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Connecticut Water Law: Judicial Allocation of Water Resources

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University of Connecticut

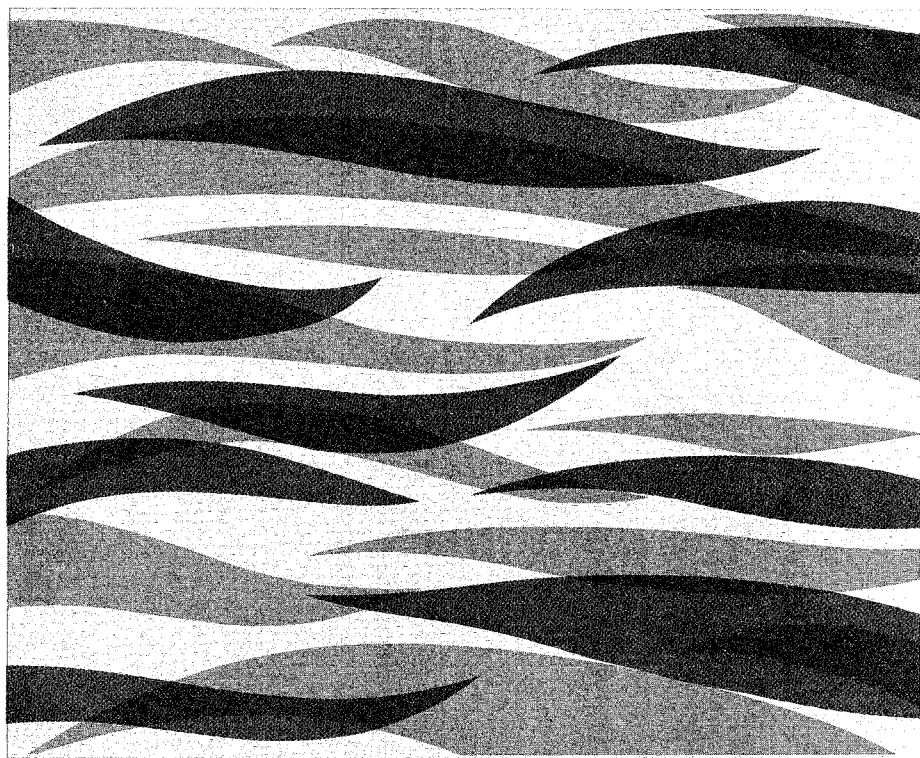
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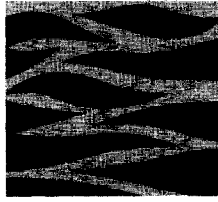
Connecticut Water Law: Judicial Allocation of Water Resources

ROBERT I. REIS



INSTITUTE OF WATER RESOURCES
THE UNIVERSITY OF CONNECTICUT
STORRS, CONNECTICUT

Connecticut Water Law:
Judicial Allocation of
Water Resources



REPORT NO. 4

Connecticut Water Law: Judicial Allocation of Water Resources

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FOREWORD

WITH the growth in population and industry and with increased water use per capita, the development and allocation of our water supplies has become a critical problem not only for Connecticut but also for the entire nation.

The successful handling of this vital natural resource is contingent upon a thorough understanding of the many factors which influence it. Prominent among these is water law.

In 1966, the distinguished attorney and teacher of law, Dr. Frank J. Trelease, Dean of the University of Wyoming College of Law, lectured in the seminar program of The University of Connecticut Institute of Water Resources. In discussing legal contributions to water resource development he stated, "The function of law is to regulate the relations between men or groups of men. In playing this role the law serves essentially a dual purpose. It provides a mechanism, the lawsuit, for the solution of conflicts after they have arisen, and it furnishes a guide, the rule of law, for the ordering of future conduct."

In this publication, through a study of court cases and decisions, Professor Reis has indeed prepared a guide to water law which will give historical perspective as well as serving as a base in planning for the future. Going back to the inception of recorded judicial opinions in Connecticut, he has reviewed and synthesized the more than two hundred decisions which have been made regarding the allocation of water use.

Professor Reis has set forth the four distinct categories of water which the courts have developed: (1) surface waters flowing in a definite channel—public; (2) surface waters flowing in a definite channel—private; (3) ground water; and, (4) diffuse surface waters. While pointing out the arbitrariness of this classification system, he notes that it forms the basis for the discussion of legal rights in and to the use of water in Connecticut.

Although restricted to Connecticut law, the principles and opinions which he has recorded will be a valuable guide to all individuals who are, or expect to be, active in planning, developing, and allocating water resources.

In this thorough and comprehensive work, Professor Reis has rendered a high service to those concerned with water resources. The Institute of Water Resources is pleased and proud to have sponsored the study.

September 8, 1967

WILLIAM C. KENNARD
Director
Institute of Water Resources

PREFACE

THIS STUDY is intended to satisfy a notable void in any recent work devoted to Connecticut Water Law. The need for such a work has been apparent for some time. The immediate cause of this study, however, was an interdisciplinary study of water resource allocation (under the auspices of the Institute of Water Resources, Storrs, Connecticut). Before the cooperative project could achieve its fuller objectives, a survey of Connecticut Water Law appeared necessary.

The problems of water resource allocation are directly related to the growth of legal regulation of water resources. If the body of law attached to water resources is antiquated, archaic, and incapable of flexible adaptation for modern needs, then economic technological and hydrological principles toward maximizing water use cannot be realized.

The lesson of this book is not only in what it says, but in what it does not say. A survey of Connecticut cases has proven that a complete and workable system of water rights law is remarkably lacking in this state. It is hoped that by this start—a survey of what the law *is*—further studies will be free to discuss what the law *ought* to be in order to maximize the use of water resources in this state, thereby ensuring the public well-being.

August 17, 1967

R.I.R.

ACKNOWLEDGEMENTS

EVEN a work of relatively short length involves the talents and encouragement of many people. I would like to express my appreciation to Dr. William C. Kennard, director of the Institute of Water Resources, Storrs, Connecticut—without whose initiation, encouragement and continued cooperation this work could neither have been undertaken, nor completed.

My colleagues on this project, Theodore H. Focht and Dr. Robert Leonard, have been most helpful to me during my research and preparation of manuscript for publication—to them I extend my gratitude.

Mr. Edward Dolan and Mr. Juri Taalman (second year law students at The University of Connecticut School of Law) have been two of the most diligent research assistants one could hope for. Both gentlemen significantly lightened my burden in the editing and proofing stages of manuscript preparation. Mr. Dolan further prepared rough drafts from my research notes of parts three and four, which were truly creditable.

My further appreciation may be extended to Mrs. Mildred Mobilia and Mrs. Adeline Krompegal for their work in typing the several drafts of the manuscript; and, to Mrs. Pat Sechrist for her typing of the final draft.

Mrs. Carl Silber deserves special commendation for her many hours of diligent proof reading and perceptive comments.

To
E.S.R.
and
J.C.R.

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INTRODUCTION

EVERY era of societal development fosters its own series of unique problems. Perhaps, those of the latter part of the twentieth century might best be labeled the problems of ever increasing population concentrations and land use densities. Ours is an age of diminishing pure water supplies, conflicting water demands, regulation, pollution, and foul smelling waters. It is an age of watershed destruction, paved roads, parking lots, and extensive surface use—all tending to accelerate water flows and divert them from the watershed.

Modern problems, however, do not differ greatly in kind from the problems of historical development. Patterns of water use and water conflicts remain a surprising staple. While the patterns of use and conflicts do not change, their intensity and likelihood of resolution are problems peculiar to the present. It is the degree of these problems and their implications for the eastern sector of this country that warrants intensive concern.

The ultimate sanctions for misallocation of water resources and mismanagement of watershed areas are insufficient water supplies for the preservation and survival of the great metropolitan areas. On a more limited scale one might be addressing only the question of water for domestic and municipal consumption. However, a broader view would consider other uses being made of water including recreational use, fishing and game preserves, discharge and control of waste products from home and industry, and like uses.

In the eastern sector of this country the population has tended to take pure water sources and supplies for granted. Never has such unconcerned havoc been visited on such a vital resource. Not only is the water itself being wasted, but its sources and places of storage and distribution are being permanently destroyed beyond the point of use. One only has to look at the distance from which New York City must draw its pure water supplies to realize the implications of continued mismanagement. Natural rivers and ground water storage areas in almost all the great cities of the East have been devastated by mismanagement. In many cases this mismanagement has approximated the point of permanently destroying the future utility of water sources and supplies.

The hard fact that must be realized is that legislative or judicial action cannot generally undo that which has already been done. Perhaps an aware and awakened judiciary, an active and progressive legislature, and a mobile and articulate population can combine to prevent the further destruction of that which is left; they cannot, however, replace that which has already been destroyed. Even the question of consolidating to protect existing supplies must be carefully scrutinized. Rigid legislative controls, vigorously enforced administrative regulations, and a sympathetic judiciary are not "curealls" in this context. Legislation, administration of water programs, and enforcement in the courts must take into account and fully understand the "whys" of water use and water conflicts and prepare at the same time for the needs of the future.

CASE LAW

A review and synthesis of the more than two hundred cases which have been decided in Connecticut allocating water use (since the inception of recorded judicial opinions) can be a most instructive method for future planning—as well as informative of that which has and has not happened in the past. These opinions are useful in a modern context not only to determine the so-called rules of "use" and "ownership" in water, but also the reasons for patterns of use and the most recurring forms of conflict within the state. The nature of water use in the past and the decisions of the courts exemplify the social, political, and economic forces contemporaneous with the decision making process. Further, once having defined and given substance to individual and public rights or privileges in water and water use, no legislative plan can operate outside the context of earlier case law. To the extent that the constitution protects private property rights, including most rights to the use of water, the historical perspectives of the court provide the bounds of permitted state activity in the present.

CLASSIFICATION OF WATER RIGHTS

Both common law and modern classifications of water rights are based upon the arbitrary physical appearance of water as found above or below the land. Rather than systematizing water rights on the functional basis of use—*i.e.*, recreational, pure water supplies for domestic purposes, water for power purposes, water for waste discharge, etc.—water has been classified according to its location above and below the ground and whether it flows in a definite

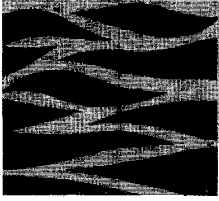
channel or not. There are four distinct classifications of water which the courts have developed: (1) Surface waters flowing in a definite channel—public; (2) Surface waters flowing in a definite channel—private; (3) ground water; and, (4) diffuse surface waters. Respectively, these classifications would involve public and private rights in public waters, riparian rights, ground water rights, and surface water.

This classification of water rights may have served a useful historical function. To the extent that each classification satisfied the measure of technology which was available to decipher and understand the means by which water was naturally stored and made available for use, these classifications represented some measure by which the courts could gauge allocations of the right to use water. In a modern context, with increasing scientific awareness of the nature of the water cycle and the interrelationship of ground and surface waters, these distinctions become less meaningful in the resolution of water allocation problems. The fact that a categorization of these rights does not always accord with the physical nature of the problem which is being considered can hinder rather than assist in the resolution of modern controversies. However arbitrary this classification may appear to the hydrologist, the water economist, or the planner for the purposes of discussing legal rights in and to the use of water in this state, one finds himself "locked into" the pattern of legal terminology and the fourfold classification discussed above.

PLANNING AND DECISION-MAKING

Throughout this work one may raise questions in the context of case analysis regarding both the social and economic consequences of water usage and the relationship of case law to the optimization of water use in concentrated urban areas. The nature and extend of the questions which can be raised are endless. Which organization of society can best realize the objectives of planned water use? How is the decision to preserve water for a given use to be made and who is to make the decision? What uses, if any, will be deemed mutually exclusive of one another and what uses will be found to be compatible? Are multiple water uses feasible? What controls are necessary? What is the nature of conflict which might arise with multiple use? Should development of these plans be left to the courts and the private sector as has been the tradition in this state, or should the state take a more active and defined role in the preservation and optimization of water resource use?

The cases discussed herein do not always answer these questions. In fact, judicial water allocation in Connecticut is as important for what it does not say and do, as for what is set forth in judicial opinions. Judicial rules attach to concrete conflicts which come before the courts for resolution. Several hundred cases, representing a much smaller number of variations in factual controversies, do not present a “comprehensive” system of water laws capable of resolving all water controversies. Large areas of water use have been left unaffected by treatment in the courts. While it is the purpose of this book to only review case law, these areas, as much as the ones which have been affected by the courts, also warrant analysis.



PART ONE:

Riparian Rights in Nonnavigable Waters

SECTION 1. INTRODUCTION

SIGNIFICANT legal and practical differences exist between public water courses and private water courses.¹ Public water courses are those affected by the ocean or seas wherein the tide ebbs and flows; or whereon factual navigation may be carried forth in the prosecution of some useful gain or occupation. Water courses denominated private are generally neither navigable nor affected by the ebb and flow of the tide.

Two of the major differences attributable to the legal status of navigable and nonnavigable (private) water courses are as follows: First, the ownership of subaqueous lands underlying nonnavigable waters is private. Second, a nonnavigable water course may be reasonably diverted or dammed for water supply purposes without interfering with the paramount public use of it for transportation, trade, or commerce. These two rather significant distinctions have had a profound effect on eastern water usage. Connecticut is geographically situated in an area of plentiful rainfall and original water supplies. The countryside is criss-crossed by streams, brooks, small rivers, and is dotted by natural and artificial lakes and ponds. These waters are utilized for domestic pure-water supplies; municipal pure-water supplies; power to operate mills and generate electricity; and fish, game, and recreational activities. All of these water uses are of extreme economic and social importance to the well-being of the state. This is not even to mention the magnificent aesthetic qualities of most water courses or the vast expanses of virgin land which surround them.²

Enormous sums of labor and money have been expended in the utilization and preservation of these water sources. All over Connecticut dams have risen to harness the power of rivers and streams; reservoir areas have been set aside for water supply purposes; and

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homes have been built in proximity to these water courses because of their beauty and their availability for recreational uses.

Not all uses desired to be made of any given body of water may be made, however, without having some affect on differing uses desired to be made by others along a water course or abutting a pond or lake. As a factual reality, different uses can be either compatible or exclusive. Thus, while water may be used in the water course for swimming, boating, fishing, and power supply purposes in a compatible manner, irrigational water usage which diverts the water from the stream and consumes it, will in all likelihood be exclusive of demands for greater water flow for power purposes. Using the river as a waste disposal system for the discharge of effluent will be incompatible, or mutually exclusive of pure water supplies, the existence of fish and game, or swimming and boating.

It is the ultimate purpose of legal principles allocating the use of water resources to minimize the intensity and duration of water use conflicts in order to optimize private use of water resources. To this end, there has developed the sophisticated, and often elusive, doctrine of *Riparian Rights*.³

SECTION 2. NATURE OF RIPARIAN RIGHTS EVOLUTION OF THE REASONABLE USE DOCTRINE

THE EXISTENCE of a riparian right presupposes a water course or body of water capable of sustaining it. A water course must be carefully defined since there are many ravines, depressions, gullies, and other natural surface contours which are capable of containing the flow of early spring mountain run-off, periodic rains, or melting snows. These natural surface areas do not constitute water courses within the meaning of riparian rights.⁴ A water course must have a defined channel with a bed and sides, an independent regular and permanent source of water, and an outlet.⁵

The court in *Chamberlain v. Hemingway*⁶ gave a rather extensive definition of the meaning of water course in Connecticut as follows:

All the waters on the face of the earth may be divided into tide waters and inland waters. It is only to the latter that the term water-course can be applied. Water-courses are commonly denominated rivers, rivulets, or brooks according to their magnitude. It is only upon water-courses that riparian rights exist. . . . A water-course

RIPARIAN RIGHTS IN NONNAVIGABLE WATERS

consists of bed, banks and water. Yet the water need not flow continually; there are many water-courses which are sometimes dry. To maintain the right to a water-course it must be made to appear that the water usually flows in a certain direction, and by a regular channel, with banks and sides.⁷

Thus, where the claimed water course is merely a sluice-way attached at both ends to a river and subject to its flow in both directions, the court in *Chamberlain* held that it was not a water course to which riparian rights could attach.

