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WATER AND WATERCOURSES—RECREATIONAL RIGHTS—
A DETERMINATION OF THE PUBLIC STATUS OF WEST VIRGINIA STREAMS

At the turn of the century, the streams of West Virginia provided the transportation network for a flourishing lumber industry. Despite the fading of the river drive into distant memory, the capacity of a stream to sustain logging activity survives as the common law test to determine the public waters of the state. The classification of public waters may now be of little interest to the lumber industry, but it is of increasing interest to those members of the public who would wish to use these waters for recreational pursuits. Since the test of public waters was designed to accommodate bygone commercial practices, it is ill-suited to a determination of present recreational rights. Consequently, a determination of public waters in West Virginia is a perplexing undertaking that, in the absence of recent decisions, can yield only vague and speculative generalizations regarding any particular stretch of water.

The common law classification of public and private waters has its origins in the English courts' definition of navigability. Those waters within the definition of navigable waters were declared to be public waters. Confusion regarding the classification of public waters arises from the application of the term "navigable waters" to a number of concepts that are related but not identical.

1 R. Clarkson, Tumult on the Mountain 50-55 (1965).
2 See text accompanying notes 22-31 infra.
3 The recreational uses of boating, swimming, fishing, wading, and even sightseeing have received general recognition as legitimate public uses arising incident to the public's right of navigation. See, e.g., Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974).
4 The controversies that most frequently require a state court's determination of the public or private status of a particular stretch of water are: (1) disputes regarding whether title to the bed or banks or underlying minerals lies in the state (if public) or in the riparian landowner (if private), see, e.g., Campbell Brown & Co. v. Elkins, 141 W. Va. 801, 93 S.E.2d 248 (1956); and (2) disputes regarding whether the rights to boating and related recreational activity are shared by the public or lie within exclusive riparian control, see, e.g., Mentor Harbor Yachting Club v. Mentor Lagoons, Inc., 170 Ohio St. 193, 163 N.E.2d 373 (1959).
5 1 R. Clark, Waters and Water Rights § 37.1 (1957).
6 "Navigable waters" is used as the term to define those waters subject to the jurisdiction of the courts of admiralty. See, e.g., Southern S.S. Co. v. NLRB, 316 U.S. 31 (1942). The phrase is also used in a different sense to label those waters

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The confusion is compounded by the early American court's mistaken impression that the English courts defined navigable waters, for all purposes, as only those waters subject to the ebb and flow of the tide. English case law in fact reflects common English practice and from the earliest recorded cases extends the public right of navigation far beyond the reaches of the tidewater. Nevertheless, the erroneous belief in the tidewater doctrine became so ingrained in American law that an understanding of the concept is necessary for an understanding of the development of American principles in effect today, for its fiction provides the reality from which American doctrine develops. The ultimate irony is that American doctrine, left to itself, shed what it took to be the common law rule and "developed" into what had been English doctrine all along.

In 1825, in The Thomas Jefferson, Justice Story applied the tidewater rule as the common law test to define boundaries of admiralty jurisdiction. In 1851 Justice Taney faced the question of admiralty jurisdiction on Lake Ontario and found that the 1825
decision "mainly embarrasses the court." The source of the embarrassment was largely that Justice Taney overread the Story decision and confused the limitation on admiralty jurisdiction with a limitation on public rights to inland lakes and streams altogether. Thus he felt compelled to reject the tidewater test, not just as the admiralty test, but as the federal public-waters test that it never was, for he writes that "[i]t is evident that a definition that would at this day limit public rivers in this country to tidewater rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide." Consequently Justice Taney, though required by the controversy before the Court to determine only admiralty jurisdiction, framed a proposition declaring all waters to be public that are navigable in fact.

Justice Taney's characterization of public waters was subsequently applied in The Daniel Ball to determine whether federal power extends under the commerce clause to the regulation of navigation on nontidal inland waterways. The Court refined the definition to declare that

[5]those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Federal decisions subsequent to The Daniel Ball have refined its language, but its essence remains as the rule of public waters for federal commerce clause purposes.

