BOOK REVIEWS

A HISTORY OF WATER RIGHTS AT COMMON LAW

JOSHUA GETZLER, OXFORD UNIVERSITY PRESS, 2004, PAPERBACK EDITION

The paperback publication of *A History of Water Rights at Common Law* makes Joshua Getzler’s meticulous account of his subject available to a broader readership. Specialists will welcome such access, but dabblers and the feint of heart must be cautioned. Getzler takes no prisoners. If you are not comfortable reading sentences such as “Livery and user gave rise to seisin of corporeities by acts of patent possession,”[84] be prepared for slow going.

That the study is deeply anchored in the doctrinal foundations of English law, (subject as Getzler carefully demonstrates to broader and deeper influences), is clearly indicated by a little arithmetic. While the volume appears in a series of Oxford monographs on modern legal history described as “covering the period from 1750 onwards,” the text devotes no less than 150 of its 350 pages to the preceding centuries. The weight allocated to background developments, notably the nature of servitudes, the forms of action, and the relationship between *injuria* and *damnum* is entirely consistent, however, with the central argument.

As articulated at the outset the author asserts that:

“The history of riparian rights demonstrates that English property-use doctrine remained intractably legalistic and casuistical, and resistant to political and economic calculation.”[7]

Or, as expressed in a forceful concluding chapter containing a trenchant review of the limitations of several alternative explanations of the evolution of water law:

“Historians must recognize the signal dominance of conceptualism in the thinking of common lawyers if they are to capture the meaning and significance of common-law evolution with any accuracy. The inheritance of concepts from Roman law and medieval early-modern formulary law was the major determinant in shaping modern riparian doctrine. Sophisticated extra-legal policy arguments may have exerted some pull, but policy was expressed or filtered through the ancient vocabulary of the law.”[342]
Getzler’s primary concern is with water rights from the perspective of quantity or flow, chiefly in relation to the use of water power for industrial activity. Demand was often related to the needs of textile producers and manufacturers as the Industrial Revolution advanced.

The general narrative of legal developments for the modern period will not be unfamiliar. As “English law turned away from the res communes theory…,” [207-8] in early nineteenth century cases such as Bealey v. Shaw (1805), Blackstone’s theory of entitlement derived from prior appropriation gained acceptance, displacing alternative foundational principles such as prescriptive or natural rights. This short-lived era was undermined in Mason v. Hill (1833) when the King’s Bench re-vitalized natural rights as a cornerstone of riparian law. [226] Meanwhile across the Atlantic, in somewhat different circumstances, though with reference to a similar body of legal principle, American judges and commentators were engaged in the creation of a more stable synthesis encapsulating natural and reasonable use. Justice Story’s work, notably in Tyler v. Wilkinson (1827) and Webb v. Portland Manufacturing (1838), along with Chancellor Kent’s contributions outlined the new framework. [274] By mid-century, in Embrey v. Owen (1851), English courts incorporated the American conception of a natural right to ‘reasonable’ water use into their own decision-making. [282]

Getzler stresses the theoretical instability of the period preceding Embrey v. Owen in connection with his overall assessment of factors accounting for legal change. “Complications and uncertainties,” which are well-illustrated indeed make it “difficult to see any progression of clear developmental stages in riparian doctrine during the period of modern industrialization.”[335]

In addition to the elaborate account of the central elements of riparian allocation principles, the volume addresses rights to underground waters, to surface water lacking a defined channel, and the assignability of water rights to non-riparians. [297…]

It is by no means unexpected that questions of water allocation and access to industrial water power predominate rather than issues affecting water quality, for during much of the century following Blackstone, the scientific and engineering community generally subscribed to the convenient, though limited, proposition that running water purified itself. Indeed, bacteria and their role in disease transmission had yet to be discovered, and the ecological and environmental concerns that are now vital, were unknown to those responsible for formulating modern riparian doctrine.