The definition of a water course is subject to great flexibility in construction depending upon endless factual circumstances. In *Bishop v. Seeley*⁸ the court treated a navigational canal as a water course. In *Gillett v. Johnson*⁹ the court held that a spring which failed during periods of drought was a water course. The latter court's analysis was as follows:

It clearly appears that a water-course existed from the spring to the premises of the plaintiff, which had been immemorially and beneficially used by him for watering his cattle. It was a small but constant stream, failing only when all or nearly all of such small streams fail, by reason of drought; running rapidly in a well defined course between abrupt banks, where the fall was considerable; and sluggishly but continuously in a natural and defined bed, where the fall was less; and it had in these respects the characteristics observed, to a greater or less extent, in all such small streams. The quantity of water was also considerable to be furnished by a single spring, and it required a dam and ditches to divert it on to the defendant's land, and when so diverted it served a useful and valuable purpose. These facts are sufficient to show that a water-course, valuable to both plaintiff and defendant, existed.¹⁰

Where a natural brook or spring is permanently blocked and diverted, the old bed (although it may at times contain water) no longer constitutes a water course for legal purposes. Thus, in *Sozanska v. Stratford*¹¹ the town constructed a highway and diverted a brook running to plaintiff's land. The court held that the plaintiff's tiling of the bed was for surface water drainage and did not suffice to keep it open as a brook when its source of water had been permanently stopped.

Connecticut is unique in holding that riparian rights may attach to regular flood waters which overflow the banks and channel of a stream. In *Thompson v. New Haven Water Company*¹² the plaintiff used the annual flood or freshet waters for irrigation and

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fertilization of his low lands. The defendant water company proposed to dam the stream and divert the flood flow for municipal water supply purposes. The court found that no connection had been made between the stream and the defendant's reservoir. Thus, the water could not be put to beneficial use by the defendant. The court went on to make an extensive analysis of the traditional definitions of water courses and diffuse surface water. They refused to classify the freshet as either one or the other and established a new category to which riparian rights might attach as follows:

Looking at the various phases which the freshet overflow of streams may assume, it is apparent that it may present the unmistakable indicia of either a watercourse or of surface water. The water which has overleaped the banks confining the normal flow of the stream may still go on its way in a well defined channel. Its line of movement may present all of the recognized indications of a watercourse. The bed, banks, and flow may be there, so that the water clearly deserves to be regarded as either a part of the stream from whose main course it was turned aside, or, at least, an independent stream. On the other hand, the escaped water may have become so scattered and diffused over the adjoining territory and there taken on such a character as to present all the recognized characteristics of surface water. It is equally evident that this overflow may appear under such conditions that the requisites of a watercourse according to our definition are not present, and at the same time the characteristics of surface water according to our accepted notions are not discoverable.

We are thus presented with the important practical question as to whether we shall change our definitions so that the limits of the fields of the two classes shall be brought together, and the two be made comprehensive enough to include all nonponded fresh water, or shall recognize a third class between the two, to be dealt with independently and with a sole regard for the conditions it may present. In substantially all, if not all, jurisdictions where there has been occasion to deal with conditions arising from flood water, the courts have felt under the necessity of finding a place for it in one or the other of the two classes referred to, by some sort of expedient and at whatever cost of inconsistency. The result has been a most perplexing medley of decisions, which refuse to yield a satisfactory working rule. In some cases flood water has been made to masquerade as surface water; in more as a watercourse. The great struggle has been to so classify it that justice to the rights of parties under the given conditions might be done. When the classification

RIPIARIAN RIGHTS IN NONNAVIGABLE WATERS

has once been thus established, the difficulty has arisen that it fails, under another set of conditions, to lead to results consonant with justice, if accepted principles applicable to the class where the new conditions find themselves placed are observed. Then has come the necessity for legal gymnastics, if palpably right results were to be attained.¹³

A. Riparian Rights Defined:

The riparian right's doctrine went through centuries of evolution before arriving at its modern definition. Broadly stated, a riparian right has come to represent a property right arising from ownership of land adjoining a water course. It is inseparably annexed to the soil. A riparian right includes the right to make any reasonable use of water relating to riparian lands with due regard to the rights of upper and lower riparians in their use of the water.

It will be noted that this broad definition is comprised of numerous elements, each forming an integral part of the riparian doctrine. At this point it may also be noted that not all elements of the doctrine have been included from the earliest attempt to define the nature of riparian rights. For example, the limitation of "reasonable use" is of relatively recent historical origin. In order fully to understand the doctrine, each of the various elements must be given separate consideration. These elements can be set forth separately as follows:

1. A property right which is inseparably annexed to the ownership of land adjoining a water course.
2. A usufructory right in the water and not several ownership of the water itself.
3. A right to use water on riparian lands.
4. A right to make reasonable use of water on riparian lands with due regard to the rights of upper and lower riparians.

1. PROPERTY RIGHT ANNEXED TO SOIL:

One of the earliest Connecticut cases utilizing the term riparian and including as one of its defined legal characteristics the designation that the right was annexed to the soil was *Buddington v. Bradley*,¹⁴ decided in 1834. Therein the court said:

[T]he riparian proprietor has annexed to his lands the general flow of the stream, so far as it has not been actually acquired, by some prior and legally operative appropriation.¹⁵

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The meaning of "annexed to the soil" was cleared of any ambiguity by the court in *Wadsworth v. Tillotson*.¹⁶ The court distinguished the riparian interest from an easement which is an interest in the land of another. Thus, the court said: "this right is not an easement or appurtenance; but is inseparably annexed to the soil, and is parcel of the land itself."¹⁷

Riparian rights are clearly property rights and entitled to be treated as such. This treatment of the riparian right is beyond dispute in Connecticut. Many cases have clearly expressed the view that riparians are entitled to protection not only against other riparians but against the state, its governmental subdivisions and utilities as well.¹⁸ Nowhere has this been more clearly expressed than in the two leading cases of *Platt Brothers & Co. v. Waterbury*¹⁹ and *Adams v. Greenwich Water Company*.²⁰ In both cases the courts required that the riparian property rights be compensated for by way of damages or in an action to condemn them for public use. In *Platt Brothers* the court said:

The plaintiff has certain rights as a riparian landowner. These rights are property within the meaning of our constitutional guaranty, and an invasion of these rights such as the defendant has made is a taking of that property. The legislature has no power to authorize such taking except for public use, and then only upon providing for just compensation.²¹

As a right annexed to the soil, the continued existence of the riparian right does not depend upon use of the water.²² The existence of the riparian right is predicated not upon use, but rather ownership of riparian lands to which it is attached.

2. USUFRUCTORY RIGHT—NOT OWNERSHIP OF WATER ITSELF:

A riparian right is the right to the use of water and not to the ownership of the water itself. The court in *Parker v. Griswold*²³ quoted from 3 Kent's Commentaries as follows:

He [the riparian proprietor] has no property in the water itself, but a simple usufruct as it passes along. *Aqua currit et debet currere*, is the language of the law.²⁴

In *Gager v. Carlson*²⁵ the court furthered the distinction between usufructory rights and ownership of the water by noting:

Even as to the water flowing over any land which the defendant owns outright, his rights are riparian and usufructuary in nature. They are protected against injury. . . . But they do not constitute 'ownership' of the water in the accepted sense of the word.²⁶

RIPARIAN RIGHTS IN NONNAVIGABLE WATERS

The distinction between an ownership right in the water and usufructory rights thereto has obtained special significance in two major areas: First, where the right to take ice from a pond is placed in issue; second, where an individual owns all the land around a pond, as well as the land beneath the water. Both of these special situations have led to some confusion regarding the usufructory nature of riparian rights.

In *Howe v. Andrews*²⁷ the plaintiff had a flowage right over defendant's land for mill and power purposes. Both plaintiff and defendant claimed the right to ice formed on the pond. The plaintiff claimed the ice by virtue of her dam; the defendant claimed it by virtue of her riparian rights and ownership of the land beneath the water. The court held that neither party had an absolute right to take ice from the pond. The plaintiff had a right not to take the ice, but to have it remain as long as necessary for mill purposes. The defendant had a right to take the ice as long as her appropriation was not injurious to the mill of the plaintiff.

In *Lawton v. Herrick*²⁸ the court held that taking ice from a stream is a proper riparian use where no injury is done to lower riparians; as against upper riparians, since the water has already passed their lands, the right to take ice is absolute.

In neither of the above cases (or in others reported)²⁹ is the right to take ice deemed one of ownership. Ice, as frozen water, is capable of being diverted and appropriated to individual use. It is treated as property subject to possession and ownership. While in a pond or stream,³⁰ however, the interest of the riparian proprietor is usufructory. So long as it remains unappropriated, there can be no "ownership" in the water.

The leading offender in this confused area setting forth the concept of "ownership" with regard to water is *Turner v. Hebron*.³¹ Therein the plaintiff had title to all the land surrounding North Pond, a natural body of water. Possibly the plaintiff also had title to the pond's subaqueous lands. When the plaintiff sought to prevent the use of the waters for fishing purposes, the court spoke of water "ownership" as follows:

Prima facie the right to take fish in any water other than navigable rivers belongs to the owner of the soil over which the water flows. This is because in ordinary cases the ownership of the soil carries with it the ownership of the water. But the ownership of the water may be separated from the ownership of the soil, and where this is done the right of fishing goes with the ownership of the water.³²

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Fortunately, the potential confusion created by the *Turner* case was rectified by the court in *Great Hills Lake v. Caswell*³³ and *Gager v. Carlson*.³⁴ These cases indicated that the language of the *Turner* case was too broad. Rather than constituting ownership, the right of a riparian was properly classified as being usufructory. For some purposes, however, the interest of a riparian who owns all the land around a lake, stream or pond, and title to the bed beneath the water may be tantamount to possession or "ownership" because of the exclusive right to use the water. Any entrance upon his lands or water overlying it constitutes a trespass.³⁵

3. RIGHT OF USE ON RIPARIAN LANDS:

The riparian right can exist only upon riparian lands and can only be used for the benefit of riparian lands. Although earlier cases alluded to this limitation on the exercise of riparian rights,³⁶ the first case clearly setting it forth was *Williams v. Wadsworth*.³⁷ Therein the court noted both the rule and the reason therefor as follows:

Being a riparian owner the defendant has the right to consume water upon riparian premises for drinking, culinary and other domestic uses, and for the watering of animals; this right taking precedence of any right below. But this use is to be confined to riparian land. This limitation applied to a brook stands upon the necessity for a restraining rule in order to secure something for all, and upon the presumption that the brook will supply the absolute needs of as large an area of land as is usually held in riparian ownership.

If land not riparian may draw to itself, equally with land riparian, water for man and beast thereon, because it is in the possession of a riparian owner, then land not riparian may take precedence of land riparian and deprive it of water for either man or beast. That such a possibility is within the defendant's claim shows that it puts in jeopardy the well established rule that the right of riparian land to water for man and beast shall yield to nothing except like needs upon like land above.³⁸

A further reason for the limitation was given by the court in *Stamford Extract Manufacturing Co. v. Stamford Rolling Mills Co.*³⁹ There the court noted that a diversion without return of the water to the stream would diminish the flow of water available to a lower riparian and affect the latter's right to use it. The limitation on riparian lands prevents the withdrawal of water beyond the watershed. This factor was also noted in the *Williams* case which first set

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forth the rule. In *Williams* the defendant sought to divert the waters of the stream to non-riparian lands over one half mile away and the water would have been kept thereby from returning to the stream.

The court in *Harvey Realty Company v. Wallingford*⁴⁰ further delineated the extent of riparian lands and the question of riparian usage. Here, a riparian owner attempted to subdivide his land, retaining a small strip around the water's edge. He purported to give each of the buyers of a remote plot the right to use the water. The court held:

[W]e may confine our discussion to those which relate to and determine the principal issue on which the case was tried—the scope of the riparian rights of the plaintiff, with special reference to the extension to its grantees of nonriparian land and to invitees and the general public, of the privilege of bathing in Pine Lake. A riparian proprietor is an owner of land bounded by a watercourse or lake or through which a stream flows, and riparian rights can be claimed only by such an owner. They are appurtenant only to lands which touch on the watercourse or through which it flows and which are used as a whole for a common purpose, not to any lands physically separated from the stream and the land bordering on it, although belonging to the same owner. . . . It is clear that the grantees or contractees, from the plaintiff, of lots separated from and not bordering on Pine Lake can have, of their own right, no riparian privileges in its waters. And any attempted transfer of the right made by a riparian to a nonriparian proprietor is invalid. . . .

Each riparian proprietor has an equal right to the use of the water to drink and for the ordinary uses of domestic life, although such use may in some degree lessen the volume or affect the purity of the water, and this right extends to such use 'both by the owner himself and all living things in his legitimate employment.' The right includes use of water for drinking, culinary and other domestic purposes, and for watering of animals. The right, being to use '*ad lavandum et potandum*,' logically includes ordinary and reasonable bathing privileges by the riparian owner, his family, and inmates and guests of his household, in the stream or pond as well as in waters drawn therefrom.⁴¹

Because of these major cases, the court in Connecticut is in a far better position to determine the extent of riparian lands than are the courts of many other states.⁴² Clearly, land which is not connected with a water course, even if owned by the same person, is not riparian land. Land beyond the watershed, even if a unified tract in single ownership, would not be riparian land. The only

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remaining major question is whether riparian land must have been in unified ownership, from its inception. If land may be purchased adjacent to existing riparian lands and added thereto, then the amount of riparian land may constantly be increased. If, on the other hand, once severed, land ceases to be riparian even if repurchased, the total amount of riparian land is constantly diminishing. Which rule would prevail in Connecticut were the question to arise is difficult to assume. In the *Williams* case, the land upon which the water was to be used was not connected with the three quarters of an acre owned by the defendant along the river. In the *Harvey Realty* case, the land which was to give rise to use of the water was separated from the stream, and title to this land was not in the riparian. Neither of these cases presented a factual setting to answer the question posed; however, the opinion in *Harvey Realty* stated that riparian rights do not attach to "lands physically separated from the stream *and the land bordering it*, although belonging to the same owner." Literally construed, this language may lead one to believe that had the land in question touched other riparian land held by the same owner, it would have been considered riparian.

B. Evolution of Reasonable Use Limitation:

The present reasonable use limitation in Connecticut (the use of water must be reasonable with regard to the rights of other upper and lower riparian users) had its origin in one of the earliest water law decisions in this country.⁴³ The connection of the term riparian with the reasonable use limitation, however, is attributed to later American and English cases.⁴⁴ Evolution of the present reasonable use limitation can best be examined in terms of its several stages. These include: "prior occupation," "natural flow" and, finally, "reasonable use."

1. PRIOR OCCUPATION THEORY:

By prior occupation and possession of an article of nature previously enjoyed in common with the world at large, or a specific class thereof, one may acquire rights superior to later appropriators. Blackstone, in his *Commentaries*,⁴⁵ set forth the principle of prior occupancy with regard to water as follows:

Light, Air, Water—Thus, too, the benefits of the elements, the light, air, and the water, can only be appropriated by occupancy. . . . If a stream be unoccupied, I may erect a mill thereon, and detain the

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water, yet not so as to injure my neighbor's prior mill, or his meadow; for he has by first occupancy acquired a property in the current.

