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Water Law in West Virginia

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The time allowed for this part of the program will not permit an examination of all phases of the West Virginia law applicable to the water resources of the state. Therefore, it has been necessary to choose segments which may be of special interest as related to the beneficial use of this resource, especially as applied to the problems which arise when the water supply becomes scarce.

This discussion will not deal with the legal rights concerning the purity of water, even though the quantity of water available for many uses will be dependent upon its quality. Abundance of water even though available at the right time and place, and even with the right to use the quantity needed, will not result in a beneficial use of the water if it is so polluted that it is not economically feasible to use the water for a planned purpose. As you have already learned during this symposium, the West Virginia Legislature has shown concern as to this problem and active steps are being taken to control or eliminate pollution of the waters in this state. Neither the statutory law applicable to these efforts nor the common law rights of riparian owners to protection against pollution of streams will be discussed at this time.

In addition, in efforts to conserve water or to make it available for use at a particular location, legal rights as to disposition of water may become important. Most of the cases decided by the Supreme Court of Appeals of West Virginia in which legal principles concerning our water resources have been established have involved "too much water" and the damages resulting in the casting of that water on others. However, the principles in those cases will be applicable, even when there is an anticipated scarcity of water, if another is damaged by the mere detention of water which is present or by the transferring of it to a different location. Time limitations will not permit a discussion of that body of law.

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The present discussion will be limited primarily to the right to use the water which is available, including an examination of the persons who have rights to use it and of the quantity which each may legally use. These are the rights which will be of special interest when the water supply is scarce. In West Virginia there is no statutory law applicable to these problems, and the West Virginia case law is meager on these subjects. Therefore, much of this discussion must be based on predictions of what the courts will decide in these areas, basing the predictions, first, on the premises which have been controlling in the prior West Virginia decisions concerning water rights, and second, on the law in other jurisdictions which recognize the same general principles of water rights as heretofore recognized by the West Virginia court. Decisions from the western states cannot be used as the basis for these predictions since, as we shall see, those states have a basically different concept of water rights law.

The West Virginia court has been confronted with the normal classifications into which water has been placed for the purpose of determining private legal rights to use water. The four broad categories which the courts have normally used in dealing with water rights are:

1. Watercourses;
2. Surface waters;
3. Percolating waters; and
4. Underground waters in watercourses.

This classification will be followed herein in analyzing the legal rights to use such waters.

1. WATERCOURSES

The West Virginia court in describing watercourses has frequently used the following language:

> ". . . . 'A water course consists of bed, bank and water. Yet the water need not continually flow, as many streams are sometimes dry. There is a difference between a water course and an occasional outburst of water which, at times of freshet, from rain or snow, descends from the hills and inundates the country. To be a water course, it must appear that the water

usually flows in a certain direction, and by a regular channel, with banks or sides. . . .' "[1]

For the sake of brevity, such a watercourse is often called a stream and this terminology will be used interchangeably herein.

(a) *Appropriation Doctrine.*

In many western states the legal doctrine applied to the use of water from streams is that of "prior appropriation." It has been recognized as the sole basis for determining such rights in some of these states, and has been combined with the riparian doctrine in others.[2] Briefly, the appropriation doctrine was derived from early mining customs, particularly in California, and bases the right to the use of water on priority of beneficial use. It is sometimes referred to as the doctrine of "first come, first served." Since rights thereunder are not dependent on ownership of land or its location but rather on beneficial use of water, persons who have acquired rights may use the appropriated water beyond the watershed of the stream from which it is derived and they need not be owners of land abutting on the stream. The rights, however, are for fixed quantities of water and they may be lost by nonuse.[3] In appropriation states, certain uses may have preferences over other uses. For example, water for irrigation may have a preference over use for mining.[4] Also in most of these states permits to appropriate must be obtained from an administrative agency, and the dates of application for such permits may be controlling as between the applicants.[5]

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[1] McCausland v. Jarrell, 136 W. Va. 569, 578, 68 S.E.2d 729, 736 (1951), quoting from the syllabus in Neal v. Ohio River R.R., 47 W. Va. 316, 34 S.E. 914 (1899). Compare the much briefer definition of a "watercourse" in RESTATEMENT, TORTS § 841 (1939).

Water from rain or melted snow, although running through a natural depression but with no definite channel, is surface water; but when such water begins to flow permanently in a well-defined stream with a bed and banks, it becomes a watercourse. 2 THOMPSON, REAL PROPERTY § 650 (perm. ed. rev. 1939), citing *inter alia,* Uhl v. Ohio River R.R., 56 W. Va. 494, 49 S.E. 378 (1904).

[2] VI-A AMERICAN LAW OF PROPERTY § 28.58 (Casner ed. 1954); RESTATEMENT, TORTS, Scope Note preceding §850 at 340 (1939); CALLAHAN, PRINCIPLES OF WATER RIGHTS LAW IN OHIO 2 (1957); Busby, *American Water Rights Law,* 5 S.C.L.Q. 106 (1952).

[3] Authorities cited in note 2 *supra.*

[4] VI-A AMERICAN LAW OF PROPERTY § 28.58 at 176 (Casner ed. 1954); Thomas, *Appropriations of Water for a Preferred Purpose,* 22 ROCKY MT. L. REV. 422 (1950).

[5] VI-A AMERICAN LAW OF PROPERTY § 28.58 at 174 (Casner ed. 1954).

(b) *Riparian Doctrine.*

In the eastern part of the United States, private rights to the use of water in streams are governed by the common law under the riparian doctrine. The rights to use stream water are derived from ownership of the lands through which the stream flows or by which it is bounded.[6] (If the water in a natural watercouse is a lake or pond, the landowners' rights to the water therein are often called littoral rather than riparian, but the rights are not different.[7]) Priority in time with respect to ownership of the land or use of the water is not important. The doctrine is one of general equality as to all persons owning land on the stream, regardless of the extent of the frontage, and the rights are not lost by nonuse.[8]

The doctrine of riparian rights in streams seems to have been derived from the civil law rather than from the common law of England and to have been introduced into American law by Story and Kent.[9] In any event, it is recognized as common law in the eastern states, including West Virginia.

In *Roberts v. Martin,*[10] the West Virginia court, relying upon the riparian doctrine, limited the use of stream water to riparian owners, that is, to those who own land crossed or bounded by the stream. The defendants in this case had purchased their "right" to use the water on their non-riparian land from an upper riparian owner. The court held that a lower riparian owner could prevent the defendants' use even though only a small quantity of water was being taken from the stream and the lower owner did not need the water and was not actually damaged. This law applies also to municipal corporations by the majority view; that is, even though the city is a riparian owner, it cannot as such owner claim a right to supply its inhabitants with water from the stream.[11]

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[6] *Id.* at § 28.55.
[7] *Id.* at 158.
[8] *Id.* at § 28.55.
[9] VI-A AMERICAN LAW OF PROPERTY § 28.55 at 158 (Casner ed. 1954); RESTATEMENT, TORTS, Introductory Note preceding § 850 at 342 (1939); CALLAHAN, *op. cit. supra* note 2, at 2.
[10] 72 W. Va. 92, 77 S.E. 535 (1913).
[11] By the weight of authority, a municipality, merely as a riparian owner, has no right to divert the waters of a stream for the purposes of a public water supply. See the cases collected in Annot., 141 A.L.R. 639 (1942), including as supporting this view Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508 (1921). See also 3 TIFFANY, REAL PROPERTY § 725 (3d ed. 1939). (Of course, a municipality may take water from a stream for a public purpose under the power of eminent domain.) This principle does not apply to a municipality's

