every person who causes or knowingly permits to flow, or puts or knowingly permits to be put, into any waters containing salmon, or into any tributaries thereof, any liquid or solid matter to such an extent as to cause the waters to poison or kill fish, shall incur the following penalties (that is to say):

(1.) Upon the first conviction a penalty not exceeding 5*l.*;

(2.) Upon the second conviction a penalty not exceeding 10*l.*, and a further penalty not exceeding 2*l.* for every day during which such offence is continued;

(3.) Upon the third or any subsequent conviction, a penalty not exceeding 20*l.* a day for every day during which such offence is continued, commencing from the date of the third conviction:

But no person shall be subject to the foregoing penalties for any act done in the exercise of any right to which he is by law entitled, if he prove to the satisfaction of the court, before whom he is tried, that he has used the best practicable means, within a reasonable cost, to render harmless the liquid or solid matter so permitted to flow or to be put into waters; but nothing herein contained shall prevent any person from acquiring a legal right in cases where he would have acquired it if this act had not passed, or exempt any person from any punishment to which he would otherwise be subject, or legalize any act or default that would but for this act be deemed to be a nuisance or otherwise be contrary to law.

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24 & 25 Vict. c. 133.

The Land Drainage Act, 1861.

Commissions of sewers may be issued for new areas on recommendation of Enclosure Commissioners.

Declaration of Powers of Commissioners of Sewers.]—**16.** The powers of commissioners acting within their jurisdiction shall extend to cleansing, repairing, and maintaining; to deepening, widening, straightening, and improving any existing watercourse or outfall for water; to maintaining or altering an existing defence against water; to removing obstructions to watercourses; to making new watercourses and defences, and to doing any other act required for the drainage, supply of water for cattle, warping, or irrigation.

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25 & 26 Vict. c. 102.

The Metropolis Management Amendment Act, 1862.

Regulations respecting Openings into Sewers.]—**61.** The 77th section of the firstly-recited act (18 & 19 Vict. c. 120) is hereby repealed; and in lieu thereof it is enacted, that no person shall make or branch any sewer or drain, or make any opening into any sewer vested in the Metropolitan Board of Works, or in any vestry or district board, without the previous consent in writing of such board or vestry: provided that it shall be lawful for any person, with such consent, at his own expense, to make or branch any drain into any sewer vested in such board or vestry, or authorized to be made by them or either of them under the first-recited act or this act, such drain being of such size, materials, and other conditions, and branched into such sewer in such manner and form of communication in all respects, as the board or vestry shall direct or appoint: provided also, that where any contribution to the cost of a sewer is payable in respect of drainage into the same, it shall not be lawful for any person to make or branch any drain into such sewer, except in conformity with the directions of the board or vestry in whom the same shall be vested with respect to payment of contribution under the provisions contained in the firstly-recited act and this act in that behalf; and in case any person, without the consent of the said Metropolitan Board, district board, or vestry as aforesaid, make or branch, or cause to be made or branched, any sewer or drain, or

make any opening into any of the sewers vested in any such board or vestry, or authorized to be made by them as aforesaid, or if any person make or branch, or cause to be made or branched, any drain of a different construction, size, materials, or other conditions, or in another form of communication than shall be directed or appointed by such board or vestry, every person so offending shall for every such offence forfeit a sum not exceeding 50*l.*; and the board or vestry may cut off the connection between such drain and their sewer, or if they shall see fit execute the necessary works for making the said drain conformable to their regulations or directions at the expense of the person making such drain or causing the same to be made, such expenses to be recovered either by action at law or in a summary manner before a justice of the peace, at the option of the board or vestry.

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27 & 28 Vict. c. 113.

The Thames Conservancy Act, 1864.

Recites that it is expedient to provide for the addition to the conservators of the River Thames of a certain number of elective conservators, &c., and in other respects to amend the laws relating to the River Thames, and particularly the Thames Conservancy Act, 1857 (hereafter in this act called the principal act).

Incorporated with Principal Act.]—**2.** The provisions of the principal act, save so far as they are expressly repealed or varied by or inconsistent with the provisions of this act, shall be incorporated with this act, and this act shall be read and have effect together with the principal act as one act, and for this purpose the expression "this act," when used in the principal act, shall be taken to apply to the present act as well as to the principal act, as the case may require.

Injuries to River by throwing in Ballast, &c.]—**74.** If any person, without lawful excuse (the proof whereof shall lie on him), does any of the following things, namely:—

(1.) Unloads, throws, or puts or causes or suffers to fall any gravel or other substance which has been used as ballast, or any stones, earth, mud, ashes, or rubbish, or any refuse from gas-works or other manufactories, into the River Thames, or on the shore thereof;

(2.) Unloads, throws, or puts or causes or suffers to fall, any such gravel or other thing, as aforesaid, into any river, stream, cut, dock, canal, or watercourse, communicating with the River Thames, at any point within three miles of the River Thames, measured in a direct line therefrom, so that the same will be carried, or be likely to be carried, by, through, or out of such river, stream, cut, dock, canal, or watercourse, into the River Thames;

(3.) Knowingly puts any such gravel or other thing, as aforesaid, in any place where the same is likely to be carried by floods or extraordinary tides in the River Thames;

(4.) Causes or suffers any washing or other substance produced in making or supplying gas, or any other offensive matter, to flow or pass into the River Thames, or to flow or pass

into any river, stream, cut, dock, canal or watercourse aforesaid, within the distance aforesaid, so that the same will be carried or be likely to be carried by, through, or out of the same into the River Thames;

he shall, for every such offence, be liable to a penalty not exceeding twenty pounds.

Where any offence against this enactment is committed from or out of a vessel, the master and the owner of the vessel shall be liable to be proceeded against and punished under this enactment, so that the master and owner of the vessel be not both punished in respect of the same offence.

Any constable, and any person whom a constable may call to his assistance, may take into custody, without warrant, any person found committing any offence against this enactment.

NOTE.—This act is amended by the *Thames* Navigation Act, 1870 (33 & 34 Vict. c. cxlix).

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27 & 28 VICT. C. 114.

The Improvement of Land Act, 1864.

A landowner may raise money by way of rentcharge, on application to Inclosure Commissioners for England and Wales, for the "improvement of land." By term "improvement of land" is meant, *inter alia*, the drainage of land and the straightening, widening, deepening or otherwise improving the drains, streams and watercourses of any land; and the embanking and weiring of land from the sea or tidal waters, or from lakes or streams, in a permanent manner.

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29 & 30 VICT. C. 89.

The Thames Navigation Act, 1866.

An Act for vesting in the Conservators of the River Thames the Conservancy of the Thames and Isis from Staines, in the County of Middlesex, to Cricklade, in the County of Wilts; and for other purposes connected therewith.

The preamble recites, *inter alia*—

And whereas it is expedient that provision be made in this act for preventing the pollution of the Thames between Cricklade and Staines, and that application for another act for preventing the pollution of the Thames between Staines and the western boundary of the district under the authority of the Metropolitan Board of Works be made to parliament by the conservators.

Interpretation of Terms.]—**2.** In this act—

The term "the Thames" or "the river" means (unless a different meaning is expressed or implied) the River Thames or Rivers Thames and Isis from the city stone near Staines to Cricklade.

Conservancy Acts extended to Upper Thames.]—**41.** From the passing of this act the conservators shall have the same or the like powers and authorities over and with respect to the Thames and Isis from Staines to Cricklade as they have by virtue of the Conservancy Acts over and with respect to the Thames below Staines;

and all the provisions of the Conservancy Acts shall extend and apply, *mutatis mutandis*, to the Thames and Isis from Staines to Cricklade, and those acts shall be read and have effect together with this act as one act as nearly as may be as if the conservancy of the Thames and Isis from Staines to Cricklade had been comprised in the Thames Conservancy Act, 1857, and had been accordingly thereby vested in the conservators; and for this purpose—

The expression "this act" where used in either of the Conservancy Acts shall be taken to include the present act:

The expression "River Thames" or "river" where used in either of the Conservancy Acts shall be taken to include the Thames as defined by this act:

The word "shores" where used in either of the Conservancy Acts shall be taken to include the shores of the Thames as defined by this act:

Save that nothing in this act shall extend to the Thames as defined by this act the provisions of section one hundred and three, one hundred and four, or one hundred and sixty-six of the Thames Conservancy Act, 1857, or so much of section fifty-eight of that act as requires the approval, for the purposes therein mentioned, of one of her Majesty's Commissioners of Woods, Forests, and Land Revenues.

Power for Conservators to regulate drawing down, &c. of Water.]—**48.** Notwithstanding anything in any of the Upper Navigation Acts, the conservators may regulate as they think fit the opening, shutting, and management of the locks and works on the Thames, and the drawing down or keeping back of the water by means of any of those locks and works, but so as not to interfere in the case of any mill with the maintenance of as efficient a head of water for the purposes thereof as at the passing of this act may lawfully be maintained for those purposes; and in case of any difference between the conservators and any mill owner relative to the exercise of the powers by this section vested in the conservators, the same shall be determined by an arbitrator appointed by the Board of Trade, whose decision shall be final; but nothing in this section shall take away from the conservators or interfere with the exercise by them of any power that would have been exerciseable by the Upper Navigation Commissioners if this act had not been passed.