By this view, the first to build a mill, divert the water of a stream, or otherwise put it to beneficial use would acquire a perfected property interest in the water. The right thus acquired by prior occupation would be protected to the exclusion of subsequent users where their use would affect the use of the prior occupant. This view is very much akin to the doctrine of prior appropriation which prevails in the western states.⁴⁶

The prior occupation theory was discredited at an early date in American and English reports. In *Tyler v. Wilkinson*⁴⁷ Justice Story noted as follows:

But of a thing, common by nature, there may be an appropriation by general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant taken by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietors the right to the use in common, as an incident to the land; and whoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be, either by a grant from all the proprietors, whose interest is affected by the particular appropriation, or by a long exclusive enjoyment, without interruption, which affords a just presumption of right. By our law, upon principles of public convenience, the term of twenty years of exclusive uninterrupted enjoyment has been held a conclusive presumption of a grant or right. I say of a grant or right; for I very much doubt, whether the principle now acted upon, however in its origin it may have been confined to presumptions of a grant, is now necessarily limited to considerations of this nature. The presumption is applied as a presumption *juris et de jure*, wherever by possibility a right may be acquired in any manner known to the law. Its operation has never yet been denied in cases where personal disabilities of particular proprietors might have intervened, such as infancy, coverture, and insanity, and where, by the ordinary course of proceeding, grants would not be presumed. In these, and in like cases, there may be an extinguishment of right by positive limitations of time, by estoppels, by statutable compensations and authorities, by elections of other beneficial bequests, by conflicting equities, and by other means. The presump-

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tion would be just as operative as to these modes of extinguishment of a common right as to the mode of extinguishment by grant.⁴⁸

In *Embrey v. Owen*,⁴⁹ the leading English case, the court rejected the prior occupancy theory as follows:

The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupancy may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only.⁵⁰

In Connecticut, the prior occupancy theory was apparently accepted in *Ingraham v. Hutchinson*.⁵¹ However, a distinction regarding presumptive rights akin to that made by Justice Story was attempted by the dissenting opinion of Justice Gould.⁵² The reasoning of Justice Gould appears to have prevailed with the passage of time; in *King v. Tiffany*⁵³ the court rejected the prior occupation theory. The court at the same time distinguished the prior occupation theory from the prescriptive right theory as follows:

The first occupant has a right to the use of water, taking care not to interfere with the established rights of others. What, then, are the established rights of the plaintiffs? Is it a right to have so much water only as will carry such a wheel, and subserve the purposes of such a mill as they have formerly had? Or have they a right to have the water flow in the manner that it has been accustomed to flow for fifteen years? If the former principle is adopted, then a valuable privilege, which has not been improved, would be lost, by a prior occupation below or above, although that occupation was but a few years, or perhaps months. Thus, too, an occupation less than fifteen years would confer a right. This would be extending the principle of prior occupation much farther than it was carried in *Ingraham v. Hutchinson*. . . . There it was adjudged, that a prior occupation of a stream of water for fifteen years would confer a title upon the occupant, although the possession was not strictly adverse. This was doubted, by a distinguished judge; but it was never claimed, that occupation for a less time could confer any such right.⁵⁴

2. NATURAL FLOW THEORY:

The natural flow theory accords each riparian proprietor the right

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to have the water of a river, stream, or brook flow by his land undiminished in velocity and unaffected in quality. Applied literally, this means that no use may be made by an upper riparian owner which will affect either the rate of flow or the quality of the water. Thus, no use could be made of the water for irrigation, drinking water, power for mills, or the like. Several early Connecticut cases used language indicating that the riparian right warranted full flow of a water course without qualification.⁵⁵ In *Ingraham v. Hutchinson*,⁵⁶ for example, the court said:

By common law, every person owning lands on the banks of rivers, has a right to the use of the water in its natural stream, without diminution or alteration; that is, he has a right that it should flow, *ubi currere solebat*; and if any person on the river above him, interrupts or diverts the course of the water, to his prejudice, action will lie.⁵⁷

The natural flow theory was ultimately repudiated and the earlier theory language of the court was clarified in *Wadsworth v. Tillotson*.⁵⁸ Therein the court said:

Now, it is obvious, that there is scarcely any mode whatever, whether artificial or not, by which water can be beneficially used, which would not be necessarily attended with some degree of loss. It is not practicable for every particle of it, which is not used or consumed, to be returned to the original stream. It does not, however, necessarily follow, that in such cases there has been an improper use of one's own rights, or an infringement of the rights of others. The principles on this subject, as they are generally, and with substantial accuracy stated in the books, that each proprietor through whose land the stream runs, is entitled to its use, as it is wont to run (*ut currere solebat*) without diminution or alteration; and, that the water cannot be diverted, in whole or part, but must be returned, after it is used, to its ordinary channel,—are not to be understood so literally as to prevent that small, or unessential, or insensible diminution, variation or loss of the water, which is necessarily consequent upon the beneficial and proper enjoyment of it; for such a strictness of construction would be wholly incompatible with the nature of the element, and most of the important purposes for which it was created; and indeed, in most cases, would prevent its beneficial enjoyment at all. As remarked by chancellor Kent, "There will, no doubt, inevitably be in the exercise of the perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*; and a right of action by the proprietor

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below, would not necessarily flow from such consequences, but would depend on the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party, by or over whose land 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 below on the stream.⁷⁵⁹

3. REASONABLE USE THEORY:

The reasonable use theory accords each riparian proprietor an equal right to the beneficial use of a water course. In the exercise of the common right of use, care must be taken to preserve the reasonable rights of upper and lower riparians to the use of the water.

The two leading cases articulating the doctrine of reasonable use are reputed to be *Embrey v. Owen*,⁶⁰ an 1851 English decision, and *Tyler v. Wilkinson*,⁶¹ an 1827 federal decision. The latter case sets forth the doctrine of reasonable use as follows:

Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad filum aquae*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors of that, which is common to all. The natural stream, existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed, by operation of law, to the land itself. When I speak of this common right, I do not mean to be understood, as holding the doctrine, that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it. There may be, and there must be allowed of that, which is common to all, a reasonable use. The true test of the principle and extent of the use is, whether it is to the

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injury of the other proprietors or not. There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the existence of the common right. The diminution, retardation, or acceleration, not positively and sensibly injurious by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights. The maxim is applied, "Sic utere tuo, ut non alienum laedas."⁶²

The court in *Embrey v. Owen*⁶³ elaborated extensively on the nature of the riparian right:

The right to the benefit and advantage of the water flowing past his land, is not an absolute and exclusive right to the flow of all the water in its natural state; if it were, the argument of the learned counsel, that every abstraction of it would give a cause of action, would be irrefragable; but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence.

It is only therefore for an unreasonable and unauthorized use of this common benefit that an action will lie; for such an use it will; even, as the case above cited from the American Reports shows, though there may be no actual damage to the plaintiff. In the part of Kent's Commentaries to which we have referred, the law on this subject is most perspicuously stated, and it will be of advantage to cite it at length:—"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (currere solebat), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. 'Aqua currit et debet currere' is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below,

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nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbour below him, who has an equal right to the subsequent use of the same water; nor can he, by dams or any obstruction, cause the water injuriously to overflow the grounds and springs of his neighbour above him. Streams of water are intended for the use and comfort of many; 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; and there will, no doubt, inevitably be, in the exercise of a perfect right to the use of the water, some evaporation and decrease of it, and some variations in the weight and velocity of the current. But *de minimis non curat lex*, and a right of action by the proprietor below would not necessarily flow from such consequences, but would depend upon the nature and extent of the complaint or injury, and the manner of using the water. All that the law requires of the party by or over whose land 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. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbour. Pothier lays down the rule very strictly, that the owner of the upper stream must not raise the water by dams, so as to make it fall with more abundance and rapidity than it would naturally do, and injure the proprietor below. But this rule not be construed literally, for that would be to deny all valuable use of the water to the riparian proprietors. It must be subjected to the qualifications which have been mentioned, otherwise rivers and streams of water would become utterly useless, either for manufacturing or agricultural purposes. The just and equitable principle is given in the Roman Law:—‘*Sic enim debere quem meliorem agrum suum facere, no vicini deteriorem faciat.*’ . . .

The same law will be found to be applicable to the corresponding rights to air and light. These also are bestowed by Providence for the common benefit of man; and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no

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action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air; he cannot erect a building, or plant a tree, near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all.⁶⁴

Connecticut had long prior to the rendition of the opinions in either of these cases adopted a rule of reasonable use. As early as 1793, one found the court in *Perkins v. Dow*⁶⁵ observing that a proprietor of land has the right to the "reasonable use" of a stream. The court recalled the facts of the case as follows:

Upon the evidence, the case appeared to be thus—The defendant owned a valuable meadow through which said stream of water run; which stream ran east and west, and was easily turned out of its natural course on the defendant's land; the defendant by placing dams in the natural channel, and cutting small ditches northward and southward upon his own land, threw the water upon his meadow, northward and southward; the water which was turned out northward, was not absorbed, returned into the natural bed of the stream, before it got to the plaintiff's land; what was turned out southward, which was by far the greater part, did not any part of it return into its natural course again before it came to the plaintiff's land, but went off southward into the low lands.⁶⁶

In holding the diversion unlawful and "unreasonable," the court set forth the following general principles:

The defendant had right to use so much of said water, passing through his land, as to answer all necessary purposes, to supply his kitchen, and for watering his cattle, etc. Also he had right to use it for beneficial purposes, such as watering and enriching his land; but this right hath restrictions, and must be so exercised as not to injure the plaintiff, who lies next below, and who hath right to have the surplus flow into his land in the natural channel; and which appeared might easily have been done in this case; the defendant, therefore in diverting the surplus of the water, not used by him, out of its natural course and away from the plaintiff's land was an injury and a nuisance.⁶⁷

What is confusing in the consideration of succeeding Connecticut cases is the absence of any clear reference to these "established" principles. In fact, the rearticulation of the doctrine of reasonable use had to await the decision of *Wadsworth v. Tillotson*⁶⁸ in 1843. Therein, the court quoted from 3 *Kent's Commentaries* as follows:

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All that the law requires of the party, by or over whose land 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 below on the stream.⁶⁹

What is reasonable in any given case is a question of degree. Factors such as the size and velocity of the stream, the permanence and evenness of flow, the number and needs of riparians, the customs of the community, and the economic context in which the question arises must all be considered.⁷⁰ Reasonable use is a question of fact and the reasonableness of use in any given case may be a question for the jury to decide.⁷¹

The difficulty inherent in framing a precise formula for the determination of what constitutes reasonable use of water was noted by the court in *Embrey v. Owen*.⁷² There is what is stated that:

[N]or do we mean to lay down that it would in every case be deemed a lawful enjoyment of the water, if it was again returned into the river with no other diminution than that which was caused by the absorption and evaporation attendant on the irrigation of the lands of the adjoining proprietor. This must depend upon the circumstances of each case. On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, could be permitted to irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose; on the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a wateringpot into the stream, in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not; and in this we think, that as the irrigation took place, not continuously, but only at intermittent periods, when the river was full, and no damage was done thereby to the working of the mill, and the diminution of the water was not perceptible to the eye, it was such a reasonable use of the water as not to be prohibited by law. If so, it was no infringement of the plaintiffs' right at all; it was

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only the exercise of an equal right which the defendant had to the usufruct of the stream.⁷³

The question of reasonable use repeatedly arises in several recurring factual situations. These would include such patterns as where:

1. Water is either detained or caused to flow more rapidly on lower riparians by use of a dam.
2. Water is diverted from a water course by either upper riparians or non-riparians.
3. Water is polluted by the discharge of a waste substance by an upper riparian.

SECTION 3. SPECIFIC REASONABLE USE CONTROVERSIES— DETENTION AND DAMS

THE GENERATION of power to run the mills and factories of Connecticut by impounding water courses and harnessing their energies has been, and continues to remain, of extreme social and economic importance to the state and its population. Therefore, it is no surprise that one of the most often litigated questions involving the right to the use of water in this state involves the detention and release of water for mill purposes.

A. Title to Bed:

The right to build a dam on the bed of a water course arises as an issue independent of any right to use of the water. Where land is owned on both sides of a nonnavigable water course, a riparian proprietor owns the entire bed. His ownership of subaqueous land extends the full length of his adjoining land ownership on both sides of the water course. If a riparian owner owns land on only one side of a water course, he holds title to subaqueous land to the center of the stream and no farther. Any attempt to build a dam across the full width of a water course without the consent of the riparian proprietor on the opposite bank would constitute a trespass on the latter's lands. These principles were recognized in *Parker v. Griswold*.⁷⁴ Therein the court noted as follows:

An owner to the centre of the stream only, may not be able to use the water so beneficially, as if he owned on both sides of the stream, because it might be disadvantageous to him that he could not extend his dam to the bank opposite his land, without obtaining permission from the owner of that bank. The question, however, is

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not, whether he could use the water more or less beneficially, but whether he could use it beneficially at all; and this he plainly could do, although his land extended only to the centre of the stream. He might, for instance, use it for milling or manufacturing purposes, by means of a diagonal or wing dam, as is not unfrequently done.⁷⁵

B. Reasonableness of Detention—Lower Riparians:

In *Twiss v. Baldwin*⁷⁶ the defendant constructed a dam above the plaintiff's mill. The dam was used to hold back the waters of the stream during the day time. They were released at night when the plaintiff could not use them. Without extensive analysis of what made the use of the defendant unreasonable, the court held that:

The defendants only proved, that they had a right to use the water for their mill according to their convenience and judgment. This certainly does not prove, that they had a right to use it according as caprice or malice may dictate, without regard to the rights of others. A right to use merely, cannot confer a right unreasonably and unnecessarily to prejudice the rights of others.⁷⁷

In *Rock Manufacturing Company v. Hough*⁷⁸ the court construed a cooperative contractual arrangement pursuant to which a dam was constructed high on a stream for the use of both respondent, who controlled the dam, and several lower mill owners who needed the water for mill purposes. After several years of mutual use, the respondents caused the water from the dam to flow only at night during the dry season when the lower mill owners could not beneficially use the water. The contract was silent on the time of day when the water was to be released. The court predicated its decision on the practice of the parties to the use of the water of the dam during normal working hours in dry seasons. To this end, they held:

During such seasons we think it behooves the parties to this contract to consult each other's interests, and use the water only during the usual working hours of each day, when all can use the water to advantage. We think the parties must have so intended when the contract was made. The reservoir was constructed to meet the emergency of such seasons. It could be of no advantage whatever at other times when there is an abundance of water in the streams flowing over the reservoir dam for milling purposes. The reservoir therefore was intended for times when frugality of its waters would be necessary; and at such times it could not have been intended by the parties to the contract that one of them might use

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the water during the night, when the others could not use it to advantage, thus subjecting them to the loss of all beneficial use of one-half of the water, and compelling them to remain idle for a time during the working hours of each day, while waiting for the pond of the respondents to become filled.⁷⁹

In 1873, the year after the contractual interpretation of reasonable use in the *Rock Manufacturing* case, the court in *Keeney and Wood Manufacturing Company v. Union Manufacturing Company*⁸⁰ incorporated the principles of custom and usage into the riparian determination of reasonable use. The fact pattern of the case was the reverse of that in the *Rock* case and arose among riparian proprietors. The plaintiff, a lower riparian, brought an action to prevent the defendant, an upper riparian, from using the water only during the normal working hours of the day and storing them up at night. The plaintiff claimed that as a riparian proprietor it had a right to have the stream flow at night and that the defendant's detention was unreasonable. The court elaborately considered the reasonableness of the defendant's detention of the water at night as follows:

The plaintiffs claim . . . that their rights as mere riparian proprietors are violated by the acts of the defendants, that it is a familiar maxim that '*aqua currit et currere debet*,' and that under this maxim any detention of the water by the proprietor above is unreasonable which inflicts serious damage upon the proprietor below; which the committee find is inflicted in this case by the detention complained of.

