THE LAW OF CONNECTICUT IN REGARD TO THE POLLUTION OF WATERS

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I.

INTRODUCTION.

The law does not lead but rather follows the progress or at least the changes of the human race. Precedents are not established nor statutes enacted to meet a condition until that condition presents itself. No attempt is made to remedy an evil until the evil is known to exist and its ill effects have been experienced.

Not until more than half of the nineteenth century had passed did the legislature of Connecticut begin to enact statutes in regard to the pollution of waters and it was not until about the same time that cases involving this subject began to be brought to our Supreme Court. The subject does not appear to be mentioned in an edition of Swift's Digest published in 1849. The reason for this is evident. It was not until that time that the cities of this state began to construct sewers upon an extensive plan, nor was it until then that the germ theory of diseases was announced and came to be widely accepted — moreover, it was not until that time that the soils of the state began to show the need of artificial fertilization and a more scientific treatment then they had heretofore received.

It is true that long before that period many mills had been established in this state and had formed a practice of casting their wastes into the waters of the streams on which they were located. But the manufacturing enterprises of those days were small in comparison with those that now exist and the evils resulting from the disposal of their wastes, not being great, were endured with patience by riparian owners located on streams below the mills of the manufacturers.

But because no statutes or decisions in regard to the pollution of waters bear a date earlier than 1856 it must not be supposed that prior to that date the law had no principles to apply when cases involving the subject should arise. The fundamental principles of justice and the common law are ancient in their origin and are capable of furnishing rules to govern all situations and conditions that ever have arisen or ever will arise in human society.

It had long been established that while the owner of land has a right to the reasonable use of the water of a stream that passes through his land, he can not deprive another proprietor located below him on the same stream of an equal enjoyment of its benefits. "A right to a stream of water," said Chancellor Kent, "is as sacred as the right to the soil over which it flows. It is a part of the freehold." Gardner v. Newburgh, 2 Johns Ch. 162 at 166.

No less clear is the common law in regard to the creation or maintenance of a nuisance. No man may so conduct himself on his own premises as to interfere with the right of any other man to the quiet enjoyment of his premises. In fact the common law is but the expansion and application to social conditions of the great fundamental principle of justice as formulated by Herbert Spencer: "Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man." Principles of Ethics, Vol. II., Part IV., Chap. VI.

In the matter of preventing the pollution of waters, Connecticut has ever taken an advanced position. Her statutes have gone farther than the legislation of most states and the courts of other states have sought and found in the opinions of her Supreme Court the principles and precedents for solving the questions submitted to them. Unlike Pennsylvania and Massachusetts the Supreme Court of this state did not, when cases of the class we are considering first began to come before it, hamper itself by some unfortunate and perhaps ill-considered decision, which it has ever since had to evade while keeping up the pretense of following. Indeed we can almost feel that without the aid of legislation our courts would have worked out a solution of all the problems to which the pollution of streams has given rise in a manner that would have been entirely satisfactory to the people of this commonwealth.

II.

SURFACE WATER.

"Surface water," said Lord Tenterden, "the law very largely regards as a common enemy, which every proprietor may fight and get rid of as best he may." (Dillon on Municipal Corporations, 5th Ed. Sect. 1732.) But although a proprietor is not liable if the slope of his land is such that surface water pours from his premises onto the premises of a neighbor gullying out the latter's lawn and washing sand thereon, tearing up his shrubs and washing away the soil from the roots of his trees (Stein v. Coleman, 73 Conn. 524, 1901), yet one may not be relieved of the rain water falling upon his roof by precipitating it through a spout upon the land of an adjoining proprietor. Watson v. New Milford, 72 Conn. 561 (1900). But an injunction will lie to prevent the obstruction on one's own land of a ditch that has for many years drained the land of another, although the ditch is dry at certain seasons of the year. Robertson v. Lewie, 77 Conn. 345 (1904).

If filthy and noxious substances are deposited on a man's land and by means of rain are washed and carried along the surface of the ground without soaking into it into the well of a neighbor or if they are not carried literally on the very surface but soak into the ground and are thence diffused laterally towards a neighbor's land and into his well, the one on whose land the substances were deposited is liable. But he is not liable if the water after falling on the substances sinks into the ground and becomes commingled with subterraneous streams and currents and is by such streams and currents alone transmitted to the well. Brown and Brothers v. Illius, 25 Conn. 583 (1857) and 27 Conn. 84 (1858). The reason for this distinction is not only that a proprietor can not know of the existence of underground streams, but that principle of English law which gives to the owner of the soil all that lies beneath its surface. This is a principle which finds no place in Continental law and one that those nations which accept the English law may yet find it necessary to modify.