Power for Occupier of Mill to draw down Water for Repair, &c.]—**49.** Notwithstanding anything in this act, and until it is otherwise provided by bye-law, any owner or occupier of any mill may draw down the water to such extent and at such times as may reasonably be required for the repair of such mill, or any flood-gates or waterworks belonging thereto, and for the purpose of cleansing the millstream.

Surface of River to be scavenged.]—**52.** The conservators shall cause the surface of the Thames to be (as far as is reasonably practicable) effectually scavenged, in order to the removal therefrom of substances liable to putrefaction.

NOTE.—By the Thames Conservancy Act, 1867 (30 Vict. c. ci), the provisions of this section and of sects. 63 to 69 (both inclusive) are extended so as to apply to the Thames from the city stone near Staines to the western boundary of the metropolis, and to so much of every river, stream, cut, dock, canal, and watercourse communicating with that part of the

Thames as lies within three miles of the Thames measured in a direct line therefrom, and for that purpose the term "this act" used in those provisions shall be taken to include the present act.

And by the 18th section of the Thames Navigation Act, 1870 (33 & 34 Vict. c. cxlix) the provisions of these sections were again extended so as to apply to the Thames from the western boundary of the metropolis to Yantlet Creek, and to so much of every river, &c., communicating with that part of the Thames as lies within three miles.

Sects. 63—69. *Pollution of Water.*

Sewage, &c. prohibited from being sent into River where not so sent at passing of Act.]—**63.** From and after the passing of this act it shall not be lawful for any person to do any of the following things, namely:—

(1.) To open into the Thames any sewer, drain, pipe, or channel with intent or in order thereby to provide for the flow or passage of sewage, or of any other offensive or injurious matter:

(2.) To cause or, without lawful excuse (the proof whereof shall lie on the person accused) to suffer any sewage or any matter aforesaid to flow or pass into the Thames down or through any sewer, drain, pipe, or channel not at the passing of this act used for that purpose;

(3.) To open into any river, stream, cut, dock, canal, or watercourse communicating with the Thames at any point within three miles of the Thames, measured in a direct line therefrom, any sewer, drain, pipe, or channel with intent or in order thereby to provide for the flow or passage of sewage or of any matter aforesaid, in such manner that the same will be carried or be likely to be carried by, through, or out of that river, stream, cut, dock, canal, or watercourse into the Thames;

(4.) To cause or, without lawful excuse (the proof whereof shall lie on the person accused) to suffer any sewage or any matter aforesaid to flow or pass into any such river, stream, cut, dock, canal, or watercourse at any point within the distance aforesaid, down or through any sewer, drain, pipe or channel not at the passing of this act used for that purpose, in such manner that the same will be carried or be likely to be carried by, through, or out of that river, stream, cut, dock, canal, or watercourse into the Thames:

If any person does any act or thing in contravention of this enactment he shall for every such offence be liable on summary conviction to a penalty not exceeding 100*l.*, and to a further penalty not exceeding 50*l.* for every day during which the offence is continued after the day on which the first penalty is incurred.

Notice for Discontinuance of existing Sewerage Works.]—**64.** Whenever any sewage or any other offensive or injurious matter is caused or suffered to flow or pass into the Thames, or is caused or suffered to flow or pass into any river, stream, cut, dock, canal, or watercourse communicating with the Thames, at any point within three miles (now five miles, 33 & 34 Vict. c. cxlix, s. 7) of the Thames, measured in a direct line therefrom, in such manner that the same is carried or likely to be carried into the Thames, then, and in every such case, whether any such sewerage or other matter aforesaid had or had not been so caused or suffered to flow or pass before the passing of this

act, the conservators within a reasonable time after knowledge of the fact shall and they are hereby required to give notice in writing under their common seal to the person or body causing or suffering the same so to flow or pass, to the effect that they require him or them to discontinue the flow or passage thereof as aforesaid within a time to be specified in the notice, not being in any case less than twelve months or more than three years; provided that the conservators may, if they think fit, at any time and from time to time extend the time specified in the notice by another notice in writing under their common seal; but nothing in this section shall authorize the conservators, until the expiration of six months after the passing of this act, to give to the owner or occupier of any mill or work a notice requiring him to discontinue the flow or passage as aforesaid of any liquid matter produced or used in the manufacture of paper or in any process incidental thereto.

Penalty for Disregard of Notice.]—**65.** Subject to the provisions of this act, any person to whom any such notice is given by the conservators shall, notwithstanding anything in any other act, within the time allowed by the notice, discontinue the flow or passage of the sewage or other offensive or injurious matter to which the notice refers; and if any person fails to do so he shall be guilty of a misdemeanor, and shall be liable on summary conviction thereof before two or more justices, or on conviction thereof on indictment, to a penalty not exceeding one hundred pounds, and to a further penalty not exceeding fifty pounds for every day during which the offence is continued after the day on which the first penalty is incurred.

Power to obtain Extension of Time.]—**66.** Provided always, that if any person to whom any such notice is given thinks himself aggrieved by reason of the time allowed, either by the original or by any subsequent notice, not being sufficient to enable him to discontinue the flow or passage of the sewage or other offensive or injurious matter to which the notice refers, he may, not later than one month before the expiration of the time so allowed, by writing delivered to the secretary of the conservators, demand an extension of such time; and in case the conservators refuse to comply with such demand, the question of such extension shall be referred to an arbitrator appointed by agreement, or, failing agreement, by the Board of Trade, on the application of either party, and the decision of the arbitrator shall be final, and the costs of the reference shall be in the discretion of the arbitrator.

NOTE.—By 30 Vict. c. ci., s. 4, it is enacted, the word "person" in this section shall include any corporation or any other local authority to whom the notice under sect. 64 of this act may be given by the conservators.

Power for Removal of Proceedings by Certiorari, and Appeal to be with a Jury.]—**67.** Notwithstanding anything in the Thames Conservancy Act, 1857 (sect. 160), any proceeding in pursuance of this act in respect of such a misdemeanor as aforesaid may be removed by certiorari into her Majesty's Court of Queen's Bench at Westminster; and notwithstanding anything in the same act (sect. 162), the Court of Quarter Sessions shall hear and determine with a jury any appeal brought against any adjudication or determination in respect of such a misdemeanor as aforesaid.

Right to prosecute to be in Conservators only.]—**68.** It shall not be competent for any person, other than the conservators, their officers, attorneys, solicitors or agents, to institute or carry on any proceeding or prosecution under the provisions of this act relative to the flow or passage of sewage or of any matter aforesaid.

Nothing deemed to legalize Nuisances, or affect any Remedy which Conservators at present have.]—**69.** Nothing in the provisions of this act relative to the flow or passage of sewage or of any matter aforesaid shall be deemed to legalize or permit any nuisance, or shall take away or prejudicially affect any remedy or right which the conservators or any person would or might have had or exercised if this act had not been passed as against the person for the time being causing or suffering the flow or passage thereof.

Conservators to apply to Parliament for further Powers.]—**90.** The conservators shall apply to parliament, so soon as the usage and practice of parliament will permit, for an act containing such provisions in relation to the Thames between Staines and the western boundary of the district under the authority of the Metropolitan Board of Works as are not already in force in relation to that part of the Thames, and as are contained in this act in relation to the Thames between Cricklade and Staines, or such other provisions as will enable them efficiently to preserve and purify the waters of the Thames.

NOTE.—Such act was applied for and obtained (30 Vict. c. ci.).

Sect. 5 of this act enacts as follows:—

Subject and without prejudice to their existing powers, rights and privileges, it shall be the duty of the conservators, by all lawful and proper means, to preserve and maintain at all times, as far as may be, the flow and purity of the water of the Thames and its tributaries down to the western boundary of the metropolis, and the discharge of that duty, and the proper exercise and execution of the powers and functions of the conservators under the Thames Conservancy Acts, 1857 and 1864, and the Navigation Act of 1866, and the Upper Navigation Acts therein referred to, shall be deemed purposes of the Thames Conservancy Act, 1857, within the meaning of sections 111 to 113 (both inclusive) of that act. See also the Thames Valley Drainage Acts of 1871 (29 & 30 Vict. c. cccxix.) and 1874 (37 & 38 Vict. c. xxii.).

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31 & 32 VICT. C. CLIV.

The Lee Conservancy Act, 1868.

3. For the purposes of this act, the Lee shall be taken to be the River Lee from its rise in the county of Bedford to certain stones or boundary marks placed on each side of the Bow Creek in the counties of Essex and Middlesex, to be called the south boundary stones, to be placed 200 feet below the centre of the Barking Road iron bridge, including not only the ancient course of the river and the Limehouse Cut, but also all cuts, canals, creeks and streams, whether tidal or not, having formed or forming at any time before or after the passing of this act part of the course or channel of the river, or of the navigation commonly called the River Lee Navigation (except as much of the Manifold Ditch as shall from time to time be required by the New River Company for the conveyance of pure water); and the tributaries of the Lee shall be taken to be the rivers or brooks fol-

lowing, namely:—the Stort, Mimram, Beane, Rib, Quin, Ash, Pincey Brook, Cobbin's Brook, Turkey Street Brook, Edmonton Brook, Salmon Brook, Moselle, Lynch, Stone Bridge Brook, and the Carbuncle, and such diversions, if any, of those rivers or brooks as are affected by the intercepting drains made under the powers of the East London Waterworks Act, 1853, and that intercepting drain and all streams flowing mediately or immediately into the Lee or into any of the rivers or brooks aforesaid.