This West Virginia case may well pose the problem as to whether the upper riparian owner could have acquired this tract of land from the nonriparian owners and then have used water from the stream thereon. In the majority of the jurisdictions no limitation is placed on the size of the tract which may be regarded as riparian, assuming that it is held as one tract and is within the watershed involved. However, in some states a riparian owner cannot add to his riparian tract by acquiring a contiguous inland area.[12] Thus, in some states riparian land may lose its favored position if separated from the portion abutting on the stream, and it may not become riparian by later being rejoined to that which abuts on the stream. In any event, it is generally held that water may not be diverted from the stream for use on land which is beyond the watershed of the stream.[13]

In the *Roberts* case the West Virginia court made the following observations as to the nature of the rights of a riparian owner:

> "Plaintiff . . . is entitled as a riparian owner to have the stream which washes his land flow as it is wont by nature without diminution or alteration. He may insist that the stream shall flow to his land in the usual quantity, in its natural place and at its natural height, and that it shall flow off the land to his neighbor below in its accustomed place and at its usual level. While he has no property in the water itself, yet his right to the natural flow of the water will be regarded and protected as property. His right to have the water pass his land in its natural current is not an easement or appurtenance; but it is a right annexed to the soil which he owns. The right exists *jure naturae* as parcel of the land. Gould on Waters (3rd ed.), sec. 204; Pomeroy on Riparian Rights, secs. 7-9. The flow of the water in its natural way and at its natural height is a part of

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taking surface water or percolating water for its water supply. See CALLAHAN, *op. cit. supra* note 2, at 15, and the discussion in the text, *infra*, concerning the use of these types of water. Compare the position taken in RESTATEMENT, TORTS § 855, comment at 374 and 377 (1939) on the use of a stream for the water supply of a town or city bordering thereon, as well as on the sale of water from a stream by a riparian owner to a nonriparian village.

[12] VI-A AMERICAN LAW OF PROPERTY § 28.55 at 160 (Casner ed. 1954); 3 TIFFANY, REAL PROPERTY § 727 (3d ed. 1939). For a collection of the pertinent cases, see the addendum to Maloney, *The Balance of Convenience Doctrine in the Southeastern States, Particularly as Applied to Water*, 5 S.C.L.Q. 159, 178 (1952). The Restatement takes the position that the parcel of land, which will be considered "riparian land," means a continuous tract or plot of land in one possession, no part of which is separated from the rest by intervening land in another possession. RESTATEMENT, TORTS § 843 (1939).

[13] CALLAHAN, *op. cit. supra* note 2, at § 21.

> plaintiff's landed estate. Interference with the flow is the infringement of a property right of plaintiff for which he may have redress as readily as for violation of his right to any other portion of the soil."[14]

This statement of the law has sometimes been referred to as the "natural flow" theory. Under it, the stream could not be lawfully diminished in quantity.[15] If applied literally, the doctrine would permit no consumptive use at all except diversions which would be so small as to be considered *de minimus,* for example, a one-inch pipeline from the Great Kanawha.[16]

It will be noted, however, that in this case the court in fact applied the theory only to nonriparian use of the water.[17] There is no indication that the court would not permit consumptive use of the water

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[14] Roberts v. Martin, 72 W. Va. 92, 94, 95, 77 S.E. 535, 536 (1913). In McCausland v. Jarrell, 136 W. Va. 569, 68 S.E.2d 729 (1951), the court recognized the principles applied in the *Roberts* case, quoted these statements and additional ones therefrom, and cited many West Virginia cases in which the principles as quoted had been recognized by the West Virginia court since the decision of the *Roberts* case.

[15] The following observations were made by the court in the *Roberts* case: "Defendants, by their act in taking the water, . . . are disturbing the natural flow of the stream to which he is entitled, by reducing the quantity of water that would naturally flow therein. Their act is an unlawful one. It does not matter whether plaintiff is actually damaged. Nor does it matter that plaintiff does not need the water for use." Roberts v. Martin, *supra* note 14, at 95, 77 S.E. at 536.

[16] This illustration was used by the court in the *Roberts* case. The court also noted that another court had stated that the *de minimis* maxim is applied to the condition of the stream at the time of its lowest stage and not at the average flow. Roberts v. Martin, *supra* note 14, at 98, 77 S.E. at 538.

Even under the "natural flow" doctrine, it is recognized that water may be taken from the stream and consumed for domestic needs. VI-A AMERICAN LAW OF PROPERTY §§ 28.56, 28.57 (Casner ed. 1954). See the discussion in the text, *infra,* concerning the use of water from streams for domestic needs.

Compare the statement of the legal consequences of the "natural flow" theory in RESTATEMENT, TORTS, Introductory Note preceding § 850 at 342 (1939). The *de minimis* maxim is recognized in RESTATEMENT, TORTS § 855(d) (1939).

[17] The court made these observations: " . . . The diversion of the water by the pipe line to nonriparian land is an exrtordinary use to which the riparian owner who sold to defendants is not entitled by the law relating to riparian rights . . . . No reasonable use of the water is made in connection with the riparian land, but the water is taken therefrom and conducted wholly around the land of the plaintiff, so that he is deprived of his legal right to its flow in the natural course. . . ." Roberts v. Martin, *supra* note 14 at 97, 77 S.E. at 735. This principle is generally recognized as applicable under the "natural flow" doctrine, namely, that no diversion is permitted to nonriparian lands, nonriparian uses being injurious at law, even if not in fact, to riparian interests. VI-A AMERICAN LAW OF PROPERTY § 28.56 (Casner ed. 1954). Compare, however, the manner in which riparian and nonriparian uses of the water from a watercourse are treated in RESTATEMENT, TORTS § 855 (1939).

of the stream as between riparian owners. In fact, the court in this opinion and in others has recognized, although it has never so held, that the right of each riparian owner to the natural flow of the stream is subject to reasonable use of the water by other riparian owners as the stream runs through or contiguous to their lands.[18] This doctrine is usually referred to as the "reasonable use" doctrine. In the *Roberts* case, the court quotes at length from Kent's *Commentaries,* pointing out in substance that it would be unreasonable to debar every riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use of it be made under the limitations of equal rights without material injury or annoyance to the lower riparian owners.[19] Two difficulties with this "reasonable use" doctrine are that no cause of action arises until a lower riparian owner has been injured and, further, what is a reasonable use generally cannot be determined without litigation.

The latter of these two problems will be examined first. Assuming that the water is being taken from a "stream"[20] and assuming that the land on which it is to be used is riparian,[21] under the reasonable use doctrine are all beneficial uses to be treated in the same manner? Further, will it make a difference depending upon what uses the other reparian owners are making of the water? It is usually said that a riparian owner may take a greater quantity of water for domestic purposes than for uses of a commercial nature. It has been

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[18] Recognition of the right of a riparian owner to make a reasonable use of the water from a stream is apparent from these portions of the opinion:

"Of course the right of a lower riparian owner to the natural flow of the stream through his land is subject to reasonable uses of the water by upper riparian owners as it runs through their lands before reaching his. 2 Farnham on Waters, sec. 464. Each riparian proprietor has a right to a reasonable use of the waters flowing through or by his land, for the purpose of supplying his natural wants. Says Chancellor Kent: '. . . Streams of water are intended for the use and comfort of man; and it would be unreasonable and contrary to the universal sense of mankind, to debar every riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use of it be made under the limitations which have been mentioned; . . . . All that the law requires of the party, by or over whose lands a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect, the application of the water by the proprietors above or below on the stream.' 3 Kent. Com. 439." Roberts v. Martin, *supra* note 14 at 95-97, 77 S.E. at 536-537.

