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La nature comme norme

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OUTLINE

TEXT

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Introduction

1 Nature, or what is considered natural, may frequently be taken for granted, rendered invisible by its very naturalness, its seeming inevitability. The explosion of environmental history scholarship on imperial environments reflects a recognition of the fact that imperial expansion, in which colonizers encountered novel environments, landscapes, and climates, often threw nature into sharper relief, bringing it squarely within the sights of contemporary observers. This article argues that this was so not only for explorers, naturalists, physicians, and scientists, but for lawyers and judges as well. A legal regime that seemed unremarkable in the home country often seemed a poor fit for the conditions of other, far-off lands, leading to friction between the law and the lived life of the colony and its natural environment.

2 Water law – the area of law that deals with what uses may be made of water, by whom, under what conditions, and with what legal effects – is a field that is and has been deeply intertwined with nature. It is perhaps no surprise, then, that the water law of the British Empire dealt intensively with issues thrown up by the exotic aquatic environments encountered by the colonizers, and in particular with the question of the extent to which the English common law applied to differing natural circumstances.

3 This article examines the water law of jurisdictions from across the « common law world » (the British Empire and the United States of America, in which the legal systems were largely based on the English common law) in the nineteenth and early twentieth centuries, a period in which increasingly intensive uses of water and watercourses around the world brought conflicts over water law into court with relative frequency. One issue that arose in a variety of contexts was the degree to which the rules of the common law of England with regard to water could or should be applied in territories characterized by environmental conditions that often differed radically from those found in England.

4 Though water law in this period was made by a variety of institutional actors, this article focuses on the law as declared by courts. The reason for this narrow view is the normative force attributed to nature in judicial decisions, a force lacking in the legal products of other period institutions, such as the many legislatures around the common law world that legislated on water issues, and the legal experts who wrote on the topic. Legislators, scholars, and publicists certainly discussed the question of whether English common-law rules were appropriate for the different environmental conditions of the colonies, and new statutory regimes were often based on the assumption that different law was needed for different circumstances. But in these contexts natural conditions were raised as policy arguments, potentially of great persuasive force, but ultimately lacking binding legal weight. Only once the legislature enacted the policies into law did these environmental arguments acquire legal force.

5 The judicial forum was different. In the common law world, courts openly made law ; indeed, entire areas of law – including water law – were largely governed by rules developed and pronounced by courts,

with little or no legislative direction. On the other hand, courts were not free to decide as they wished. They were bound to follow the precedents set by earlier court decisions in the jurisdiction or in the mother country. The law could change over time, but typically only by a slow process of distinguishing the circumstances of precedential decisions from those of new cases brought to court. Historical court decisions are thus a good place to test the historic power of nature as a norm : When common-law courts departed from precedent due to what they described as the necessary implications of environmental conditions, they were doing more than giving weight to policy arguments ; they were imbuing nature with legal force, force that was sometimes great enough to overturn established law. In this way these courts give clear expression to the idea of nature as norm.

6 Another group of sources left out of the present analysis is writing by commentators on the law. A deterministic tradition in Western legal thought, often associated with Montesquieu, argues that differences between the laws of various countries are often the result of climatic factors. In the field of water law, this tradition was given prominent voice by historian Walter Prescott Webb, who argued that changes in the common law of water rights in the western United States (along with various other technological changes) were the result of the aridity of the region[1]. More recently, economists of the law have given this environmental explanation an efficiency-based twist[2]. While this school of thought might reasonably characterized as viewing nature as a norm, their argument is a descriptive and explanatory one, not a normative one. The focus of this article is not on this type of empirical claim – that the law did or did not change in response to environmental factors – but on the arguments made by legal actors, primarily judges, regarding the normative force of environmental factors on the legal decisions they were called to make.

7 This article will explore some of the areas of water law in which courts around the common law world departed from the established rules of the common law in order to make the legal rules more appropriate, as they saw it, to the local environment. As will be seen, they did so consciously, explicitly granting nature normative force. It will also look at other courts and judges, ones that resisted this kind of normative claim, arguing that the law in new environments had to conform to the old common-law rules, regardless of what nature

seemed to demand. Perhaps surprisingly, this discourse in far-flung jurisdictions about the potential legal force of local environmental conditions was at the same time a global one : Arguments were made not only about the differences between local and British nature, but also about the similarities between the natures of territories very distant and different from each other. Both types of environmental comparisons were seen as having normative significance.

8 The question of whether environmental factors required or justified a departure from the inherited rules of the common law arose in courts around British Empire and United States in connection with a variety of legal issues, four of which will be examined here in turn : a) the question of whether the water, bed, or other resources of a non-tidal river belonged to the riparian landowners or to the state or public ; b) conflicts over property rights following shifts in the course of a river ; c) the issue of the degree of liability of reservoir owners for damage caused to others by escaping waters ; and d) conflicts over whether water might be diverted from a river for irrigation, to the detriment of downstream landowners.

I. Who owns the river ?

9 While the civil law (for example Article 538 of the Code Napoleon) distinguished between private and public rivers based on tests of navigability and floatability, the English common law adopted a slightly different distinction : Tidal rivers were held to be the property of the Crown, while rivers and lakes above the reach of the tide were the property of the adjoining landowners, with each riparian owner owning the river from the edge of his dry land up to the median of the water body (« *usque filum aquæ* » or « *ad medium filum* »). Non-tidal but navigable bodies of water typically were subject to a public right or servitude of navigation, while the water, the submerged land, and other resources (such as fish) belonged to the riparian owners [3].

10 These rules were relatively uncontroversial in England, but in British colonies and the new United States they were often felt to be inappropriate to the environmental reality of other continents, in which rivers might be kilometers wide in some portions and navigable for thousands of kilometers above the reach of the tides, while freshwa-

ter lakes might bear a closer resemblance to seas than to the small lakes of England. In this context, a rule under which all non-tidal waters were private seemed problematic to many.

11 The first reported case in which the tension between the received law of England and the local environment arose was the 1807 Pennsylvania case of *Carson v Blazer*, in which a landowner along the Susquehanna River, near Harrisburg, demanded compensation from some fishermen who had fished shad from the river alongside his land [4]. As the Susquehanna at this point was navigable but not a tidal river, the common law rule seemed to be clear – the river, and the right to fish, belonged to the riparian owners. But Chief Justice William Tilghman, presiding over the trial, thought otherwise, distinguishing between the geographies of England and Pennsylvania :

> The common law principle concerning rivers, even if extended to America, would not apply to such a river as the Susquehanna, which is a mile wide, and runs several hundred miles through a rich country, and which is navigable and is actually navigated by large boats. If such a river had existed in England, no such law would ever have been applied to it. Their streams, in which the tide does not ebb and flow, are small [5].