Constitution of Board.]—7. The several conservators, members of the Conservancy Board, shall be elected and appointed as follows:—

(1.) Seven shall be elected,—
- Five in the first instance by the trustees, and afterwards by the landowners;
- One by owners of barges used on the Lee (in this act referred to as barge owners);
- One by the heads of the local authorities of the places mentioned in the fourth schedule to this act:

(2.) Six shall be appointed,—
- Two by the New River Company;
- Two by the East London Waterworks Company;
- One by the mayor, aldermen and commons of the City of London in common council assembled;
- One by the Metropolitan Board of Works.

NOTE.—By the 62nd section of this act, all the works, powers, &c. of the trustees constituted under the earlier Lee Navigation Improvement Acts are transferred to the Conservancy Board constituted by the 7th section. The 64th section enacts that the Lee Navigation Improvement Act shall remain in force except as varied by this act. These acts are 12 Geo. 2, c. 32; 7 Geo. 3, c. 51; 19 Geo. 3, c. 58; 45 Geo. 3, c. lxix; 13 & 14 Vict. c. cix.

Protection of Water.

The Preservation of Purity and due flow of Lee for purposes of this Act.]—89. The Conservancy Board may by all lawful and proper means preserve and maintain at all times, as far as may be, the purity of the water of the Lee and its tributaries; and also (but subject to the lawful exercise of any rights of taking, impounding, or using the water) the flow of the water of the Lee and its tributaries; and the discharge of that duty, and the proper exercise and execution of the powers and functions of the Board in relation thereto, and the prevention of pollution, shall be deemed purposes of this act.

Meaning of the Term "Person" in the Provisions of Act relating to the Protection of Water.]—90. In the following sections of this act, under the head or division "Protection of Water," the term "person" means with reference to any act or omission or notice in respect of—

- Any public sewer, drain, pipe or channel situate within any place for the local government whereof there is any corporate or other body or board constituted in pursuance of any act for the local management of the metropolis, or of the Public Health Act, 1848, or the Local Government Act, 1858, or of any act or acts in amendment of those acts respectively,—

that corporate or other body or board;

And means with reference to any act or omission or notice in respect of—

Any public sewer, drain, pipe or channel situate within any place in which there is a sewer authority constituted by the Sewage Utilization Act, 1865, the Sanitary Act, 1866, or the Sewage Utilization Act, 1867, or any act or acts in amendment of those acts respectively,—

that sewer authority;

And means with reference to any act or omission or notice in respect of—

Any other public sewer, drain, pipe or channel,—

if the same be situate within a borough, the mayor, aldermen and burgesses of that borough, and if the same be not situate within a borough, then the overseers of the poor of the parish in which any such last-mentioned sewer, drain, pipe or channel is respectively situate;

And means with reference to any act or omission or notice in respect of—

Any private sewer, drain, pipe or channel,—

the person having the adequate ownership or adequate control thereof.

Sewage, &c. prohibited from being newly sent into Lee or Tributaries.] —**91.** From and after the establishment of the Conservancy Board, it shall not be lawful for any person to do any of the following things:—

(1.) To open into the Lee or any of its tributaries any sewer, drain, pipe or channel, with intent or in order thereby to provide for the flow or passage of sewage or other offensive or injurious matter:

(2.) To cause, or without lawful excuse (proof whereof shall lie on the person accused) to suffer, any sewage or other offensive or injurious matter to flow or pass into the Lee or any of its tributaries down or through any sewer, drain, pipe or channel not used for that purpose before the establishment of the board:

(3.) To open into any cut, dock, canal, ditch or channel communicating with the Lee or any of its tributaries any sewer, drain, pipe or channel, with intent or in order thereby to provide for the flow or passage of sewage or other offensive or injurious matter in such manner that the same will be carried or be likely to be carried by, through or out of that cut, dock, canal, ditch or channel into the Lee or any of its tributaries:

(4.) To cause, or without lawful excuse (proof whereof shall lie on the person accused) to suffer, any sewage or other offensive or injurious matter to flow or pass into any such cut, dock, canal, ditch or channel down or through any sewer, drain, pipe or channel not used for that purpose before the establishment of the board, in such manner that the same will be carried or be likely to be carried by, through or out of that cut, dock, canal, ditch or channel into the Lee or any of its tributaries:

If any person does anything in contravention of this section he shall for every such offence be liable, on summary conviction, to a penalty not exceeding one hundred pounds, and to a further penalty

not exceeding fifty pounds for every day on which the offence is continued after the day on which he becomes liable to the first penalty; and after such conviction the board may stop up the outlet of the sewer, drain, pipe or channel in respect of which the offence is committed, and for that purpose may do all works that appear to them requisite, and may enter on any lands; and the board may recover from the person offending all expenses incurred by them in so doing, with costs.

Notice for Discontinuance of existing Sewerage Works.]—**92.** Where, after the establishment of the Conservancy Board, sewage or other offensive or injurious matter is caused or suffered to flow or pass into the Lee or any of its tributaries, or into any cut, dock, canal, ditch or channel communicating therewith, then (whether any such sewage or other offensive or injurious matter had been so caused or suffered to flow or pass before the establishment of the board or not) the board, within a reasonable time after knowledge of the fact, shall give notice in writing under their common seal to the person causing or suffering the same so to flow or pass, to the effect that they require him to discontinue the flow or passage thereof as aforesaid within a time to be specified in the notice, not being in any case less than one year or more than three years; but the board may, if they think fit, at any time and from time to time, extend the time specified in the notice by another notice in writing under their common seal.

Proceedings on Non-compliance with Notice.]—**93.** Subject to the provisions of this act, any person to whom notice is given by the Conservancy Board, requiring him to discontinue the flow or passage of sewage or other offensive or injurious matter, shall, notwithstanding anything in any other act, within the time allowed by the notice discontinue the same accordingly; and if any such person fails to do so the following provisions shall have effect:—

(1.) The person so failing shall be guilty of a misdemeanor, and shall be liable, on summary conviction thereof before two or more justices, or on conviction thereof on indictment, to a penalty not exceeding one hundred pounds, and to a further penalty not exceeding fifty pounds for every day on which the offence is continued after the day on which he becomes liable to the first penalty:

(2.) After such conviction the board may stop up the outlet of any sewer, drain, pipe or channel by which such flow or passage of sewage or other offensive or injurious matter is effected, and for that purpose may do all works that appear to them requisite, and may enter on any lands; and the board may recover all expenses reasonably incurred by them in so doing, with costs, from the person failing to comply with the notice.

Power to obtain Extension of Time.]—**94.** Provided always, that if any person to whom notice is given by the Conservancy Board requiring him to discontinue the flow or passage of sewage or other offensive or injurious matter thinks himself aggrieved by reason of the time allowed either by the original or by any subsequent notice not being sufficient to enable him to discontinue the same, he may, not later than one month before the expiration of the time so allowed, by writing delivered to the clerk of the board, demand an extension of such time; and in case the board refuse to

comply with his demand, the question of extension of time in the case of a corporation, board, body, or authority shall be determined by one of her Majesty's principal Secretaries of State, whose direction thereon shall be final, and in any other case shall be referred to an arbitrator appointed by the Board of Trade, on the application of either party, and the decision of the arbitrator shall be final, and the costs of the reference shall be in the discretion of the arbitrator.

Funds out of which Penalties recovered against Public Authorities are to be paid.]—**95.** The penalties recoverable under the provisions of this act under the head or division "Protection of Water," and also all expenses and costs so recoverable from any corporate or other body, board, authority, or overseers for or in respect of any act or omission by them respectively, or any proceeding of the Conservancy Board, in respect of any public sewer, drain, pipe, or channel, shall be payable and paid out of the rates from time to time leviable by the respective corporate or other body, board, authority, or overseers for the purposes in respect of which they severally are authorized by law to levy rates.

Prohibition on placing Manure, &c. on Banks.]—**96.** From and after the establishment of the Conservancy Board, it shall not be lawful for any person, without reasonable excuse (proof whereof shall lie on him), to place any manure heap or other collection of offensive or injurious matter on the banks of the Lee or any of its tributaries, so that any offensive or injurious matter will drain or run therefrom into the Lee or any of its tributaries; and if any person does anything in contravention of this section he shall for every such offence be liable, on summary conviction, to a penalty not exceeding ten pounds, and to a further penalty not exceeding five pounds for every day on which the offence is continued after the day on which he becomes liable to the first penalty.

Service or Publication of Notices.]—**97.** Any notice which the Conservancy Board may serve for the purposes of the provisions of this act, under the head or division "Protection of Water," on any person may be served personally or by post; in the case of public sewers, drains, pipes, or channels on the clerk or secretary of the corporate or other body or board, or of the sewer authority respectively intended to be affected thereby, or as the case may be on the overseers of the parish where the overseers are intended to be affected thereby, and in the case of private sewers, drains, pipes, or channels on the person having the adequate ownership or control thereof; or, in the option of the Conservancy Board, any such notice relating to other than private sewers, drains, pipes, or channels may be published for three consecutive weeks in any public newspaper circulating in the places or parishes in which respectively the same sewers, drains, pipes, or channels are situate, and affixed on three consecutive Sundays on a principal door of the parish church, or of each of the parish churches of the same places or parishes, and every notice so published and affixed shall be considered as duly served as if the same had been served personally or by post.