[19] *Id.* at 96, 77 S.E. at 537. For a general discussion of the "reasonable use" doctrine, see VI-A AMERICAN LAW OF PROPERTY § 28.57 (Casner ed. 1954); RESTATEMENT, TORTS, Introductory Note preceding § 850 at 344 (1939).

[20] See the discussion in the text, *infra,* concerning problem areas in determining whether the water is being taken from a "stream" or "watercourse."

[21] See the discussion in the text, *supra,* concerning what is "riparian land."

said that the upper riparian owner may take such quantities as he needs for *domestic* purposes even though none is left for *domestic or commercial* uses of lower owners.[22] Domestic uses might best be classified as an exception to the general doctrine of correlative rights in stream water.[23] Since there have been no decisions on this right in West Virginia, the law is uncertain in this jurisdiction.

Further, even if this be the law, what are domestic uses? It has been said that they are limited to uses which are necessary for the sustaining of life on the riparian land. For example, drinking, bathing, irrigating gardens supplying food for family use and the watering of farm animals are domestic uses, but large-scale irrigation or the watering of a large herd for commercial purposes is not included.[24]

If the use is commercial, it must first be determined whether the particular use is itself *reasonable* without regard to the circumstances of use; for example, is commercial irrigation a reasonable use?[25] Second, even if the commercial use is reasonable in this sense, is the quantity of water which is being taken reasonable with reference to similar rights of other riparian owners either for the same commercial purpose or for different commercial uses?[26] Even if criteria are established for testing these matters,[27] the test of "reasonable use" is difficult to apply and perhaps can only be determined *from time to time* by the court or jury as conflicting claims are asserted in actual litigation. Even though the reasonable portion for use is established by court decree, the order would be subject to modifica-

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[22] VI-A AMERICAN LAW OF PROPERTY § 28.57 (Casner ed. 1954); 3 TIFFANY, REAL PROPERTY § 724 (3d ed. 1939); 2 THOMPSON, REAL PROPERTY, § 656 (perm. ed. rev. 1939) (statement therein as to municipal domestic use is minority view—see note 11, *supra*).

[23] VI-A AMERICAN LAW OF PROPERTY § 28.57 at 165 (Casner ed. 1954); CALLAHAN, *op. cit. supra* note 2, at § 12.

[24] VI-A AMERICAN LAW OF PROPERTY § 28.57 at 165 (Casner ed. 1954). See also 3 TIFFANY, REAL PROPERTY § 724 (3d ed. 1939).

[25] For a discussion of the problems in irrigation cases, see VI-A AMERICAN LAW OF PROPERTY § 28.57 at 166 (Casner ed. 1954). See also CALLAHAN, *op. cit. supra* note 2, at § 15.

[26] CALLAHAN, *op. cit. supra* note 2, at § 16. Compare the statement of the legal consequences of the "reasonable use" theory in RESTATEMENT, TORTS, Introductory Note preceding § 850 at 344 (1939).

[27] RESTATEMENT, TORTS § 854 (1939) lists five factors as important in determining the gravity of intentional harm to a riparian proprietor through a non-trespassory invasion of his interest in the use of water in a watercourse. In substance, those factors would be applied in determining whether the use is "reasonable." See also the discussion as to such criteria in CALLAHAN, *op. cit. supra* note 2, at § 17. Compare 3 TIFFANY, REAL PROPERTY § 724 (3d ed. 1939) which also discusses rights as between opposite riparian owners.

tion if future changes show that portion to be unreasonable,[28] and there are no West Virginia decisions as to either what commercial uses are reasonable or what determines the reasonableness of any commercial use in relation to use by other riparian owners for commercial purposes.

The first difficulty with the "reasonable use" doctrine mentioned above was that no cause of action arises until a lower riparian owner has been injured.[29] This has reference to the establishment of rights by prescription to use water in streams. Basically this is a common law doctrine which permits one to acquire rights as against others by "continued and uninterrupted, open and visible, use of a definite right in the land of another which is identical to that claimed as an easement and has a relation to the use of, and a direct and apparent connection with, the dominant tenement under an adverse claim of right, for the prescriptive period of time."[30] The period of time required in West Virginia is ten years or more.[31] Thus, a riparian owner may lose his rights as to water in a stream as against others if their use of such water meets the test of this doctrine.

This doctrine of prescription as applied to nonriparian uses seems more satisfactory than when it is applied to use on riparian lands. As noted above, the natural flow theory applies to nonriparian uses, and the use becomes adverse as to lower reparian owners on the stream involved as soon as a perceptible amount of water is take from the stream, even though the lower riparian owners are not being injured by the water's being taken. A cause of action arises for the riparian owners and the prescriptive period begins to run against them as soon as such nonriparian use is made if the other conditions as to adverse use are satisfied, even though this use does not interfere with any use by the riparian owners and no harm to them results.[32] If the riparian owners are not being injured, they may not in fact complain for the prescriptive period, and

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[28] VI-A AMERICAN LAW OF PROPERTY § 28.57 at 170 (Casner ed. 1954); RESTATEMENT, TORTS, Introductory Note preceding § 850 at 344 and 346; CALLAHAN, *op. cit. supra* note 2, at § 18.

[29] Kinyon, *What Can a Riparian Proprietor Do?* 21 MINN. L. REV. 512, 525 (1937); CALLAHAN, *op. cit. supra* note 2, at § 7. See also the authorities cited in note 33, *infra*.

[30] Paden City v. Felton, 136 W. Va. 127, 137, 66 S.E.2d 280, 286 (1951).

[31] *Id.* at 139, 66 S.E.2d at 288.

[32] As the court said in the *Roberts* case: " . . . The unlawful act of defendants will, in time, ripen into an adverse right if permitted to continue. . . ." Roberts v. Martin, *supra* note 14, at 99, 77 S.E. at 538. See also Town of Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508 (1921).

the nonriparian owner's right to use water from the stream may become established.

The nonriparian owner may not desire to assume the risk of investment needed for such water use when ten years are required before the right is fixed, but the riparian owner's risk may be greater under the "reasonable use" doctrine which is applied to him. It is true that the riparian owner is in the favored position so far as *some use* of the stream water is concerned; he may safely invest if the only uses which he will ever make of the water of the stream will continue to be viewed by the courts as reasonable.

If a riparian use is only to be reasonable, the landowner has that right as soon as he becomes a riparian owner. However, if he wants assurance that he can legally continue to use the amount of water for which he makes an investment, even though it may become an unreasonable amount, he can acquire no rights by prescription to such amount of water from the stream until this amount becomes unreasonable. This would not occur until his use causes harm to the riparian owners involved, or, in other words, until they need water from the stream. Their rights are not lost by nonuse, and riparian rights are not related to priority of use.[33] The law, which gives the riparian owner making the investment the right to continue to use the stream water until another riparian owner is injured, also prevents the investor from acquiring any rights against those riparian owners who may later need water from the stream. It is not until then that their causes of action arise. The investment must be made on the assumption that, when other riparian owners need the water, the investor will have a fair return from the beneficial use which he has already made and from that which he may continue to make as his share which is reasonable as to all riparian owners then asserting rights to use the water of the stream.