Of course one may not wilfully pollute the water supply of another. "Every person who shall put anything into a well, spring, fountain, cistern, or other place from which water is

procured for drinking or other purposes, with the intent to injure the quality of said water, shall be fined not more than five hundred dollars, or imprisoned not more than six months." General Statutes, Sect. 2595.

III.

STREAMS AND NON-NAVIGABLE RIVERS.

Waters are sometimes classified as non-navigable waters and navigable waters. This distinction is important. For a riparian owner's rights extend to the center of a non-navigable stream, but only to the high water mark of a navigable river or of tidal waters.* Mather v. Chapman, 40 Conn. 382 at 395 (1873). Welles v. Bailey, 55 Conn. 292 at 316 (1887).

Most of the cases that have been decided in this state have to deal with non-navigable waters. This latter class of cases is quite numerous and from them we may deduce the principles which follow.

The right of a landowner to have the water of a stream covering his land flow in its accustomed manner, exists in connection with the rights of other landowners over whose land the stream flows, and the right is not an easement or appurtenance; it is inseparably annexed to the soil. A taking of that right is to that extent a taking of his property in the land. The discharge into such a stream of foul and noxious substances in such manner that the same are carried by it over the land of another and there deposited, producing noxious and unhealthy gases, is an actionable wrong, and the nuisance thus produced is a public nuisance. It is an invasion of a riparian owner's rights to divert the water from a stream, although the water is again returned to the stream in the form of sewage. Morgan

*NOTE: — It is not the purpose of the author in this paper to discuss grants or laws of a local and exceptional nature, but one exception may be noted. According to the common law of England navigable waters were those in which the tide ebbed and flowed. In the case of the great rivers of America this definition could not well be accepted and has been modified in many states. Connecticut, however, is not among the number. The Connecticut River above the Enfield Falls is not affected by the tides and it has been held that, while the river above the falls is a common highway, the riparian proprietors have the exclusive right of fishery opposite their lands to the middle of the river. Adams v. Pease, 2 Conn. 481 (1818). But it is not certain that the Supreme Court would at the present day sustain the principle of the above case. See Welles v. Bailey, 55 Conn., 292 at 315 (1887).

v. Danbury, 67 Conn. 484 (1896), Nolan v. New Britain, 69 Conn. 668 (1897), Fisk v. Hartford, 70 Conn. 720 (1898), Waterbury v. Platt Bros. & Co., 76 Conn. 435 (1904), Platt Bros. & Co. v. Waterbury, 80 Conn. 179 (1907).

The right of the owner of a pond to take, use and dispose of ice from the pond in its natural condition is the property of the owner also, and this property may not be destroyed or injured by a riparian owner higher up on the stream putting sawdust and pomace into the pond. Lawton v. Herrick, 83 Conn. 417 (1910).

In addition to the protection afforded by the common law the legislature has from time to time passed statutes to prevent the pollution of waters. Most of these are designed to protect the public generally rather than individual proprietors and will be referred to later, but one statute may be quoted at this point. "Every person who shall put or leave a dead animal or carcass in a pond, spring, or reservoir, the water of which is conveyed to any building, or who shall wilfully put and leave in any of the waters of this state a dead animal, shall be fined not more than fifty dollars, or imprisoned not more than thirty days." General Statutes, Sect. 2594.

Whoever by his act or negligence causes waters to be polluted is liable to the party sustaining the injury resulting thereby. And in these respects a municipality has no greater immunities than any private landowner. Watson v. New Milford, 72 Conn. 561 (1900). As the pollution of waters is an act of tort the party causing the injury is more strictly liable than he would be for the breach of a contract. Lawton v. Herrick, 83 Conn. 417 (1910).

Every day's continuance of the acts causing such injury renders the defendant liable to a suit for injuries so caused, for each day such unlawful act is repeated the plaintiff suffers a fresh invasion of his legal rights. Platt Bros. & Co., v. Waterbury, 80 Conn. 179 (1907).

