

REVIEWS

RESTATEMENT OF THE LAW OF TORTS, Volume IV, Division 10, Chapter 41,
As Adopted by the American Law Institute. St. Paul: American Law
Institute, Publishers. 1939.

HERE in these late sections (Division Ten, Volume Four) of the *Restatement of Torts*, the American Law Institute's most recent effort to promote "certainty and clarity" and so to avoid either a confused "common law system" or "rigid legislative codes,"¹ are tucked away certain chapters on what "property" teachers have been accustomed to call "natural rights." Of these, Chapter 41 deals with Invasions of Interests in the Private Use of Waters ("Riparian Rights"), Chapter 40 with Invasions of Interests in the Private Use of Land (Private Nuisance) and Chapter 39 with Invasions of Interests in the Support of Land.

The query rises: why has the Institute removed all of these important problems from the domain of "property" and transplanted them in "tort"? Motion for removal came, the Preface tells us,² from a "Property group" (composed of distinguished "property" teachers and headed by Dean Fraser) to which these problems—designated as "Natural Rights in Land"—had been assigned. "After working for a year," this group recommended that what had been "entrusted to them should be approached and restated not as a part of the Law of Property, but as part of the Law of Torts, that is as limitations on the use of land which are imposed by law on the possessor because such uses interfere with the reasonable use of the possessors of neighboring land." Some expansion of this notion is found in a subsequent scope note.³ "Riparian Rights," this note states, "are dealt with in the Restatement of this Subject, and in tort terminology, rather than in the Restatement of Property because, *fundamentally* and *analytically*, they constitute a field of tort liability, and also because they are inseparably tied up with the subject matter of private nuisance. . . ." ⁴ *Fundamentally* and *analytically*? Whatever these words may mean, the basic preconception which pervades these chapters is that tort rationales are the best available controls for the important social

1. Preface, x. Note the curious limitation of possibilities here: the Institute's proposed *clear* "common law," our existing *confused* "common law," and "rigid legislative codes."

2. *Id.* at vii.

3. P. 340. More explicit still is RESTATEMENT, TORTS (Proposed Final Draft No. 5, 1939) note to § 12. Emphasis on "property rights" has hindered the tort analysis of surface waters problems. "As a result, the cases contain very little of analysis of liability in terms of tortious conduct, intent, negligence, and other tort concepts which have received intensive scrutiny and development in the last fifty years." Much difficulty has been caused, it is alleged, by courts' confused and indiscriminate use of the word "right."

4. [Italics supplied]. The inseparable "tie up" with "private nuisance" (c. 40) is not persuasive. Even the latter topic could have been more fruitfully treated in another context, that of "land planning."

problems hidden behind "natural rights."⁵ What, in terms of the scope and policy perspective of the restatement materials, are the consequences of this preconception? For appraisal let us examine in some detail Chapter 41 on Riparian Rights.

The most obvious consequence of the *tort* distillation is the amazing amount of omission which it requires. "This chapter is restricted," the first scope note informs us,⁶ "to the private use of waters as distinguished from the public use thereof for navigation, fishing and other public purposes, and therefore does not deal with invasions of interests in the public use of public watercourses or lakes, or with conflicts between public and private uses." Among the unspecified "other public purposes" could have been listed the supply of water for city use, public power plant and flood control works, and public irrigation and soil conservation projects.⁷ Nor is this all. In the next paragraph we learn that it is "not within the scope of the Restatement of this Subject to state the rules governing special rights and privileges created by way of grant or other consent, prescription, or eminent domain."⁸ All "special legal relations between the persons involved, such as easements, profits, licenses and the like" are under the *tort* taboo. Finally, the doctrine of "prior appropriation," despite its wide currency in a variety of guises,⁹ gets summary dismissal: "In view of the widespread tendency in most Western States today to establish new water codes and to bring all controversies over water rights under the jurisdiction of special administrative tribunals, no attempt has been made in the Restatement of this Subject to deal with the law of Prior Appropriation."¹⁰ So much for "this Subject's" excision of problems, doctrines and institutions. What remains?