One other difficulty with placing any reliance on the prescriptive rights doctrine, whether for riparian or nonriparian uses, is that

[33] 2 THOMPSON, REAL PROPERTY § 654 at 297 (perm. ed. rev. 1939) states that such rights are "not gained by use or lost by disuse." See also RESTATEMENT, TORTS, Introductory Note preceding § 850 at 345, which states that, since a use cannot be said to be unreasonable when it causes no harm to others, there is no cause of action against one who is making a use, at least until it causes harm, and further that, even when harm is caused, there is no liability for making the use unless it is unreasonable in view of all of the circumstances of the case. Compare 3 TIFFANY, REAL PROPERTY § 726 (3d ed. 1939), noting, however, that the text there has reference to an "unreasonable" appropriation of water. See also the authorities cited in note 29, *supra*.

such rights do not run upstream as to the right to use the water.[34] The riparian owners upstream from the point of diversion have no causes of action against those who are diverting the water below them; using the water from the stream below a riparian owner does not interfere with his right to take the water as it passes his land, and therefore such use cannot be adverse to his rights.

Now consider what bodies of water are classified as "streams" though not normally so called, including the question as to when such bodies either become or cease to be "streams." Although it may not be difficult in most cases to determine that flowing surface water in a channel is a stream or watercourse within the description quoted above, some consideration needs to be given to the more frequent problem areas.

(c) *Springs.*

In *Roberts v. Martin,*[35] the West Virginia court applied the riparian doctrine to water taken by the defendants from one of the springs which constituted the source of the stream as to which the plaintiff was a riparian owner. The defendants were conducting the water from this spring by a small pipeline to nonriparian land. Therefore, a spring which is a source of a flowing stream is regarded as part of the stream, and use of water therefrom is controlled by the riparian doctrine. Accordingly, a nonriparian has no right to use the water from the spring, and a riparian owner, including the one on whose land the spring is located, is permitted to make only a "reasonable use" thereof along with other riparian owners on the stream.[36]

The law may be different if there is no outlet in the nature of a watercourse for the water to escape from the spring.[37]

(d) *Ravines.*

From the description of watercourses, as shown above, it is apparent that water need not flow continually in the channel for the

[34] Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water,* 23 TEXAS L. REV. 24, 48 (1954). See also Town of Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508 (1921); VI-A AMERICAN LAW OF PROPERTY § 28.56 (Casner ed. 1954); 2 THOMPSON, REAL PROPERTY § 666 (perm. ed. rev. 1939).

[35] 72 W. Va. 92, 77 S.E. 537 (1913).

[36] 3 TIFFANY, REAL PROPERTY § 739 (3d ed. 1939); 1 and 2 THOMPSON, REAL PROPERTY §§ 77 and 651 (perm. ed. rev. 1939). RESTATEMENT, TORTS § 841 (1939), in defining the term "watercourse," includes springs in which a stream originates or through which it flows.

[37] See the authorities cited in note 36, *supra.*

water which does flow therein to be treated as a stream. Most courts hold, however, that a flow of water through a swale or ravine, which takes place whenever it rains and then ceases until the next rain, is not a watercourse since it lacks any element of permanency.[38] However, there need not be a constant source of supply, seasonal flow therein being sufficient as long as such water rises from a fixed and predictable source.[39] These considerations naturally pose the problem of whether surface waters may become a stream, or vice versa, and thereafter be governed by a different body of law.

Several times the West Virginia court has been confronted by these problems as related to the disposition of water. In *Neal v. Ohio River R.R.*,[40] the defendant made an inadequate opening through a fill which it had placed across a channel through which water ran from a pond on the plaintiffs' land. The plaintiffs claimed the channel was a watercourse; the defendant contended that it was only surface water which had been stopped by the inadequate opening. Since the facts involved offer a rather common picture, the court's detailed analysis merits attention. These are the facts and the court's reasoning:

> ". . . we must see whether the water obstructed in this case was only surface water or a water course. On this land, in a basin or depression, there had always been a pond, covering half an acre in natural state, used for watering stock, fed by water from rain and snow gathered over a considerable area, conducted from hills back of it by several ravines,—so to call them. This pond always had water in it. It had an outlet to the Ohio river by means of a channel cut by the water, through which, when too full, it discharged itself, twenty or twenty-five feet wide, where it ran under a trestle of the railroad before the fill was made where the trestle had stood. The channel was not deep under the trestle, having a wide space to spread out; but thirty yards from the trestle it narrowed, and the ravine or channel was very deep. This stream had been running under the trestle ten years, and had always been there. Great quantities

[38] 3 TIFFANY, REAL PROPERTY § 719 (3d ed. 1939). See also the concept of reasonable permanency in the definition of a "lake," as that term is included within the term "watercourse" in RESTATEMENT, TORTS § 842 (1939).

[39] VI-A AMERICAN LAW OF PROPERTY §§ 28.55 and 28.61 (Casner ed. 1954); 3 TIFFANY, REAL PROPERTY § 719 (3d ed. 1939); 2 THOMPSON, REAL PROPERTY § 650 (perm. ed. rev. 1939).

[40] 47 W. Va. 316, 34 S.E. 914 (1899).

> of water came down from the hills through this pond; sometimes, in heavy rains, bringing down great stones and other debris. Before the fill was made, this water freely flowed into the river. The water in this pond covered, in natural state, half an acre, for the depth of three feet; and any rise would go off by the said outlet to the river. It was never dry, and, when rains or snow came, it received and discharged much water. I do not regard the four ravines or drains going into the pond as water courses. But how as to the pond and its outlet? . . . I regard the outlet from this pond as complying with this definition. There was a quantity of water regularly passing, considerable except in droughts, in one, and only one, direction; not squandering and wandering over the surface as surface water does, but in a defined channel, over a bed, between banks, —through a channel cut by the waters long ago. . . . I do not see why this stream does not fill this measure. Here was the pond, a material element, made up by various incoming drains. Gould, Waters, §263, says that 'mere surface water may be said to form a water course at the point where it begins to have a reasonably well defined channel, with bed and banks or sides, though the stream itself be very small, and the water may not flow continuously, and surface water ceases to be such after entering within the banks of a water course.' See 24 Am. & Eng. Enc. Law, 904. It seems to me that this large quantity of water collected in this pond, and going from it as constantly as water came in the usual course of nature, by a fixed channel, over a fixed bed, is not mere surface water. It originated in rains. So do all streams. But when it reached this pond it lost the character of surface water. . . ."[41]

In *McCausland v. Jarrell*,[42] the defendants raised the elevation of farm land in the path of water which flowed from the plaintiff's land to and through the defendants' land. Before the defendants made the change, the water had formed a swamp or small pond on the defendants' land and drained therefrom into a stream. The plaintiff contended that the water which was blocked was a watercourse, and the majority of the appellate court agreed; but one of the dissenting judges and the lower court took the position that the water was only surface water. The majority opinion points out that

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[41] *Id.* at 319, 34 S.E. at 915.
[42] 136 W. Va. 569, 68 S.E.2d 729 (1951).

before the change was made there was a well-defined bed and banks, normally containing water that usually flowed in a known direction and in a regular channel, and that it was created by nature and not by human work or effort. It was also observed that a watercourse implies a place of discharge, ordinarily emptying into a river or another watercourse, but that even if a stream spreads out on land and there terminates, that does not deprive that part of the stream which flows regularly through a channel of its character as a watercourse.[43] This may imply that water in a stream may become surface water and that here the water after it reached the defendants' land may have become such. However, it has been held in other jurisdictions that a watercourse does not become surface water at some particular place though it there spreads out over a wide space without apparent banks if it subsequently again passes into a regular channel.[44]

(e) *Ponds and Lakes.*

In both the *Neal* and *McCausland* cases, the court was confronted with the treatment of water in ponds. This appears more indirectly in the latter case, but Judge Lovins' dissent therein was based on the water involved being "a series of surface ponds." To what lakes and ponds does the riparian doctrine apply? For the purpose of classification as used in this paper, when may they be regarded as watercourses or streams?