The English rule equating navigability with tidal waters, Tilghman continued, « would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches. » [6]

12 On appeal, Justice Jasper Yeates upheld Tilghman's position, arguing that while a Pennsylvania law from the Revolutionary period provided that the common law of England would be in force in the state,

> the uniform idea has ever been, that only such parts of the common law as were applicable to our local situation have been received in this government. The principle is self-evident. The adoption of a different rule would [...] resemble the unskilful [sic] physician, who prescribes the same remedy to every species of disease [7].

13 In a later decision Chief Justice Tilghman expanded this logic to the great Mississippi River, and a Pennsylvania trial court similarly ruled that the local environment, with its long and wide rivers (the proud

listing of which was becoming a set feature of this judicial discourse), changed the English law that would have otherwise applied :

> The rules of the common law of England in regard to the rivers and the rights of riparian owners, do not extend to this commonwealth, for this plain reason, that rules applicable to such streams as they have in England, above the flow of the tide, scarcely one of which approximates to the size of Swatara, would be inapplicable to such streams as the Susquehanna, the Alleghany, the Monongahela, the Ohio, the Delaware, and many of their tributaries [8].

The highest courts of North and South Carolina soon took a similar approach to the rivers in those states [9].

14 This environmental approach was by no means accepted by all courts. In another case involving shad fishing, this time on the Connecticut River, Chief Justice Zephaniah Swift of Connecticut rejected efforts to rely on *Carson v Blazer*, writing of the common law rules that « a more perfect system of regulations on this subject could not be devised. It secures common rights, as far as the public interest requires ; and furnishes a proper line of demarcation between them and private rights. » [10] His fellow Justice, Stephen Hosmer, wrote that the relevant principles of the common law were « incontrovertible », and that

> the argument, from inconvenience, must be very powerful, to cast a shade on a long established principle. On the other hand, the doctrine of the common law [...] promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to every thing capable of ownership, a legal and determinate owner [11].

Similarly, in a New York case in which the defendant was accused of trespass for taking salmon from a section of the (appropriately named) Salmon River that the plaintiff claimed belong to him, Chief Justice Ambrose Spencer criticized the decisions in *Carson v Blazer*, writing, « I do not feel myself authorized to reject the principles of the English common law, by saying they are not suited to our condition, » [12] and ruled for the plaintiff. For these judges, the natural differences between English and American rivers were not enough to overturn settled legal rules.

15 But now the tides in New York began to turn, whether as a reflection of American exceptionalism writ large or the more specific Romantic celebration of American nature that Daniel Hulsebosch has noted[13]. Yet the rhetoric in the state Court of Errors, in which state senators sat alongside judges, sometimes went beyond local patriotism to outright denigration of England and its rivers. Lawyers in a case involving the Mohawk River argued :

> Can the English law extend to our large rivers, lakes, inland seas ? Their waters gathered, would form a mighty ocean into which were the whole land of the common law [i.e. England] cast, a ripple on its surface would be scarce produced ; so all the waters and streams of Great Britain diverted into the Niagara would cause no perceptible accession[14].

Senator Levi Beardsley picked up this argument in his opinion in the case :

> It is matter of just exultation, as well as benefit to the country, that in the United States we have rivers which above tide are navigable to a greater extent than would be the circumnavigation of the United Kingdoms of Great Britain and Ireland. It is therefore preposterous to contend that the limited doctrines of the common law are applicable to the Mississippi, Ohio, Susquehannah, Niagara and St. Lawrence.

> […]

> Rules of law should be adapted not only to the moral but to the physical condition of the country. Had the common law originated on this continent we should never have heard of the doctrine that fresh water rivers are not navigable above the flow of the tide[15] […]

In a later iteration of this case, Senator Albert Tracy opined that the reasons of the traditional common law rule, « when weighed against the considerations which it seems to me should determine a rule for this country, are as dissimilar and disproportionate as the rills of an island when contrasted with the expanded lakes and magnificent rivers of a continent »[16]. Similar rhetoric was used by the Iowa Supreme Court in an 1856 case :

> It is impossible to bring the mind to an approval, when we attempt to apply to the rivers of this country, stretching up to three thousand miles of extent – flowing through or between numerous independent states – and bearing a commerce which competes with that of the oceans – of a test which might be applicable to an island not so large as some two of our states ; and to streams whose utmost length was less than three hundred miles, and whose outlet and fountain, at the same time, could be within the same state jurisdiction. In England, or in Great Britain, the chief rivers are the Severn, Thames, Kent, Humber, and Mersey ; the latter of which is about fifty, and the first about three hundred miles in length, and of this (the Severn) about one hundred miles consists of the Bristol channel. The world renowned Thames, has the diminutive proportions of two hundred miles. And of even these lengths, not the whole is navigable. Thus, it will be seen, that these chief rivers of good old England, range in extent with our Connecticut, Merrimac, Hudson, Allegany, Monongahela, Cedar, Iowa, and Des-Moines, and bear a proportion of one to twenty, when compared with the greater rivers of this continent [17].

16 How, then, were Americans to know which rivers were public and which were private, if the common law tests were rejected ? Tracy suggested that nature itself, mediated through the indigenous inhabitants of the area, could indicate the applicable legal rule for New York's Mohawk River :

> Plainly this rule is to be sought in circumstances arising out of the nature and history of each river, for it is only by knowledge of the public use to which a particular water course has been or can be put, that it is possible in the absence of positive legislative declaration to determine, that it is or is not subject to the local law of this country […].

> [W]e must bear in mind that […] the whole river, except at some points where navigation is interrupted by falls, has been always dedicated to public use as a water highway ; that this was a dedication anterior to any European claim to the country, and when individual and exclusive proprietorship even to the banks or shores of the stream was unthought of and unknown--when the dark forests which overshadowed the river, equally with the river itself, were possessed and enjoyed in strict accordance with the great dictate of nat-

> ural law, that nothing should be made exclusive property which can be conveniently enjoyed in common.
>
> […]
>
> [F]rom the nature of the element, individual property in the water flowing in such rivers must be regarded as transcient, usufructuary and subordinate […]. We should seek to avoid and not to incur the reproach, *quod natura remittit, invida jura negant* [18].

17 Another form of judicial argument in favor of granting natural conditions legal force was based on the differences between the common law and civil law rules on private property in rivers. American courts had argued that the differing legal regimes apparently reflected the fact that Continental Europe had larger rivers than Britain [19] ; Justice William Turley of the Tennessee Supreme Court turned this explanatory theory into a normative *a fortiori* argument :

> Now, these principles of the common [and] civil law are not in conflict with one another ; they are both right and proper for the countries to which they are made to apply. In England there are no streams navigable above tide-water ; but the reverse is true of the continent, and the end designed to be effected, both by the common and civil law upon this subject, is identical, viz.: that navigable rivers shall not become private property, but shall belong to the community at large. If the local situation of the continent of Europe required an extension of the construction of what was necessary to constitute a navigable river, and prevented its restriction to tide-water, much more so does that of our own country, and particularly the valley of the Mississippi. Our rivers are of immense extent and size, and navigable for thousands of miles above their mouths [20].