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13 The two concepts were distinctly separate at common law, 1 H. Farnham, supra §§ 22a, 23e, and in The Thomas Jefferson Justice Story deals only with admiralty.
14 53 U.S. (12 How.) at 457.
15 The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870).
16 For example, in determining navigability for purposes of federal control over the New River from Allisonia, Virginia to Hinton, West Virginia, the United States Supreme Court applied the Daniel Ball test, construing "ordinary condition" to refer to "volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken." United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407 (1940). For similar application and refinement of the Daniel Ball definition, see United States v. Utah, 283 U.S. 64 (1930); United States v. Holt
Subsequent state court decisions reflect the language of the federal doctrine. Yet a determination of navigability for state purposes is an altogether different matter than a determination of navigability for federal purposes. As long as the state purpose recognizes the paramount federal right to control commercial navigation under the commerce clause, each state is free to determine the property rights in its own waters by any method it chooses. The common law method of distinguishing public and private rights is by defining navigability, but, as a nonliteral term of art, navigability can mean whatever the state, for its purposes, chooses it to mean.

Thus the state definitions, freed from the presumed common law ebb-and-flow-of-the-tide restrictions, took on the character appropriate to the particular needs of the individual state and became as unique and varied as the conditions within the state upon which each is based. At the time of the formulation of the West Virginia rule, perhaps the most prevalent use of the waterways of the state was as “highways” for logging drives. Thus it is not surprising that the controversy that led to the formulation of the West Virginia rule concerned the right of such use, nor that the rule that emerged contains provisions for logging privileges.

The action was a trespass on the case. The plaintiff, Isaac Gaston, was “possessed of a certain close” on both sides of Stone Coal Creek in Lewis County. That portion of the creek “was not, in its natural condition, sufficient to float vessels or other craft, but . . . saw-logs could be floated upon the occurrence of floods.” In a manner consistent with private riparian ownership, Gaston

State Bank, 270 U.S. 49 (1925); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); The Montello, 87 U.S. (20 Wall.) 430 (1874).


See note 6 supra.

Compare, for example, the public waters test in Gaston v. Mace, 33 W. Va. 14, 10 S.E. 60 (1889), designed to accommodate logging activity, with Miss. Code Ann. § 51-1-1 (1972), basing navigability on the capacity for floating two hundred bales of cotton.


Gaston v. Mace, 33 W. Va. 14, 10 S.E. 60 (1889).

Id. at 16, 10 S.E. at 61.
maintained a milldam across the creek. The impounded waters, thus raised, provided the supply that turned the waterwheel that powered Gaston's mill. The dam had been in existence since 1818 and until 1880 no logging activity had been attempted on the creek. Despite the obstruction of Gaston's milldam, in 1880 the defendant, at the appropriate high-water opportunity, deposited his collection of sawlogs into the upstream waters. Upon reaching Gaston's property, the logs collected in the millpond until, either through weight or impact, the logs smashed the dam and proceeded on their way to market. Gaston brought suit to recover for the destruction of his dam and for the loss of the use of his mill.

The West Virginia court held that not only was there no trespass, but that Gaston's dam had been a public nuisance, an "illegal and improper obstruction" of the public highway that lies in navigable waters. The definition of navigability that the court fashioned to encompass a creek incapable of floating anything more than sawlogs at floodstage unfolds in three parts:

(1) Tidal streams, that are held navigable in law, whether navigable in fact or not; (2) those that, although non-tidal, are yet navigable in fact for "boats or lighters," and susceptible of valuable use for commercial purposes; (3) those streams which, though not navigable for boats or lighters, are floatable, or capable of valuable use in bearing logs or the products of mines, forests and tillage of the country they traverse to mills or markets.

The first class can be recognized as the fictional "English" category, which the decision proceeds to criticize as inappropriate in an application to American waters. The second class is familiar as a reflection of the federal commerce clause test of waters navigable in fact. Yet since the third class—the "floatable" streams or "sawlog" category—extends the reach of public waters well beyond that of the second class, it is apparent that the sawlog test, if given equal consequence, is the operative one in West Virginia.