New River Company and East London Waterworks Company may require Conservancy Board to give Notice, &c.]—**98.** If after the establishment of the Conservancy Board that board shall, in the case of any sewage or other offensive or injurious matter which may be caused or suffered to flow or pass into the Lee or any of its tribu-

taries, or into any cut, dock, canal, ditch, or channel communicating therewith, or in the case of any offensive or injurious matter which may drain or run into the Lee or any of its tributaries from any manure heap or other collection of offensive or injurious matter, omit to give such notice, or to institute or carry on such other proceeding as the board is by this act authorized in the respective case to give, institute, and carry on in the proper exercise and execution of its powers and functions for preserving the purity of the water of the Lee and its tributaries, it shall from time to time be lawful for the New River Company, and the East London Waterworks Company respectively, in respect of any such flow or passage, or draining or running, which may affect the purity of the water which they respectively take, by writing under their respective common seal, to require the Conservancy Board to give such notice, or as the case may be, to institute or to carry on such other proceeding, as is by this act in such case authorized or prescribed, and every such requirement shall specify the particulars in respect of which any omission is alleged, and the Conservancy Board shall with all reasonable despatch consider every such requirement, and the matters thereof, and shall communicate to the requiring companies or company, in writing, the decision of the board with reference thereto ; and if the board shall fail so to communicate, or if upon receipt of any such communication the requiring companies or company shall be dissatisfied therewith, or with the subsequent action of the board in respect of the requirement, it shall be lawful for one of her Majesty's principal Secretaries of State, on the application of the companies or company, and after due inquiry, having regard to the funds shown to be at the disposal of the Conservancy Board, to make such order in the premises (including any order as to the payment by either party of the costs of the application or any part thereof), subject to the provisions of this act, as he thinks fit, and his order shall be final, and shall be carried into effect accordingly.

Right to prosecute to be in Conservators only.]—**99.** It shall not be competent for any person, other than the Conservancy Board, their officers, attorneys, solicitors, or agents, to institute or carry on any proceeding or prosecution under the provisions of this act relative to the flow or passage of sewage or of any matter aforesaid.

Saving for Law of Nuisance, ordinary Remedies, existing Decrees, and pending Proceedings.]—**100.** Nothing in this act shall legalize or permit a nuisance, or take away or prejudicially affect any remedy or right which the Conservancy Board or any person would or might have had or exercised if this act had not been passed, as against any person causing or suffering the flow or passage of sewage or other offensive or injurious matter, or interfere with the operation of any order or decree obtained, or prejudicially affect the prosecution of any proceeding instituted, by the trustees before the establishment of the Conservancy Board.

Protection of Channel, &c.

Prohibition of throwing in Ballast, &c.]—**109.** If any person, without lawful excuse (proof whereof shall lie on him), does any of the following things :

(1.) Unloads, throws, or puts, or causes or suffers to fall, into the navigable part of the Lee any gravel or other substance

which has been used as ballast, or any stones, earth, mud, ashes, rubbish, refuse, or other substance:

(2.) Unloads, throws, or puts, or causes or suffers to fall, any such gravel or other thing as aforesaid, into any cut, dock, canal, ditch, or channel communicating with the navigable part of the Lee, so that the same will be carried or be likely to be carried by, through, or out of that cut, dock, canal, ditch, or channel into the navigable part of the Lee:

(3.) Puts any such gravel or other thing as aforesaid in any place where the same is likely to be carried by floods or extraordinary tides into the navigable part of the Lee:

he shall for every such offence be liable to a penalty not exceeding 20*l.*

Where the offence is committed from or out of a vessel, the master and the owner of the vessel shall be liable to be proceeded against and punished under this section, but so that the master and the owner of the vessel be not both punished in respect of the same offence.

Any constable, and any person called by a constable to his assistance, may take into custody, without warrant, any person found committing any such offence.

Act not to prevent the loading or unloading of Manure.]—**110.** This act shall not be construed to prevent the loading or unloading of manure on the banks of any navigation, provided reasonable care be exercised in such loading and unloading to prevent the pollution of the water.

Prohibition against Dredging.]—**111.** It shall not be lawful for any person, other than the Conservancy Board, their agents, servants, and workmen, to dredge, dig, or raise any gravel, sand, or other substance from the bed of the navigable part of the Lee, except with the licence of the board under their common seal (proof of which licence shall lie on the person accused); and if any person does anything in contravention of this section he shall for every such offence be liable, on summary conviction, to a penalty not exceeding 20*l.* without prejudice to any other remedy or proceeding against him.

Dead Animals, &c.

Byelaws as to dead Animals, &c.]—**118.** The Conservancy Board may from time to time make byelaws for the following purposes or any of them:

For prohibiting persons from throwing into the Lee or any of its tributaries any dead animal:

For prohibiting persons from throwing into the Lee or any of its tributaries any filth, or other noisome thing, and from washing or cleansing therein any cloth, wool, leather or skin:

For prohibiting the washing or cleansing of animals in those parts of the Lee or its tributaries in which, in the judgment of the Conservancy Board, such washing or cleansing will affect the purity of water.

The Fourth Schedule.

The chairman of the local board of health of the respective districts following:—Luton; Bishop Stortford; Ware; Cheshunt; Waltham Holy Cross; Tottenham; West Ham; Enfield; Edmonton;

and of any other district formed or to be formed under the Public Health Act, 1848, and the Local Government Act, 1858, through or adjoining any part of which district the River Lee or any of its tributaries specifically named in this act may flow.

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38 & 39 Vict. c. 55.

The Public Health Act, 1875.

Sewage to be purified before being discharged into Streams.]—**17.** Nothing in this act shall authorize any local authority to make or use any sewer, drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond or lake, until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond or lake.

Power of Owners and Occupiers within District to drain into Sewers of Local Authority.]—**21.** The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority, on condition of his giving such notice as may be required by that authority of his intention to do so, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications.

Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding 20*l.*, and the local authority may close any communication between a drain and sewer made in contravention of this section, and may recover in a summary manner from the person so offending any expenses incurred by them under this section.

Use of Sewers by Owners and Occupiers without District.] —**22.** The owner or occupier of any premises, without the district of a local authority, may cause any sewer or drain from such premises to communicate with any sewer of the local authority, on such terms and conditions as may be agreed on between such owner or occupier and such local authority, or, as in case of dispute, may be settled, at the option of the owner or occupier, by a court of summary jurisdiction, or by arbitration, in manner provided by this act.

Power of Local Authority to enforce Drainage of undrained Houses.] **23.** Where any house within the district of a local authority is without a drain sufficient for effectual drainage, the local authority shall, by written notice, require the owner or occupier of such house, within a reasonable time therein specified, to make a covered drain or drains emptying into any sewer which the local authority are entitled to use, and which is not more than one hundred feet from the site of such house; but if no such means of drainage are within that distance, then emptying into such covered cesspool, or other place not being under any house, as the local authority direct; and the local authority may require any such drain or drains to be of

such materials and size, and to be laid at such level, and with such fall as, on the report of their surveyor, may appear to them to be necessary.

If such notice is not complied with, the local authority may, after the expiration of the time specified in the notice, do the work required, and may recover in a summary manner the expenses incurred by them in so doing from the owner, or may by order declare the same to be private improvement expenses.

Provided that where, in the opinion of the local authority, greater expense would be incurred in causing the drains of two or more houses to empty into an existing sewer pursuant to this section, than in constructing a new sewer and causing such drains to empty therein, the local authority may construct such new sewers, and require the owners or occupiers of such houses to cause their drains to empty therein, and may apportion as they deem just the expenses of the construction of such sewers among the owners of the several houses, and recover in a summary manner the sums apportioned from such owners, or may by order declare the same to be private improvement expenses.

NOTE.—By section 4 of the act "house" includes factories and other buildings in which more than twenty persons are employed at one time.

Provisions for obtaining Order for cleansing offensive Ditches lying near or forming the Boundaries of Districts.]—**48.** Where any watercourse or open ditch lying near to or forming the boundary between the district of any local authority and any adjoining district is foul and offensive, so as injuriously to affect the district of such local authority, any justice having jurisdiction in such adjoining district may, on the application of such local authority, summon the local authority of such adjoining district to appear before a court of summary jurisdiction to show cause why an order should not be made by such court for cleansing such watercourse or open ditch, and for executing such permanent or other structural works as may appear to such court to be necessary; and such court, after hearing the parties, or ex parte in case of the default of any of them to appear, may make such order with reference to the execution of the works, and the persons by whom the same shall be executed, and by whom and in what proportions the costs of such works shall be paid, and also as to the amount thereof, and the time and mode of payment, as to such court may seem reasonable.

NOTE.—As to what parts of a highway or of a tidal river which separates two districts is in either parish, see *R.* v. *Strand District*, 33 L. J., M. C. 33; *Bridgwater* v. *Bootle-cum-Linacre*, L. R., 2 Q. B. 4; and sect. 27 of 31 & 32 Vict. c. 122.

As to removal of filth, &c. from turnpike roads and adjoining waste land, and as to turning watercourses, drains, &c. running along a turnpike road, and cleaning same, see sect. 114 of 3 Geo. 4, c. 126.

Provisions for Protection of Water.