Under the maxim referred to water cannot be detained for the use of mills so as to deprive the proprietors below of what is needed for domestic and agricultural purposes, and under that maxim water cannot be *diverted* from its natural channel to the prejudice of the lower proprietors upon the stream.

But water power is made available mainly by means of dams, by which it is temporarily detained, and its power thereby accumulated and stored up for use, and the maxim '*debet currere*' is not applicable to such detentions of the current as are convenient and necessary and usual for the purpose of making such accumulations.

The right of the proprietor above to make the water useful to him by detaining it long enough to render it useful, is of the same quality as the right of the proprietor below to take the constant course of the current for his use, where both parties are applying the water to the artificial use of propelling machinery. The two rights being thus in apparent conflict, which must yield? In deciding

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such a question many circumstances come naturally into consideration. . . .

In the present case, where the plaintiffs wish to run their mills day and night, and the defendants wish to run theirs during the usual working hours only, the custom of the country may well be referred to as an important consideration.

On this subject the committee finds that 'for many years the respondents have run their cotton mill only in the daytime, from 6 A.M. to 6 P.M., and this has been and is the general custom of the country with cotton and woolen mills, and mills for the manufacture of most other goods; paper mills being the leading exception.'

Independently of this finding it is matter of notoriety that mills usually lie still at night and that dams are usually constructed of such height and size as to detain the water during the night for the more efficient working of the mill by day, and that where individual dams are not adequate large reservoirs are provided like that mentioned in the committee's report at Rockville, the gates of which are closed during the night in order to store up the power which during the day drives the machinery of a long chain of mills which successively receive the supply.

The right of the up stream proprietors thus to detain and use the water is of the highest importance, and the case must be a strong one in favor of the down stream owner successfully to resist it. . . .

In deciding such a question it is important to consider also what general rule on the subject will best secure the entire water of a stream to useful purposes. If the plaintiffs are right in their claims the defendants must either run their mill nights or suffer the useless escape of half the water which flows past their mill. But such water may be saved if the proprietor below is required to see to it that if he wants the water nights he must secure a privilege adequate to such a want. We think, if we should announce it to be the general rule that the water of streams may not be detained and accumulated at night to be applied to machinery during the day, we should render useless a large portion of the water power in the state.⁸¹

These principles were carefully set forth and applied in *Hazard Power Company v. Somersville Manufacturing Company*.⁸² Therein, the court considered not only the custom of the community, but of mills generally located in the New England area. The court found that textile mills in New England run during the daytime, for "58 to 60 hours per week," adapting accordingly for a half-day on Saturdays and shutting down on Sundays. The defendant's detention at

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night and on weekends was therefore deemed to be a reasonable exercise of its riparian rights.

In *Elting Woolen Company v. Williams*⁸³ the court held that where a riparian proprietor had built a pond and negotiated for the sale of water rights, it was a reasonable exercise of his riparian right to reserve a small portion of the water power for future use.

It has been consistently held that where an upper riparian by his dam obstructs the entire flow of a stream as against a lower riparian, this detention is unreasonable. Thus, the court in *Buddington v. Bradley*⁸⁴ held an upper riparian liable for the obstruction of an entire stream where a lower riparian was injured thereby. And in *Parker v. Hotchkiss*⁸⁵ the court held the defendant liable for the obstruction of a stream by means of a dam where the defendant failed to consider the needs of lower riparians.

The reasonableness of detention by an upper riparian was given careful consideration by the court in *Mason v. Hoyle*.⁸⁶ Therein the court took the opportunity to summarize not only the meanings of equality of use and reasonable use, but also to expound upon the nature of the public interest with regard to the question of large mills versus small ones. Justice Loomis said as follows:

In the first place, the use must be as near as possible an equal use, or rather an equal opportunity to use. 'Equity delighteth in equality.' Every owner improving a mill privilege has a right to consider the law as protecting him against any unfair use by any other owner who may establish a mill above him. The term 'unfair use,' is the equivalent of 'unreasonable use.' When the owner above him has established his mill he is bound not merely by this obvious rule of the stream, but by another more general rule of universal application, that no one may so use his own as to injure the property of another. This golden rule of the law is not of course to be taken literally for, where there is a concurrent use of water and at the same time a deficiency, the use of one will to some extent injure another.

In the next place, a reasonable use is one adapted to the character and capacity of the stream. Indeed there is no other factor of so much importance that comes into the question as that of the capacity of the stream, and in determining this capacity its condition throughout the year is to be considered. If, for instance, there is an ample supply of water for nine months of the year and a scarcity for three, this scarcity, if it occurs so regularly that it can be anticipated, is to be treated as a fixed quantity in the estimate and as so far reducing the capacity of the stream. . . .

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In the next place, a reasonable use must permit the water to flow in its accustomed way, so far as this can be done and a beneficial use, though a limited one, be made of the reduced stream, each riparian mill-owner having his fair proportion.

It is the right of every mill-owner, large or small, on the stream, that the water be allowed to run in its usual way except where detained by another to secure his fair proportion of beneficial use. A policy of the state may come in to affect the question.

It is for the public interest that all our streams be improved as far as they can be. This rule has sometimes been applied to favor the large mill-owner, but it should have regard also to small mill-owners, who are the great majority of those in such business or who incline to go into it. These men of moderate capital investing their means in mills upon our lesser streams, should be protected against such a use of the streams by mills disproportioned to their capacities as would practically deprive them of water and ruin their privileges. And where the water is sufficient only for a few hours use in a day it is a reasonable demand of these lesser mills that they should be allowed water enough to run a part of every day rather than it should be detained by any larger mill in such a way as to compel them to crowd into a single day or night all the work of a week. There would be no way in which the lesser mills could hold their own against the disproportionately large ones, with reservoirs of great capacity, but to enlarge their own reservoirs and ponds to an equal capacity, thus compelling all to enlarge their works in a manner not demanded by the capacity of the stream, and involving an unnecessary and perhaps ruinous expenditure.

If a large mill-owner has made a reservoir which it requires several days to fill in the dry season, he has no more right on that account to detain the water for a week to fill it than he would have to detain it a month. His rights are not measured at all by the capacity of his reservoir, for he may be able to double or fourfold its capacity, and the law will not allow him to establish for himself the rule that shall decide his rights between himself and another. The question is, not as to the capacity of the reservoir, but what is a fair use of the water between him and his neighbor below. Where the reservoir, as in the case at bar, is simply to store the water and not to furnish the head and fall, he can as well use the water when it is a half or a quarter filled as the lower owner can use it when his smaller pond is wholly filled. A reservoir used to store surplus water, when the supply is abundant, for use at a time when it is deficient, is a great benefit to all the lower proprietors,

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but if used to detain the water in the dry season it may occasion great injury, as in this case.⁸⁷

C. Reasonableness of Detention—Upper Riparians:

The protection of large and small mills found embodiment in applications for flowage easements before the courts. The policy of the state in maximizing use of streams for mill and power purposes was implicit in the enactment of early Flowage Acts.⁸⁸ A lower riparian under the Flowage Acts could apply for the assessment of damages caused the proprietor of lands above him by the inundation of his lands due to the construction of a dam. Several cases held, however, that the Flowage Acts specifically protected existing mill sites from injury and that a flowage petition could only be granted where no such mill or dam already existed.⁸⁹

This protection from inundation accorded mills higher on the stream (under the Flowage Act) was also found to inhere in the riparian doctrine. In *King v. Tiffany*⁹⁰ the court recognized the general principle that a lower riparian cannot throw back the water of a stream to the injury of an upper proprietor. The injury must be real, however, and where there is no showing of damages, a lower riparian will not be enjoined from setting back the water in the future. The same principle was followed in *Taylor v. Keeler*.⁹¹ The water set back by a lower riparian never reached the mill wheels of the plaintiff—nor did they flood the latter's land. The court held that there were no damages for legal purposes unless an injury could be shown. As recently as 1943, the principle that a lower riparian may dam a stream if he does not flood the land or mill site of an upper proprietor was followed by the Connecticut court in *Farrington v. Klauber*.⁹²

In *Burdick v. Glasko*⁹³ the plaintiff and the defendant each owned mills on opposite sides of a river. The defendant raised the dam on his side in such a manner as to inundate the plaintiff's mill and wheel, and flood his lands. The court held that this was an actionable invasion of the plaintiff's rights for which damages should be awarded.

D. Reasonableness of Detention—

Injury to Lower Riparians by Release of or Flood:

In *Beauton v. Connecticut Light and Power Company*⁹⁴ the plain-

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tiffs' land and cottages were washed away by a sudden release of water from the defendant's dam. They claimed that this was due to the negligence of the defendant in operating the dam's flood gates. The defendant denied any liability:

[I]n either the construction or operation of the dam; and in a special defense set up that the damage to the plaintiffs' houses was wholly caused by an act of God—an unprecedented flood upon the river due to unusually heavy rains and warm weather causing the snow to melt rapidly, whereby an amount of water came into the river much greater than any theretofore known.⁹⁵

If the facts were as alleged by the defendants, there could be no negligence. An unprecedented flood renders the harm caused unforeseeable and therefore not within the ability of the defendants to take adequate precautions. To avoid the "foreseeability" question the plaintiff asked that the defendant be held strictly liable, whether or not negligent, for any damages caused by the release of flood waters by the owner of the dam. The court rejected this attempt to hold the defendant as an insurer for all damages caused by the maintenance of a dam. They approved the lower court's instructions to the jury as an accurate statement of the law:

An upper proprietor upon a stream has no right to gather and impound waters and then suddenly let them loose on the land of the lower proprietors. Each riparian owner is limited to the reasonable use of the water with due regard to the rights and interests of such other owners. It is the common right of all to have the stream preserved in its natural size, flow and purity without material diversion.⁹⁶

And further,

While the plaintiffs were entitled to the customary flow of the river and the defendant had no right to accelerate substantially the flow of the water beyond the natural capacity of its banks, yet you will bear in mind that the plaintiff has to prove that such acceleration or increase was caused by the defendant and caused the injuries claimed; and if the flood that caused the damages was created solely by storm and weather conditions and the conduct of the defendant as alleged did not contribute substantially or essentially to cause it, the defendant would not be liable.⁹⁷

These distinctions were followed in *Wargo v. Connecticut Light and Power Company*.⁹⁸ There a flood caused the water to rise over the top of the defendant's dam and caused the flashboards at the top of the dam to give way. The court held that although a dam

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owner would be liable for negligence in the construction or operation of a dam whereby water was released to the injury of lower riparians, no liability can attach where the damage was caused by an unprecedented flood.

E. Reasonableness of Lowering Pond Levels:

In *DeWitt v. Bissell*⁹⁹ the owner of a pond lowered the level of the water during the summer months to provide water to power his mill. The plaintiff, a riparian owner along the banks of the pond, alleged that the lowering of the water level would expose the bottom of the pond in such a manner as to create a nuisance by offensive sights and odors. The lower court had enjoined the defendant from making *any* withdrawal of water from the pond during the summer months. The court on appeal held that the rights of both parties could be protected. The defendant was limited in his withdrawal to only so much water from the pond as was necessary to the operation of his mill without exposing the bottom. The court's views on the economic significance of the mill pond, the right to use it for mill purposes, and the nature of the damage to the plaintiff are enlightening:

Not only has such property always been favored by the public policy of this State, but in later years the power of eminent domain has been pushed to its limits in authorizing the acquirement of such property through proceedings for condemnation. Assuming for the moment that such property may become by the mere fact of its existence the occasion of a private nuisance injurious to the property of neighboring landowners, so as to make its owner liable in damages to such landowners, especially when he is chargeable with malicious or wanton disregard of their interests, it is evident that in determining the question of such liability all the facts and circumstances must be weighed in their relation to the law which establishes a dam and water-privilege as property and defines its incidents.¹⁰⁰

It is clear from this statement and subsequent cases¹⁰¹ that the right to lower a mill pond is not absolute, but subject to limitations of reasonable use. In the determination of reasonable use the harm caused by exposure of the bottom of a pond must be weighted against the benefits to be obtained by the operation of the mill or factory. Where the damage caused by the lowering of a mill pond is minimal, no injunction or damages will be awarded by the courts.

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SECTION 4. SPECIFIC REASONABLE USE CONTROVERSIES— DIVERSIONS

THE RIGHT to make reasonable diversions of water from a stream, river, or brook is of extreme practical value to a riparian proprietor. Many uses of water cannot be made *in* the water course itself. Thus, diversions must be made for domestic drinking purposes, watering cattle in a barn, irrigating land and the like. Without the right to divert water from a water course, much of the beneficial use of lands abutting a water course would be lost.

The propriety of diverting water is complicated not only by the competing demands of other normal riparian users, but by attempted diversions for use on non-riparian lands, or by non-riparians for use on their lands. Priorities to select from among competing riparian water uses have not been established in Connecticut. All riparians have a co-equal, common right of water use. As between non-riparians, or the use of water on non-riparian lands, the courts clearly accord the riparian proprietor a priority of use. Despite statements which may be found in the cases to the effect that any diversion by a non-riparian is unlawful, as a matter of practical construction the Connecticut courts have generally required a showing of injury by the complaining riparian proprietor before awarding either compensatory damages or an injunction to prevent future withdrawals. Therefore, rather than being “unlawful” and prohibited under any circumstances, the withdrawal of water by a non-riparian, or by a riparian for use on non-riparian lands, is under the practical construction of the courts a temporarily permissive withdrawal until a riparian can show damages.

A. The Right to Divert Among Riparians:

The right of a riparian to make reasonable diversions for household use, the watering of cattle, and for irrigating his lands was established in *Perkins v. Dow*.¹⁰² Therein the court held that this right belongs to all proprietors through whose land a stream passes and that each may divert as much water as he may beneficially use without causing undue injury to others further down the stream.

In *Buddington v. Bradley*¹⁰³ one riparian proprietor claimed the right to divert water to the exclusion of a lower riparian because the latter had not previously exercised his rights. The court held that the existence of the riparian right does not depend upon use.

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It is annexed to the land as an incident of riparian ownership. Mere non-use, therefore, does not negate the riparian right to use a water course.