18 A related argument, made by the Pennsylvania Supreme Court, was that the civil law had actually been adopted in colonial Pennsylvania, due to the supposed similarities of its rivers to those of the Roman Empire :

> The Roman law, which has pervaded Continental Europe, and which took its rise in a country where there was a tideless sea, recognised all rivers as navigable which were really so, and this common-sense

> view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth [21].

19 The debate over whether the common law of England was applicable to American rivers reached the United States Supreme Court in the 1851 case, *The Genesee Chief*. At issue was whether the federal government's admiralty jurisdiction extended to navigable rivers above the influence of the tides. Justice Peter Daniel opposed giving environmental factors any normative force :

> I cannot construe the Constitution either by mere geographical considerations ; cannot stretch nor contract it in order to adapt it to such limits, but must interpret it by my solemn convictions of the meaning of its terms, and by what is believed to have been the understanding of those by whom it has been formed [22].

But Chief Justice Roger Taney, writing for the majority, argued that while the English common law test for navigability was reasonable for English rivers and the original American states of the Eastern seaboard, in which only tidal waters were navigable, such a test became « inadmissible » when applied to the « thousands of miles of public navigable water » of the interior of the American continent [23]. The normative force of natural factors thus received the backing of the highest court of the United States [24].

20 The question of whether the common law applied to environments unlike England's soon arose not only in the United States but in territories around the British Empire. In an 1842 case the New Brunswick Supreme Court noted the « great difference in the character of the small rivers of England and those of this Province », but thought that this consideration « may be thought more fit for the Legislature than the Court » [25]. Yet the same court in 1849 adopted the ruling of an American court, following the argument of counsel that :

> The principles of the law of England, in respect to rivers, cannot be applied to this country : there the rivers are not subject to such sudden freshets, nor are they used for the same purposes as in this country ; the cases therefore on this subject in the United States,

> where the rivers are used for the same purposes as in this country, will be very important [26].

21 The idea that Canadian courts should follow American courts rather than English ones when dealing with rivers was not limited to New Brunswick. In an 1852 case, Chief Justice James Macaulay of the Upper Canada (Ontario) Court of Common Pleas, after examining the English precedents which normally would be thought binding in the British colony, demonstrated the legal power of geography over the common law by contrasting English precedents with decisions from « this side of the Atlantic », lumping together American and Canadian cases without distinguishing between them [27]. Macaulay's judgment was also significant in ruling that the test for navigability of a river was its « natural capacity », not its use in practice, once again demonstrating the normative power of nature [28]. The influence of American jurisprudence was evident as well in an 1882 opinion of Justice Samuel Strong of the Supreme Court of Canada :

> I do not hesitate to say that the rule which appears to have been adopted as a principle of the common law as administered in England, that no rivers are to be considered in law as public and navigable above the ebb and flow of the tide, is not applicable to the great rivers of this continent, as has been determined by the Supreme Court of the United States and by the courts of most of the States [29] […]

22 (A similar discussion arose in Quebec with regard to the local law inherited from France, according to which rivers that were neither navigable nor *flottable* by rafts belonged to the riparian owners, while rivers *flottable* belonged to the Crown [30]. An 1859 appeal to the province's Court of Queen's Bench over fishing rights in the Jacques Cartier River raised the question of whether the French law applied to the geographical conditions of Quebec. Evidence showed that rafts could not be floated down the Jacques Cartier's falls and rapids, leading the trial court to hold that the river was *non-flottable* and therefore the fishing rights belonged to the riparians. The appellant's lawyer argued that « the doctrine laid down by the French writers with respect to rivers in France was not applicable to the rivers of this continent », continuing with rhetoric, familiar from the U.S. cases

discussed above, praising the power and size of the river in question. While the majority of the Queen's Bench rejected the appeal, Judge Thomas Aylwin thought the river should be considered public : « Our rivers cannot be compared with those of France or Europe ; the Jacques Cartier is a good sized river and has plenty of water. » [31] Similarly, in a 1905 case on the definition of navigability, Justice Hall of the province's Court of King's Bench justified his reliance on American cases : « United States authorities upon this question possess more than ordinary interest for Canadian Courts, as the conditions there were and are precisely like those in this country. » [32])

23 In the 1908 case of *Keewatin Power Co. v Kenora*, on the other hand, Justice Meredith of the Ontario Court of Appeals mocked the environmental jingoism of many American and Canadian decisions :

> It is not without its amusing features to have the super-tidal waters of Great Britain and Ireland treated as if they were but mere ponds and rivulets when this question is discussed here. It ought not to be, though it may be, necessary to bring to mind the fact that some of the inland waters of the United Kingdom are really not so insignificant, even when compared with such « magnificent water stretches » as the east or the west branches of the Winnipeg River at the Lake of the Woods [...]. It is to be hoped that « spread-eaglism » or bombastry, however much it may naturally infest a new and fresh country in other fields, will not be permitted to invade the domain of its law [33].

While environmental similarities were thus often felt by many Canadian courts to be more legally significant than strict lines of legal authority, this was not always the case.

24 As we will further see below, the epicenter of the debate over the normative force of nature in water law now moved to India, with environments radically different from those both Britain and North America, yet under tighter political control of the imperial metropolis. In a 1919 case, *Secretary of State v Bommadevara Venkatanarasimha*, the Madras High Court discussed the question that had earlier plagued American and Canadian courts, whether a riverbed in a navigable but non-tidal river belonged to the riparian landowners or to the government. At issue was a portion of the Krishna River that had turned into dry land, and was now being

claimed by the Zemindar of North Vallur, who owned the adjoining lands. After quoting at length from a Privy Council case, *Srinath Roy v Dinabandhu Sen* (discussed below), with its quotes from the Pennsylvania cases *Carson v Blazer* and *Zimmerman v Union Canal Co.*, Justice Sadasiva Aiyar asked :

> Having regard then to the historical, geographical, social and physical conditions of India, is there any presumption which could be safely made as to the ownership of the bed of a river like the Krishna in that portion of its length which has the characteristics and is affected by [...] seasonable fluctuations [...] ? [...] The reason put forward in some English decisions [...] does not, in my opinion, apply to Indian conditions just as it has been held not to apply to conditions in America. [34]

25 Justice Burn, too, highlighted the importance of local geography, pointing out that the Krishna was three to four miles wide and discharged 100 times the amount of water as the Thames during the flood season ; « the contrast of physical conditions with those of English streams is capital. » [35] He then went on to argue :

> The peculiar historical and geographical reasons which led to the evolution of the English rule that 'tidality decided the point at which ownership of the bed should be public on one side and private on the other' have no counter part [sic] in this country. On the other hand, certain of the considerations which led to the modification of the English rule by some American Courts [...] are applicable to the great navigable rivers of India [36].

The Madras court thus rejected the rules of English common law in favor of the American version, due to supposed similarities between the « great navigable rivers » of the two countries. At the same time, it preferred the rule of Bengal, a neighboring Indian jurisdiction, according to which only streams navigable throughout the year were publicly owned, rejecting a different rule advanced by some American authorities [37].