5. Assignment of the subject of "natural rights" in "property" could have been construed as an opportunity for comprehensive treatment of the whole problem of the use and conservation of water resources. If it was not so construed, our criticism is directed at both the "construction" and the "shaping" of the assignment.

6. Pp. 315, 316.

7. Many of the uses here listed as "omitted" get frequent, if scattered and impressionistic, mention in the chapter. Bold as the Institute is in blackletter definition, it nowhere comes to grips with its "public use" and "private use." Occasional passages suggest that a use is public where people or things move upon the water and not where water is extracted for use elsewhere; but other passages foreclose this inference. Presumably the Institute thus achieves the strategic position of being able to assert, when an "omitted" use is mentioned, that such a use is public or private as its rules are applicable or not. The fact is of course that "public use" and "private use" are polar terms describing a continuum of uses. The physical unities of a drainage basin make simple dichotomy futile.

8. P. 316. Cross reference is made to "Restatement of Property—Division, Servitudes." If all of the omitted problems are eventually somewhere "restated," an intricate system of cross references might conceivably provide a more comprehensive picture than that here proffered. But at what cost? Physical, utilization and institutional unities must be subsumed—and perhaps lost—under the artificial unities of the doctrinal structure.

9. Compare *In re Pigeon River Lumber Co.*, 12 P.U.R. (N.S.) 452 (1935) (licensing under Federal Power Act); *Bean v. Central Me. Power Co.*, 133 Me. 9, 173 Atl. 493 (1934) (state Mill Act); *Ickes v. Fox*, 300 U. S. 82 (1937) (federal reclamation project).

10. P. 341.

Elaborate definitions of commonplace concepts, distinctions of a questionable difference and repetitions of a doctrine of "reasonable user"—such is the sum. Building about the traditional defiance of the hydrologic cycle, the blackletter begins by defining, for eighteen pages,¹¹ "watercourses," "subterranean waters," and "surface waters" and such auxiliary concepts as "lake," "riparian land," "riparian proprietor," "use of water" and "harm." Most basic of the distinctions which we are offered—in justification of a separate chapter on interference with the use of water—is between invasions, through the instrumentality of water, of interests in the use of *land* and of interests in the use of *water*: water and land have peculiar physical inter-relations and water unlike land and air is communal and scarce.¹² Other distinctions, emphasized by blackletter and in separate sections, are between invasions involving and not involving competing *use* of the water¹³ and between intentional and unintentional harms.¹⁴ But if, with patience, we work on down through the serried ranks of blackletter, comment and illustration we always—or almost always—find that none of these definitions and none of these distinctions makes much difference anyhow; in the end whether we are dealing with watercourses,¹⁵ subterranean waters¹⁶ or surface waters,¹⁷ whether the harm is intentional or unintentional,¹⁸ whether the invasion is of an interest in land or an interest in water¹⁹ or by a competing use of a non-competing use,²⁰ we always get back to "reasonableness" or "reasonable use."²¹ For a use which causes substantial harm to another riparian proprietor to be reasonable, its utility must, we are told, outweigh the gravity of its harm.²² *Utility and gravity?* For weighing these imponderables we are given a table of factors ("social value," "suitability of use," "burden of avoiding harm," "extent of harm") substantially similar to one expounded at greater length in the previous chapter on non-trespassory interference with the use of land.²³ One additional factor only appears here. In determining the "utility" or "the gravity of the harm" of a use, in controversies between riparians, the classification of the questioned use as riparian or non-riparian is made "important."²⁴ By this oblique, very oblique, attack upon the concept of "ripa-

11. Pp. 317-336.

12. Pp. 314, 315.

13. § 849.

14. § 850.

15. § 851.