Yet important ‘fouling’ cases are also scrutinized for their relationship to doctrinal development and in the author’s assessment these suggested that “The courts seemed particularly concerned to give remedies against water pollution, even in the absence of possessory interests or sensible damage to property.”[251] Public and
community interests in the quality of flowing waters were largely absent from the calculus.

Nevertheless, just as riparian doctrine was being settled, the outcomes in growing numbers of pollution cases seem to have disappointed many who looked to the common law to address their concerns. In the West Riding of Yorkshire, and in other heavily industrialized districts which produced a corresponding array of water quality challenges as the nineteenth century unfolded, dissatisfaction gave rise to pioneering legislative initiatives. New institutions, regional and watershed-based, operated within the context of newly-established general legislative arrangements which have been specifically excluded from the volume under review. In 1876 the Rivers Pollution Prevention Act set out to reassert the public and communal character of important industrial waterways whose condition the common law regime had failed to protect and was incapable of restoring. Experience exposed the challenges and procedural limitations of early watershed institutions even as they made some contribution to improvement.

Despite the rigorous doctrinal thrust of the volume, there are occasional insights into some of the vital characters. Bramwell’s personal contribution is of particular interest and significance. He is appropriately acknowledged by Getzler as among “a handful of extraordinary judges” [7] who stand out amidst a sea of more conventional practitioners. Bramwell’s decisions in Whalley v. Laing (1857), Bamford v. Turnley (1862) and Stockport Waterworks v. Porter (1864) are among cases that Getzler analyses with great care, for Bramwell, to put the matter mildly, had a distinctive utilitarian point of view and was never reluctant to articulate it, often in provocative form. Indeed, Bramwell’s ongoing influence on water law and policy extended beyond his service on the bench. He was counsel for the successful defendant in Embrey v. Owen, a decision that is recognized for incorporating the American approach into English law and that brought some stability to water doctrine. As the author clearly notes, though, the new foundation for doctrinal stability entailed a good deal of flexibility associated with the discretion available to the bench in determining the reasonableness of a wide range and extent of water uses examined in the myriad circumstances that brought conflicts into court.

In Stockport Waterworks v. Potter, Bramwell failed to persuade his colleagues on the bench to acknowledge a more general obligation against pollution than existing riparian convention allowed. Yet it is opinions of this nature explicitly associating legal decisions with their significance for society that may have put Bramwell in line for a later appointment as commissioner of an inquiry into London metropolitan sewage. In an intriguing footnote, [310 n.137] not picked up in the indexing, we learn that Lord Wensleydale, formerly Parke B, and author of the Embrey v. Owen decision, agreed with a principled dissent prepared by Bramwell in Chasemore v. Richards (1859), although in the interests of avoiding differences it was not delivered.
The work under review provides an impressive account of the internal workings of the common law. And yet, as indicated, the close technical dissection of the jurisprudence presented in *A History of Water Rights at Common Law* engages broader questions of historiography and theory on many fronts. Getzler reviews debate on the role of property rights and economic development and concludes that:

There is little support... for the theory that clear and distinct property rights and their efficient legal protection were an essential precondition of the Industrial Revolution, or even that the existence of property rights significantly contributed to increases in productivity. [43]

He deals extensively with literature on institutional considerations in social ordering and in connection with the significance of water law on strategic behaviour, investment and economic initiative and observes that:

Comparative advantage was ... a union of natural endowments and the social institutions permitting their effective utilization; and here the analysis of legal institutions clearly has a role. [40]

He further remarks on “the structure of expectations between persons” or the manner in which we assess how our conduct is likely to be received by others that “it is dependent on rules laid down by institutions and by culture, and cannot straightforwardly be discovered in natural law or reason.” [277]

It is equally notable that this examination of water law highlights the implications of the subject for the study and understanding of general property law:

...water as an ephemeral and changeable element incapable of exclusive possession was hard to fit within any available legal or philosophical categories. And the problems posed by water reached back to challenge the law’s basic ideas about all forms of property. [329]

This proposition and the extensive research offered in support will make the volume of interest to a wider range of legal theorist.

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