Penalty for causing Water to be corrupted by Gas Washings.]—**68.** Any person engaged in the manufacture of gas who—

(1.) Causes or suffers to be brought or to flow into any stream, reservoir, aqueduct, pond or place for water, or into any

drain or pipe communicating therewith, any washing or other substance produced in making or supplying gas; or

(2.) Wilfully does any act connected with the making or supplying of gas whereby the water in any such stream, reservoir, aqueduct, pond or place for water is fouled,

shall forfeit for every such offence the sum of 200*l.*, and, after the expiration of twenty-four hours' notice from the local authority or the person to whom the water belongs in that behalf, a further sum of 20*l.* for every day during which the offence is continued or during the continuance of the act whereby the water is fouled.

Every such penalty shall be recovered, with full costs of suit, in any of the superior courts, in the case of water belonging to or under the control of the local authority by the local authority, and in any other case by the person into whose water such washings or other substance is conveyed or flows, or whose water is fouled by any such act as aforesaid, or in default of proceedings by such person, after notice to him from the local authority of their intention to proceed for such penalty, by the local authority; but such penalty shall not be recoverable unless it be sued for during the continuance of the offence or within six months after it has ceased.

NOTE.—See Gasworks Clauses Act, 1847 (10 Vict. c. 15), and Waterworks Clauses Act, 1847 (10 Vict. c. 17), ss. 62-64, *ante*, p. 164; *Hipkins* v. *Birmingham and Staffordshire Gaslight Co.*, 29 L. J., Exch. 169: affirmed in Exch. Ch., 30 L. J., Exch. 60; *R.* v. *Medley*, 6 C. & P. 292. See also Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 23, which also imposes a penalty for causing water to be fouled by gas washings. This act is repealed except for the metropolis. See Sched. V. of P. H. Act, 1875.

Local Authority may take Proceedings to prevent Pollution of Streams.]—**69.** Any local authority, with the sanction of the Attorney-General, may, either in their own name or in the name of any other person, with the consent of such person, take such proceedings by indictment, bill in chancery, action or otherwise, as they may deem advisable for the purpose of protecting any watercourse within their jurisdiction from pollutions arising from sewage, either within or without their district; and the costs of and incidental to any such proceedings, including any costs that may be awarded to the defendant, shall be deemed to be expenses properly incurred by such authority in the execution of this act.

NOTE.—See sect. 108, which enables the Commissioners of Sewers in the city of London and the liberties thereof, and the vestry or district board elsewhere in the metropolis, to take proceedings "in respect of any nuisance within the area of their jurisdiction caused by an act or default committed or taking place within the district of a local authority under this act; or by any such local authority in respect of any nuisance within their district caused by an act or default committed or taking place within the jurisdiction of any such nuisance authority." See also saving clauses, ss. 327—341.

Power to close Polluted Wells, &c.]—**70.** On the representation of any person to any local authority that within their district the water in any well or cistern, public or private, or supplied from any public pump, and used or likely to be used by man for drinking or domestic purposes, or for manufacturing drinks for the use of man, is so polluted as to be injurious to health, such authority may apply

to a court of summary jurisdiction for an order to remedy the same; and thereupon such court shall summon the owner or occupier of the premises to which the well, tank, or cistern belongs, if it be private, and in the case of a public well, tank, cistern, or pump, any person alleged in the application to be interested in the same, and may either dismiss the application, or may make an order directing the well, tank, cistern, or pump to be permanently or temporarily closed, or the water to be used for certain purposes only, or such other order as may appear to them to be requisite to prevent injury to the health of persons drinking the water.

The court may, if they see fit, cause the water complained of to be analyzed at the cost of the local authority applying to them under this section.

If the person on whom an order under this section is made fails to comply with the same, the court may, on the application of the local authority, authorize them to do whatever may be necessary in the execution of the order, and any expenses incurred by them may be recovered in a summary manner from the person on whom the order is made.

Expenses incurred by any rural authority in the execution of this section, and not recovered by them as aforesaid, shall be special expenses.

Nuisances.

Definition of Nuisances.]—**91.** For the purposes of this act,—

(2.) Any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain, or ash-pit so foul, or in such a state as to be a nuisance or injurious to health;

(4.) Any accumulation or deposit which is a nuisance or injurious to health;

shall be deemed to be a nuisance liable to be dealt with summarily, in manner provided by this act: provided that a penalty shall not be imposed on any person in respect of any accumulation or deposit necessary for the effectual carrying on any business or manufacture, if it be proved to the satisfaction of the court that the accumulation or deposit has not been kept longer than is necessary for the purposes of the business or manufacture, and that the best available means have been taken for preventing injury thereby to the public health.

NOTE.—As to what is a nuisance under this section, see *Great Western Ry. Co.* v. *Bishop*, L. R., 7 Q. B. 550; and *Gaskell* v. *Bayley*, 30 L. T. Rep., N. S. 516. As to what is to be understood by the "best available means" in the above proviso, see *Schofield* v. *Schunck*, 19 J. P. 84.

Provisions of Act relating to Nuisances not to affect other Remedies.—**111.** The provisions of this act relating to nuisances shall be deemed to be in addition to and not to abridge or affect any right, remedy, or proceeding under any other provisions of this act, or under any other act, or at law or in equity: provided that no person shall be punished for the same offence both under the provisions of this act relating to nuisances, and under any other law or enactment.

RIVERS POLLUTION PREVENTION ACT, 1876.

39 & 40 Vict. c. 75.

An Act for making further Provision for the Prevention of the Pollution of Rivers. [15th August, 1876.]

Whereas it is expedient to make further provision for the prevention of the pollution of rivers, and in particular to prevent the establishment of new sources of pollution:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short Title of Act.]—**1.** This act may be cited for all purposes as the Rivers Pollution Prevention Act, 1876.

Part I.

Law as to Solid Matters.

Prohibition as to putting Solid Matters into Streams.]—**2.** Every person who puts or causes to be put or to fall, or knowingly permits to be put or to fall or to be carried into any stream, so as either singly or in combination with other similar acts of the same or any other person to interfere with its due flow, or to pollute its waters, the solid refuse of any manufactory, manufacturing process or quarry, or any rubbish or cinders, or any other waste or any putrid solid matter, shall be deemed to have committed an offence against this act.

In proving interference with the due flow of any stream, or in proving the pollution of any stream, evidence may be given of repeated acts which together cause such interference or pollution, although each act taken by itself may not be sufficient for that purpose.

Part II.

Law as to Sewage Pollutions.

Prohibition as to Drainage into Streams of Sewers.]—**3.** Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter, shall (subject as in this act mentioned) be deemed to have committed an offence against this act.

Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this act if he shows to the satisfaction of the court having cognizance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream.

Where the Local Government Board are satisfied after local inquiry that further time ought to be granted to any sanitary authority, which at the date of the passing of this act is discharging

sewage matter into any stream, or permitting it to be so discharged, by any such channel as aforesaid, for the purpose of enabling such authority to adopt the best practicable and available means for rendering harmless such sewage matter, the Local Government Board may by order declare that this section shall not, so far as regards the discharge of the sewage matter by such channel be in operation until the expiration of a period to be limited in the order.

Any order made under this section may be from time to time renewed by the Local Government Board, subject to such conditions, if any, as they may see fit.

A person other than a sanitary authority shall not be guilty of an offence under this section in respect of the passing of sewage matter into a stream along a drain communicating with any sewer belonging to or under the control of any sanitary authority, provided he has the sanction of the sanitary authority for so doing.

Part III.

Law as to Manufacturing and Mining Pollutions.

Prohibition as to Drainage into Streams from Manufactories.]—**4.** Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process, shall (subject as in this act mentioned) be deemed to have committed an offence against this act.

Where any such poisonous, noxious, or polluting liquid as aforesaid falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this act, or any new channel constructed in substitution thereof, and having its outfall at the same spot, for the purpose of conveying such liquid, the person causing or knowingly permitting the poisonous, noxious, or polluting liquid so to fall or flow or to be carried shall not be deemed to have committed an offence against this act if he shows to the satisfaction of the court having cognizance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream.

Prohibition as to Drainage into Stream from Mines.]—**5.** Every person who causes to fall or flow, or knowingly permits to fall or flow or to be carried into any stream any solid matter from any mine in such quantities as to prejudicially interfere with its due flow, or any poisonous, noxious, or polluting solid or liquid matter proceeding from any mine, other than water in the same condition as that in which it has been drained or raised from such mine, shall be deemed to have committed an offence against this act, unless in the case of poisonous, noxious, or polluting matter he shows to the satisfaction of the court having cognizance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting matter so falling or flowing or carried into the stream.

Restriction on Proceedings under this Part of the Act.]—**6.** Unless and until parliament otherwise provides the following enactments shall take effect, proceedings shall not be taken against any person under this part of this act save by a sanitary authority, nor shall any such proceedings be taken without the consent of the Local Government Board: provided always, that if the sanitary authority, on the

application of any person interested alleging an offence to have been committed, shall refuse to take proceedings or apply for the consent by this section provided, the person so interested may apply to the Local Government Board, and if that board on inquiry is of opinion that the sanitary authority should take proceedings, they may direct the sanitary authority accordingly, who shall thereupon commence proceedings.

The said board in giving or withholding their consent shall have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality.

The said board shall not give their consent to proceedings by the sanitary authority of any district which is the seat of any manufacturing industry, unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry.