16. §§ 858-863, with cross references.

17. § 864, with cross references.

18. § 850 at 353. The problem of unintentional harm is stated as "fundamentally" one of "unreasonableness," to be determined "through application of the concepts of negligence, recklessness, and ultrahazardousness." The latter concepts require a cross reference to the whole of Volume II and to a few sections of Volume III of the *Restatement of Torts*.

19. C. 40, §§ 822-840.

20. § 849 with cross reference to c. 40, §§ 822-840.

21. "Reasonable use" is preferred to "natural flow" because, though the latter is "relatively more definite and certain," the former is more utilitarian (P. 344).

22. § 852.

23. §§ 853, 854. Cf. c. 40, §§ 827, 828.

24. §§ 853, 854, 855.

riar," sale of water to non-riparians or diversion outside the watershed could conceivably be legal.²⁵ But note just how oblique—and here is our only major recession from an all embracing "reasonable use"—this attack on riparian is. The non-riparian claimant—that is, a claimant who neither "owns" nor "possesses" a "parcel," not even a few inches of bed or bank—without "special right" is given no protection whatsoever in his use of the water against riparians making use of the water.²⁶ He is not "within the reason of the rule which protects the interests of riparian proprietors in the use of water."²⁷ Utilitarianism, communalty and scarcity all succumb at last to the peculiar physical interrelations of land and water.²⁸

It is not our purpose to belittle the substantial achievement of Dean Fraser and his advisers in getting the enormous prestige of the Institute back of doctrines of "reasonable use," even as circumscribed by "riparian." So much, so good; but it is not enough. So flexible a doctrine as "reasonable use" can be made to serve the purpose of turning a court into an administrative body for determining what is fair and politic under all the circumstances of a particular dispute between individual litigants. Unfortunately, however, neither this doctrine nor any of its competitors can give a court the requisite staff, training, experience and powers to carry out the affirmative, multi-purpose programs which the public interest and the physical, engineering and utilization unities of a drainage basin require.²⁹ Floods, drouth and soil erosion make even the headlines in the daily newspapers scream not for "tort" limitations on free enterprise but for planned, collective control.³⁰ Going, if not gone—save in the pages of the A.L.I.—is the easy dichotomy of "private" versus "public" uses of water and with it the myopic assumption that the public interest can best be identified and secured in the private law suit. New ideas, attitudes, techniques and institutions—all beyond the scope and perspective of the Restatement—are emerging to make vital this notion of the public interest. Recognition of the interrelation of all forms of the use of water,³¹ combined with a clear value-judgment that the benefits of

25. § 855, Comment a.

26. § 856.

27. *Id.* at 380.

28. Riparian land is defined somewhat liberally as "a parcel of land which includes a part of the bed of the watercourse or lake or which borders upon a public watercourse or lake, the bed of which is in public ownership." (§ 843). Riparian uses "are those made on or in connection with the use of the riparian land." (§ 855, Comment a). What is lacking is exploration of the "policy" alleged to have "crystallized" in these peculiar physical interrelations.

29. This correlation of physical, engineering and utilization unities is borrowed from COOKE, *Physical and Functional Relationships* in UPSTREAM ENGINEERING CONFERENCE, HEADWATERS CONTROL AND USE (1936). Mr. Cooke's exposition of the "unities" is most persuasive.

With the "scenic" tour of the judge in *McCarthy v. Bunker Hill & Sullivan Mining & Coal Co.*, 147 Fed. 981 (C. C. D. Idaho 1906) contrast the administrative control proposed in NAT. RESOURCES COMM., WATER POLLUTION IN THE UNITED STATES (1939).

30. For excellent popular exposition of this demand and the reasons behind it, see White, *We're Moving the Rain*, SATURDAY EVENING POST, April 27, 1940, p. 18.