The first difficulty in an application of the sawlog test is in determining if the West Virginia court has placed the floatable class on an equal footing with that of waters commercially navigable in fact. The distinction the court draws between the two classes

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25 Id. at 30, 10 S.E. at 66.
26 Id. at 20, 10 S.E. at 62.
27 See text accompanying notes 7-9 supra.
28 See text accompanying notes 12-16 supra.
is that the title to the beds of floatable streams remains, as with nonnavigable waters, in private hands, whereas the beds of waters navigable in fact are property of the state. The distinction may mean very little as far as public use is concerned, depending upon the following implications of bed ownership that the court has not discussed.

Title to the beds of waters navigable in fact is held by the state, but held in trust for the use of the public.\textsuperscript{29} Title to the beds of floatable streams is held by the riparian, but held subject to a public easement for navigation.\textsuperscript{30} The distinction bears no significance for the public user so long as the easement is a general one extending, like the public trust, to activities incident to the navigational right: recreational boating, swimming, fishing and wading. The \textit{Gaston} controversy involved only the public's right to float sawlogs and the court's decision limits its concern to establishing that right. Litigation regarding the \textit{scope} of the easement has not reached the court.\textsuperscript{31}

The extent of the easement in floatable streams has been litigated elsewhere. The decision of the Missouri court in \textit{Elder v. Delcour}\textsuperscript{32} warrants examination since the state law of navigable waters upon which it is based appears to be identical to that delineated by the West Virginia court in \textit{Gaston v. Mace}.\textsuperscript{33} The Missouri controversy involved a floatable stream deemed by Missouri law

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\item\textsuperscript{29} Campbell Brown & Co. v. Elkins, 141 W. Va. 801, 93 S.E.2d 248 (1956).
\item\textsuperscript{30} Gaston v. Mace, 33 W. Va. 14, 10 S.E. 60 (1889).
\item\textsuperscript{31} The only apparent reference the West Virginia court has ever made to the recreational uses incident to the public right of navigation appears tangentially in International Shoe Co. v. Heatwole, 126 W. Va. 888, 30 S.E.2d 537 (1944). A landowner brought a public nuisance action based on an upstream polluter's interference with the use of the Greenbrier River for fishing and bathing. The landowner's claim to special injury was derived from his riparian status. The court held that the public's right to share equally in the enjoyment of the river defeats the riparian's claim of special injury. Without referring to navigability, or specifying into which public class the river fell, the court stated that anyone . . . could fish in the same waters to the very edge of the river and to the same extent as the [riparian] if such others could reach these waters from a boat, a bridge, or by any other means . . . . Is the right to bathe in the river, on which his land fronts, any greater in a riparian owner than in the general public? All may use the waters of a river for this purpose equally with the owner of the abutting land, so long as they do not trespass on the land.
\item\textsuperscript{32} \textit{Id.} at 893, 30 S.E.2d at 540.
\item\textsuperscript{33} 364 Mo. 835, 269 S.W.2d 17 (1954).
\item\textsuperscript{33} 33 W. Va. 14, 10 S.E. 60 (1889).
\end{itemize}
\end{footnotesize}
to be nonnavigable for bed title purposes, but, like the West Virginia category, a public highway nonetheless. The Missouri plaintiff sought a declaratory judgment to ascertain his rights to canoe, wade, and fish in the floatable stream. The landowner had fenced the farmland through which the stream flowed. Canoeing downstream, the plaintiff encountered the fence obstructing his way, along with written trespass warnings that were orally reinforced by the landowner himself. Ignoring the warnings, the canoeist pressed the fence out of his way. While on the riparian’s land, the plaintiff fished, waded, portaged, and picnicked along the bank. The court held that the floatable character of the stream created in it a commercially valuable public highway. Thus, notwithstanding the private bed and the noncommercial nature of the activity, the canoeist had a right to the stream’s use, so that his activities, while using the stream, were free from trespass. Because Missouri and West Virginia share the floatable concept, the decision may bear predictive relevance to the eventual resolution in the West Virginia courts.