Any person within such district as aforesaid, against whom proceedings are proposed to be taken under this part of this act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the sanitary authority to such proceedings being taken, and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken, so far as the same relate to his works or manufacturing processes. The sanitary authority shall thereupon allow such person to be heard by himself, agents, and witnesses, and after inquiry such authority shall determine, having regard to all the considerations to which the Local Government Board are by this section directed to have regard, whether such proceedings as aforesaid shall or shall not be taken; and where any such sanitary authority has taken proceedings under this act, it shall not be competent to other sanitary authorities to take proceedings under this act till the party against whom such proceedings are intended shall have failed in reasonable time to carry out the order of any competent court under this act.

Part IV.

Administration of Law.

Sanitary Authority to afford Facilities for Factories draining into Sewers.]—**7.** Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers:

Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view:

Provided also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such

facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority.

Power of Sanitary Authority to enforce Act.]—**8.** Every sanitary authority shall, subject to the restrictions in this act contained, have power to enforce the provisions of this act in relation to any stream being within or passing through or by any part of their district, and for that purpose to institute proceedings in respect of any offence against this act which causes interference with the due flow within their district of any such stream, or the pollution within their district of any such stream, against any other sanitary authority or person, whether such offence is committed within or without the district of the first-named sanitary authority.

Any expenses incurred by a sanitary authority in the execution of this act shall be payable as if they were expenses properly incurred by that authority in the execution of the Public Health Act, 1875.

Proceedings may also, subject to the restrictions in this act contained, be instituted in respect of any offence against this act by any person aggrieved by the commission of such offence.

Power of Lee Conservancy Board to enforce Act.]—**9.** The Conservancy Board, constituted under the Lee Conservancy Act, 1868, shall, within the area of their jurisdiction, have, to the exclusion of any other authority, the powers for enforcing the provisions of this act which sanitary authorities have under this act.

The said Conservancy Board may also enforce the provisions of the Lee Conservancy Act, 1868, under the head or division "Protection of Water," by application to the county court having jurisdiction in the place in which the offence is committed against those provisions, and such court may by summary order require any person to abstain from the commission of any such offence, and the provisions of this act with respect to summary orders of county courts and appeal therefrom shall apply accordingly.

Legal Proceedings. Saving Clauses. Definitions.

(1.) *Legal Proceedings.*

Offences to be restrained by Summary Order of County Court.]—**10.** The county court having jurisdiction in the place where any offence against this act is committed may by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this act may require him to perform such duty in manner in the said order specified; the court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the court seems meet. Previous to granting such order the court may, if it think fit, remit to skilled parties to report on the "best practicable and available means" and the nature and cost of the works and apparatus required, who shall in all cases take into consideration the reasonableness of the expense involved in their report.

Any person making default in complying with any requirement of an order of a county court made in pursuance of this section shall

pay to the person complaining, or such other person as the court may direct, such sum not exceeding fifty pounds a day for every day during which he is in default, as the court may order; and such penalty shall be enforced in the same manner as any debt adjudged to be due by the court; moreover, if any person so in default persists in disobeying any requirement of any such order for a period of not less than a month or such other period less than a month as may be prescribed by such order, the court may in addition to any penalty it may impose appoint any person or persons to carry into effect such order, and all expenses incurred by any such person or persons to such amount as may be allowed by the county court shall be deemed to be a debt due from the person in default to the person or persons executing such order, and may be recovered accordingly in the county court.

Appeal from County Court, and removal of Case into High Court of Justice.]—**11.** If either party in any proceedings before the county court under this act feels aggrieved by the decision of the court in point of law or on the merits, or in respect of the admission or rejection of any evidence, he may appeal from that decision to the High Court of Justice.

The appeal shall be in the form of a special case to be agreed upon by both parties or their attorneys, and, if they cannot agree, to be settled by the judge of the county court upon the application of the parties or their attorneys.

The court of appeal may draw any inferences from the facts stated in the case that a jury might draw from facts stated by witnesses.

Subject to the provisions of this section, all the enactments, rules, and orders relating to proceedings in actions in county courts, and to enforcing judgments in county courts and appeals from decisions of the county court judges, and to the conditions of such appeals, and to the power of the superior courts on such appeals, shall apply to all proceedings under this act, and to an appeal from such action, in the same manner as if such action and appeal related to a matter within the ordinary jurisdiction of the court.

Any plaint entered in a county court under this act may be removed into the High Court of Justice by leave of any judge of the said High Court, if it appears to such judge desirable in the interests of justice that such case should be tried in the first instance in the High Court of Justice and not in a county court, and on such terms as to security for and payment of costs, and such other terms (if any) as such judge may think fit.

Certificate of Inspector of Local Government Board as to best practicable Means.]—**12.** A certificate granted by an inspector of proper qualifications appointed for the purposes of this act by the Local Government Board to the effect that the means used for rendering harmless any sewage matter or poisonous, noxious, or polluting solid or liquid matter falling or flowing or carried into any stream, are the best or only practicable and available means under the circumstances of the particular case, shall in all courts and in all proceedings under this act be conclusive evidence of the fact; such certificate shall continue in force for a period to be named therein, not exceeding two years, and at the expiration of that period may be renewed for the like or any less period.

All expenses incurred in or about obtaining a certificate under this section shall be paid by the applicant for the same.

Any person aggrieved by the grant or the withholding of a certificate under this section may appeal to the Local Government Board against the decision of the inspector; and the Board may either confirm, reverse, or modify his decision, and may make such order as to the party or parties by whom the costs of the appeal are to be borne as to the said board may appear just.

Restriction on Proceedings for Offences.]—**13.** Proceedings shall not be taken under this act against any person for any offence against the provisions of Parts II. and III. of this act until the expiration of twelve months after the passing of this act; nor shall proceedings in any case be taken under this act for any offence against this act until the expiration of two months after written notice of the intention to take such proceedings has been given to the offender, nor shall proceedings under this act be taken for any offence against this act while other proceedings in relation to such offence are pending.

Orders as to Costs of Inquiries.]—**14.** The Local Government Board may make orders as to the costs incurred by them in relation to inquiries instituted by them under this act, and as to the parties by whom such costs shall be borne; and every such order and every order for the payment of costs made by the said board under section twelve of this act may be made a rule of Her Majesty's High Court of Justice.

Power of Inspectors of Local Government Board.]—**15.** Inspectors of the Local Government Board shall, for the purposes of any inquiry directed by the board under this act, have in relation to witnesses and their examination, the production of papers and accounts, and the inspection of places and matters required to be inspected, similar powers to those which the inspectors of the said board have under the Public Health Act, 1875, for the purposes of that act.

(2.) *Saving Clauses.*

Powers of Act cumulative.]—**16.** The powers given by this act shall not be deemed to prejudice or affect any other rights or powers now existing or vested in any person or persons by act of parliament, law, or custom, and such other rights or powers may be exercised in the same manner as if this act had not passed; and nothing in this act shall legalize any act or default which would, but for this act, be deemed to be a nuisance or otherwise contrary to law: provided nevertheless, that in any proceedings for enforcing against any person such rights or powers the court before which such proceedings are pending shall take into consideration any certificate granted to such person under this act.

Saving of Rights of impounding and diverting Water.]—**17.** This act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water.

Saving of certain Conservancy Acts.]—**18.** Nothing in or done under this act shall extend to interfere with, take away, abridge, or prejudicially affect any right, power, authority, jurisdiction, or privilege given by "The Thames Conservancy Acts, 1857 and 1864," or by "The Thames Navigation Act, 1866," or by "The Lee Conservancy Act, 1868," or any act or acts extending or amending the said acts or either of them, or affect any outfall or other works of

the Metropolitan Board of Works (although beyond the metropolis) executed under "The Metropolis Management Act, 1855," and the acts amending or extending the same, or take away, abridge, or prejudicially affect any right, power, authority, jurisdiction, or privilege of the Metropolitan Board of Works.

Saving of Works of certain Local Authorities.]—**19.** Where any local authority or any urban or rural sanitary authority has been empowered or required by any act of parliament to carry any sewage into the sea or any tidal waters, nothing done by such authority in pursuance of such enactment, shall be deemed to be an offence against this act.

(3.) *Definitions.*

20. In this act, if not inconsistent with the context, the following terms have the meanings hereinafter respectively assigned to them; that is to say,

"Person" includes any body of persons, whether corporate or unincorporate:

"Stream" includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board, by order published in the London Gazette. Save as aforesaid, it includes rivers, streams, canals, lakes, and watercourses, other than watercourses at the passing of this act mainly used as sewers, and emptying directly into the sea, or tidal waters which have not been determined to be streams within the meaning of this act by such order as aforesaid:

"Solid matter" shall not include particles of matter in suspension in water:

"Polluting" shall not include innocuous discoloration:

"Sanitary authority" means—

In the metropolis as defined by the Metropolis Management Act, 1855, any local authority acting in the execution of the Nuisances Removal for England Act, 1855, and the acts amending the same;

Elsewhere in England, any urban or rural sanitary authority acting in the execution of the Public Health Act, 1875.

Part V.

Application of the Act to Scotland.

Modifications of Act in Scotland.]—**21.** In the application of this act to Scotland the following provisions shall have effect:

(1.) The expression "sanitary authority" shall mean and include the local authority in any parish or burgh in Scotland, acting under the Public Health (Scotland) Act, 1867:

Note.—See sections 5 and 71 of 30 & 31 Vict. c. 101.