31. UPSTREAM ENGINEERING CONFERENCE, HEADWATERS CONTROL AND USE (1936); NAT. RESOURCES COMM., DRAINAGE BASIN PROBLEMS AND PROGRAMS (Rev. ed. 1937);

such use should reach the majority of consumers,³² invigorates the regional planning of TVA,³³ of the Columbia and other River Basins,³⁴ and underlies the Report of the Mississippi Valley Committee,³⁵ the administration of western codes³⁶ and the factual research of the National Resources Committee. The problems created by conflicting municipal, power and agricultural claims on the use of water,³⁷ the problems created by floods and the measures taken for their control,³⁸ and the problems created by erosion³⁹ and pollution⁴⁰ have long since broken the bounds of the Restatement's

Fly, The Role of the Federal Government in the Conservation and Utilization of Water Resources (1938) 86 U. OF PA. L. REV. 274; NAT. RESOURCES COMM., WATER PLANNING (1938); NAT. RESOURCES COMM., DEFICIENCIES IN BASIC HYDROLOGIC DATA (1936).

32. Lasky, *From Prior Appropriation to Economic Distribution of Water by the State* (1929) 1 ROCKY MT. L. REV. 161; LAMPEN, ECONOMIC AND SOCIAL ASPECTS OF FEDERAL RECLAMATION (1930); ANNUAL REP., TVA (1939).

33. HODGE, THE TENNESSEE VALLEY AUTHORITY (1938); ANNUAL REP. TVA (1939); *Report of Joint Committee Investigating the Tennessee Valley Authority*, SEN. DOC. NO. 56, 76th Cong., 1st Sess. (1939); *Fly, op. cit. supra* note 31.

34. NAT. RESOURCES COMM., REGIONAL PLANNING, PT. I, THE PACIFIC NORTHWEST (1936); NAT. RESOURCES COMM., DRAINAGE BASIN PROBLEMS AND PROGRAMS (Rev. ed. 1937).

35. REP. MISSISSIPPI VALLEY COMM. OF PWA (1934).

36. Lasky, *op. cit. supra* note 32; Wiel, *Fifty Years of Water Law* (1936) 50 HARV. L. REV. 252; REP. ON STATE WATER PLAN, CAL. DEP'T OF PUBLIC WORKS (1930); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1935).

37. An illustrative group of controversies, from California, can be found in *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 252 Pac. 607 (1926), *cert. denied*, 275 U. S. 486 (1927); *Peabody v. Vallejo*, 2 Cal. (2d) 351, 40 P. (2d) 486 (1935); *Meridian v. San Francisco*, 13 Cal. (2d) 424, 98 P. (2d) 572 (1939); *cf. United States v. Central Stockholders' Corp.*, 52 F. (2d) 322 (C. C. A. 9th, 1931); *San Joaquin & Kings River C. & I. Co. v. County of Stanislaus*, 233 U. S. 454 (1914); *Alabama Power Co. v. McNinch*, 94 F. (2d) 601 (App. D. C. 1938).

38. Brief formulation of the problems will be found in REP. MISSISSIPPI VALLEY COMM. OF PWA (1934) 27-29; NAT. RESOURCES COMM., DRAINAGE BASIN PROBLEMS AND PROGRAMS (Rev. ed. 1937) 53-54. For recent litigation see *United States v. Sponenbarger*, 308 U. S. 256 (1939); *Danforth v. United States*, 308 U. S. 271 (1939); *Cheesebro v. Los Angeles Flood Control Dist.*, 306 U. S. 459 (1939); *Franklin v. United States*, 101 F. (2d) 459 (1939), *aff'd on other grounds*, 308 U. S. 516 (1939); *Fly, op. cit. supra* note 31, at 281-284.