As between several persons owning land abutting on any lake or pond, they are treated the same as riparian proprietors on a watercourse.[45] If water passes from a pond or lake by a natural watercourse, the owners of land abutting on the pond or lake are treated also as riparian owners as to others owning land abutting on the watercourse, and the latter in turn owe reciprocal riparian duties to the owners of land abutting on the lake or pond.[46] In the case of a lake or pond, however, the water of which, so far as appears, does not pass out in a watercourse, the water apparently is regarded as belonging to the one who is the exclusive owner of the land on which the pond is located.[47] It should be noted that this apparently does not

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[43] *Id.* at 579, 68 S.E.2d at 736.

[44] 3 TIFFANY, REAL PROPERTY § 740 at 156 (3d ed. 1939); 2 THOMPSON, REAL PROPERTY § 651 (perm. ed. rev. 1939); RESTATEMENT, TORTS § 841 at 323 (1939).

[45] VI-A AMERICAN LAW OF PROPERTY § 28.55 at 158 (Casner ed. 1954); 3 TIFFANY, REAL PROPERTY § 739 at 151 (3d ed. 1939).

[46] 3 TIFFANY, REAL PROPERTY § 739 at 151 (3d ed. 1939).

[47] *Id.* at 154. See also RESTATEMENT, TORTS §§ 841, 842 (1939).

include those cases in which two or more own land abutting on such lake or pond, where they are each treated as riparian owners, as noted above.

It seems that the West Virginia court could have applied these principles in deciding the *Neal* and *McCausland* cases. In both cases it seems that the ponds had natural watercourse outlets and thus might have been treated as "watercourses" and the riparian doctrine applied.

(f) *Artificial Watercourses.*

In the *McCausland* case, Judge Haymond in writing the opinion made reference to the fact that the bed and banks were "created by nature and not by human work or effort." If this were not true, could the stream have been treated as a *natural* watercourse? The same problem may also arise as to artificial lakes, ponds, and reservoirs.[48] Will the riparian doctrine apply to them after their artifical creation? This may become of special importance with the increased use of detention dams for both water conservation and flood control. The problem may also arise from the diversion of natural watercourses for manufacturing, irrigation, or even domestic use. We are not here concerned primarily with those who may lose water by the diversion and who may have a right to prevent the diversion; we are now dealing with those who own land on the body of water which has been artifically created or diverted.

The law to be applied in such situations is certainly not settled. The decisions which have been rendered by the courts are not consistent. Traditionally riparian rights attach to natural watercourses, but this does not mean that such rights or *similar* ones may not attach to bodies of water existing in particular locations by virtue of human work or effort. Sometimes courts apply the doctrine of reciprocal easements by prescription; sometimes the estoppel theory, especially if the change appears to be permanent.[49] The cases have been collected in a leading article by Dean Evans. He made these observations:

> "Perhaps almost enough has been said respecting riparian rights, the theory here advocated being that when a stream

[48] 3 TIFFANY, REAL PROPERTY § 739 at 155 (3d ed. 1939).

[49] 3 TIFFANY, REAL PROPERTY §§ 720, 737 (3d ed. 1939). See also VI-A AMERICAN LAW OF PROPERTY § 28.55 at 157 n. 8 (Casner ed. 1954); 2 THOMPSON, REAL PROPERTY §§ 650, 668 (perm. ed. rev. 1939); and RESTATEMENT, TORTS § 841 at 321 (1939).

diversion has occurred or an artificial lake, reservoir or other body of water has been created and has continued long enough to assume in the minds of those in the neighborhood a settled condition, (sometimes called an appearance of permanency) the artificial condition is now to be regarded the same as if it had been caused by nature rather than by the hand of man. When this has occurred, riparian rights should attach. The question should not be simply with what intent was the diversion made, but rather what do general appearances lead people who may be affected thereby to believe.

"An important element should be lapse of time. There should be a strong presumption that a long continued situation has become permanent even though it may be that the act of alteration may not originally have been intended to make a permanent change. The period of limitations as such should not be conclusive inasmuch as a settled condition may well appear in much shorter time, but a longer period might be necessary where the circumstances were otherwise inconclusive.

. . .

"In cases from many states artifical diversions of streams and artificial lakes and reservoirs have been held to afford the owners riparian rights in the lands so affected. . . .

"In many cases riparian rights are not mentioned, but their existence is inferable from the conclusions reached. . . ."[50]

Judge Haymond's reference in the *McCausland* case to channels created "not by human work or effort" seems to have stemmed from the majority opinion which he had written earlier that year in *Paden City v. Felton.*[51] In this latter case two judges dissented. The defendant had obstructed a drainage ditch which ran through her lot by placing debris therein. The ditch was two to four feet deep and four to six feet wide as it passed through the defendant's lot. The municipal corporation sought to enjoin the interference with the flow of water through the ditch from which it emptied into a watercourse. In the majority opinion this statement appears: ". . . the ditch is obviously a man made, artifical watercourse, and . . .

[50] Evans, *Riparian Rights in Artifical Lakes and Streams,* 16 Mo. L. Rev. 93, 113 (1951) (reprinted with permission from the University of Missouri School of Law).

[51] 136 W. Va. 127, 66 S.E.2d 280 (1951).

a natural watercourse, unlike the present ditch, is a watercourse which consists of bed, bank, and water, and in which the water usually flows in a certain direction and by a regular channel with banks and sides."[52] Judge Given, writing for the dissenting judges, summarized their position in this manner:

> "As I understand, the majority concedes that if the ditch is a natural water course, within the legal meaning of that term, or partakes of the nature thereof, the defendant would have no right to obstruct the flow of water through the same. The majority opinion simply dismisses the question of whether the so called ditch is a natural or an artificial water course with the statement that 'the ditch is obviously a man made, artificial water course, * * *.' It is not so clear to me that the so called ditch is either 'man made' or 'artificial.' It had, of course, its origin in the action of man. The natural flow of water through the same for a period of over forty years may have not only changed its nature, size and appearance but changed its existence from what was originally a mere ditch to a natural water course, depending upon circumstances. Prior to the construction of the ditch the waters now drained by it from the area of the streets and alleys of the town flowed in almost the opposite direction from that in which the waters now flow through the ditch. . . .
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> "I can not see that the mere definition of a natural water course, as stated in the majority opinion, can be of much assistance, for the so called ditch, whether an artificial or a natural water course, 'consists of a bed, banks and water, and in which water usually flows in a certain direction and by a regular channel with banks or sides.' The manner of the creation of the water course does not control its classification. It is not unusual for owners of land, acting alone or jointly, to change the channel of a natural water course through their lands. The change may straighten the course of a stream, reclaim valuable land or better drain certain areas. In such circumstances I do not presume that it would be contended that the new channel, though man made, would not be the natural course for the flow of water. It would be an artificial change in the water course, but a water course nevertheless."[53]

In the dissenting opinion there is also recognition of the rights of others to insist on the continuance of the artificial condition when

[52] *Id.* at 145, 66 S.E.2d at 291.
[53] *Id.* at 154, 66 S.E.2d at 295.

a natural watercourse is changed, and the authority cited is based on the estoppel theory and also on the analogy to rights by prescription. There is also recognition in the dissent that a drainage ditch though of artificial origin may become a watercourse and that the landowners adjoining it may have the same rights and duties as if it had a natural origin.

It should be remembered that in the *Neal* case, cited in the majority opinion for support, the court took the position that, even if it were questionable whether a watercourse was involved, the defendant "recognized and treated it as a water course, and cannot now be heard to say that it is not a water course."[54] This was apparently recognition of the applicability of the estoppel theory in determining water rights.