26 Robert Travers has argued that while judges in England had used ideas of natural law to modify the common law, in India natural law arguments were used in some contexts to support the replacement of local law by English norms [38]. Here, however, we see the reverse, with

nature invoked to reject English rules of water law in favor of new norms, felt to be more appropriate to the local environment.

II. Shifting watercourses

27 A second branch of water-related law dealt with the legal consequences of changes in the course of a river or a shoreline over time. The property-law questions thrown up by these changes, under the legal terms « alluvion » and « diluvion », were to whom newly formed dry land belonged – to the former owner of the dry land now submerged, or to the owner of the adjacent riverbed. The English rule, based on Roman law, was that gradual accumulations of land from water belonged to the to the owner of the land to which the new land was added, while gradual losses of land were lost to the landowner and became part of the river.[39] Sudden changes in the course of a river, on the other hand, were held not to bring about changes in ownership of the bed.[40]

28 One line of legal thought held that the English common law rules in this area of law applied everywhere. The English Court of Exchequer in 1839 opined that the common law of alluvion « is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law, for the permanent protection and adjustment of property. »[41] Similarly, seventy-five years later, the Privy Council rejected arguments that the English law did not apply to the Nigerian shoreline due to differences in the local conditions, Lord Shaw stating that the court did not doubt the « general applicability » of the English law of accretion[42]. This, however, was the minority position.

29 The incubator for the opposing view, that the common law needed to be modified to take into account environmental conditions, was India, where the great deltas around the Bay of Bengal saw constantly shifting configurations of water and land[43]. As we began to see in Part II of this article, it was often argued that the subcontinent's supposed environmental affinities with America made the United States a more relevant source of water law than English precedents.

30 This claim seems to have been first advanced by barrister Charles Pontifex, soon to be appointed to the bench in Bengal and later the

legal adviser to the India Office, in arguments before the Privy Council in 1872 [44]. The case turned, among other things, upon the question of who owned land that had been lost to the Karnaphuli River in its lower reaches and then later reformed – the original landowner, or the government, as owner of the river. Pontifex, representing the government, contended that the land was permanently lost to the original owner, citing an American treatise on water law [45], which he argued was « the more deserving of attention, by reason of the similarity which exists between the great rivers of America and those of India in their conditions and mode of action. » [46] The Privy Council was unconvinced that the American treatise really helped Pontifex's case, and made no decision about whether American water law was really a better source for Indian law that the English common law.

31 Similarly, in an 1899 appeal from Madras to the Privy Council the question arose as to whether land that had formed in the Godavari (Godaveri) River belonged to the government – the owner of the island to which the new land was attached – or rather to the owner of the banks of the river. The claim of the latter on appeal was based on the English common law rule according to which the owner of the banks of a river owned the riverbed in between. First noting that the differences between English rivers and the Godavari are « obvious », calling into question the attempt to rely on English law, the Privy Council asserted that « Their Lordships do not travel into that interesting discussion » [47]. Nonetheless, the court concluded by noting that it had « grave doubts whether the presumption applicable to little English rivers applies to great rivers such as the Godaveri », and that they would therefore « require to know much more about the river in question and the mode in which it has been dealt with before deciding as to the presumption or its rebuttal. » [48] Once again, the court declined to rule on the question of the applicability of English rules to the very different rivers of India – but the groundwork had been laid for granting Indian nature normative force in this area of the law.

32 The leading case on this topic was the 1914 Privy Council decision of *Srinath Roy v Dinabandhu Sen*. The case involved a *jalkar*, or right of fishery, in a section of the Padma River, in the Ganges Delta. The river had shifted course so that it no longer flowed over the appellants' land, but they claimed that their right of fishing moved with the river,

even though the relevant section now flowed over the respondent's land. « The common law of England, » argued counsel for the appellants, « has absolutely no application to Bengal, which is essentially different from England. »[49] Lord Sumner, delivering the opinion of the Privy Council, opened with a geography lesson :

> The streams in the Gangetic delta are capricious and powerful. In the course of ages the land itself has been deposited by the river, which always carries a prodigious quantity of mud in suspension. The river comes down in flood with resistless force, and throughout its various branches is constantly eroding its banks and building them up again. It crawls or races through a shifting network of streams. Sometimes its course changes by imperceptible degrees ; sometimes a broad channel will shift or a new one open in a single night. Slowly or fast it raises islands of a substantial height standing above high water level and many square miles in extent[50].

33 Precedents that arose from disputes on the English rivers Eden and Lune were dismissed by Sumner, as these rivers were « not [...] subject to frequent change. How the law might be if conditions similar to those of Bengal could occur in England is another matter. The above cases would have been more directly in point had the river in question been one which often and swiftly changes its course, as for instance the tidal Severn [...] »[51] After characterizing English doctrine as laid down by Hale as a departure from Roman law and « essentially insular »[52], he stated the case for matching legal rules to geography, once again turning to American law :

> In truth the rule which in the United Kingdom thus connects the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil is itself the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal [...]. The question how far a rule established in this country [Britain] can be usefully applied in another, whose circumstances, historical, geographical, and social, are widely different, is well illustrated by the case of navigability, as understood in the law of the different States of the United States of America [...]. The Courts of the different States, minded alike to follow the common law where they could, found themselves in the latter part of the eighteenth and the early part of the nineteenth cen-

> turies constrained by physical and geographical conditions to treat it differently [53].

After quoting from the Pennsylvania decisions discussed above, Sumner went on :

> A similar deviation, equally grounded in good sense, from the strict pattern of the English law of waters lies at the bottom of the current of Indian cases [that deviated from English law on grants of fishery], and forms its justification.

> In proposing to apply the juristic rules of a distant time or country to the conditions of a particular place at the present day regard must be had to the physical, social, and historical conditions to which that rule is to be adapted [...]. Above all the difference, indeed the contrast, of physical conditions is capital. In England the bed of a stream is for the most part unchanging during generations, and alters, if it alters at all, gradually and by slow processes. In the deltaic area of Lower Bengal change is almost normal in the river systems, and changes occur rarely by slow degrees, and often with an almost cataclysmal suddenness [...]. Any given section of the river system is in all probability a shifting and irregular patchwork of water flowing over soil which belonged to the Sovereign at the selected date and of water flowing over soil then belonging to other owners and since encroached upon, with the background of a probability that before the date in question, and yet within historic times, no water may have run there at all. By what analogy can rules applicable to the Eden and the Lune be profitably applied to such physical conditions [54]?