In *Gillett v. Johnson*¹⁰⁴ the court was confronted with the conflicting demands of an upper riparian who sought to divert water for irrigation purposes and a lower riparian who wished to use the water for his cattle. The court said:

The right of the defendant to use the stream for purposes of irrigation can not be questioned. But it was a limited right, and one which could only be exercised with a reasonable regard to the right of the plaintiff to the use of the water. It was not enough that the defendant applied the water to a useful and proper purpose, and in a prudent and husbandlike manner. She was also bound to apply it in such a *reasonable manner and quantity* as not to deprive the plaintiff of a sufficient supply for his cattle.¹⁰⁵

In *Wadsworth v. Tillotson*¹⁰⁶ an upper riparian diverted water from a stream and carried the water to her house and barn by means of an artificial aqueduct. Some of the water was allowed to escape by small leaks in the aqueduct and additional water was lost by a constant trickle at the terminus of the aqueduct even when not in use. The defendant claimed the need to maintain a constant flow in order to prevent freezing during the winter and stagnation during the summer months. In response to the plaintiff's claim that the diversion was unreasonable, the court said as follows:

Although some stress has been laid on the circumstances that the water was conducted to the defendant's house and barn, by means of an artificial aqueduct, which, by its construction, rendered it necessary that a portion of the water should be lost in order to preserve the remainder from the effects of stagnation,—as if there were some—in the mode of obtaining the water adopted in this instance, which was unlawful,—it is plain, that the defendant, having a right to use the water, for the purposes for which she did use it, had, by consequence, a right to do so, by such means as were suitable for that purpose. If in doing so, she does not abuse her right of using the water, and inflicts on the plaintiff an injury, by unnecessarily depriving her of the water which would otherwise come to her land; if she appropriate to herself only the proportion of the water, to which she is fairly entitled;—it is as immaterial to the plaintiff what means she adopts for that purpose, as it would be, if she should, by an unreasonable exercise of her rights, inflict an injury on the plaintiff. The liability of the party depends rather on the result, than the means by which it is produced. And the mode

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taken in order to obtain the benefit of the water, can be no otherwise important, than as it may be evidential of the quantity taken, or some other circumstance attending it, which may shed light on the main inquiry, whether the defendant has made a proper use of her rights. For most of the purposes for which water is needed, it is applied, and necessarily so, by artificial means of some description; and in far the greatest proportion of cases, where questions have arisen on this subject, it appears that it has been appropriated, by means of dams, sluices, conduits, or other artificial works; but no argument has ever been attempted to be drawn merely from any such mode of appropriation. It is however claimed, that here has been an improper diversion or waste of the water, by reason of the surplus not being returned to the natural channel of the stream. Now, it is obvious, that there is scarcely any mode whatever, whether artificial or not, by which water can be beneficially used, which would not be necessarily attended with some degree of loss. It is not practicable for every particle of it, which is not used or consumed, to be returned to the original stream. It does not, however, necessarily follow, that in such cases there has been an improper use of one's own rights, or an infringement of the rights of others.¹⁰⁷

Where the diversion of a stream is found to be wrongful after due consideration has been given to the rights of lower riparians, the court may in its discretion award not only the payment of damages, but also compel the defendant to restore the stream to its natural course. To this end, the court in *Averill v. Buckingham*¹⁰⁸ said: ". . . we think it clear that a court of equity would compel the defendant to restore the stream which he had wrongfully diverted from the plaintiff's land."

Where there has been a wrongful obstruction and diversion of a water course, the obligation to pay damages or return the stream to its natural condition may pass with the ownership of the land. In *Rau v. Urban*¹⁰⁹ the defendant's predecessor in title had obstructed a stream. The court held that after reasonable notice to the new owner had been given, coupled with a request to remove the obstruction, the new owner may be liable for the failure to restore the stream to its natural condition.

B. Effect of Non-Riparian Purchase of Water Rights Against Riparian Grantor:

A riparian may convey his "right" to the use of water to a non-riparian. As between the riparian and his grantee (where the rights

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of other riparians are not in question) the conveyance or assignment of the right to the use of water will be upheld. In *Brigham v. Ross*¹¹⁰ the owner of land for three quarters of a mile along a river conveyed a non-riparian lot with the right to divert water through a canal constructed across the grantor's riparian land. The court held the attempted assignment of water rights was good as against the grantor and inured to the benefit of the assignee and his successors in interest.

In order for the right to carry water from the stream to be binding and enforceable, however, it must be clearly shown to the court that the conveyance was of a quantity of water and not merely the right to maintain a channel or ditch across the riparian's land. In *Griswold v. Allen*¹¹¹ the court said:

A right to make and have a ditch of a particular size, over the land of another person, is obviously quite distinct and different from a right to abstract the water from a stream, to the use of which that or some other person is entitled. Although, then, the grant to the plaintiff, in this instance, of a right to erect the dam, and make the raceway on the land of the defendant, might imply a right in the plaintiff to draw from the river, by means of such raceway, as much water as the defendant himself might use, we do not think that it extends any further; and we are also of opinion that, beyond this, it was the intention of the defendant, to grant, and of the plaintiff to obtain, by the deed in question, the right only of making a passage for so much of the water of the river, as should be acquired by the plaintiff, from those to whom the use of the water belonged, not exceeding the capacity of the raceway described in the deed.¹¹²

Where the language of the deed purporting to grant the right to divert water uses confirmatory language, *i.e.*, that they "*have a right to, or have been accustomed to do,*" in the diversion of water, the effect may not be to grant new rights but only to recognize already existing ones.¹¹³

In order to protect their interests, it has been the general practice of non-riparian users attempting to divert water to secure the release of lower riparians along the stream for the diversion. In *Williams v. Wadsworth*¹¹⁴ the court noted that a release granted by lower riparians for the purpose of permitting upstream diversions will be upheld.

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C. Diversion by Riparian Proprietor for Use on Non-Riparian Land:

A diversion for use on non-riparian land is a non-riparian use.¹¹⁵ The riparian proprietor for such purposes stands in the same shoes as a non-riparian user. If a diversion is contested by a lower riparian and he can show himself injured thereby, he may secure damages or an injunction to prevent future withdrawals.¹¹⁶

By limiting the right of a riparian to contest withdrawals to those cases wherein the riparian can show himself injured, the "non-right" of a non-riparian to withdraw water from a stream attains some semblance of a "right" even if for only a limited duration.

This interesting proposition was utilized to forestall the injunction of a non-riparian use by a water company in *Hartford Rayon Corporation v. Cromwell Water Company*.¹¹⁷ The defendant water company owned land adjoining Divided Brook in Rocky Hill. The defendant proposed to sink a well next to the brook and pump therefrom some "one hundred and fifty thousand gallons of water a day." The court refused to enjoin the defendant from constructing the well until some definite injury was shown by the plaintiff. This put the plaintiff in the position of having to sit back and await the obvious consequences of a well constructed only ninety-five to one hundred eight feet from the watercourse: a definite lowering of the water level of the stream by the withdrawal of support from subterranean waters.

D. Effect of Conveyance of Water Rights to Non-Riparians Against Lower Riparians:

Attempted conveyances of rights in and to the use of a water course involve the use of one or more of the following legal forms: (1) contract rights; (2) assignment rights; (3) reservations to use; (4) exceptions from a conveyance of the riparian land; (5) easements; (6) licenses. Each of these differ in the manner created and their legal efficacy. Despite the broad language of some courts, rights to the use of water, as distinguished from the riparian right itself, may be validly created.¹¹⁸

In *Kennedy v. Scovil*¹¹⁹ the court considered the nature and differing effects of reservations, exceptions, and assignments; the two former interests are classified as property rights, while the latter

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is a form of contract right. Accordingly, where a riparian proprietor has used his water rights in a separate and distinct manner on his lands, he may make this use the subject of an exception in a conveyance of the riparian property to another. In this manner, he can retain to himself or create in another the use of the water, or a portion thereof, although he has conveyed the property itself. A *reservation* operates in a like manner but does not require that the water right be used separately and distinctly from the land itself. Thus, where one party owns the whole of the right to divert water from a pond and conveys his riparian land to another reserving unto himself a right to use one half of the water from the pond, he has created an interest distinct from that which he exercised before. Traditionally, this interest may not be created in a third person.

Neither a contract right nor an assignment of the right to divert water would be an interest in the property itself. Both are contractual rights, purportedly being exercised by the non-riparian in the right of the riparian proprietor. As between the riparian and the party with whom he agrees to contract or assign these rights, the agreement is valid.¹²⁰ However, where the water is to be used for non-riparian lands (this being a use which the riparian could not himself have made), lower riparians may contest the validity of the alleged right as binding against them.¹²¹

An easement (as well as reservation or exception) is an interest in the land of another. It is distinguishable from a license which is not an interest in the land, but merely a personal privilege to use land or water in the right of another. These distinctions were set forth in *Branch v. Doane*,¹²² where the court used them to determine the competency of a witness.

Whether the interest be contractual, personal, or in the land and water itself, the non-riparian "right" to use water appears to be valid only against the original grantor, and in some cases his successor; it is not binding against lower riparians unless they have consented to the diversion by grant or release.¹²³

SECTION 5. SPECIFIC REASONABLE USE CONTROVERSIES— POLLUTION BY ONE OTHER THAN A MUNICIPALITY

THE DISCHARGE of effluent into a stream eliminates, almost as a matter of course, the use of water for many other purposes. If substantially polluted, water cannot be used for drinking purposes,

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as water supply for domestic animals, for irrigation, industrial wash or consumption, ice, or recreational activities. This listing could further include the potential inability of the stream to support fish, shell-fish, and wild life. This pervasive impact of pollution excludes the use of water in all its broader ramifications.

A riparian proprietor is entitled to receive water, not only in sufficient quantities for his use, but also free from any unnecessary impurities. The Court in *Harvey Realty Company v. Wallingford*¹²⁴ noted that the riparian is entitled “. . . to have the stream preserved in its natural size, flow, and purity, without material diversion or pollution.” The realty company, as an inducement for purchasers to buy their lots, had allowed large numbers of the public to swim and bathe in a stream. The stream was thereby polluted by waste discharge. The court held that this was an abuse of the riparian’s rights.

In *Lawton v. Herrick*¹²⁵ the plaintiff used the waters of the stream for mill purposes and the cutting of ice for sale. The defendant discharged into the brook above the plaintiff “scantlings, sawdust, pomase, and other refuse.” These damaged the plaintiff’s mill, filled his pond, and destroyed the value of his ice. The defendant claimed the right to pollute, both as a riparian proprietor and as one having acquired a prescriptive right to do so against the plaintiff. The court held that the defendant had a right to make reasonable use of the stream as a riparian proprietor. A use, in order to be reasonable, must not unduly destroy valuable rights of a lower riparian. The discharge of waste products by the defendant in this case was not only destructive of plaintiff’s valuable property rights and therefore unreasonable as a riparian use, but it was tantamount to a nuisance, negating any possible acquisition of prescriptive rights. The court on this latter point noted as follows:

A riparian proprietor cannot acquire by any prescription a right to maintain a nuisance. . . . The claim of such a right in another’s land is unnatural and unreasonable, and is not sanctioned by law. A prescription to be valid must be reasonable.¹²⁶

In *Stamford Extract Manufacturing Company v. Stamford Rolling Mills Company*,¹²⁷ the plaintiff, a dye producer, complained of the unreasonable discharge of zinc, copper and other metallic substances into the water by the defendant upper riparian. Plaintiff’s use of water for the production of dyes required water of the purest quality. The court extensively reviewed the nature of the

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defendant's use of the water for waste disposal. They found that the defendant had expended large sums of money on a waste treatment system which had effectively curtailed the discharge of effluent into the stream. The plaintiff conceded that for a period of years this had been so. It claimed, however, that in recent years the pollution concentration had risen and that they were forced to purchase their water for dye production from other sources. The court held that since the defendant had done everything within its power to treat the water before it was returned to the stream its discharge was a reasonable use under the circumstances. Thus, they noted:

There is nothing more that the defendant can do, in view of the present state of knowledge, to render harmless its effluent, and to impose upon it any further requirements in that regard would necessitate its closing its plant. The efficiency of its sewerage system is dependent upon the care and attention given it by the defendant and upon the maintenance of proper machinery in condition to keep the water uncontaminated, but there is not substantial danger of any failure in that regard.¹²⁸

Although the case may be thought to create or uphold the right of a riparian reasonably to pollute the waters of a stream, several factors influencing the decision should be considered as bearing on the court's decision: First, the defendant was engaged in war production during a period of emergency. Second, there had been an increase in both manufacturing and urban population density along the stream—both invariably contributing to the overall quality of the water. Finally, the plaintiff had not been totally deprived of water for the production and manufacture of supplies, but was able to secure water from the Stamford Water Company; as an economic matter the plaintiff's plight was merely reflective of the increased costs of dye production with pure water. It could also be said that the inevitable consequence of population increases must be reflected as a cost of doing business and the cause of the injury, the consumer, can therefore be the ultimate bearer of the increased cost.

SECTION 6. RECREATIONAL USE

A RIPARIAN proprietor has the right to make reasonable use of a water course for recreational purposes such as boating, swimming and fishing. Recreational use is an incident of riparian ownership and as such is entitled to protection against municipal appropriation or abuse by other riparians.¹²⁹

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In *Rockville Water and Aqueduct Company v. Koelsch*¹³⁰ the plaintiff water company attempted to enjoin the use of Snipsic Lake for recreational purposes on the ground (among other reasons) that such use constituted a nuisance with regard to their use of the lake for water supply purposes. The defendant owned lands around the lake and claimed the right as a riparian proprietor to use the lake for any reasonable recreational purposes. The court held that although by the nature of occupation and the manner of operation a recreational use (in particular use as a public resort) may become a public nuisance, there is no rule which would make it such by operation of law. There must be some damage incurred before the court will find that a recreational use of water constitutes a nuisance. Where a water supplier seeks to curtail recreational use of a lake or stream it must respect the property rights of a riparian user and pay damages therefor.

The court in *Harvey Realty Company v. Wallingford*¹³¹ was more explicit in its recognition of the right of a riparian to use waters for recreational purposes. Therein, the court noted as follows:

The right, [riparian] being to use '*ad lavandum et potandum*,' logically includes ordinary and reasonable bathing privileges by the riparian owner, his family, and inmates and guests of his household, in the stream or pond as well as in waters drawn therefrom.¹³²

The controversy was between the Borough of Wallingford water commissioners and a riparian proprietor. The commissioners were seeking to protect their water supplies pursuant to legislation prohibiting the pollution of reservoirs and such other relief as the court might in its discretion award. Interestingly, the court did not proceed under these statutes; rather they decided the case on the basis of general riparian principles. In this light, the case serves to highlight several pervasive principles affecting the riparian right of recreational use.

The defendant was a developer which subdivided its lands away from the lake into lots. It retained a strip of land around the lake for itself. The object of the realty company's plan was to convey to each purchaser of a lot the right to use the lake for recreational purposes. As an inducement to the purchase of lots the developer advertised and solicited prospective buyers to swim and bathe in the lake.

The court held that the developer's scheme was an abuse of its riparian rights on two major grounds. First, the lots not abutting the

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lake were non-riparian lands; as such no riparian privileges attached to them. Any conveyance of the right to use the lake as riparians would be clearly invalid. Second, although every riparian has a right to use the water for recreational purposes, the exercise of the right is limited to members of the riparian's household, guests and invitees, subject always to the restriction that the use be reasonable. Inviting large numbers of the public to use the lake and purporting to grant to purchasers of nearby lots the right to use the lake for recreational purposes is clearly an abuse of the riparian right where the lake becomes (or threatens to become) polluted by such use. Interestingly, the court did not say that any attempted use of the water as an inducement for the sale of lots or use by purchasers of lots in the right of the developer-riparian would be unreasonable. They reiterated the primary rule that reasonableness depends on all the facts and circumstances of the case. It is likely that the court would not prohibit the normal practice of developers along lake fronts in selling their land with water rights. Where the water is not used for pure water supply purposes, recreational use by lot purchasers and members of the public should not be construed as an unreasonable exercise of the riparian right.

SECTION 7. MUNICIPAL WATER SUPPLIES— ACQUISITION AND PROTECTION¹³³

THE INTERPLAY between riparian proprietors and municipal water supplies must be considered in a separate light from purely private riparian conflicts. Public water supplies are deeply affected with the public interest and are increasingly important to the well-being of urban communities and the general populace. When a conflict arises between a riparian and a water supplier, the treatment accorded the riparian proprietor in the exercise or preservation of his rights often differs substantially from that accorded him in a conflict with another private individual. The courts have, for the most part, remained vigilant to prevent the uncompensated usurpation of the riparian right by a municipality. Their willingness to deny remedial requests endangering the continuity of a public water supply exhibits a remarkable persistence and uniformity of treatment. Wherever possible the courts have refused to enjoin the appropriation of water for public supply purposes and have either award-

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ed damages or forced the exercise of the power of eminent domain by the water supplier.