In a more limited area, if artifical changes are made by a riparian owner to benefit part of his land and he later conveys that part to another, that person can insist upon the changed condition by virtue of an implied grant of the easement.[55] Likewise, if he retains the part benefited, the grantee of the other part cannot insist upon restoration of the original condition since the grantor retained his rights to the changed condition by virtue of an implied reservation of the easement.[56]

(g) *Flood Waters.*

Although there are a few cases *contra,* the great majority of the decisions hold that flood waters of a stream, meaning the excess over the ordinary quantity of water therein, are to be treated as part of the stream and the riparian doctrine applies. At least this is true as long as it is in fact part of the same body of water; that is, it is still a part of the watercourse as long as it is confined by the highwater banks which are at a greater distance from each other than the ordinary banks.[57] Furthermore, courts generally regard as part of the stream even flood waters which have become temporarily separated from the stream but which will return in time to the ordinary channel.[58] If the waters spread out over the adjoining land

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[54] Neal v. Ohio River R.R., 47 W. Va. 316, 321, 34 S.E. 914, 915 (1899).
[55] CALLAHAN, *op. cit. supra* note 2 at § 31.
[56] *Ibid.*
[57] 3 TIFFANY, REAL PROPERTY § 743 at 170 (3d ed. 1939). Compare RESTATEMENT, TORTS § 841 at 320, 324 (1939).
[58] VI-A AMERICAN LAW OF PROPERTY § 28.60 at 183 (Casner ed. 1954); 3 TIFFANY, REAL PROPERTY § 743 at 170 (3d ed. 1939).

and become entirely severed from the stream with little likelihood of return to the stream, they are regarded as surface water.[59]

This was the reasoning of the Ohio court in treating flood waters as part of the stream:

> "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its channel; so that when, swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel, as when, by droughts, it is reduced to its minimum, that is its low water channel. . . ."[60]

There is no West Virginia case dealing with the beneficial use of flood waters, but the West Virginia court has applied these principles in dealing with the disposition of flood waters. In *Uhl v. Ohio River R.R.*,[61] the defendant interfered with the overflowing waters of the Ohio River, at a point outside of its [ordinary] banks, by means of an embankment. One of the defenses was that this water was surface water. The plaintiff's property had been damaged by waters from the river, during an ordinary flood, overflowing the embankment when water on the river side rose faster than the water in a stream on the plaintiff's property and by the embankment's retaining the water on the plaintiff's property longer than it would have remained in the absence of the embankment. The court held that the defendant was liable both for preventing the gradual rise of the water over plaintiff's lot by the embankment, which caused the water level to rise and the water to be cast as a waterfall on the lot, and for preventing the normal outflow of the water from the basin. Since this is the only West Virginia case in point, it is worth quoting therefrom to this extent:

> "Though the flow or current of a watercourse is one of its pronounced characteristics, it is at variance with common knowledge and reason to say that only such water of a stream as is perceptibly moving may be considered a part if it. When

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[59] 3 TIFFANY, REAL PROPERTY § 743 at 170 (3d ed. 1939).
[60] Crawford v. Rambo, 42 Ohio St. 279, 282, 7 N.E. 429, 431 (1886).
[61] 56 W. Va. 494, 49 S.E. 378 (1904).

one stream, uniting with another, obstructs its flow by reason of its running bank full, while the other is low, and causes such other stream to be filled with back water, can it be said that, so long as the backwater stands, it is only surface water? Are all the motionless pools within the banks of a river, produced by the windings of its channel and current, to be called surface water? Nobody has ever ventured such an unreasonable suggestion. If it be conceded, that the running waters of an overflowing river on the low lands outside of its banks do not cease to be part of the river, as clearly they do not, what reason can be assigned for a distinction outside of the banks which cannot exist within them? The standing waters are supported and maintained by the great body of water forming the river. From bank to bank, surface to bed, within the banks and beyond them, as far as the water stands or flows, all the atoms or parts are, for their positions, interdependent and inseparably united save when absolutely severed. If, from the lowest point in the bed a large quantity should be removed, a subsidence of the entire surface would result, each particle finding a lower level by the law of gravitation. That part of the water which flows is simply seeking what the standing water has already found, its level. By nature, it is all one body, until severed in some way, and the law suggests no reason or principle upon which what clearly is not severed can be deemed to have been cut off.

"No doubt such water often becomes so separated from the river as to justify its classification as surface water. On the low lands along our rivers, there are depressions having no outlets to the river or elsewhere, and in which, when filled, the water must stand until it passes away by evaporation through the air and percolation through the soil. These are filled by overflow in times of flood and, upon the recession of the river, are left full of water. This overflow water is thereby effectually severed from the waters of the river and, no doubt, becomes, under the decisions, surface water. . . .

"For the foregoing reasons, we conclude that the overflow water of a river, at times of ordinary flood, whether standing motionless on the adjacent land, or sweeping over it, do not cease to be part of the river, unless so separated from it as to prevent its return. . . ."[62]

[62] *Id.* at 505, 49 S.E. at 383.

The limitation in the opinion to "ordinary floods" has been noted, but it must be remembered that the court found in this case that the flood was only an ordinary flood and also that this limitation needed to be applied as to liability for wrongfully disposing of water in a stream. This need not be viewed as a limitation on beneficial use of waters from extraordinary floods if the other standards as to the water remaining a part of the stream are established.

Most of the cases in which the problem as to flood waters has arisen have dealt with disposition of such waters rather than its beneficial use. However, if they are parts of a stream, the riparian doctrine would seem to apply to both disposition and use; and in one case dealing with use of flood waters, the court applied the riparian doctrine where the waters were found to be parts of the stream.[63]

2. Surface Waters

As distinguished from streams or watercourses, the West Virginia court has described surface water in the following manner:

> "Surface water is water of casual, vagrant character, oozing through the soil, or diffusing and squandering over and under the surface, which, though usually and naturally flowing in known direction, has no banks or channel cut in the soil; coming from rain and snow, and occasional outbursts in time of freshet, descending from mountains or hills, and inundating the country; and the moisture of wet, spongy, springy, or boggy land. . . ."[64]

In the more arid states, it is recognized that water, at a given time and place, is pursuing a cycle, all stages of which are related in that taking water from any source, whether above or below the surface, affects the total supply.[65] In such states rights in surface waters are generally the same whether the water is diffused or flows in a watercourse. However, in most jurisdictions diffused surface water has been placed in a separate classification and is governed by special legal rules applied to what is generally called "surface waters."

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[63] Thompson v. New Haven Water Co., 86 Conn. 597, 86 Atl. 585 (1913) (upper riparian owner not permitted to divert flood water to a reservoir for the purpose of sale).

[64] Neal v. Ohio River R.R., 47 W. Va. 316, 34 S.E. 914 (1899) (point 2 of syllabus). Compare the definition of surface waters in Restatement, Torts § 846 (1939).

[65] VI-A American Law of Property § 28.61 at 186 (Casner ed. 1939); Callahan, Principles of Water Rights Law in Ohio § 36 (1957).