34 Finally, in a remarkable theoretical and rhetorical turn, Sumner invested the river with agency not only as to environmental change, but as a partner in sovereignty with the state :

> Lastly, it is said to be unjust that a landowner should not only lose the use of his land when the river overflows it, but also the right to fish over his own acres and in his own waters, in order that another may unmeritoriously fish in his place. There is some begging of the question here ; the waters are not his waters, nor is the change confined to the flooding of his fields. It is the river that has made his land its own ; the waters are the tidal navigable waters of the great stream. In physical fact the landowner enjoys his land by the precari-

> ous grace of the river, whose identity is so persistent, and whose character is so predominating, as almost to amount to personality ; and is it fundamentally unjust that in law too he should lose what he has lost in fact, and be precluded from taking in substitution for his lost land an uncorporeal right which has been granted not to him but to another [55]?

Here was the argument for the normative force of nature stated most clearly : Not only did the law need to change with differing natural conditions, but nature, or the very river itself, was imbued with law-making force. In the face of this natural legislation the common law had to give way, and the Privy Council accordingly ruled that the appellants kept their right of fishery even when the river had radically shifted course.

35 A few years later the question of the applicability of English law to Indian Rivers again reached the Privy Council, in another appeal involving the Godavari River. At issue was whether the English rule, according to which title to land could be acquired by accretion only if the accretion was « gradual, slow, and imperceptible », was in force in Madras. In a learned opinion, Justice Sriniyasa Aiyangar of the Madras High Court rejected the English rule, noting that « in England, they have not such large rivers as we have here in India [...]. If we apply [...] the test which is applied in England, there can scarcely be any doubt that *lankas* [islands] formed in the Godaveri are not accretions at all, but I doubt whether that is the principle which is applicable in India. » He then went on to consider several U.S. Supreme Court decisions, as well as one from New York [56].

36 On appeal to the Privy Council, counsel for the appellants impugned the reliance on American authority, arguing, « There is no distinction between the principles applicable in England and in India » [57]. The judges were skeptical :

> Lord Buckmaster.– Can you apply English rules and law to something England never contemplated ?

> Sir John Edge.– You have no rivers in England comparable to the Godavari or the Ganges.

> […].
>
> Lord Buckmaster.– The law of accretion is the common law but that common law has been brought in India into conditions very different to those operating in England. The same and very similar conditions have been found in America and I presume reference is made to American decisions in order to see how the common law has been interpreted in those altered conditions [58].

Unsurprisingly, the court rejected the appeal, ruling that application of the English rule would be inapplicable to the very different Indian rivers.

37 The issue of the applicability of English riparian law in countries with different environments arose again soon after, in a decision by the Canadian Supreme Court regarding the ownership of accretions to riparian land along the North Saskatchewan River in Alberta. The statute importing the laws of England to the area had included the proviso « in so far as the same are applicable » to the territory, and the court, citing the Indian cases of *Raja of Vizianagaram* and *Srinath Roy* (discussed above), noted the necessity of adapting foreign rules to local physical conditions [59]. The court held that English rule that accretions belonged to the adjacent landowner was indeed applicable to the province, adding that « it is interesting to note that in India, where a number of the rivers more nearly approximate in size and character to the North Saskatchewan than do those of England, the law applicable to accretions was laid down by the Privy Council in *Sri Balsu Ramalaksmamma v Collector of Godaveri District* » to be the same as the English law on the point at issue [60]. The law had thus come full circle, from North American to India and back again – and so had the idea that environmental factors could be more important than legal heritage or precedent for determining the law of shifting watercourses.

III. Damage from escaping water

38 One of the best-known cases in English tort law is the 1868 decision of the House of Lords in *Rylands v Fletcher*, affirming an 1866 decision of the Court of Exchequer Chamber [61]. The defendant in the case had

built a water reservoir on his land to store water for powering a mill, taking all due care, but the water in the reservoir escaped through some old mineshafts and flooded the mines of his neighbor. The court ruled that if a defendant brings something dangerous on to his land and that thing escapes and causes damage to a neighbor, he is liable in tort even if he acted without fault.

39 Of particular relevance for this study, Lord Chancellor Cairns's ruling turned to a large extent on the issue of whether the use made by the defendant landowner was natural or not. Lord Cairns wrote that if the defendant's land had accumulated water by « natural user » of the land, and then « by the operation of the laws of nature » flowed onto his neighbor's land, there would be no liability. If, however, the defendant used his land for « a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it », liability would ensue were the water to escape and cause damage, as it did in this case [62].

40 Even before the House of Lords had issued its opinion in Rylands's appeal, the Madras Railway Company decided to try and have the rule in the case established by the Court of Exchequer Chamber imported to India. A couple of tanks (reservoirs) located near the rail line in the District of North Arcot had burst several times in 1865 and 1866, and the resulting floods had damaged embankments, bridges, and culverts belonging to the railway company. The company brought suit against the landowner for the damages, at the same time refusing to allege negligence on the part of the defendant, choosing instead to rely on the new rule of *Fletcher v Rylands* [63]. It seems that the railway company was hoping from the start to appeal the case up to the Privy Council in London, hoping, as the Madras High Court put it, to take the final decision out of the hands of « Judges conversant with the necessities of the country », instead having « a rule [...] imposed elsewhere by Judges not so conversant » [64].

41 As expected by the company, the court of first instance rejected its claim, as the defendant had taken reasonable precautions against the escape of water from his tanks. On appeal to the Madras High Court, Acting Chief Justice Holloway accepted the application of the rule in *Rylands*, according to which strict liability for escaping water applied only if the land use made by the defendant was artificial, not natural.

Yet he argued while water storage for irrigation in England would not be considered a natural use, « Surely the storing up of water is no mere artificial user of Indian land, but the only possible mode of natural user. » [65] The ancient art of agriculture, he continued, « in the country from which this case comes, is impossible without tanks by which water is to be stored to meet the terrible drought which, in their absence, would wither every blade of grass, destroy the cattle and render future culture impossible. » [66]

42 According to plan, the Madras Railway then appealed to the Privy Council, arguing for the application of the rule in *Rylands* to India. The decision of this highest court must have disappointed them. While the Privy Council ruled that *Rylands* did, indeed, apply in India, it distinguished the circumstances of the case from those in England :

> The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognised by Hindu and Mahomedan law, by regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India [...].

> In [*Rylands*] the Defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord *Cairns* 'a non-natural use' of their land. They were under no obligation, public or private, to make or to maintain the reservoir ; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights and liabilities of the Defendant [in the Madras case] appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed [67].

43 The distinction made by the courts between English and Indian reservoirs thus recognized a new sort of connection between law and nature. Water storage in England for industrial purposes was « non-natural ». In India, on the other hand, it was « the only possible mode of natural user », not only because irrigation was necessary in the different climate, but because the law itself had recognized the use as essential, even obligatory. Nature here fed into the legal norm, but

what was to be considered natural and what not was itself influenced by the attitude that law had taken to the activity in question.

IV. Diversion of water

44 The issue of what uses were « natural », and thus protected by law, arose as well with respect to the final issue under examination – complaints by riparian owners of upstream water uses that interfered with their own uses. As with the issue of escaping water, what was considered « natural » could turn, here too, on local natural conditions.