The second difficulty that arises in applying the sawlog test of public waters is that the test cannot be applied with any certainty to the miles of marginally floatable waters unless a river drive has actually been attempted. The proof of a river’s susceptibility to a particular activity is the accomplishment of that activity. In the absence of an attempt, a landowner can only guess as to the public or private status of the waters that flow through his possessions. In the case of Isaac Gaston, sixty-two years of local experience would suggest that his “guess” of privacy was correct. Only in the ruins of his milldam did he learn that it was not.

Part of this difficulty is inherent in the design of any general test to achieve predictive reliability when applied to a specific stretch of water. The source of the problem lies in the peculiar nature of the river itself. Unlike the fixed and less mutable objects of ordinary property rights, the river is a slithering, fluctuating quantity. At its mouth it merges with the sea, as navigable and as public as the sea itself. At its source it is innumerable insignificant trickles, perhaps as public as all of nature might be, but certainly not by virtue of its navigability. Yet somewhere in between the one becomes the other and the privacy of the land on which it flows yields to the rights of the public. As long as landowners’ interests

\[\text{Id.}\]

\[\text{Id.}\]
in privacy oppose the public's interest in the enjoyment of the outdoors, the opposing parties will require that the line be drawn. Yet what is navigable one day is not the next, and no matter how detailed the test may be, the imprecision remains. To draw the line by virtue of the susceptibility of a stream to the floating of logs in commerce is to utilize a test whose results, in the absence of the actual commerce, would be uncertain throughout miles of the course of every stream in the state.

The alternatives are not necessarily preferable. Early in its history the Texas legislature attempted to remove the uncertainty with a statutory formula based on specified dimensions rather than susceptibility for a particular use. Although the Texas width requirement may provide a greater certainty, the imprecision of applying a fixed definition to a fluctuating quantity nevertheless remains. More significantly, predictability is acquired at the expense of flexibility, and it seems evident that the limits of useful navigation would rarely coincide with the innermost reaches of arbitrary width. The difference is that whereas the susceptibility tests fail to label many waters, the measurement tests label them all, but inaccurately.

The final difficulty in applying the sawlog test of public waters is that the test is designed to protect a commercial practice that is no longer in existence. Although the disappearance of commercial practice on a particular stream does not diminish its public status, it nevertheless compounds the difficulty of determining that status. Once determined to be navigable in fact, a stream is

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34 Tex. Rev. Civ. Stat. Ann. art. 5302 (Vernon 1962), enacted in 1837, declares that "[a]ll streams so far as they retain an average width of thirty feet from the mouth up shall be considered navigable streams." Enacted, ostensibly, for survey purposes, the statute is applied by the courts as the formula to determine the public waters of Texas for "navigation, fishing and other lawful purposes." Diversion Lake Club v. Heath, 128 Tex. 129, 138, 86 S.W.2d 441, 445 (1935).

35 A 1972 Mississippi enactment provides an example of a considerably more detailed attempt to approximate the limits of useful navigability:

Such portions of all natural flowing streams in this state having a length of not less than five miles and which have an average depth along the thread of the channel of three feet for ninety consecutive days in the year and which have an average width at low water of not less than thirty feet shall be public waterways of the state on which the citizens of this state and other states shall have the right of free transport and the right to fish and engage in water sports.


held to be permanently navigable, thus public, in law.\textsuperscript{39} The susceptibility for the activity, though, is determined by the occurrence of the activity.\textsuperscript{40} The problem created by the disappearance of actual use under the commercial-practice definitions is that no compilation of the streams put to such use was ever recorded, and the small-scale commerce of the past is long forgotten.

In a 1956 decision requiring a determination of the navigability of the Guyandotte River in Lincoln County for bed title purposes, the evidence of actual use was provided by available histories and by the testimony of those still able to recall such use.\textsuperscript{41} The witnesses ranged in age from seventy-three to ninety-two years old. The ninety-two year old died between trial and appeal. The youngest of the witnesses, if alive today, would be ninety-five years old. In the absence of a historical compilation, the outcome of a determination of a stream's capacity for commercial use may depend on nothing more than the oral testimony of those who remember that use. The ability of a litigant to procure that testimony would be difficult today, and impossible tomorrow.