(2.) The expression "London Gazette" shall mean Edinburgh Gazette:

(3.) The expression "the Public Health Act, 1875," shall mean the Public Health (Scotland) Act, 1867, and any acts amending the same:

(4.) This act shall be read and construed as if for the expression "the Local Government Board," wherever it occurs therein, the expression "the Secretary of State" were substituted; and the expression "the Secretary of State" shall mean one of Her Majesty's principal Secretaries of State:

(5.) The expression "the county court" shall mean the sheriff of the county, and shall include sheriff substitute; and the expression "plaint entered in a county court" shall mean petition or complaint presented in a sheriff court:

(6.) The expression "the High Court of Justice" shall mean the Court of Session in either division of the Inner House thereof:

(7.) All the jurisdiction, powers, and authorities necessary for the purposes of this act are hereby conferred on sheriffs and their substitutes:

(8.) The Court of Session may, on the application of the Lord Advocate, on behalf of the Secretary of State, interpone their authority to any order made by the Secretary of State as to the costs incurred by him in relation to inquiries instituted by him under this act, and as to the parties by whom such costs shall be borne; and may grant decree conform thereto, upon which execution and diligence may proceed in common form:

(9.) An inspector appointed for the purposes of this act by the Secretary of State shall, for the purposes of any inquiry directed by the Secretary of State under this act, be entitled, by a summons signed by him, to require the attendance of all persons he may think fit to call before him in regard to the matters of the inquiry, and to administer oaths to, and examine upon oath, all such persons, and to require and enforce the production upon oath of all documents, accounts, or papers in anywise relating to such inquiry; and shall also have, in relation to the inspection of places and matters required to be inspected, similar powers to those which sanitary inspectors have under the Public Health (Scotland) Act, 1867.

Part VI.

Application of this Act to Ireland.]—**22.** In the application of this act to Ireland the following provisions shall have effect:

(1.) The expression "sanitary authority" shall mean any urban or rural sanitary authority acting in the execution of "The Public Health (Ireland) Act, 1874:"

Note.—See sections 2, 3, 4 and 9 of 37 & 38 Vict. c. 93.

(2.) The expression "The Public Health Act, 1875," shall mean "The Public Health (Ireland) Act, 1874:"

(3.) The expression "the Local Government Board" shall mean the Local Government Board for Ireland:

(4.) The expression "the county court" shall mean the civil bill court:

(5.) The expression "plaint entered in a county court" shall mean civil bill process:

(6.) The expression "the High Court of Justice" shall mean any of the Superior Courts of Common Law in Dublin, or any judge thereof to whom appeals may be brought from the decision of a civil bill court:

(7.) The expression "the judge of the county court" shall mean the chairman of quarter sessions and judge of the civil bill court:

(8.) The expression "the London Gazette" shall mean the Dublin Gazette:

(9.) All the jurisdiction, powers, and authorities necessary for the purposes of this act are hereby conferred upon the civil bill courts and superior courts, and the judges of the same respectively:

(10.) All penalties, when recovered by or on behalf, or at the instance of or in any proceeding instituted by any sanitary authority, or any officer of such authority, shall be paid to such sanitary authority, and by the same applied in aid of their expenses under the sanitary acts; and save as aforesaid all such penalties shall be applied in manner directed by the Fines Act (Ireland), 1851, and any act amending the same.

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"Taking the whole British Empire, the tonnage of sailing and steam vessels registered in the year 1873 was, we learn in the preface, no less than 7,294,230, the number of vessels being 36,825, with crews estimated, inclusive of masters, at 330,849; but the growth of our mercantile fleet to such gigantic proportions is scarcely attributable to any peculiar attention on the part of the Legislature to its safety and welfare, for, as Mr. Kay justly says, 'it is remarkable that in England, the greatest maritime State the world has ever seen, no proper precautions were taken before the year 1850 to protect the public from the appointment of ignorant and untrustworthy men to these important posts'—the command of vessels, 'in which property and life are committed to them under circumstances which necessarily confer almost absolute power and at the same time preclude for long periods the possibility of any supervision.' The French, he tells us, had an ordinance as early as the year 1584, requiring the master to be examined touching his experience, fitness, and capacity. But in England the indifference on this subject was more apparent than real; it arose, we believe, out of the dislike of interference with personal concerns and private enterprise which is so strongly marked in our national character, nor must we forget that some of the most glorious achievements in our nautical annals have been accomplished by men not strictly trained to the sea, and this fact, no doubt, contributed to the reluctance manifested by the Legislature to apply the principles of paternal government to the protection of our seamen; for the going and coming of hundreds of thousands over the ocean for the purposes of business or pleasure had then but lately commenced; and, moreover, probably it was feared that too much care for the welfare of our seamen would have the effect of diminishing the hardihood, self-reliance, and daring which had up to that time made them the envy of the world.

"In 1854 the Merchant Shipping Act was passed, repealing the Act of 1850. Under its provisions the Board of Trade received its present extensive authority over merchant ships and seamen, Local Marine Boards were constituted for the examination of masters and mates of foreign-going and home passenger ships, Mercantile Marine officers established for the registration of seamen, and Naval Courts for the investigation of complaints against masters, and other matters. Without doubt the result of this system of compulsory examination has been beneficial, and the master may also possess those other qualifications which cannot be subjected to examination. But it is not enough now-a-days that he should be honest, skilful, courageous, and firm; he must also, if he would steer clear of rocks other than those marked on the chart, be something of a lawyer. This, it might seem, would apply equally to all men having the conduct of important interests, and coming into contact with large numbers of men, but to no one else is so large a discretionary power granted, and the very fact that his use of it is not very severely scrutinised, only adds to the caution with which it should be exercised. And then there are many incongruities in his position. He may have a share in a ship, and yet he is but the agent of the other owners; though, if he has no share, and in a case of necessity hypothecate the ship, he also binds himself in a penalty to repay the sum borrowed. We can make no charge of redundancy or omission against our author; but if we were called upon to select any one out of the fifteen parts into which the two volumes are divided as being especially valuable, we should not hesitate to choose that numbered three, and entitled 'The Voyage.' There the master will find a succinct and compendious statement of the law respecting his duties, general and particular, with regard to the ship and its freight from the moment when, on taking command, he is bound to look to the seaworthiness of the ship, and to the delivery of her log at the final port of destination. In Part IV. his duties are considered with respect to the cargo, this being a distinct side of his duplicate character, inasmuch as he is agent of the owner of the cargo just as much as the owner of the ship.

"Next in order of position come 'Bills of Lading' and 'Stoppage in Transitu.' We confess that on first perusal we were somewhat surprised to find the subject of the delivery of goods by the master given priority over that of bills of lading; the logical sequence, however, of these matters was evidently sacrificed, and we think with advantage to the author's desire for unity in his above-mentioned chapters on 'The Voyage.' That this is so is evidenced by the fact that after his seventh chapter

THE LAW RELATING TO SHIPMASTERS AND SEAMEN.

REVIEWS OF THE WORK—*continued.*

on the latter subject he has left a blank chapter with the heading of the former and a reference *ante*. 'The power of the master to bind the owner by his personal contracts,' 'Hypothecation,' and 'The Crew,' form the remainder of the contents of the first volume, of which we should be glad to have made more mention, but it is obviously impossible to criticize in detail a work in which the bare list of cited cases occupies forty-four pages.

"The question of compulsory pilotage is full of difficulties, which are well summed up by Mr. Kay in his note to page 763:—'In the United States no ship is bound to take on board a pilot either going in or coming out of the harbour, but if a pilot offers and is ready, the ship must pay pilotage fees whether he is taken on board or not.' Ships do not exist for pilots, but pilots for ships, so that this option in the use of the pilot, and obligation in the matter of fees, appears to us to be exactly that solution of the difficulty which should not have been arrived at; and, moreover, it is open to the first objection urged by Mr. Kay against the compulsory system of pilotage, which is, that it obliges many ships which do not require pilots to pay for keeping up a staff for those who do. Seven other cogent reasons, for which we must refer the reader to the book itself, though most of them, indeed, will instantly present themselves to the minds of sailors without even an effort of memory, are noted. Section 338 of the Merchant Shipping Act provides that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of a pilot is compulsory by law. If he interferes to correct the pilot in the handling of a ship, with the peculiarities of which the latter cannot generally be acquainted, he may render himself and the owners liable in case of accident, and so a premium is offered to his indifference, proof being always required that the damage was occasioned solely by the pilot's neglect or fault, to entitle the owners to the benefit of this section. The decision in the case of the *General de Caen* well illustrates some of the difficulties surrounding the subject. She was a French ship upon the Thames, where the employment of a pilot is compulsory, and she, therefore, took on board a pilot as well as a waterman to take the wheel in consequence of none of the crew being able to understand English. The waterman put her helm up instead of luffing as the pilot ordered, whereby a barge was run into and damaged. The French owner claimed under Section 389 of 17 and 18 Vic., c. 104. It was held that the pilot was not answerable for the waterman's incapacity or fault; that the pilot gave the proper orders; that it would be contrary to justice to say that the pilot was solely liable for the collision; that the waterman was the servant of the owners, and that they, therefore, were liable. The real question at issue seems to have been whether the English pilot ought to have spoken French or the French ship to have had on board a helmsman who could understand English, and the corollary, when the decision had been given in favour of the former, that the Government officer, when engaging the helmsman, was acting merely as the agent of the French owners.