45 The traditional common law rule of conflicting riparian uses – that an upstream riparian may not divert a stream's water to the (unreasonable) detriment of downstream owners – was explained by the court of King's Bench in 1625 in terms of natural law : « a water-course [...] doth begin ex jure naturæ, having taken this course naturally, and cannot be averted » and « the nature of this [water-course] is to be current [i.e. to flow] » [68].

46 In the leading case of *Evans v Merriweather* in 1842, the Illinois Supreme Court advanced a distinction : An upper riparian might reasonably consume all the water in the stream if his use were a « natural » one, necessary for existence, but not were it to be considered « artificial », for the mere increase of « comfort and prosperity ». The court then suggested that the application of this distinction would vary depending on natural conditions :

> The supply of man's artificial wants is not essential to his existence ; it is not indispensable ; he could live if water was not employed in irrigating lands, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is absolutely indispensable to the cultivation of the soil, and in them, water for irrigation would be a natural want. Here [in Illinois] it might increase the products of the soil, but it is by no means essential, and can not, therefore, be considered a natural want of man [69].

What riparian uses were to be recognized as « natural », and therefore permitted, was thus dependent on the climate and environment. Irrigation would be considered an « artificial » use in the American

Old Northwest, as it would be in England, but the court had legitimized changing the law if and when the common law spread to arid lands.

47 This way of thinking was crucial for the development of water law in the arid western states and territories of the United States, in which the traditional common law of riparian rights was rejected in favor of a new system. The new law, known as « prior appropriation », opened up water resources to appropriation by all, not just riparian owners, and allowed them to take as much of the water as they could put to beneficial use, regardless of the effect on later appropriators [70]. An early case from Colorado discussed whether an appropriator could dig a ditch across another's land without permission, an invasion of property that would clearly not be allowed under the traditional common law. Along the way it advanced a general theory of the adaptation of property law to environmental conditions :

> The principles of the law are undoubtedly of universal application, but some latitude of construction must be allowed to meet the various conditions of life in different countries. The principles of the decalogue may be applied to the conduct of men in every country and clime, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.

> In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands [...]. In other lands, where the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provision for this necessity, by withholding from the landowner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of obtaining needed supplies of water [71].

48 Similarly, the leading case in the field explained why the common law of riparian rights could not apply in Colorado :

> The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive ; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity. Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate, or right of property.

> […].

> We conclude, then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith [72].

These American courts, like Lord Sumner in *Srinath Roy*, depicted nature as practically a sort of legislature.

49 As discussed at the beginning of this article, some modern commentators have used decisions like these to support a deterministic theory of law [73]. That is not the argument here. In fact, at the same time as the Colorado courts here discussed were advancing their arguments about the power of arid environments to change the law, other courts in the common law world were rejecting this line of thinking. In Australia, for instance, where the climate was as arid Colorado's, courts consistently rejected attempts to argue that water law needed to change in response to the environment, and the law changed primarily through legislation [74]. A series of decisions by the Privy Council and House of Lords in London similarly argued that the law of riparian rights was identical across legal systems [75].

50 This skeptical attitude toward the normative power of nature characterized the majority opinion in the leading California case of *Lux v Haggin* as well. In this case the state supreme court rejected the claim that California should follow *Evans v Merriweather* and allow diversion of water for irrigation as a « natural » use [76]. It also rejected as unworkable the position that the law should vary across the state, with prior appropriation the rule in the arid portions of the state, and

riparian rights applying « in the regions in which the climate more nearly resembles that of other states where the common-law rule is enforced »[77]. Most importantly for present purposes, it faced head-on the argument that environmental conditions on their own had normative force, contrasting them with political circumstances :

> Since the [American] Revolution the common law of England has, of course, been inapplicable in the particulars that it does not harmonize with the political conditions on this continent [...].

> We know of no decisions which intimate that a difference in climatic or geographical conditions may operate to transfer a right of property from those in whom a right of property is vested by the common law[78].

So for the California court political changes had normative force ; environmental differences did not.

51 Yet in a later California case, dealing with whether the use of underground water would be governed by a rule of « reasonable use » or rather follow the English rule allowing a landowner to extract groundwater indiscriminately, Justice Lucien Shaw of the state supreme court adopted the approach that the law must change with the environment. Citing many of the Pennsylvania and New York decisions discussed above, Shaw wrote :

> Whenever it is found that, owing to the physical features and character of this state, and the peculiarities of its climate, soil, and productions, the application of a given common-law rule by our courts tends constantly to cause injustice and wrong, rather than the administration of justice and right, then the fundamental principles of right and justice on which that law is founded, and which its administration is intended to promote, requires that a different rule should be adopted[79] [...]

He then proceeded to outline « the conditions existing in many parts of this state, which are different from those existing where the rule had its origin » :

> In a large part of the state, and in almost all of the southern half of it, particularly south of the Tehachapi range of mountains, aside from grains, grasses, and some scant pasturage, there is practically no production by agriculture except by means of artificial irrigation. In a few places favored by nature crops are nourished by natural irrigation, due to the existence underneath the ordinary soil of a saturated layer of sand or gravel ; but these places are so few that they are of no consequence in any general view of the situation [80].

Shaw's extended disquisition on the geography and history of California's water resources continued for over 1,000 words. He then went on to contrast California's environment with Britain's :

> It is scarcely necessary to state the conditions existing in other countries referred to to show that they are vastly different from those above stated. There the rainfall is abundant, and water, instead of being of almost priceless value, is a substance that in many instance is to be gotten rid of rather than preserved. Drainage is there an important process in the development of the productive capacity of the land, and irrigation is unknown. The lands that from their situation in this country are classed as damp lands would in those countries be either covered by lakes or would be swamps and bogs [81].

52 The upshot of these natural differences (and the resulting economic and social effects) was, for Shaw, that the English rule of « absolute ownership » applicable to groundwater could not be applied in California ; the state supreme court was practically bound by the nature of the state to adopt a different legal course. This type of reasoning was in line with that of the Colorado cases discussed above, but a departure from the attitude of Shaw's predecessors on the state supreme court in *Lux v Haggin*. Why the California approach changed is beyond the scope of the present study.

V. Nature as a Norm and as an Impediment to Norms

53 This article has aimed to illustrate a once-common way of thinking about law and legal claims, in which the natural environment was held not only to provide the physical background on which states

(and empires) and their legal systems existed, but to demand from these legal systems a measure of accommodation. For some judges, it is true, the demands of nature, however worthy or desirable from a social or economic point of view, had no place in court ; a judge's role was to resist such claims in the name of the law. For many others, however, environmental realities might be imbued with normative force powerful enough to outweigh considerations of legal precedent and tradition. Moreover, while environmental differences could sometimes break the chains of black-letter law, environmental similarities might at the same time create new legal bonds, as in the Indian and Canadian cases that looked to the law of the independent United States of America, with is great rivers, for legal guidance. All this is to say that in the context of water law in the British Empire, nature could often be « jurisgenerative », to use Robert Cover's phrase – creating law [82].