A. Municipal Water Supply— Riparian or Nonriparian Use?

It is reputed that some eastern states treat municipal diversions for water supply purposes where the municipality is the owner of land abutting a water course as a valid exercise of the riparian right.¹³⁴ This rule, however, does not obtain in Connecticut. It would appear that the Connecticut position accords with more general notions of the riparian doctrine, if for no other reason than the fact that the water is obviously not being used on riparian lands for the immediate or mediate benefit of the riparian owner.

Early confusion concerning the status of the municipal diverter may have been due in part to the opinion of the court in *Harding v. Stamford Water Company*.¹³⁵ In an action by a lower riparian to prevent the diversion of a water course by a water supplier, the court treated the latter *as if* they were exercising normal riparian rights. This trap may have been set by the emphatic claim of the water company that their diversion was in fact the exercise of their riparian rights and by the inability of the court to carry the necessary distinction between an unreasonable exercise of riparian rights and non-riparian user to its logical conclusion. The court appears to have held that an otherwise permissible diversion by the water supply company was an unreasonable exercise of the riparian right as follows:

We regard the plaintiffs as having a right in this stream of water; a right to use it for every useful purpose to which it can be applied; a right to have it run as it is wont to run, without diminution or alteration. 'This right,' says Judge Storrs . . . 'is not an easement, or appurtenance, but it is inseparably annexed to the soil, and is parcel of the land itself.' These defendants then can have no more right to divert the water of this stream from the land of the plaintiffs, or to use the same, *except in a reasonable manner for proper purposes as it passes over their land*, than they have to take the mill of the plaintiffs, or the land on which it stands, and appropriate them to their own or to the public use.¹³⁶

Based upon this language, however, and implicitly upon their own understanding of the riparian doctrine, the court in *Osborn v.*

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*Norwalk*¹³⁷ clarified the status of the municipal diverter by specifically holding that the diversion of water for municipal supply purposes was not a permissible part and parcel of riparian ownership:

Such a use of it [the Silvermine River] by the city was not warranted by its riparian ownership. The diversion in no way promoted its beneficial enjoyment of its land adjoining the river.¹³⁸

B. Municipal Acquisition of the Right to Divert— Condemnation and Damages:

It is difficult to classify the exact nature of a municipal water company's right to divert water to the injury of riparian proprietors. Certainly, it cannot be the exercise of a riparian right. If it is not in the general right of a riparian proprietor, then it must be some *special right* such as an easement or contractual right. Further classification at this point becomes moot for most purposes. If all lower riparians have consented to the diversion of water or have been compensated for the *special right* of the municipality to divert water in derogation of their riparian rights, then no one has cause to question further the nature of the interest—it merely exists. The significance of classifying the interest to the point of calling it an outstanding and recognized *special right* lies in distinguishing it from the mere payment of damages to a lower riparian for injuries already inflicted in the past. The payment of damages for past injury is substantially different from the acquisition of a right to appropriate water in the future.¹³⁹

I. DAMAGES:

Any substantial diversion or appropriation by a municipality of a riparian proprietor's right to use water will be redressed by the award of damages.¹⁴⁰ This rule is subject to two limitations: first, the riparian must be able to show that he has in fact suffered the damages for which he claims the right to recover; second, the damages claimed must be capable of valuation.

These questions were considered in *Watson v. New Milford Water Company*.¹⁴¹ Therein the court set forth the following general statement of principles:

In a case like this some damage results from the mere invasion of the plaintiff's rights, and its amount, not being determinable by proof, must be comparatively small and in that sense nominal;

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whereas specific damage results from loss by reason of the plaintiffs having been interfered with in the application of the water—to the natural flow of which he is entitled—to some beneficial use, by reason of the defendant's acts, and its existence and amount must be established by proofs. . . .

It is found by the court that from a time antedating the diversion of water by the defendant, the plaintiffs did not apply the flow of water to any beneficial use, and could not have done so without incurring expense for the adaptation of their premises to that purpose. This, in the absence of qualifying facts, supports the conclusion of no specific damage, and there is no other fact found which, as a matter of law, requires a different conclusion. The fact that at sometime in the past the flow of water had been profitably applied to running a grist-mill, does not necessarily prove specific damage, and did not require the court to estimate the injury that might have been done by the diversion if, during its continuance, the plaintiffs had built a dam and a mill and, under the Flowage Act, had condemned land for the necessary ponding of the water, and to assess damage as if such injury had really been inflicted. Even in proceedings for condemnation of a water right, such contingent sources of future profit are considered only in connection with all the testimony establishing a pure question of fact; and there is no principle of law requiring the assessment of damages at the amount of such possible profit.¹⁴²

This rule obtains where the mere threat of possible damages exists; it requires that the riparian actually await the occurrence of real damages before recovering.¹⁴³ Nor will the court award double damages—once in a condemnation action and later in an action to recover damages for an interest inseparably connected with the right which was condemned.¹⁴⁴

Where an injunction is requested to prevent future diversions or withdrawals by a municipal water supply company, the court in most cases will deny the injunction and award damages in lieu thereof.¹⁴⁵ The granting of an injunction is a discretionary remedy which is not accorded the riparian proprietor as a matter of right. Even a temporary cessation of the right to make withdrawals for public water supply purposes could cause a substantial public harm.

The public interest in refusing an injunction has been repeatedly acknowledged by the courts. In *Fisk v. Hartford*,¹⁴⁶ the city first constructed its water system in 1867. Since that time it enlarged its dams and reservoirs. At no time prior to the bringing of this action

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did riparian proprietors complain of an invasion of their rights. Both the silence of the plaintiffs and the great public interest in the continuance of the city's water supply led the court to hold as follows:

So far then as the right to an injunction is concerned, the mill owners have slept upon their rights during all these years with full knowledge of all the facts. The fact that they were willing to accept the sewage of the city upon sufferance and at the will of the city, in place of the water to which they were entitled as of right, furnishes we think no legal excuse for this long delay in asking for an injunction. They now ask a court of equity to cut off the entire water supply of a great city until it pays them the damages to which they shall prove themselves entitled. The city is and will continue to be abundantly able to pay all such damages, and the remedy of the plaintiffs at law to recover such damages is adequate and complete. To cut off the entire water supply of this city for any considerable length of time, would cause great public inconvenience and suffering, and would greatly endanger the lives and property of its inhabitants in case of fire, or from disease. The granting or refusal of an injunction rests in each particular case in the sound discretion of the court, exercised according to the recognized principles of equity. It ought not to be granted where it would be productive of great hardship or oppression, or great public or private mischief.¹⁴⁷

A more difficult question arises where an injunction is sought by one water supplier against another. The court in *New Haven Water Company v. Wallingford*¹⁴⁸ considered the respective times of appropriation and alternative water supplies available to each party as determinative of the conflict. They said:

The plaintiff next claims that as a riparian owner it is entitled to the full flow of the river, and to an injunction to restrain the defendant from diverting the water, at least until it pays damages for such diversion. It is conceded that the defendant has not paid damages for diverting the water from the plaintiff's property, and that it is liable in damages for such diversion. But *the real question* in this case does not relate to the right of the plaintiff as riparian owner to damages, nor to the amount of such damages, nor even to its right, under certain circumstances, to an injunction restraining the diversion until damages have been paid; but it relates to the very different question, whether the trial court erred in refusing to grant an injunction upon the facts found. The answer to this question is to be looked for in the special facts found. The plaintiff

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bought its property in 1897 with full knowledge of what the borough had done prior to that time in this matter, and with full knowledge of all the other pertinent facts spread upon the record. The water diverted is necessary for the uses of the borough, and to enjoin the defendant from diverting it might cause great hardship. This stream is practically the only source of additional supply open to the borough. It is found that it is doubtful whether the damages to riparian owners below the pumping station will be more than nominal; the borough has tried to settle for them, and is ready and willing and abundantly able to pay them as soon as the amount is ascertained. Upon the facts found upon this part of the case the injunction was properly refused.¹⁴⁹

The court in *Adams v. Greenwich Water Company*¹⁵⁰ reviewed several situations wherein a court might reasonably refuse to grant an injunction. Traditionally, an injunction will be denied where the comparative damages suffered by the parties are grossly disproportionate and the complaining party has less to lose. This rule is subject to several qualifications, however, including the requirement that: (1) the acts sought to be enjoined were undertaken by claim of right or innocent mistake; (2) the acts complained of were not willful or inexcusable; or, (3) where the complaining party has not been diligent in the prosecution of his own rights. The water company in the *Adams* case knowingly made the diversion without claim of right or mistake and the riparian proprietors were quick to assert their rights. As such, the denial of an injunction could not be justified by traditional means. The court noted, however, that one major exception to the general rule exists for the benefit of the public interest as follows:

The limitations on the propriety of the denial of an injunction on the theory of comparative damage between the parties do not apply to the refusal of an injunction which, if issued, would seriously affect public interest. It is well within a court's discretion to deny an injunction against the infringement of riparian rights if to grant it would adversely affect the interest of the public.¹⁵¹

The court's decision, in light of the emphasis they placed upon the nature of the public interest involved in denying the injunction is an excellent indication of the flexibility which courts can achieve to protect all parties concerned. The court modified the decree of the lower court wherein they refused to issue an injunction as follows:

The plaintiffs do have property rights to the accustomed flow of the Mianus River. In the emergency of a drought the public interest

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may require the court to refuse to protect those rights by way of injunction. However, the riparian owners ought not to be deprived permanently of those rights without compensation. If the judgment of the trial court stands in its present form, there is nothing to prevent the defendant from continuing indefinitely to pump water from the river as the most economical way of getting its required supply. By doing this it might well be able to avoid the building of its proposed reservoir. The result would be that the plaintiffs would for many years continue to be deprived of their rights without any compensation except that which they might recover by a multiplicity of actions. It is obviously not doing equity to leave them in such a position. Under the circumstances of this case, equity demanded that the defendant be allowed a reasonable time within which to make adequate compensation to the plaintiffs for the permanent taking of their water rights if it intends to acquire them, and, if that compensation is not made within such reasonable time, the defendant should be enjoined from further diversion of the waters of the stream.¹⁵²

The courts have consistently refused to issue injunctions in the additional class of cases where damages are speculative. Thus, where a city threatens to enlarge its water supply facilities in the future, the court will not presently enjoin them;¹⁵³ nor will an injunction issue where there is no certainty that any injury will be caused by the construction of a municipal supply well along a river bank because of its speculative affect upon river flow.¹⁵⁴

2. ACQUISITION BY CONDEMNATION:

The acquisition or appropriation of private water rights for public water supply purposes is unquestionably a proper exercise of the eminent domain power of the state. Both the federal and Connecticut constitutions require that before the power of eminent domain is exercised, the following criteria be met:

Federal Constitution: "Nor shall private property be taken for public use, without just compensation."¹⁵⁵

Connecticut Constitution: "The property of no person shall be taken for public use, without just compensation therefor."¹⁵⁶

Both constitutions, therefore, limit the exercise of the power of eminent domain in similar language to the following situations: (1) There must be private property involved; (2) it must be taken by the state or its designee; (3) the taking must be for a public use; (4) and just compensation must be paid to the owner of private property for the taking of his property.

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That riparian rights constitute private property for which the owner is entitled to protection is beyond dispute.¹⁵⁷ Further, any substantial interference with or appropriation of riparian rights by a city constitutes a taking for eminent domain purposes.¹⁵⁸ This rule applies whether the legislature has provided for compensation or not.¹⁵⁹ It is interesting to note that the courts have apparently considered the appropriation of water supplies to be so inimical to the public interest that from earliest times a taking by a municipal water supplier has been deemed to be a taking for public use without fuller exposition on the nature of the public use aspects of the taking. A comprehensive judicial inquiry into limitations on the public use doctrine for water supply purposes had to await the relatively late decision of the Connecticut court in *Adams v. Greenwich Water Company*.¹⁶⁰ The plaintiffs were numerous riparian proprietors along the Mianus River in Greenwich, Connecticut.¹⁶¹ They brought an action to enjoin the Greenwich Water Company from diverting the river to the prejudice of their land and riparian interests. The court characterized their land holdings as follows:

The properties of the plaintiffs are estates with elaborate private residences, representing an investment of many thousands of dollars. Some of the owners have created artificial ponds and islands in the Mianus River. They all use the river for swimming, fishing and skating and draw water from it for their lawns, gardens and livestock and, on occasion, for fire protection. There is no public water supply system serving the neighborhood. In many instances the owners purchased and improved their properties because of the river frontage thereof, and, to some extent, the river enhances the value of the real estate.¹⁶²

The Mianus River originates in New York State. Over fifty percent of its watershed lies in that state. The summer of 1949 was a period of intense drought. In order to meet its obligations to provide water for the use of Connecticut residents and for sale to a New York water supplier to be used in New York State, the water company began to pump over one million gallons a day from the river without purchasing the water rights or securing the permission of riparian owners along the river.

The court held that the water company's diversion violated the rights of lower riparians. The defendant water company realized this and requested the court to issue a declaratory judgment determining their right to condemn water rights along the river. The

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court set forth in elaborate detail the normal public use standard where the benefits to be realized accrue within the state, the distinction between public use and necessity, and the effect of a partial diversion of water without the state. Thus, the court said:

We will first consider the question whether the defendant has the power to condemn the water rights of the plaintiffs for the purpose of constructing its proposed reservoir. Clearly, the General Assembly, by the amendment of the defendant's charter in 1927, purported to grant it that right. The taking of water by a water company chartered to supply water to the public is a taking for a public use. . . . When the legislature endows a public utility company with the power to take by eminent domain such property as is necessary to fulfill its corporate purposes without restriction, the determination of what is necessary to be taken lies in the discretion of the company. The courts will interfere with the exercise of that discretion only in cases of bad faith or unreasonable conduct. . . . On the question of the necessity of a taking, needs which will arise in the reasonably foreseeable future must be taken into consideration. . . . Upon the subordinate facts found, there can be no question that it is reasonably necessary for the defendant to acquire water rights for the construction of a reservoir in the Mianus River in order to continue to furnish an adequate supply of water to its customers in Connecticut, to say nothing of the users of its water in New York state. The court would not be warranted in concluding the contrary.

The position taken by the plaintiffs, however, is that the proposed taking will benefit residents of New York and that, therefore, the 1927 amendment of the defendant's charter either should be so construed as to limit the taking of water rights to such taking as will be necessary to furnish an adequate supply of water to Connecticut residents or should be held unconstitutional. They say that, in so far as the defendant proposes to construct a reservoir greater in capacity than is necessary to supply its customers in Connecticut, such a reservoir is for the exclusive benefit of non-residents. It is true that no state is permitted to exercise or authorize the exercise of the power of eminent domain except for public use within its own borders. . . . It is apparently universally held, however, that if a taking of property by eminent domain is for a public use within the state authorizing it, such a taking is not to be prevented because it will also serve a public use in another jurisdiction. . . . This principle applies even though the major portion of the public use will benefit non-residents. . . . If the taking is for

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a public use which will provide a substantial and direct benefit to the people of the state which authorizes it, it is a proper exercise of the power of eminent domain even though it also benefits the residents of another state.¹⁶³

Having thus set forth the nature of plaintiffs' riparian property interest in the river flow, the appropriation of that interest by the defendant water company without compensation or damages, and the existing right of the water company lawfully to exercise the power of eminent domain to secure these water supplies, the court issued an injunction designed to force the defendant into either: (1) ceasing to withdraw water from the Mianus River; or (2) properly initiating an action to purchase the right to continue the diversion of water from the river by eminent domain.

Seven years later, in 1958, the court upheld their prior determination regarding the propriety of compulsory purchase by eminent domain of water rights along the Mianus River. Thus, in *Greenwich Water Company v. Adams*¹⁶⁴ the water company was allowed to purchase water rights for use within or without the state to meet present and future needs.