The task should not be necessary. The floatable-streams test was designed to secure the public right to conduct the prevalent activity of the day.\textsuperscript{42} The West Virginia streams were valuable highways for commercial flotation, so language that provides for public use was adapted to specifically embrace commercial flotation.\textsuperscript{43} The most frequent public uses today are undoubtedly the recreational ones of boating, fishing, and swimming. Yet, as rights, they arise under commercial-use definitions only incident to the right of navigation for valuable commercial purpose.\textsuperscript{44} The susceptibility for commercial use must be established as a condition precedent to recreational use. If the prevalent use is the use that the law is designed to protect, then the courts could be expected to acknowledge recreational navigation as a right in itself, independent of the stream's susceptibility to floating sawlogs and other products to market.\textsuperscript{45}

\textsuperscript{39} Id.
\textsuperscript{40} Gaston v. Mace, 33 W. Va. 14, 10 S.E. 60 (1889).
\textsuperscript{43} See text accompanying notes 22-31 supra.
\textsuperscript{44} See, e.g., the discussion of Elder v. Delcour in text accompanying notes 32-33 supra.
\textsuperscript{45} It is uncertain to what extent, if any, a recreational rule would extend the limits of public navigability. In the absence of current river logging practices, the
The concept is not a new one. The first state to hold recreational use in itself to be sufficient to determine the public status of a body of water was Minnesota in 1893. The controversy before the Minnesota Court required a determination of the navigability of the former waters of a dry lake bed for the purpose of establishing title to the relicted land. The waters were never commercially navigable. The court found that

[m]ost of the definitions of "navigability" in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.

The rationale of the Minnesota decision was subsequently applied in other states to the resolution of disputes between recreational users and riparians over the use of waters incapable of commercial proof. The majority rule within the states that have confronted the issue now appears to be that the capacity for recreational navigation confers the right of recreational navigation. The commercial limits under the Gaston sawlog test are unascertainable. Recreational limits are suggested in B. BURRELL & P. DAVIDSON, WILD WATER WEST VIRGINIA (2d ed. 1975), an account of West Virginia waters that includes the small whitewater streams considered to be at the limits of a skilled kayaker's capabilities. Whether such specialized navigation would constitute public use sufficient to establish public status is yet a further matter for clarification.

44 Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893).
47 Id. at 199, 53 N.W. at 1143.
49 Several states have also embodied the principle into statute. Perhaps the most precise is IDAHO CODE § 36-1601 (1977):

Public Waters—Highways for recreation.—
(a) Navigable Streams Defined. Any stream which, in its natural state, during normal high water . . . is capable of being navigated by oar
capacity of a particular stream is simply demonstrated by the accomplishment of the act. There the fence serves, not as a warning to potential trespassers, but as a public nuisance to those it obstructs.\(^{50}\)

A strict application of the recreational-use definition carries with it the potential for harsh results. The Ohio Court of Appeals applied Ohio's recreational-use definition to a dispute between canoeists and the owner of a concrete causeway running from the shore to an island in order to connect two portions of the defendant's industrial operation.\(^{51}\) The court affirmed an order compelling the removal of the causeway. In a stream which is capable of supporting only small canoes and kayaks perhaps riparian and public interests could both have been accommodated by requiring simply a provision for passage, or even more minimally, an easement providing rights of portage.\(^{52}\) Such an accommodation of conflicting interests in place of strict nuisance principles finds expression in the West Virginia court's \textit{Gaston} decision in which the court permits milldams on "sawlog" streams so long as they contain sluices for sawlog traffic.\(^{53}\)

The smaller canoeable streams of the state are frequently obstructed by farmers' fences, private causeways, and low-water bridges.\(^{54}\) Lulled by his observance of years of disuse, the land-

or motor propelled small craft for pleasure or commercial purposes is navigable.