54 The environmental rhetoric of these courts may, at first glance, seem but a particular instance of the wider phenomenon of colonial and newly independent courts working to stake out the independence of their legal systems from the law of the old country [83]. Yet this would be a mistake : Most of the judges arguing for nature's normative force were themselves British ; and in the cases examined here even judges of the independent United States argued not for a general rejection of the English common law, but for the inapplicability of some of its water law rules due to supposed environmental incompatibility.

55 In conclusion, though, it should be noted that this study has shown that nature also had a « jurispathic » role, impeding the smooth flow, or « transplant », of legal norms around the empire [84]. Legal norms, in particular the common law, spread around the British Empire through a network of orders, legislation, publications, correspondence, educational institutions, career paths, and more. Yet the spread of norms, never smooth, was hampered by a number of factors, some of them natural : distance, forbidding seas, and monsoon winds, to name a few. These factors impeded the transmission of legal ideas and norms in all areas of law. At the same time, this study has highlighted an additional mechanism through which nature sometimes frustrated the spread of norms : perceived environmental similarity and difference.

56 Nature thus had a dual normative role in this context : creating new norms while at the same time extinguishing others. One need not take a deterministic view of the place of nature in legal history, nor recognize in nature any sort of agency of the intentional kind, to acknowledge that nature had an important role in constituting the connections that both facilitated and obstructed the global flow of water law in the age of empire.

57 Yet if the first set of law-impeding environmental factors, deriving from physical impediments to legal communication, has historically applied with similar force across all areas of law, the efficacy of the latter mechanism, based on perceived environmental factors, presumably has been correlated with the degree to which the area of law directly dealt with environmental issues. With regard to water law, as we have seen, whether environmental conditions in fact dictated or determined the rejection of common law norms, it is clear that judicial *perceptions* of nature did play a role in impeding the spread of English norms in this field. I have argued elsewhere that forest law, too, was at least in some contexts heavily influenced by perceptions of environmental foreignness and change [85]. Further study might reveal similar patterns with regard to other related areas of law, from sanitation regulation to wildlife protection.

NOTES

1 W. P. Webb, *The Great Plains*, Boston, Ginn and Company, 1931.

2 See, e.g., T. L. Anderson & P. J. Hill, « The Evolution of Property Rights : A Study of the American West », *Journal of Law & Economics*, 18, 1975, p. 163-179.

3 The leading English source was Matthew Hale's *De Jure Maris et Brachiorum ejusdem*, published in F. Hargrave, A *Collection of Tracts Relative to the Law of England*, 1, London, T. Wright, 1787, p. 5-44. See generally D. J. Hulsebosch, « Writs to Rights : “Navigability” And the Transformation of the Common Law in the Nineteenth Century », *Cardozo Law Review*, 23, 2002, p. 1049-1106.

4 Chief Justice Tilghman's instructions to the jury in the 1807 trial were reported in *Carson v Blazer*, 2 Binn. 475 (Pa. 1810), p. 476-478.

5 *Ibidem*, p. 477.

6 *Ibid.*, p. 478.

7 *Ibid.*, p. 484.

8 Zimmerman v Union Canal Co., 1 Watts & Serg. 346 (Pa. 1841), p. 351-352. Tilghman's decision was *Shrunk v Schuylkill Nav. Co.*, 2 Sergeant & Rawle 71 (Pa. 1826).

9 Cates' Ex'rs v Wadlington, 1 McCord 580 (SC Const Ct App 1822) ; Wilson v Forbes, 2 Dev. 30 (NC 1828).

10 Adams v Pease, 2 Conn. 481 (1818), p. 483.

11 *Ibid.*, p. 484.

12 Hooker v Cummings, 20 Johns. 90 (NY Sup Ct 1822), p. 100.

13 See Hulsebosch, *op. cit.*

14 Canal Com'rs v People ex rel. Tibbits, 5 Wend. 423 (NY 1830), p. 434.

15 *Ibid.*, p. 462-463.

16 Canal Appraisers of State of New York v People ex rel. Tibbits, 17 Wend. 571 (NY 1836), p. 623 (Senator Tracy). See also Lowber v Wells, 13 How. Pr. 454 (NY Sup Ct 1856), p. 455-456.

17 McManus v Carmichael, 3 Clarke 1 (Iowa 1856), p. 30-31.

18 Canal Appraisers of State of New York v People ex rel. Tibbits, p. 624-628, quoting Ovid's *Metamorphoses*, Book X.

19 Ingraham v Wilkinson, 4 Pick. 268 (Mass. 1826), p. 285 ; Canal Appraisers of State of New York v People ex rel. Tibbits, p. 619.

20 Elder v Burrus, 25 Tenn. 358 (1845), p. 366-367.

21 Monongahela Bridge Co. v Kirk, 46 Pa 112 (1863), p. 121. See also People ex rel. Loomis v Canal Appraisers, 6 Tiffany 461 (NY 1865).

22 The Genesee Chief, 53 US 443 (1851), p. 465.

23 *Ibid.*, p. 457.

24 See also Jackson v The Magnolia, 61 US 296 (1857) ; The Daniel Ball, 77 US 557 (1870).

25 Esson v M'Master, 3 NBR 501 (1842), p. 512, 513. See also Parker v Elliott, 1 UCCP 470 (1852), p. 489.

26 Rowe v Titus, 6 NBR 326 (1849), p. 329.

27 R v Meyers, 3 UCCP 305 (1852), p. 337.

28 R v Meyers, p. 348-349.

29 R v Robertson, 6 SCR 52 (1882), p. 129-130.

30 The primary French legislation was the Ordonnance des Eaux et Forêts de 1669, preserved after the British conquest by the Quebec Act 1774, 15 Geo III c 83. See H. Brun, « Le droit québecois et l'eau (1663-1969) », *Cahiers de Droit*, 11, 1976, p. 7-45, 13-16 ; J.-L. Gazzaniga, *Le Droit de l'eau*, Paris, LexisNexis, 3rd ed, 2011, p. 12. For the rule of « *navigable et flottable* » see *ibid.*, p1. 7-19, 28-30 ; J. Bouffard, *Traité du Domaine*, Quebec, Le Soleil, 1921, p4. 2-66.

31 Boswell v Denis, 10 Lower Canada Reports 294 (QB, 1859), p. 296, 298.

32 Lefaivre v Attorney General, 14 Rapports Judiciares (B.R.) 115 (Quebec 1905), p. 125. For other Quebec water cases relying on American sources see D. Schorr, « Riparian Rights in Lower Canada and Canada East : Inter-imperial Legal Influences », *Imperial Co-operation and Transfer, 1870–1930 : Empires and Encounters*, ed. V. Barth and R. Cvetkovski, London, Bloomsbury, 2015, p. 107–125.