Just compensation requires only that the basis of compensation reflect actual or real damages suffered by a riparian; it does not require that a compensation award consider the highest value of the water for any imaginable use. In *New Britain v. Sargent*¹⁶⁵ the riparian proprietor had ceased to use the waters for manufacturing purposes. He utilized them instead for the domestic needs of his tenements. The court upheld the compensation award of an assessment committee which was based on a figure somewhat between the value of the water for its present use and its past use for industrial purposes. The burden of proving damages is on the riparian. Where his estimates are totally speculative or incapable of valuation the court will either not approve a claim for compensation or it will award only nominal damages.¹⁶⁶

In *Waterbury v. Platt Brothers and Company*¹⁶⁷ the court held that the manner of payment affects the question of just compensation. They held that the legislature had exceeded its constitutional powers when it authorized the city to condemn water rights on a temporary basis with annual determinations of damages and compensation. While a lump-sum payment for all future damages would have been sustained, the court noted as follows:

'Just compensation' means a fair equivalent in money, which must

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be paid at least within a reasonable time after the taking, and it is not within the power of the legislature to substitute for such present payment future obligations, bonds, or other valuable security.¹⁶⁸

Justice Baldwin dissented from this aspect of the case. It was his belief that the majority opinion would prevent the temporary acquisition or appropriation of property to public use. While his point is worth considering, perhaps Justice Baldwin and the majority of the court were addressing themselves to different questions. Baldwin's concern was as follows:

The city is an important instrument of government. It is not for the public interest that it should take permanently what it needs only temporarily. It was therefore competent for the legislature to authorize a temporary taking of the defendant's property, on making just compensation. The statute, under which such authority is now claimed by the plaintiff, must be so construed, if it be reasonably possible, as to support its validity. In my opinion it can be construed as authorizing a taking for one year, if just compensation for one year's use be made at the commencement of such year. The greater includes the less. One year is none the less a stated number of years, because it is the least number. In authorizing compensation to be fixed at a sum to be paid annually during a stated number of years, the legislature seems to me to have authorized compensation for a year's appropriation of the riparian rights, to be assessed in such a proceeding as this, at a sum to be paid at the beginning of that year.¹⁶⁹

This position is clearly distinguishable from the annual assessment of damages (based upon one open-ended condemnation action) envisioned by the majority of the court.

Where the property to be condemned is already being put to a similar public use of equal importance with the use for which it is sought to be condemned, the court will generally allow the first appropriation a priority of use and prevent the second condemnation. This rule is subject, however, to the inherent power of the court to balance the needs and values of conflicting uses. Thus, in *New Haven Water Company v. Wallingford*¹⁷⁰ the court allowed the town to divert water from the Pine River in Wallingford because it was the only source of water supply for the town and a cessation of use would cause great public harm.

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C. Protection of Public Water Supplies:

Four different means have been held available for the protection of pure water supplies against acts of upper riparians or riparian proprietors on the banks of a lake or pond used as a reservoir. Obviously, a public water supply needs to be maintained free not only from direct encroachments by diversion, but also from riparian activities which threaten the purity of the supply. In the minds of many, the use of public water supplies for *almost any other purpose* such as swimming, bathing, boating, or other recreational use, is totally inconsistent with the use of the water for municipal supply purposes. These attitudes and beliefs, while not universally held,¹⁷¹ have found their way into legislation¹⁷² and the opinion of courts in this state.

The first case to discuss the relationship of recreational use and pure water supplies did not arise as a riparian right case, nor was it treated solely as a matter under a statute prohibiting the use of reservoir water for recreational purposes. Rather, the case was treated by the court in *Dunham v. New Britain*¹⁷³ as an attempted revocation by a municipality of a contract right or license it had granted to the Dunhams. This revocable interest in the Dunhams was created by a prior condemnation action wherein the City of New Britain purchased land and water rights around Shuttle Meadow Lake. The Dunhams claimed that they had not conveyed their right to use the water in the condemnation action for recreational purposes. The court found that the deed said nothing about a reservation of any recreation right to use the waters; in fact, the privilege had been secured by a separate contractual agreement. As such, it was a non-property interest, in the nature of a license, which the city as licensor could revoke at any time.

The court's observation on the nature of recreational use and its effect on water supplies is interesting. Particularly regarding the emotional impact recreational use would have on the public, the court noted:

The use of the waters of the lake for boating, sailing and fishing is not in itself injurious, not a nuisance, and the agitation of the surface of the water is beneficial, but, as a necessary incident to or concomitant of such use, a considerable quantity of impure and objectional and decayed and decomposing matter, filth and various excreta of the human body is, from day to day, deposited in the

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water of the lake. But such deposit has not been, and is not at present, in sufficient quantities to be appreciable in its effect upon the water, but the knowledge on the part of the public of such deposit produces disgust and tends to prevent the use of the water by the public for domestic purposes. If the germs of infectious or contagious diseases should be deposited at or near the entrance of the supply pipes, such diseases might be communicated to the people of the city using the water for domestic purposes.¹⁷⁴

In *Rockville Water and Aqueduct Company v. Koelsch*¹⁷⁵ the defendant was enjoined by the lower court from conducting a recreational and resort establishment on the shore of Lake Snipsic because of the danger of pollution to the water supplies of the City of Rockville and the town of Vernon. The lower court treated the request for an injunction as essentially an action to condemn the water rights of the resort owner. The court noted that in each legislative grant, including the present statute under which the water company proceeded, there was coupled with the power to enjoin activities endangering a public water supply the duty to compensate those who had a lawful property interest which was thereby curtailed.¹⁷⁶ The two sections of the Act which the court referred to were as follows:

Section 5 of chapter 137 of the Public Acts of 1909 (p. 1062) provides that 'whenever any land or building is so used, occupied, or suffered to remain that it is a source of pollution to the water stored in a reservoir used for supplying residents of a city, town, or borough with water or ice, or to any source of supply to such reservoir, or when such water or ice is liable to pollution in consequence of the use of the same, either the authorities of such town, city, or borough, or the county or town health officer, or the person, firm, or corporation having charge of such reservoir, or the right to procure ice therefrom, may apply for relief to the Superior Court in the county where such reservoir or water is located, and said court may make any order in the premises, temporary or permanent, which, in its judgment, may be necessary to preserve the purity of such water or ice.' And § 6 provides that 'whenever any order is made by the Superior Court for the abatement of any nuisance to such water or ice, and said court shall find that compliance with said order will damage any person or corporation or deprive him or it for any substantial right, said court may assess just damages in favor of such person or corporation, to be paid by such municipality, person, or corporation, as the court may decree.'¹⁷⁷

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The city contended that if the activity were unlawful, as endangering the public health, safety, and welfare, no compensation would have to be made by them to the riparian owner and section five of the Act could be read independently of section six. The court held that this might be true if the resort owners were acting unreasonably, or if their use of the premises for resort purposes constituted a common law nuisance; where, however, their acts are lawful and in the prosecution of their rightful property rights, compensation must be made for the "taking" thereof. In furtherance of this the court said:

There was no evidence of any actual contamination of the water, and therefore no finding of nuisance. It is, however, found that the waters of the reservoir will be liable to become polluted by a continued use of the defendants' premises as a public pleasure-resort; and this is claimed to be a sufficient basis for the conclusion that such use ought to be enjoined without compensation. It may be doubted whether the finding of liability to pollution establishes the existence of such a real and immediate danger as would, in the absence of statute, be required to justify an injunction against a threatened nuisance.¹⁷⁸

It may be noted that the court's language opened the possibility of a statute specifically authorizing an injunction against these activities by designating them as nuisances. The validity of an attempted legislative designation of a previously lawful use as a nuisance to avoid the constitutional mandate of just compensation, however, is certainly an interesting point to ponder in the 1916 context of governmental regulation.

In 1930, the court in *Harvey Realty Company v. Wallingford*¹⁷⁹ had an opportunity to decide the last question raised. In this case the Harvey Realty Company subdivided its land abutting on Pine River and pond. The company retained a strip slightly over one hundred and fifty feet wide around the pond. The development plan was to grant with the sale of each of the more than seventeen hundred lots the right to use the pond for recreational purposes. The borough of Wallingford issued a public announcement prohibiting bathing and swimming in the pond. Members of the public who failed to follow the restriction would be prosecuted under the provisions of the General Statutes as follows:

Sec. 2544. Every person who shall bathe in any reservoir from which the inhabitants of any town, city or borough are supplied

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with water, or in any lake, pond or stream tributary to such reservoir, or who shall cast any filthy or impure substance into such reservoir, shall be fined not more than one hundred dollars or imprisoned not more than six months or both. Prosecutions under this section may be had in the town in which said city or borough is.¹⁸⁰

The Harvey Realty Company immediately protested the issuance of the public announcement and brought an action to secure an injunction to restrain the borough from interfering with the sale of their lots. The court held that the activities of the Realty Company did not constitute a common law nuisance. This gave added support to the decision of the *Koelsch* case. They further avoided the question of a non-compensatory taking by the borough by indicating that while a proceeding might have been undertaken by the municipality to enjoin the recreational activities (which proceedings might incidentally involve the award of damages), the borough had not so elected to proceed. Instead, the court decided the question on a third ground, not previously used to protect municipal water supplies. They held that the realty company had exceeded the reasonable exercise of their riparian rights by using the waters for non-riparian purposes: the attempt to let large numbers of non-riparians use the water for recreational purposes where the effect would be harmful to another riparian proprietor.¹⁸¹

Increasing urbanization, a growing need for pure water supplies to support domestic life, aggravated conflicts between riparian users, and the protection of pure water supplies and an increasing awareness of the police power potential,¹⁸² all helped contribute to a judicial attitude by the late nineteen thirties that private property need not be held completely harmless, but could be subjected to the exercise of regulatory encroachments by the state. In this context, the court decided the case of *State v. Heller*.¹⁸³ Therein, they extensively set forth general principles regarding the police power and its relationship to private property. The court set forth its landmark reasoning as follows:

The fundamental question determinative of the appeal is whether § 2542 as applied to the defendant in forbidding his bathing pursuant to his property right in a brook flowing through his own land, is a valid exercise of the State's police power, or is unconstitutional as depriving him of property rights without compensation. It is unquestioned that the defendant as riparian owner had a right which included ordinary and reasonable bathing privileges in this brook by himself, his family, and inmates and guests of his house-

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hold. . . . It is further undisputed that § 2542 can only be sustained as an exercise of the State's police power. Furthermore, it is not disputed that the object of the statute in question is to protect the health of citizens using water distributed through these reservoirs, and that its purpose affords a proper basis for the exercise of the police power inherent in the Legislature. . . . The issue for determination, therefore, is reduced to the sole question of whether or not this exercise of the police power for the purpose indicated, is so unreasonable as to violate the provisions of Section 11 of Article First of the Constitution of the State of Connecticut or Section 1 of Article XIV of the Amendments to the Constitution of the United States.

The foundation of the police power of a State is the overruling necessity of the public welfare. Thus it has been referred to as that inherent and plenary power which enables the State 'to make and enforce rules and regulations concerning and to prevent and prohibit all things hurtful to the comfort and welfare of society. It has been aptly termed 'The Law of Overruling Necessity,' and compared with the right of self-protection of the individual, it is involved in the very right and idea of government itself, and based on the two maxims that, 'The Public Welfare is the Highest Law,' and that 'One must so use his own right as not to injure that of another.' . . . Accordingly all property of every person is owned subject to this power resting in the State. . . .

It is pursuant to these principles that the State may regulate one's use of his property. 'In short, it [the police power] may regulate any business or the use of any property in the interest of the public health, safety or welfare, provided this be done reasonably. To that extent the public interest is supreme and the private interest must yield. Eminent domain takes property because it is useful to the public. The police power regulates the use of property or impairs the rights in property, because the free exercise of these rights is detrimental to public interest. . . . The use of property may be regulated as the public welfare demands. . . . Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made. . . . 'The protection of the public safety, health or morals, by the exercise of the police power, is not within the inhibitions of the Constitution. And since all property is held subject to such regulation, there is no obligation upon the State to indemnify the owner of property for the damage done him by the legitimate exercise of the police power. Property so damaged is not taken: its use is regulated in order to promote the public welfare.'¹⁸⁴

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The court upheld the exercise of the police power even though they later found that for all practical purposes the defendant's right to use the waters for recreational purposes had been entirely eliminated. In this context *Heller* raised one additional question for the court's determination: Has not the State legislature in other sections of the statute, similar to those discussed in the *Koelsch* and *Harvey Realty* cases, expressed a clear legislative policy to provide compensation for all damages incurred in the protection of municipal water supplies? The court very subtly distinguished the effect of these sections from the section providing criminal penalties as follows:

Under these statutes by the court's decree, not only may an owner's rights to use his property be curtailed, but his very title to either a part or all of it may be entirely divested. The Legislature, therefore, in these sections, with good reason, made provision for compensation to meet such a contingency, but by its enactment of penal § 2542, under which at most one's right to bathe in a stream on his land could be cut off, did not. This, as well as the language above quoted from §§ 2539, 2540 and 2541, refutes the defendant's claim that they evidence a legislative policy to provide compensation in all cases where private property rights are restricted for the benefit of a public water supply. These indicate rather that the Legislature contemplated there would be cases where the exercise of the police power would interfere with one's use of his property without entitling him to compensation.¹⁸⁵

This logic is questionable, to say the least. It should make no substantive difference whether a riparian proprietor is deprived of his right to make use of his property because in one case we say his rights have passed to the municipality, while in another his rights become "no-rights" under threat of criminal punishment. By either label, a riparian owner loses his right further to use his property and the water supply functionary correspondingly gains something which it has not had to pay for.

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SECTION 8. MUNICIPAL LIABILITY FOR SEWERAGE, ACCELERATED STREAM FLOW AND POLLUTION

A. Sewerage and Pollution:

MUNICIPAL sewerage and pollution is the inevitable by-product of increasing urban concentrations. Cities, towns, and other governmental units must make provision for the elimination of the normal waste products of human settlements. In outlying rural or suburban areas the elimination of household waste is accomplished either by cesspool facilities or direct discharge of untreated effluent into a nearby water course. Although both of these self-help remedies might adversely affect the quality of a watercourse, in areas of low population density concentrations rivers and streams, by their normal regenerative processes, are capable of rendering harmless moderate pollution discharges. Municipal effluents, on the other hand, are generally of such significant concentrations as to permanently tax the curative powers of a water course and irreparably pollute it.