The defendant may not set up that he has exercised the privilege of polluting a stream for many years. A riparian proprietor cannot acquire by any prescription a right to maintain a nuisance. The claim of such a right in another's land is unnatural and unreasonable, and is not sanctioned by law. It is also true that no length of time can legitimate, or enable

a party to prescribe for, a public nuisance. Nolan v. New Britain, 69 Conn. 668 (1897), Platt Bros. & Co., v. Waterbury, 72 Conn. 531 (1900), Lawton v. Herrick, 83 Conn. 417 (1910).

Where the waters in which one has a right are polluted the party whose right has been invaded is entitled to nominal damages, although he fails to prove that he has suffered any specific damages. That the water remains potable by cattle and inhabitable by fish is unimportant except in mitigation of damages. That the plaintiff suffers no personal inconvenience from the nuisance, because he does not reside in the vicinity, is immaterial. He is entitled to nominal damages at least, for the offensive condition of things upon his land, even if he never visits it, and although its rental and selling value remains unimpaired. But he has no cause of action either for damages or an injunction for acts to which he has expressly consented. Watson v. New Milford, 72 Conn. 561 (1900), Beckerle v. Danbury, 80 Conn. 124 (1907), Platt Bros. & Co. v. Waterbury, 80 Conn. 179 (1907).

If different persons by several acts foul the same stream, each is responsible for the results of his own wrong, and may be restrained from doing the acts for which he is chargeable, and the fact that the plaintiff has himself fouled the brook to the injury of landowners below him, does not operate as a license to landowners above him to use it in a similar way. Watson v. New Milford, 72 Conn. 561 (1900), Lawton v. Herrick, 83 Conn. 417 (1910).

Where a man constructs a covered channel that is insufficient in capacity to allow the natural flow of the stream, he is liable if, because of that incapacity, the stream overflows its banks and runs upon the land of another, but he is not liable for damage done by the increased flow of the stream because of sewage discharged into it by a city after the channel was constructed. He and the city are not joint tort-feasors. Sellick v. Hall, 47 Conn. 260 (1879).

The owner of a pond may draw off the water so as to expose the bottom of the pond, although a dweller nearby may be subjected to offensive stenches which are a nuisance to him and injuriously affect the value of his land. DeWitt v. Bissell, 77 Conn. 530 (1905). But the owner of a pond may not discharge into the stream and a pond below his dam, by means

of a blow-off pipe at the bottom of his dam, foul and stagnant water which has accumulated in the bottom of his pond. King v. Fountain Water Co., 75 Conn. 621 (1903).

We have seen that no individual may lawfully pollute waters in which another has rights and that a municipal corporation is equally liable as an individual. For in law a corporation, whether municipal, eleemosynary, or private, is treated as a single individual. If a municipal corporation, in the absence of a legal right so to do, causes sewage to pollute a watercourse, to the use of which a lower owner through whose premises the watercourse flows is entitled, it is guilty of a nuisance for which damages may be recovered. A private action is maintainable for a public nuisance, by one who suffers therefrom some particular loss or damage beyond that suffered by him in common with all others affected by the nuisance. Nolan v. New Britain, 69 Conn. 668 (1897).

But as our cities and towns have grown the legislature has by special acts given to them the right to discharge their sewage into certain rivers and streams flowing through or past them. Whether the granting of such rights was the policy of wisdom we will consider later. But the granting of such a right does not give the city or town the further right to pollute the stream without paying damages to him whose rights are injuriously affected thereby. For even if it be conceded that the disposal of sewage is a governmental duty imposed upon a city as a mere agent of government, the city is none the less liable to one whose rights are invaded. Kellogg v. New Britain, 62 Conn. 232 (1892) Nolan v. New Britain, 69 Conn. 668 (1897), Platt Bros. & Co. v. Waterbury, 72 Conn. 531 (1900), Platt Bros. & Co. v. Waterbury, 80 Conn. 179 (1907).

The taking of a landowner's right to have the waters in a stream flowing through his land pure and unpolluted, is a direct appropriation of well recognized property rights within the guaranty of the constitution. Platt Bros. & Co. v. Waterbury, 72 Conn. 531 at 550 (1900). "The property of no person shall be taken for public use, without just compensation therefor." Constitution of Connecticut, Article I., Sect. 11. This is important for it was once held in Pennsylvania in a case (Sanderson v. Penn. Coal Co., 113 Pa. St. 126) in which a riparian owner brought action against a mining company for pumping