33 Keewatin Power Co. v Kenora, 16 Ontario Law Reports 184 (1908), p. 201.

34 Secretary of State for India v Bommadevara Venkatanarasimha, 58 Indian Cases 689 (Madras 1919), p. 691.

35 *Ibid.*, p. 698.

36 *Ibid.*, p. 698-699, quoting Srinath Roy v Dinabandhu Sen, 41 Indian Appeals 221 (PC 1914), p. 242.

37 Secretary of State for India v Bommadevara Venkatanarasimha, p. 692, 700.

38 R. Travers, *Ideology and Empire in Eighteenth-Century India : The British in Bengal*, Cambridge, Cambridge University Press, 2007, p. 197.

39 Foster v Wright, 4 CPD 438 (1878), p4. 46-447.

40 In re Hull and Selby Rwy, 151 English Reports 139 (Ex 1839), p1. 41.

41 *Ibid.*, p. 140. The reference to other countries is apparently to Scotland ; see p. 141.

42 AG v John Holt & Co, [1915] AC 599 (PC), p. 613. See also AG v John Holt & Co, 2 Nigeria Law Reports 1 (S Nigeria, 1910), p. 10.

43 For the effects of these environmental conditions on Bengal property law, see D. Bhattacharyya, *Empire and Ecology in the Bengal Delta : The Making of Calcutta*, Cambridge, Cambridge University Press, 2018.

44 *Alumni Cantabrigienses*, part II, 5, Cambridge, Cambridge University Press, 1953, p. 153.

45 L. Houck, A *Treatise on the Law of Navigable Rivers*, Boston, Little, Brown & Co, 1868, p. 161. The case report refers to « Houk on Navigable Rivers » ; *Nogender Chunder Ghose v Mahomed Esof*, 10 Bengal Law Reports 406 (PC 1872), p. 418, 431.

46 Nogender Chunder Ghose v Mahomed Esof, p. 431.

47 Sri Balsu Ramalaksmamma v Collector of Godaveri, 26 Indian Appeals 107 (PC 1899), p. 111.

48 *Ibid.*, p. 112.

49 Raja Srinath Roy v Dinabandhu Sen, 18 Calcutta Weekly Notes 1217 (PC 1914), p. 1227.

50 Srinath Roy v Dinabandhu Sen, 41 Indian Appeals 221 (PC 1914), p. 225.

51 *Ibid.*, p. 238.

52 *Ibid.*, p. 241.

53 *Ibid.*, p. 241-242.

54 *Ibid.*, p. 243-244.

55 *Ibid.*, p. 245-246.

56 Sec'y of State v Rajah of Vizayanagaram, 40 Indian Cases 896 (Madras 1916), p. 901.

57 Sec'y of State v Raja of Vizianagaram, 49 Indian Appeals 67 (PC 1921), p. 70.

58 Sec'y of State v Sri Pusapati Viziarama Gajapathiraju, 26 Calcutta Weekly Notes 348 (PC 1921), p. 349.

59 Clarke v Edmonton, [1930] SCR 137, p. 148-149. The statute was section 11 of the North West Territories Act, RSC 1886, c. 50.

60 Clarke v Edmonton, p. 151.

61 Rylands v Fletcher, (1868) LR 3 HL 330, affirming Fletcher v Rylands, (1866) 1 Ex 265.

62 Rylands v Fletcher, p. 338-339.

63 Madras Rwy Co v Salvah Makaraju, 5 Madras High Court Reports 139 (1870), p. 142.

64 Madras Rwy Co v Zamnida'r of Ka'vatinaggur, 6 Madras High Court Reports 180 (1871), p. 182, 187.

65 *Ibid.*, p. 185.

66 *Ibid.*, p. 186.

67 Madras Rwy Co v Zemindar of Carvatenagarum, 1 Indian Appeals 364 (PC 1874), p. 385-386.

68 Shury v Piggot, 81 English Reports 280 (KB 1625), p. 281. For a full discussion of the historical development of the law see J. Getzler, *A History of Water Rights at Common Law*, Oxford, Oxford University Press, 2006. For similar arguments in water law, see R. H. Helmholz, *Natural Law in Court : A History of Legal Theory in Practice*, Cambridge, Harvard University Press, 2015, p. 156-157.

69 Evans v Merriweather, 4 Ill. 491 (1842), p. 495. See also Carson v Clark, 1 British Columbia Reports (Pt. 2) 189 (1885), p. 196.

70 See D. B. Schorr, *The Colorado Doctrine : Water Rights, Corporations, and Distributive Justice on the American Frontier*, New Haven, Yale University Press, 2012.

71 Yunker v Nichols, 1 Colo. 551 (1872), p. 553-554.

72 Coffin v Left Hand Ditch Co, 6 Colo. 443 (1882), p. 446-447.

73 For example Webb, *op. cit.* and Anderson & Hill, *op. cit.*

74 See, for example, Lyons v Winter, 25 Victorian Law Reports 464 (1899). See generally W. Harrison Moore, « A Century of Victorian Law », *Journal of Comparative Legislation and International Law*, 16, 1934, p. 175-200, 181-182 ; A. C. Castles, « The Reception and Status of English Law in Australia », *Adelaide Law Review*, 2, 1963, p. 1-31, 9.

75 See Miner v Gilmour, 14 Eng Rep 861 (PC 1858) ; Orr Ewing v Colquhoun, 2 App Cas 856 (HL 1877) ; Commissioners of French Hoek v Hugo, 10 App Cas 335 (PC 1885) ; Schorr, « Riparian Rights », *op. cit.*, p1. 11, 117-119.

76 Lux v Haggin, 10 P 674 (Cal 1886), p. 700, 763.

77 *Ibid.*, p. 704.

78 *Ibid.*, p. 750.

79 Katz v Walkinshaw, 74 P 766 (Cal 1903), p. 767-768.

80 *Ibid.*, p. 768.

81 *Ibid.*, p. 769.

82 R. M. Cover, « Foreword : *Nomos* and Narrative », *Harvard Law Review*, 97, 1983, p. 4-68.

83 See, for example, G. Gilmore, *The Ages of American Law*, New Haven, Yale University Press, 1977, p. 19-23.

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ABSTRACTS

English

This article recovers a debate, played out over the course of a century, in courts across the « common law world », over whether nature had normative force in water law. It explores areas of water law, such as the extent of public ownership in rivers and the effects of shifting watercourses on ownership, in which some courts, not without controversy, departed from the established rules of English law in order to make rules more appropriate, as they saw it, to the local environment.

Français

Cet article retrace un débat long d'un siècle, qui a agité les tribunaux du « monde de la common law » afin de savoir si la nature avait une force normative en droit de l'eau. Il explore des domaines débattus du droit de l'eau, tels que l'étendue de la propriété publique des rivières ou les effets du déplacement des cours d'eau sur la propriété. Certains tribunaux, non sans controverse, se sont en effet écartés des règles établies du droit anglais afin de les rendre, selon leurs affirmations, plus adaptées à l'environnement local.

INDEX

Mots-clés
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