

June 1935

Navigable Waters--Navigability--Repartian Owner's Right of Access

Robert Merricks
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Transportation Law Commons](#), and the [Water Law Commons](#)

Recommended Citation

Robert Merricks, *Navigable Waters--Navigability--Repartian Owner's Right of Access*, 41 W. Va. L. Rev. (1935).

Available at: <https://researchrepository.wvu.edu/wvlr/vol41/iss4/13>

This Recent Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

operation of law. Such a person either cannot take the legal title at all,¹⁰ or else is declared constructive trustee of the property.¹¹ Judicially articulated public policy there prevents the wrongdoer from taking, squarely in the face of statutes of descent which vest property in the killer immediately upon the death of the decedent.¹² Public policy may go far to controvert statutory law, or to work an exception to an insurance contract,¹³ where the beneficiary is a wrongdoer; but in the instant set-up, where the beneficiary is entirely innocent, it is submitted that to override established law public policy should be given legislative expression.

Certainly, unless there is evidence that deaths by execution were not included in the computation of the mortality tables on which the insurer bases his rates, denial of recovery here would be giving the insurer a windfall, for if such deaths were so included, the insurer was paid to take such risk.

In sum, the forthright disposition of the problem in the principle case should put the matter at rest.

—HERSCHEL H. ROSE, JR.

NAVIGABLE WATERS — NAVIGABILITY — RIPARIAN OWNER'S RIGHT OF ACCESS. — The United States government authorized the straightening of the James River to improve navigation between Hopewell and Richmond, Va., a distance of twenty-five miles. It was for the benefit of the city of Richmond, and the city brought condemnation proceedings. Defendants, riparian owners, claimed damages to their rights of access through prospective diversion of the river from their lands. The city claimed that riparian owners have no private property rights in the flowing of streams inconsistent with the public right of navigation, and that no damages should be awarded such owners by reason of diversion or diminu-

¹⁰ *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188 (1889).

¹¹ *Bryant v. Bryant*, 193 N. C. 372, 137 S. E. 188 (1927).

¹² W. VA. REV. CODE (1931) c. 42, art. 1, § 1.

¹³ The courts make an exception to life insurance contracts by holding that the beneficiary in a policy of insurance who murders the insured will be denied the right to recover thereon upon grounds of public policy. *Johnston v. Metropolitan Life Ins. Co.*, 85 W. Va. 70, 100 S. E. 865 (1919); *Wickline, Adm'r v. Life Ins. Co.*, 106 W. Va. 424, 145 S. E. 743 (1928). The legislature has constituted conviction of felonious killing a bar to the claim of the convicted party to the insurance or property of the decedent. W. VA. REV. CODE (1931) c. 42, art. 4, § 2. See Note (1934) 40 W. VA. L. Q. 188; (1935) 41 W. VA. L. Q. 287.

tion of the flow of water past their lands as a result of the improvement. *Held*, for the city. *Oliver v. City of Richmond*.¹

Streams in West Virginia and Virginia are in one of three classes: non-navigable, floatable, or navigable.² A floatable stream is one capable of floating logs, rafts, and the like, during high water for such a length of time as would make it beneficial for the public so to use it.³ Such streams are not capable of practical general use for navigation.⁴ Few courts draw the distinction between floatability and navigability; it is plainly a matter of degree.

At common law a navigable stream was one in which the tide ebbed and flowed; that is the present English rule.⁵ In the United States, a navigable stream is one navigable in fact.⁶ The chief test is capacity for beneficial use in commerce.⁷ The burden of proof is on the party claiming it to be navigable.⁸ Courts take judicial notice that some streams are navigable.⁹ Others are declared so by statute.¹⁰ The rest have been or must be proven navigable as a matter of fact. The federal government has control of all navigable streams.¹¹ The Federal Water Power Act contains a broad definition of what constitutes "navigable waters"¹² and

¹ 178 S. E. 48 (Va. 1935).

² *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 5 L. E. A. 392 (1889); *Hot Springs Lumber and Mfg. Co. v. Revercomb*, 106 Va. 176, 55 S. E. 580, 9 L. E. A. (N. S.) 894 (1906); affirmed on rehearing, 110 Va. 240, 65 S. E. 557 (1909); *Burner v. Nutter*, 77 W. Va. 256, 87 S. E. 359 (1915).

³ *Gaston v. Mace*, *supra* n. 2; *Hot Springs Lumber and Mfg. Co. v. Revercomb*, *supra* n. 2.

⁴ *Brown v. Chadbourne*, 31 Me. 9 (1849).

⁵ The theory actually originated in the United States and was adopted by the English Courts. Chancellor Kent first set it forth in *Palmer v. Mulligan*, 3 Caine 307, 2 Am. Dec. 270 (N. Y. 1805). See 1 FARNHAM, *WATERS AND WATER RIGHTS* (1904) § 23a.

⁶ *Gaston v. Mace*, *supra* n. 2; *Barre v. Fleming*, 29 W. Va. 314, 1 S. E. 731 (1887); *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. Ed. 1058 (1851).

⁷ 1 FARNHAM, *op. cit. supra* n. 5. (1904), § 26; *The Montello*, 20 Wall. 430, 22 L. Ed. 391 (1874); *Harrison v. Fite*, 148 Fed. 781 (C. C. A. 8th, 1906).

⁸ *Gaston v. Mace*, *supra* n. 2.