"The master has a large authority over the passengers on board his ship, equal in cases of great emergency to that which he possesses over the crew. Lord Ellenborough has decided—it will comfort intending travellers by sea to hear, especially if this country should again become involved in a war with a nation which, unlike Ashanti and Abyssinia, possesses a navy—that a master exceeded the limits of his authority in placing a passenger who refused to fight on the poop, though willing to do so elsewhere, in irons all night on that particular part of the ship to which he had objected.

"It is for the interest and security of commerce and navigation that it should be generally known that the amount of service rendered is not the only or proper test by which the amount of salvage reward is estimated, but the Court will grant to successful salvage an amount which much exceeds a mere remuneration for work and labour in order that the salvors should be encouraged to run the risk of such enterprises and go promptly to the succour of lives or vessels in distress, though they must take care that they do not by their subsequent conduct forfeit their claims to such reward.

"That it should be necessary to entice men by money to save the lives of their fellow-creatures is not a matter for congratulation; still it was no doubt to some extent anomalous that formerly, whilst large proportionate sums were paid for the recovery of property, for the rescuing of human life unless associated with property, no salvage reward could be recovered. But by Section 458 of the Merchant Shipping Act the preservation of human life is made a distinct ground of salvage reward, with priority over all other claims for salvage where the property is insufficient, and if the value of the property is not adequate to the payment of the claim for life-salvage alone, the Board of Trade is empowered to award to the salvors such sum as it deems fit, either in part or whole satisfaction.

"There is, perhaps, no species of service liable to a greater variety of circumstances under which it can be performed than salvage. Consequently we cannot be surprised that questions of this kind frequently come before the Courts, and that the number of decided cases is very large; but Mr. Kay has succeeded in an admirable way in extracting the main points connected with each case, and in presenting them in as few words as possible. Of course fuller information may sometimes be required, but the reader will then know where to find it.

"In conclusion, we can heartily congratulate Mr. Kay upon his success. His work everywhere bears traces of a solicitude to avoid anything like an obtrusive display of his own powers at the expense of the solid matter pertaining to the subject, whilst those observations which he permits himself to make are always of importance and to the point; and in face of the legislation which must soon take place, whether beneficially or otherwise, we think his book, looking at it in other than a professional light, could scarcely have made its appearance at a more opportune moment."

THE LAW RELATING TO SHIPMASTERS AND SEAMEN.

REVIEWS OF THE WORK—*continued.*

From the LIVERPOOL JOURNAL OF COMMERCE.

"'The Law relating to Shipmasters and Seamen—such is the title of a voluminous and important work which has just been issued by Messrs. Stevens and Haynes, the eminent law publishers, of London. The author is Mr. Joseph Kay, Q.C., and while treating generally of the law relating to shipmasters and seamen, he refers more particularly to their appointment, duties, rights, liabilities, and remedies. It consists of two large volumes, the text occupying nearly twelve hundred pages, and the value of the work being enhanced by copious appendices and index, and by the quotation of a mass of authorities. . . . In a short note of dedication Mr. Kay observes that he had been engaged on it for the last ten years. The result of this assiduity and care has been the production of a standard work on the subject to which it relates. . . . As to the value of the work itself, it can hardly be properly treated of in limited space. It is divided into fifteen parts which have reference to the public authorities having control in shipping matters, the appointment, certificates, &c., of the master, his duties on the voyage, his duties and powers with respect to the cargo, bills of lading, stoppage *in transitu*, personal contracts binding the shipowner, hypothecation, the crew, pilots, passengers, collisions, salvage, the master's remedies and his liabilities. From this range of topics it will be seen that *the work must be an invaluable one to the shipowner, shipmaster, or consul* at a foreign port. The language is clear and simple, while the legal standing of the author is a sufficient guarantee that he writes with the requisite authority, and that the cases quoted by him are decisive as regards the points on which he touches. The work is excellently 'got up,' and its appearance is quite consistent with its standard character as a treatise on the law relating to shipmasters and seamen."

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"In the abstracts of law cases the decisions of the Supreme Court of the United States are referred to very frequently, as precedents in maritime law, and we note, under the head of 'The Master's Duties to the Passengers, irrespective of the statutes,' that the decisions of our courts are oftentimes mentioned."

From the LAW JOURNAL.

"The author tells us that for ten years he has been engaged upon it. . . . Two large volumes containing 1181 pages of text, 81 pages of appendices, 98 pages of index, and upwards of 1800 cited cases, attest the magnitude of the work designed and accomplished by Mr. Kay.

"The total merchant shipping of the United Kingdom consisted in 1873 of 21,581 vessels of 5,748,097 tons, manned by 202,239 seamen; and the total merchant shipping of the whole British Empire consisted of 36,825 vessels of 7,294,230 tons, manned by 330,849 seamen. Mr. Kay justly observes upon these figures: 'For such a vast mercantile fleet, one would have thought that every thing would have been done to render the law affecting such a vital part of our Imperial Empire as clear, as simple, and as easily to be inquired into and understood, as was possible.' Unfortunately, everyone knows that the exact contrary is the case, and that, confused as is the condition of almost every department of English jurisprudence, no one department is in a more hopeless and chaotic state than that which embraces the merchant-shipping laws and regulations. Mr. Kay tells us that these laws are to be discovered by researches into 'thirty-five statutes, seventeen orders in council, great numbers of instructions of the Board of Trade; great numbers of bye-laws and regulations of the Trinity House and of the different ports; and great numbers of cases decided on numberless points in the various courts.' Now, in default of a code setting forth in a clear and comprehensive manner the law contained in this *rudis indigestaque moles*, and until such a code is formed, the only anchor of salvation to mariners and lawyers alike is some one or more treatises on which reliance can be placed. Mr. Kay says that he has 'endeavoured to compile a guide and reference book for masters, ship agents, and consuls.' He has been so modest as not to add lawyers to the list of his pupils; but *his work will, we think, be welcomed by lawyers who have to do with shipping transactions, almost as cordially as it undoubtedly will be by those who occupy their business in the great waters.*

THE LAW RELATING TO SHIPMASTERS AND SEAMEN.

REVIEWS OF THE WORK—*continued.*

"We must not be understood as intimating that all and every part of this work has a legal interest. Much of it concerns only the practical life of the master and crew. But there are many chapters to which members of both branches of the profession, and especially solicitors residing at the great ports, will turn with gratitude to the author in moments of difficulty. For example, Part IV. is on the master's duties and powers with respect to the cargo, and deals with hypothecation, freight, lien, and delivery. Part V. contains an exhaustive treatise on bills of lading, with special reference to the effect of the transfer of the bill of lading upon the property named in the bill. Part VI. explains fully the right of stoppage *in transitu*, and Part VII. teaches when the master may bind the shipowner by the master's personal acts. So again Part XIII. deals with the principles of salvage, and the nature and reward of salvage services. The great bulk of the book, however, is devoted to the consideration of the rights, duties, and obligations of the master and of the crew. After explaining the powers and prerogatives of the several public authorities to whose control mariners are subject, the author proceeds to the appointment, certificates, &c. of the master, his general duties and authorities on the voyage towards the shipowner, the charterer, the underwriter, and the harbour master. Next are considered the duties and powers of the master with respect to the cargo, his power to bind the shipowner by contracts either for necessary supplies or for absolute sale of the ship, and his power of hypothecation. Having so considered the position of the master, the author next deals with the crew, their engagement, wages, legal rights to wages, and modes of recovery; their discipline, and the legislation for their protection in life, limb, and pocket. Pilots and pilotage are then considered at great length; and then we have a survey of the rights and liabilities of passengers, and the statutable provisions for their protection. Collisions, salvage, the master's personal remedies and liabilities, complete the list of subjects. The appendices contain an immense variety of forms, tables, scales, &c., embracing fees, medicines, boats, protests, bottomry, and *respondentia* bonds, orders in council, instructions to emigration officers, lights, bye-laws as to pilots, remuneration of receivers, and other matters and things too numerous for detail.

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From the MANCHESTER EXAMINER.

"In a brief notice no idea could be given of the importance, or even the extent, of the details referred to in Mr. Kay's book, and a catalogue of the contents would constitute a small pamphlet. There are also in the course of the treatise interesting historical references, and the duties and responsibilities of passengers are not overlooked. Speaking generally of the law of shipping, as defined and described in the book before us, we may say that the seaman has a Magna Charta of his own. The rights of the owner, of the ship's officers, and of the sailors are all clearly recognised on the statute book, and the penalty for the infringement is in every case specified. We read of the precautions for the safety of life and property exacted by the authorities, and of the conditions which must be fulfilled before a vessel is pronounced seaworthy; yet we learn with amazement that before 1850 no proper precautions were taken in England to protect the public from the appointment of ignorant and untrustworthy men as masters of ships. In illustration of the various branches of his subject Mr. Kay refers to more than a thousand cases. The appendices also contain a considerable amount of valuable information, and the index is so complete that it indirectly serves the additional purpose of a glossary. In his preface Mr. Kay modestly hopes that his book 'may prove to be a useful book of reference for intelligent masters and for ship agents and consuls in foreign ports on matters relating to shipmasters and seamen.' That it will prove useful to them we have no doubt whatever, and that it will be gratefully accepted as a boon by many others we are equally sure. Directly or indirectly, it cannot but prove an important work of reference to all who are engaged in the shipping trade, and Mr. Kay deserves the thanks of the commercial as well as of the shipping community for having so successfully carried out his arduous task."

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