39. See NAT. RESOURCES BD. LAND PLANNING COMM., SUPP. REP., PT. V, SOIL EROSION (1925); LITTLE WATERS, THEIR USE AND RELATIONS TO THE LAND (U. S. Soil Conserv. Serv. 1932). Compare techniques suggested by *Thompson v. Andrews* 39 S. D. 477, 165 N. W. 9 (1917); *Miller v. Letzerich*, 121 Tex. 248, 49 S. W. (2d) 404; Note (1932) 85 A.L.R. 465 with STANDARD STATE SOIL CONSERVATION LAW (U. S. Dep't Agric. 1932).

40. For extent of the pollution problem and recent administrative developments and recommendations, see the excellent study, NAT. RESOURCES COMM., WATER POLLUTION IN THE UNITED STATES (1939). For variety and interplay of legal doctrine, see *Jacobson, Stream Pollution and Special Interests* (1933) 8 WIS. L. REV. 99; Comment (1936) 84 U. OF PA. L. REV. 630. The futility of attempting to handle the problems by litigation, even with tort rationales, is also suggested by *Squaw I. Freight Term. Co. v. Buffalo*, 273 N. Y. 119, 7 N. E. (2d) 10 (1937); *cf., on retrial*, 165 Misc. 722, 1 N. Y. S.

rationales, sprawled heedlessly across the boundaries of the individual state⁴¹ and set in motion the processes by which new institutions are created.⁴² Can the Restatement escape all these problems, attitudes, activities, and institutions and still promote "certainty and clarity"? Or must it escape them if it would promote "certainty and clarity"? Whatever the answer, Chapter 41 of the Restatement of Torts on Non-trespassory Invasions of Interests in the Private Use of Waters, despite all of its tort rationales, definitions, distinctions and intricate cross-references, stirs but a very small eddy in the law of waters; the main stream of contemporary drainage basin litigation and administration has long since passed it by.

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JAMES KENT: A STUDY IN CONSERVATISM, 1763-1847. By John T. Horton. New York and London: D. Appleton-Century Co., 1939. Pp. x, 354. \$3.50.

IN his inaugural Ezra Stiles, the new President, urged the youths of Yale College to "observe how far the English law, whether by custom or acts of our legislatures, has been embodied in that of America." In the best Latin idiom of the day he insisted that "students would find it useful also to examine the great principles of the English law, both common and statute, for their own worth; they would find it beneficial to follow the reasonable opinions of the English judges." He predicted that, if a curricular place could be found for so liberal a study, a great genius might arise in our midst—a Bracton, Fleta, Bacon, Coke or Selden—who would wield the scattered fragments of our emergent law into a great commentary. This tribute to the law, appreciation of its English roots, prophecy for its native growth, came when the Declaration of Independence was just two years old. In the audience on that July day—with or without a hearing knowledge of Latin—was one James Kent. This book is an account of the distinctive way in which the hope of the President of the College was in due time fulfilled by the Yale freshman.

(2d) 589 (1938), *aff'd*, 256 App. Div. 582, 11 N. Y. S. (2d) 459 (1939), *aff'd*, 281 N. Y. 794, 24 N. E. (2d) 479 (1939). For the wide sweep of statutory law see Notes (1931) 72 A.L.R. 673, (1939) 122 A.L.R. 1509, and especially PA. STAT. ANN. (Purdon, Supp. 1938) tit. 35, § 691.

41. For recent and well documented opinions see *Hinderlider v. La Plata R. & Cherry Creek Ditch Co.*, 304 U. S. 92 (1938); *Arizona v. California*, 283 U. S. 423 (1930).

42. Note the state planning commissions [see NAT. RESOURCES COMM., THE FUTURE OF STATE PLANNING (1938); NAT. RESOURCES PLANNING Bd., CURRENT PROGRAMS OF STATE PLANNING BOARDS (1939)], the great variety of federal agencies [see NAT. RESOURCES PLANNING Bd., FEDERAL RELATIONS TO LOCAL PLANNING (1939)], the regional and inter-state authorities, and such local organizations as soil conservation districts, rural electrification cooperatives, and flood control and reclamation districts.

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