(b) Recreational Use Authorized. Navigable rivers . . . shall be open to public use as a public highway for travel and passage, up or downstream, for business or pleasure, and to exercise the incidents of navigation—boating, swimming, fishing, hunting and all recreational purposes.

(c) Access Limited to Navigable Streams. Nothing herein contained shall authorize the entering on or crossing over private land at any point other than within the high water lines of navigable streams except that where irrigation dams or other obstructions interfere with the navigability of a stream, members of the public may remove themselves and their boats, floats, canoes or other floating crafts from the stream and walk or portage such crafts around said obstruction re-entering the stream immediately below such obstruction at the nearest point where it is safe to do so.

\(^{50}\) \textit{E.g.}, People v. Mack, 19 Cal. App. 3d 1040, 97 Cal. Rptr. 448 (1971).


\(^{52}\) \textit{See, e.g.}, Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc., 96 Idaho 360, 528 P.2d 1295 (1974).

\(^{53}\) 33 W. Va. at 30, 10 S.E. at 66.

\(^{54}\) For a discussion of these waters from a recreationist's viewpoint, see B.
owner has felt free, for example, to fence his pasture to include rather than exclude the streams along which it lies. It seems unnecessary to disrupt such use of property so long as passage is nevertheless permitted. A canoeist on a small stream is required to evade so many natural obstacles that the occasional man-made obstacle that serves riparian needs seems too minimal to deserve the court's attention.\(^{55}\)

On the other hand, not all states in which the issue of recreational use as a right in itself has been raised have adopted formulations that favor the recreational public. Arkansas permits a landowner to fence a riverbank to prevent public boating and swimming where waters are not "commercially usable with any degree of tolerable regularity."\(^{56}\) Missouri permits obstruction of waters not "capable of floating vessels or boats such as are used in the customary modes of travel in pursuit of commerce."\(^{57}\) These expressions of commercial-use requirements are reflective of the language of the continuing series of federal decisions regarding navigability.\(^{58}\) The rationale supporting the federal language, though, is absent from state determinations. The federal definition is necessarily tied to commercial use since its very purpose is to determine those waters subject to federal regulation under the commerce clause.\(^{59}\) The states' definitions serve the altogether different purpose of determining local property rights.\(^{60}\)

Underlying the issue is a determination whether the state definitions are principally designed to provide for public commerce or principally designed to provide for public use. If the West Virginia definition of navigable waters is designed to provide for public use, then the early formulation of its sawlog category is a prime example of the court fulfilling its duty to insure that the law develops to reflect the needs and values of the society it is designed to serve. The current need for modification of the navigable waters test in

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\(^{55}\) Furthermore, to hold otherwise would force a landowner along waters of uncertain public status to guess, like Gaston, as to the susceptibilities of the water. Precision would be impossible, particularly since improvements in whitewater technique and equipment are currently expanding the extent of waters susceptible to navigational sports. *Id.*

\(^{56}\) Jones v. Scott, 509 S.W.2d 831, 833 (Ark. 1974).


\(^{58}\) See cases cited note 18 supra.

\(^{59}\) See text accompanying notes 15-16 supra.

\(^{60}\) See text accompanying notes 17-20 supra.
order that present rights reflect present conditions parallels the former need for modification of the old tidewater test that was once presumed to be in effect. Just as the West Virginia court discarded the tidewater definition of navigable waters in order to provide for a more accurate reflection of what was in fact susceptible to public use under the circumstances of the day, so, it may be argued, should the court now permit the refinement of the susceptibility test to encompass the activities that the public does in fact exercise.

In 1977, the West Virginia legislature announced, in response to the growing cost of acquiring and maintaining recreational park lands, that "it must establish, provide for, and maintain, limits on state recreational facilities." Thus while outdoor interests continue to grow, there is little hope that available park facilities will expand to accommodate those interests. The miles of natural waterways of uncertain public status become increasingly significant.

George Castelle

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1 Town of Ravenswood v. Fleming, 22 W. Va. 52 (1883).