It may at times be difficult to determine whether the water is diffused or in a stream but, if it is diffused, the law in relation thereto has been expressed by the West Virginia court as follows:

> ". . . . each owner may fight surface water as he chooses. He may use it all, divert it away from the lower land, may prevent its invasion of his own land, and thus dam it up on his neighbor's land. He may, in the use of his land, cause it to flow differently upon his neighbor's from what it did before. Gould, Waters, § 263, very clearly states the basic principle thus: 'Water spread over the surface of land, or gathering in natural depressions, or into swamps or bayous, or percolating the soil beneath the surface, if flowing in no definite channel, does not constitute a water course, and is not subject to the law regulating riparian owners. By the common-law no rights can be claimed *jure naturae* in the flow of surface water, and its detention, expulsion, or diversion is not an actionable injury, even when injury results to others. . . .
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> "But this rule seems harsh, applied without limitation, and, even where the common-law rule was the basis or standard of decision, an exception was recognized. While recognizing the right of the owner of the higher field or lot to throw his surface water upon the lower, even if, in the use of his land, it changed or increased the flow upon the lower field or lot, yet it must not be collected in a body, and in such body or mass cast upon that lower field or lot."[66]

The holding in every West Virginia case on surface waters has been related to attempts to dispose of such water rather than to use it, but it has often been recognized, as in the above quotation, that the owner of the land may freely take and use all of the surface water which comes upon his land to the exclusion of any possible lower landowners.[67] This is apparently true whether he uses it

[66] Jordan v. City of Benwood, 42 W. Va. 312, 315, 318, 26 S.E. 266, 267, 268 (1896).

[67] See, for example, Uhl v. Ohio River R.R., 56 W. Va. 494, 497, 49 S.E. 378, 379 (1904).

2 THOMPSON, REAL PROPERTY § 649 (perm. ed. rev. 1939) recognizes that the owner of the land may use or divert the whole of such water, stating that he has an unqualified right to appropriate all of the surface water to his own use, but does recognize that in a few jurisdictions the landowner's right to obstruct or divert such water is limited to what is necessary in the reasonable use of his own land. As to the test in the latter jurisdictions, compare the position of the West Virginia court as to *percolating waters* discussed in the text, *infra*. To the effect that restrictions which may be

for domestic or commercial purposes and whether the "lower" landowner would desire to use it for domestic or commercial purposes.[68] However, it might be questioned whether one person might maliciously deprive another of the use of surface water.[69]

3. PERCOLATING WATERS

Underground diffused waters are often designated by the courts as "percolating." They are distinguished from underground bodies or streams of water which exist in known and well-defined channels. Percolating waters are those which ooze or percolate through the earth. The West Virginia court has taken the position that underground waters are presumed to be percolating waters until it is shown that they exist in known and well-defined channels, and further, that the law will recognize as underground streams only those which are known to so exist or that they do so exist can be ascertained or discovered from surface indications or other means without subsurface excavations for that purpose.[70]

Even though the withdrawal of percolating waters by one property owner may diminish the supply of such waters available to another, and even though such withdrawal may affect the water flowing in streams on the surface, the law as to percolating waters is quite

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recognized in any particular state in regard to percolating waters may also be applied to surface waters, see 3 TIFFANY REAL PROPERTY § 744 (3d ed. 1939). Compare VI-A AMERICAN LAW OF PROPERTY § 28.62 (Casner ed. 1954). See generally 2 THOMPSON, REAL PROPERTY § 660 (perm. ed. rev. 1939).

[68] See the authorities cited in the second pragraph of note 67, *supra.*

[69] In addition to the authorities cited in the second paragraph of note 67, *supra,* see RESTATEMENT, TORTS § 864 (1939) to the effect that a possessor of surface waters on his land consuming them by using them there is ordinarily reasonable and does not subject him to liability to another by interfering with the latter's use unless the use is made for the primary purpose of harming the other. Compare the position of the West Virginia court as to *percolating waters,* as set forth in the text, *infra.*

[70] Pence v. Carney, 58 W. Va. 296, 300, 52 S.E. 702, 704 (1905). To the same effect, see VI-A AMERICAN LAW OF PROPERTY § 28.65 (Casner ed. 1954); 1 THOMPSON, REAL PROPERTY § 75 (perm. ed. rev. 1939); 3 TIFFANY, REAL PROPERTY § 748 (3d ed. 1939). The last cited authority takes the position that water is known to be flowing in a well-defined watercouse only when the existence and course of the channel can be ascertained by the reasonable inference of an ordinary man without the necessity of making excavations. American Law of Property makes reference to the use of dye tests, surface indications, sounds of subsurface flow and casually connected reductions in surface stream levels to rebut the presumption that underground waters are not flowing in an underground channel. It is also mentioned in this treatise that in Colorado the presumption is the other way. Many cases involving subterranean and percolating waters are collected in Annot., 55 A.L.R. 1385 (1929) and Annot., 109 A.L.R. 395 (1937). See generally 2 THOMPSON, REAL PROPERTY § 663 (perm. ed. rev. 1939).

different from that applied to surface streams. The early common law rule was that percolating waters might be taken by the owner of the land in which it is found without regard to the effect of such taking on the percolating waters available to others.[71] This rule is followed in many states today. The West Virginia court, however, rejected this rule and limits the use by the owner of the land to a reasonable and beneficial use, where to use it otherwise would deprive the owners of adjacent and neighboring lands of the enjoyment of the waters of their lands.[72] The court recognizes that the beneficial use of the water on the land may be for some purpose in connection with the ordinary operations of agriculture, mining, domestic purposes, or improvements.[73] It has indicated that the use may be for any purpose for which an owner may legitimately use and enjoy his land.[74] However, under the West Virginia rule this would not include the extracting of the water for use elsewhere by strangers who have no right thereto as against the owners of the neighboring lands.[75]

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[71] VI-A AMERICAN LAW OF PROPERTY § 28.66 (Casner ed. 1954); 1 THOMPSON, REAL PROPERTY § 75 (perm. ed. rev. 1939); 3 TIFFANY, REAL PROPERTY § 746 (3d ed. 1939). These authorities recognize that the principle stated in the text is not applicable if the owner of the land takes the water solely to interfere maliciously with another's water supply. See particularly 3 TIFFANY, REAL PROPERTY § 747 (3d ed. 1939). Compare the "reasonable use" doctrine concerning percolating waters, discussed in the text, *infra*.

[72] Pence v. Carney, 58 W. Va. 296, 302, 52 S.E. 702, 704 (1905). In reaching this conclusion, the court made the following observation:

"We must yield assent to the later doctrine of reasonable and beneficial use, which constitutes rather a qualification of the early rule than an announcement of a new rule. The later doctrine seems to us to be sustained by the weight of authority as well as by the weight of reason. What is a reasonable and beneficial use under this later doctrine must be determined in the light of the facts and circumstances appearing in each case as it arises. . . . Such reasonable and beneficial use has often been understood and held to mean, use for any purpose for which the owner of the land, upon which underground, such percolating waters are found, might legitimately use and enjoy his land. . . ." *Id.* at 305, 52 S.E. at 706.

[73] *Id.* at 302, 52 S.E. at 705 (quoting from Am. & Eng. Enc. of Law). For recognition of other "reasonable" uses, see Drummond v. Whiteoak Fuel Co., 104 W. Va. 368, 376, 140 S.E. 57, 60 (1927) (quoting from a New Jersey decision).

[74] Pence v. Carney, 58 W. Va. 296, 305, 52 S.E. 702, 706 (1905). In Drummond v. Whiteoak Fuel Co., 104 W. Va. 368, 375, 140 S.E. 57, 60 (1927), the court stated that the *Pence* case did not seriously attempt to define the rule of "reasonable use" but that the case recognized that it had been held "to apply to any purpose for which a landowner might legitimately use and enjoy his land'."