⁹ *James River*, in *Old Dominion Iron & Nail Works v. C. & O. R. Co.*, 116 Va. 166, 81 S. E. 108 (1914); *Ohio River*, in *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 485 (1882).

¹⁰ *Economy Light and Power Co. v. U. S.*, 256 U. S. 113, 41 S. Ct. 409 (1920).

¹¹ The commerce clause, U. S. CONST. art. 1, § 8, and the clause empowering Congress to make all laws necessary to carry into execution the federal jurisdiction in admiralty and maritime matters, U. S. CONST. art. 3, § 2. *Leovy v. U. S.*, 177 U. S. 621, 20 S. Ct. 797 (1899).

¹² 41 Stat. 1063 (1920), 16 U. S. C. A. § 796 (1926): " 'Navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved

late decisions have done likewise.¹³ Today, almost any stream that connects with and affects a navigable stream may be held navigable.

A riparian owner's rights respecting the water of a navigable stream are subservient to the public use. This is true also of a floatable stream; a riparian owner has no right to obstruct it by dams or otherwise.¹⁴ He may erect a temporary obstruction like a timber boom.¹⁵ He may also make a reasonable use of the water as it flows past.¹⁶

At common law a riparian owner had a right of access to the stream which could not be destroyed even for the improvement of navigation without making compensation to the owner.¹⁷ That is still the English rule.¹⁸ The great weight of authority in the United States sustains the ruling in the principal case, that the riparian owner is entitled to no compensation.¹⁹ There are no West Virginia decisions directly on the point. In *Ravenswood v. Fleming*,²⁰ however, it is stated that it is competent for the legislature to grant to municipal corporations the exclusive right to build wharves on public navigable rivers without compensation to the riparian owners. As against the state, the riparian owner has no rights in the land below high water mark. But in *Barre v. Fleming*²¹ the court states that a riparian owner has a right of access and can construct a wharf, and the like, and adds that the

condition, notwithstanding interruptions between navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids; together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

¹³ *Economy Light and Power Co. v. U. S.*, *supra* n. 10, holding the Des Plaines River in Illinois navigable. (The only actual navigation of it for commercial purposes had been by canoes and rafts and this use had been discontinued over a hundred years before the suit was brought.) *Arizona v. California*, 283 U. S. 423, 51 S. Ct. 522 (1931), holding the Colorado River navigable at Boulder Dam. See *Niles, Arizona v. California* (1932) 10 N. Y. U. L. Q. REV. 188.

¹⁴ *Gaston v. Mace*, *supra* n. 2.

¹⁵ *Wilson v. Guyandotte Timber Co.*, 70 W. Va. 602, 74 S. E. 870 (1912).

¹⁶ *Union Sand & Gravel Co. v. Northcott*, 102 W. Va. 519, 135 S. E. 589 (1926).

¹⁷ 1 FARNHAM, *op. cit. supra* n. 5, § 65.

¹⁸ See notes (1922) 21 A. L. R. 206; (1934) 89 A. L. R. 1156.

¹⁹ *Ibid.* 1 FARNHAM, *op. cit. supra* n. 5, § 66, seemingly maintains the contrary position, that the riparian owner is entitled to compensation in most states.

²⁰ *Supra* n. 9.

²¹ *Supra* n. 6.

only question involved in the *Ravenswood* case was whether the statute denying the riparian owner of the lot in an incorporated town the right to build a wharf without consent of the town council, was unconstitutional.²² In a later case which did not involve the public interest, the court re-affirmed the proposition that a riparian owner has the "right of access to water including a right of way to and from the navigable part."²³

—ROBERT MERRICKS.

NEGLIGENCE — CONFLICT OF LAWS — ACTION AGAINST SPOUSE FOR TORT IN ANOTHER STATE. — Husband sued wife in tort for personal injuries received while a passenger in an automobile owned and operated by the latter. The accident occurred in Alabama, and suit was instituted in West Virginia. *Held*, such actions are against the public policy of this state and cannot be maintained, although permissible in the state where the injuries were received. *Poling v. Poling*.¹

The early common law concept of the legal unity of husband and wife precluded tort actions between the spouses.² Therefore, it was not until the general adoption of the Married Women's Property Acts³ that the problem became of real significance. Although the principal case represents the decided weight of authority, the courts are by no means in accord as to the effect of these statutes upon the common law disability.⁴ The divergence may be partly but certainly not entirely explainable by language variations in the respective statutes.

The tendency has been to treat the problem as primarily one of statutory construction.⁵ Invoking the maxim that statutes in derogation of the common law must be strictly construed, it is

²² 1 FARNHAM, *op. cit. supra* n. 5, § 67d.

²³ *Union Sand & Gravel Co. v. Northcott*, *supra* n. 16, at 527.

¹ *Poling v. Poling*, 179 S. E. 604 (W. Va. 1935).

² McCurdy, *Torts Between Persons In Domestic Relations* (1930) 43 HARV. L. REV. 1030, 1033.

³ For the West Virginia Statutes, see W. VA. REV. CODE (1931) c. 48, art. 3, particularly § 19, providing that "A married woman may sue and be sued . . . the same in all cases as if she were a single woman . . ."

⁴ The cases on this point are collected in NOTES in (1924) 29 A. L. R. 1482; (1924) A. L. R. 1406; (1926) 44 A. L. R. 794; (1927) 48 A. L. R. 293; (1934) 89 A. L. R. 293.

⁵ See, for example, *Keister v. Keister*, 123 Va. 157, 96 S. E. 315 (1918), in addition to the principal case.