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NEW JERSEY
Court of Errors and Appeals

THE WEIDMANN SILK DYEING
COMPANY,
Plaintiff-Respondent,
vs.
EAST JERSEY WATER COMPANY
ET AL.,
Defendants-Appellants.

THE AUGER & SIMON SILK
DYEING COMPANY,
Plaintiff-Respondent,
vs.
EAST JERSEY WATER COMPANY
ET AL.,
Defendants-Appellants.

Supplemental Brief for Appellants.

We have argued in our brief that the trunk sewer act did not by implication legalize the pollution of the river by the plaintiffs up to the time fixed for the completion of the sewer. If that argument be untenable, and if the trunk sewer act by implication does authorize the pollution of the river up to a certain time, so that at the present it is not an indictable offense to do

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so, and such pollution does not, therefore, amount to a public nuisance, that would not affect the rights of lower riparian owners, so that, as against them, notwithstanding the trunk sewer act, it is still a *private* nuisance to pollute the stream so as to render it unfit for the lower riparian owners' riparian use.

"A nuisance is literally an annoyance and signifies in law such a use of property, or such a course of conduct, as, irrespective of actual trespass against others, or of malicious or actual criminal intent, transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom."

Am. & Eng. Ency. of Law, Vol. 21, p. 682.

A nuisance is, therefore, an unlawful use of property, or an unlawful course of conduct; and its unlawfulness consists in the fact that such use or conduct transgresses the restrictions placed by law upon the use or conduct.

The reason for the restriction is the fact that other persons or property will be injuriously affected if the restrictions are not imposed.

The distinction between a public and private nuisance is that a private nuisance affects a single individual or a determinate number of persons in some private right not common to the public, and a public nuisance is one that affects the public at large and is a violation of a public right.

But in either case to commit a nuisance is to do an unlawful act. If a private nuisance, no one can complain except the person who has actually been damaged. If a public nuisance, there may be, in addition to a complaint by any person suffering *special* damage, a public prosecution by indictment.

In the case of the riparian use of water the law imposes a restriction upon the use of the water.

It was stated by Pitney, J., in *McCarter v. Water Company*, 70 N. J. Eq. 695, cited in plaintiff's brief, p. 18, in referring to the usufructuary interest in the water of a riparian owner, that such right of user is limited to so much as shall be reasonably necessary, and is qualified by the obligation to leave the stream otherwise undiminished in quantity and unimpaired in quality.

Counsel for plaintiff says that, "this is merely a recognition of the qualifications which the common law necessarily put upon the use for the benefit of all riparian owners who had property in common successively in the use."

Any use beyond this restriction is, therefore, unlawful; that is to say, to do anything in using the water which will impair its quality, is to do an unlawful act.

Applying the foregoing to the decision as contained in the opinion of Bergen, J.—the Court held that the jury should have been charged that the plaintiff cannot recover more than nominal damages if the jury found that the plaintiff would use the diverted water for the purpose of further polluting the river, or if he only damages was being prevented from committing a nuisance.

The opinion states the question before the Court as follows: "The plaintiff bases its right of action upon the fact that it is a riparian owner and therefore entitled to such use of the water as would naturally flow over its lands, * * * and the *question* is whether such use includes the right to pollute the water to the extent of rendering it unfit for use by man or beast?"

And the Court answered the question as follows: "That its diversion by the plaintiff for the mere purpose of returning it in a polluted condition is not included in the reasonable use to which a riparian owner is entitled, is, we think, beyond successful contest."

And the Court cites as authority for that proposition the Doremus case, which was a civil suit for an injunction.

The opinion then goes on to deal with the residuary right of the public in the water of the stream, and shows that it is a public nuisance to pollute it, and states that “in the present cases we have a plaintiff claiming damages because it is not allowed to divert * * * the water * * * in order that it may be so used that when returned to the stream it is in a condition as to quality which is prohibited by law. In other words, it claims damages because it is deprived of the means of committing an *unlawful* act.”

And the opinion continues: “The record discloses facts from which a jury might find that the use to be made by the plaintiff of a water of which it claims to have been deprived was not within the meaning of the term ‘reasonable’ as applicable to cases of this nature.”

And the reason for this proposition is stated as follows: “For it cannot be that a riparian use of passing water in which the owner has a limited right, the effect of such use being to return it to the stream in such a polluted condition that it is unfit for use by others having at least equal rights therein, is within the right of a riparian owner, which is confined to a reasonable use for domestic and other legally recognized purposes.”

The opinion then goes on to state: “We are of opinion that when the riparian owner abstracts water from a running stream for the purpose of so using it that it will be returned to the stream: in such a polluted condition as to appreciably deprive it of its natural qualities and render it unfit for the use of the public, thereby committing a nuisance, he is not making the reasonable use thereof to which he is entitled as such owner, and that any damage that he may suffer