[75] Cross, *Groundwaters in the Southeastern States*, 5 S.C.L.Q. 149, 151 (1952). 3 TIFFANY, REAL PROPERTY § 746 at 176 (3d ed. 1939) recognizes the principle of law, but criticizes it where the water, such as mineral water, has little value for purposes other than sale. The West Virginia court seems

The West Virginia rule is often called the "reasonable use" doctrine,[76] but this should not be confused with that doctrine as applied to the taking of water from streams. That is a correlative rights approach, whereas here the test is the reasonableness of the use of the water on the land from which it is taken.

In those jurisdictions which continue to follow the early common law doctrine of absolute ownership in percolating waters, some modifications have occasionally been applied. A malicious taking of the water for the purpose of injuring another has been held actionable by the majority of the courts.[77] This result should clearly follow in a "reasonable use" jurisdiction such as West Virginia. Our court quotes the following with approval:

> "'. . . it is accordingly held that if such water is drawn off, not in the *bona fide* enjoyment of the defendant's property, but for no beneficial purpose, and *a fortiori* if it be drawn off maliciously, he may be enjoined from so doing, especially if the interests of the public would otherwise suffer, though the water be used colorably for some purpose of benefit to himself.' . . ."[78]

This would also seem to cover the situation which has concerned other courts, namely, whether the one withdrawing the water will be liable if he is actuated by a desire to injure his neighbor. The rule stated above would test the action of the one withdrawing the water by the reasonableness of the action.

If the one taking percolating waters from the land deprives another of such waters through negligence, the one injured is more likely to have a remedy in a "reasonable use" jurisdiction than in a common law absolute ownership jurisdiction.[79] There is no case in point in West Virginia, but the court indicates that the landowner has no right to waste such water, whether through malice

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to have recognized this principle of law. Pence v. Carney, 58 W. Va. 296, 303, 52 S.E. 702, 705 (1905). This limitation seems inherent in the concept of a reasonable and beneficial use of the waters *on the land* in which it is found.

[76] VI-A AMERICAN LAW OF PROPERTY § 28.66 (Casner ed. 1954); 1 THOMPSON, REAL PROPERTY § 75 (perm. ed. rev. 1939); 3 TIFFANY, REAL PROPERTY § 746 (3d ed. 1939). This was recognized by the West Virginia court in Drummond v. Whiteoak Fuel Co., 104 W. Va. 368, 375, 140 S.E. 57, 60, (1927).

[77] See the authorities cited in note 71 *supra*.

[78] Pence v. Carney, 58 W. Va. 296, 304, 52 S.E. 702, 705 (1905).

[79] CALLAHAN, *op. cit. supra* note 65, at § 53.

or indifference.[80] However, the court held that temporary wasting on the facts shown in connection with the completion of a well for use in running a hotel on the land was not an unreasonable use.[81] Also our court has indicated that no liability arises when the diversion is made for a reasonable use "by operations conducted in the usual way."[82]

Extraction of minerals is a reasonable use of property, and the diversion of percolating waters in mining operations creates no liability for others' losses of such waters therefrom.[83] However, if the mining operation does not leave adequate subjacent support of the surface in its natural state and the surface breaks or subsides, and as a result damages springs or wells, liability for the loss attaches.[84] There is no West Virginia case dealing with loss of lateral or subjacent support of land by the mere withdrawal of percolating waters, and the courts and textwriters are not agreed as to whether such withdrawal may create liability or on the facts which will create such liability if it does arise from such act.[85]

The rights of landowners as to percolating waters may come in conflict with the rights of riparian owners if the percolating waters are so located that withdrawal thereof may affect the level of the stream. The cases are not in agreement. Some hold that the landowner may appropriate percolating waters without liability to riparian owners even though the withdrawal indirectly lowers the level of the stream. Some have held that the riparian's rights prevail over the rights of others in percolating waters.[86]

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[80] Pence v. Carney, 58 W. Va. 296, 304, 52 S.E. 702, 705 (1905). The court was quoting with approval and the statement in the text above is limited by these words: "if by such waste the neighboring landowner is deprived of percolating waters which otherwise would be within his land and which he there has a necessity for using." The added statement seems to merely indicate the person who may complain concerning such waters being wasted by the other landowner. Compare 3 TIFFANY, REAL PROPERTY § 746 at 177 (3d ed. 1939).

[81] The court found that the evidence of the plaintiffs in a great measure sustained the contention of the defendants that the pumping was only temporary, was without malice, and was for the purpose of completing the well for use.

[82] Drummond v. Whiteoak Fuel Co., 104 W. Va. 368, 376, 140 S.E. 57, 60 (1927).

[83] *Ibid.* Compare 3 TIFFANY, REAL PROPERTY § 746 at 177 (3d ed. 1939).

[84] Drummond v. Whiteoak Fuel Co., 104 W. Va. 368, 377, 140 S.E. 57, 60 (1927).

[85] VI-A AMERICAN LAW OF PROPERTY § 28.46 (Casner ed. 1954).

[86] CALLAHAN, *op. cit. supra* note 65, at § 56.

4. Underground Water in Watercourses

Waters which flow underground and meet the standards established for watercourses or streams on the surface are often called subterranean streams. These standards and examples of their application have already been set forth herein under the first classification. Under the discussion of the third classification, the difficulty of proof as to the existence of subterranean streams has been mentioned.[87] However, if the existence of an underground stream can be proved, the body of law which applies to the use of such waters is the same as that which applies to the use of surface streams.[88] Repetition of that law and the difficulties inherent in its application seems unnecessary. This has already been treated under the first classification.

Conclusion

Although this discussion as to West Virginia law has been based of necessity largely on predictions of what the West Virginia Supreme Court of Appeals will hold concerning such water rights, it is believed that such predictions are reasonably accurate. They represent the common law in other jurisdictions, and the Constitution of West Virginia provides that the common law shall be the law of this state except to the extent it is changed by the Constitution or by legislation.[89]

As we have seen, some phases of the common law doctrine of riparian rights discourage the development of new projects or expansion of existing projects which would make beneficial use of the water resources of the state. Perhaps some phases of the doctrine of prior appropriation should be coordinated with the common law doctrines as to water rights, even though doing so would involve the establishment of administrative machinery to determine certain water rights.[90] Some states have already made such changes in their law by legislation. Some of these statutes have been held invalid under the provisions of state constitutions. Similar changes in our law by legislation might be held invalid under our present

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[87] See note 70 *supra* and the text thereto.

[88] VI-A American Law of Property § 28.65 (Casner ed. 1954); 1 Thompson, Real Property § 75 at 87 (perm. ed. rev. 1939); 3 Tiffany, Real Property § 748 (3d ed. 1939).

[89] W. Va. Const. art. VIII, § 21.

[90] Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 Texas L. Rev. 24, 25 (1954).

Constitution.[91] Thus, amendment of the State Constitution may be needed.

However, prior to considering legislative changes in our existing law or questioning the constitutionality of such proposed changes, other questions need to be answered. Before these questions are answered, we may need more factual information. Do we now know what are the water needs for our future economy? Assuming we need increased industrialization, which types shall be given preference if conflicts in water needs develop? Will the answer be affected by the size of the industry? Will the type and location of the water involved be material? If these factors are to be considered before determinations are made, who will consider them and according to what standards? When these decisions are reached, shall they be final ones or shall they be tentative depending upon possible future changes in our economy? Answers to these questions and other related ones are needed before it should be decided to what extent the present law is unsatisfactory and what changes ought to be made therein in order to obtain the most efficient beneficial use of the water resources of the state.

[91] Scurlock, *Constitutionality of Water Rights Regulation*, 1 KAN. L. REV. 125-150, 298-318 (1952); see also VI-A AMERICAN LAW OF PROPERTY § 28.56 n. 15 (Casner ed. 1954).