Large concentrations of municipal sewerage are inconsistent with almost any use desired to be made by a riparian proprietor on a water course.¹⁸⁶ Certainly, pollution is exclusive of recreational uses, the existence of wild life, irrigation, the watering of livestock, water for domestic purposes, industrial usage and the like. If the concentration of pollution is of sufficient density, it may even be disruptive (during certain periods of the year) of the normal amenities of fresh air and residential life.¹⁸⁷

The discharge of municipal pollutants into a water course has consistently been held by the courts to constitute a nuisance for which a riparian may recover damages.¹⁸⁸ This rule was clearly set forth by the court in *Nolan v. New Britain*.¹⁸⁹ The city was discharging large amounts of residential and industrial waters into Piper's Brook. The plaintiff was deprived of all reasonable riparian use of the brook's water by the heavy concentration of pollution. The court held that the plaintiff was entitled to recover damages against the city as follows:

The use of Piper's Brook which the complaint charges that the defendant has made, unless there is a lawful warrant therefor, causes a public nuisance. Anything not warranted by law, which annoys and disturbs one in the use of his property, rendering its

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ordinary use or occupation physically uncomfortable to him is a nuisance. . . . If the annoyance is such as to materially interfere with the ordinary comfort of human existence, it is a nuisance. . . . And if the annoyance is one that is common to the public generally, then it is a public nuisance. . . . The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence. . . . That it would be a public nuisance to render the water of a stream so impure that it could not be used for domestic purposes, or for the watering of cattle, and so that it gave off noxious and unhealthy odors, is hardly open to question; . . . for the reason that these causes would injuriously affect every riparian owner along the whole length of the stream and every person who lived near it. If a municipal corporation, in the absence of a legal right so to do, causes sewage to pollute a water-course, to the use of which a lower owner through whose premises the water-course flows is entitled, it is guilty of a nuisance for which damages may be recovered.¹⁹⁰

In *Platt Brothers and Company v. Waterbury*¹⁹¹ the city claimed the right to pollute as a riparian proprietor. The court unequivocally rejected this argument:

The defendant claims that its use of the river is a reasonable use, and is justified by the fact that the water of the river has been, for an indefinite period, given up to secondary uses. This claim is substantially disposed of by the court as a question of fact. Whether or not the use of a river by a riparian proprietor is a reasonable use in view of the rights of other riparian proprietors, depends largely on the circumstances of each case, and is essentially a question of fact. . . . The inference of the trial court from the special facts found, that the city's use of the river is an unreasonable one, is the only inference that can legally be drawn from those facts. The use of a stream for drainage may under some circumstances be reasonable, although the water is thereby rendered unfit for its primary use; but the concentration of the filth accumulated by one proprietor, whether an individual or a municipal corporation, and its discharge into the river in such quantities that it is necessarily carried to the premises of another where it produces a nuisance dangerous to his health and destructive of the value of his property, must be unreasonable.¹⁹²

As a second basis for avoiding liability the city alleged a prescriptive right to pollute the waters of the brook. The court

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refused to sustain this contention; the city's concentration of pollution in the brook was tantamount to a nuisance and no prescriptive right may be acquired for such purposes.¹⁹³

If the city had neither the right to pollute the brook as a riparian owner, nor by any prescriptive or traditional special right, how then might the city have continued to perform an essential public function? In very limited situations, a city may acquire a right to pollute based upon the silence of a riparian proprietor leading to acts in reliance on this silence by a city. This drastic remedy has only been sustained once.¹⁹⁴ The only other means by which such right might be acquired would be through purchase or condemnation.

The acquisition of the right to pollute by eminent domain was sustained by the court in *Kellogg v. New Britain*.¹⁹⁵ It was consistently allowed by the courts from that time as a proper public use.¹⁹⁶ Eight years after *Kellogg*, the court in *Platt Brothers and Company* noted:

The appropriation of the river to carry such substances to the property of another, is an invasion of his right of property. When done for a private purpose it is an unjustifiable wrong. When done for a public purpose it may become justifiable, but only upon payment of compensation for the property thus taken. Public necessity may justify the taking, but cannot justify the taking without compensation. It may be necessary for a city to thus mix with its drainage such substances, but it is not necessary to pour such mixture into the river, without purification; indeed the purification is coming to be recognized as a necessity. But however great the necessity may be, it can have no effect on the right to compensation for property taken. The mandate of the Constitution is intended to express a universally accepted principle of justice, and should receive a construction in accordance with that principle, broad enough to enable the court to protect every person in the rights of property thus secured by fundamental law.¹⁹⁷

The interest acquired by the city in a condemnation action was described by the court in *Waterbury v. Platt Brothers and Company*¹⁹⁸ as an easement in the lands of another.

Even before the articulation of this view, the court had placed itself in the position of having to oversee and direct every claim for an injunction or damages into a condemnation action.¹⁹⁹ Perhaps this justifies the following language of the court:

We fail to see how any great public mischief will be produced by

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compelling the city within the time limited [2 years before injunction took effect], either to make compensation for the property taken or to provide proper means for the disposition of its sewerage.²⁰⁰

In a subsequent condemnation action brought by the city (pursuant to the dictates of the court),²⁰¹ two additional questions were raised regarding both the propriety of allowing sewerage discharge (even with a condemnation proceeding) and the sufficiency of compensation for damages suffered by the riparian proprietor. In response to the first contention that the discharge of pollution, whatever the right claimed, remains a public nuisance, the court noted:

The legislature has the power to authorize, and has authorized, the city to acquire for the public use of sewerage, by agreement with landowners on the Naugatuck River, or by condemnation of their property, the right to utilize the flowing water of said river for that purpose. It cannot be assumed that, having acquired such property, the city will so improperly or negligently use the property it has acquired as to inflict on the property of others any injury that is not incident to the lawful employment of its own property for such public use. If a condition should ever arise where it seems impossible for the State to afford that protection which it owes to the health and lives of the inhabitants of a city, without using means that must subject other portions of the public to the very dangers from which the inhabitants of the city are thus relieved, a serious problem will be presented for legislative solution, involving questions of legislative power which the courts may eventually be obliged to determine. There is at this time no occasion to consider such questions.²⁰²

The company's second argument was that they were denied "just compensation" under the assessment and payment plan of the city. The city proposed to assess damages on a yearly basis and make payments accordingly. This plan was held invalid by the court as an attempt to make future compensation for a present taking. Apparently the court felt that just compensation required a lump sum payment for all future injuries. The dissenting opinion of Justice Baldwin treated the plan of the city as the bringing of a *new* condemnation action each year. So construed, it would satisfy the present payment requirement of "just compensation."²⁰³

Damages and the amount of just compensation to be awarded for injuries caused by pollution are often difficult to estimate. In

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*Dudley v. New Britain*²⁰⁴ the court upheld a lower court award of damages as follows:

[I]t is certain that the damage which consists in a depreciation in the usable value of the plaintiff's property directly caused by the defendant's wrong may be ascertained without determining with mathematical certainty the precise amount of that value with the stream unpolluted and its precise amount after the pollution; the amount of damage in such case is intrinsically approximate, depending largely on the sound judgment of the trier, and it is sufficient if the evidence furnishes data from which damage to the amount found may be inferred with reasonable certainty and without resort to mere conjecture.²⁰⁵

A condemnation award does not necessarily include damages for injuries suffered prior to the institution of the action. Thus, in the third and final case involving the City of Waterbury and the Platt Brothers Company,²⁰⁶ the court upheld an award of damages for injuries suffered by the company between the date of the first action in 1900 and the condemnation action in 1904.

B. Accelerated Stream Flow and Flood Waters:

A riparian proprietor is entitled to have the water of a stream, river, or brook maintained as it was "wont to flow" in nature.²⁰⁷ A host of factors influence the quantity of water contained in a water course and the rapidity with which the water flows. These might well include the extent of forestry, ability of surrounding land to absorb water, length and breadth of the watershed, extent of mountain run-off, number of tributaries feeding the watercourse, and the natural slope or contour of the surrounding area.

The density of industrial and residential use and the processes of urbanization drastically affect the natural content and flow of water courses. Urbanization brings paved surface areas, the destruction of forests and other open land spaces, alteration of the slope and contour of the land, and the like. The natural effect of human settlement alters the quantity and velocity of water flow in recipient water courses. If cities and municipalities were to be held liable for every change in the characteristic flow of water courses due to these inevitable processes, their liability would be extraordinary. To avoid this result the courts have distinguished the normal riparian principles; the standard applied to municipalities has the effect of saving them harmless from the inevitable injuries caused

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by urbanization. Cities and municipalities will be held liable for damages suffered by a riparian proprietor only where: (1) they have altered the size, shape, or point of entry of water into a water course and the water course is inadequate to carry off the flow without overstepping its banks to the injury of riparian proprietors; (2) they have added sewerage and water through channels or culverts directly into a water course and have clearly exceeded the natural capacity of the stream; (3) they have been negligent in the construction, maintenance, or operation of a dam which causes damages to lower riparians by the rapid release of impounded or extraordinary flood waters.

In *Wilson v. Waterbury*²⁰⁸ a riparian proprietor brought an action to recover damages caused by the overflow of Little Brook. He sought to hold the city liable for their use of the water course to carry off sewerage and surface waters. The city had been given the power (by city ordinance) to increase the capacity of Little Brook for these purposes but had not exercised the right to alter the capacity of the brook. The court held that the city was liable neither for the increased flow, nor for the failure to widen the brook:

The city emptied no sewage into the brook, and it led into it no water coming from outside of its drainage area. The increase came indirectly and incidentally from the growth of the city; it was caused in part by the erection of buildings, and the opening and paving of streets, and the surface water as such flowing therefrom into the brook; and in part by the surface water collected in highway gutters leading directly into the brook. It is true that this condition of things was anticipated and provided for in that part of the plan adopted relating to Little Brook, and the city had the power to prevent harm resulting from this condition by executing that part of the plan; but there is no law which imposed upon it liability for such harm because of its failure to exercise that power. It might possibly be liable for consequences resulting from such failure if it had directly created the conditions in question; but there is nothing in the finding to show that the city did directly create them, in any such sense as to make it responsible for them.²⁰⁹

In *Sisters of St. Joseph Corporation v. Atlas Sand, Gravel and Stone Company*²¹⁰ the Sisters complained that their land had been flooded by the alteration of a brook on Prospect Street in West Hartford. Their damages were caused by the increased flow of water into the stream due to the paving of surface areas and sewerage discharge by the city of West Hartford. A pipe and culvert had

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been laid in the bed of the brook by the defendant. The court held that a riparian is entitled to have a water course maintained in a sufficient condition to carry off the natural supply of water which reaches it. If a stream is so modified as to impede its natural ability to carry off the water reaching it, thereby causing flooding, a riparian proprietor is entitled to recover damages for the injuries he suffers. Such a condition is a nuisance. In this case, the culvert and pipe line had not diminished the original capacity of the stream and the defendants were not held liable for the flooding of plaintiff's lands.

The court further held that a municipality is not liable for the increased discharge of surface waters into a stream where they have not added to the area of surface drainage. They said:

A municipality commits no wrong through the increased quantity and discharge of surface water which is the result of the grading of streets, the erection of buildings, or the paving of streets or the making of other proper public improvements which lessen the absorption of such waters by the soil, so long as the area of drainage is not added to. . . . Also the flow of surface water may be hastened and incidently increased by gutters or drains leading directly into a watercourse into which it would ultimately find its way, so long as it is not diverted from its natural course and the stream which is its natural outlet is not filled beyond its normal capacity.²¹¹

In *Feudl v. New Britain*²¹² the city was held liable for the discharge of sewerage and surface waters into a small stream running through the plaintiff's land. The basis of liability, however, was not the fact of the increased flow alone; it was predicated upon the city's having altered the entrance point of surface waters into the brook by channels and culverts. The original point of surface water discharge was below the plaintiff's land. The city so changed the natural conditions of surface flow as to cause the water to enter the stream above the riparian's land; any injuries caused the riparian because of the altered surface water were injuries he would not have otherwise suffered.

The danger of releasing impounded water or of negligently maintaining a reservoir or dam in such a manner as to cause the inundation of lower lands is readily apparent. In *Osborn v. Norwalk*²¹³ the plaintiff brought an action seeking to recover for damages caused by the inundation of his lands by the negligent release of great quantities of water by the defendant during "freshet-time." The court held that the city's release of flood waters, even if neces-

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sary for the protection of their dam, was an unreasonable invasion of the plaintiff's rights for which he could recover damages.

In *Donnelly Brick Company v. New Britain*²¹⁴ an unprecedented flood caused the water to overflow the Shuttle Meadow reservoir. The court held that the city would not be liable for damages caused by the flooding of plaintiff's lands lower on the stream if caused solely by an unprecedented flood—*i.e.*, one which is normally unforeseeable. A city has no duty to prepare for floods of nonpredictable quantity. If, however, the flooding of the plaintiff's land was caused by a combination of acts by the city and the natural flood waters, the city could be held liable for damages suffered by a lower riparian.

SECTION 9. EXTINCTION OF THE RIPARIAN RIGHT AND LOSS OF THE "RIGHT" TO EXERCISE EXISTING RIPARIAN RIGHTS

THE RIPARIAN right is a right to the use of water which is inseparably attached to the ownership of riparian lands. It may be surrendered only by a limited number of legally recognized means. Among these are:

1. Sale or purchase of riparian lands
2. Severance of title to subaqueous land from upland ownership
3. Alteration or cessation of a water course

These acts are not to be confused with what has been loosely termed the loss of riparian rights by other legal devices. In each of the above listed means, the riparian has actually lost or conveyed away *the* riparian right itself. In each of the following instances, the riparian may lose a part or all of the right to use water, *but not* the riparian right itself:

1. Estoppel and laches
2. Condemnation and damages in lieu of injunction
3. Police Power Regulations
4. Prescriptive Rights
5. Grants

A. Extinction of the Riparian Right:

The riparian right is annexed to the soil;²¹⁵ it is part and parcel of the land itself.²¹⁶ When riparian land is conveyed, the right to the use of water passes with the land²¹⁷—absent, of course, any express

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reservation or exception in a deed of conveyance. Even where there is a reservation or exception of the right to the use of water in a deed,²¹⁸ as long as the conveyance includes the water course the riparian right theoretically passes to the new owner of the land. The nature of the interest retained by the original riparian owner is a contract right, easement,²¹⁹ or license.²²⁰ As these are lesser interests than the riparian right, the riparian should be able to confine the holder of the "interest" to the limits of the withheld water right; the riparian may also prevent the water right from being used in a manner inconsistent with rights which have passed to him. On abandonment or cessation of use by the non-riparian, he should have any outstanding "rights" of use revert to him in his status as a riparian owner for the benefit of his land. It would appear that the only consistent way to "lose" the riparian right is to be divested of riparian land and the status of riparian ownership.

In Connecticut it would appear that ownership up to but not including the bed of a natural or artificial body of water effectively precludes the existence of the riparian right. In *Schroder v. Battistoni*²²¹ a developer separated the title to subaqueous lands beneath a pond from shore ownership. The developer later sold the shore lots. The purchasers of these shore lots did not acquire any riparian rights. The court treated their claimed "right" of use only in terms of implied rights to use the pond, or easements, both of which are distinct from the exercise of a riparian right.

The logic of the above becomes clear when considered in the context of the elements necessary for the existence of the riparian right. The riparian doctrine presupposes the existence of a water course or body of water to which riparian rights can attach. If the upland does not extend beneath the water, then it has been deprived of its status of touching upon a water course in much the same way as if the water course had altered its path of flow or ceased to flow at all. In *Welles v. Bailey*²²² the Connecticut River changed its course of flow. The river moved away from the land of the defendant and through the plaintiff's land. The latter's land had previously not touched upon the river. The court held that the defendant *lost* his riparian rights when the river ceased to abut or touch upon his lands. The lands of the plaintiff now became riparian and as a riparian proprietor the plaintiff was entitled to all the rights of a riparian owner. The court noted that the same rule pertains to both navigable and non-navigable water courses.

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B. Loss of the "Right" to Exercise Existing Riparian Rights of Use:

In numerous instances a riparian proprietor may lose all or a part of his right to exercise his riparian rights. By either his own acts, the acts of others adverse to his interests for a sufficient length of time, voluntary sale or condemnation, or the enactment of legislation regulating his use of the water, he may be precluded from complaining of the use made by others, or of exercising his rights inconsistent with their use.

1. ESTOPPEL AND LACHES:

The right to complain of another's infringement on the riparian right to use water may be lost by estoppel or laches. Both of these concepts operate to preclude one from asserting an otherwise valid right either by way of claiming damages or as defense to the claim of another for his interference with this alleged right. *Estoppel* requires: a statement or act by one person, upon which another relies in acting in good faith to expend money, make improvements, or otherwise alter his course of behavior. *Laches* is the failure of a person to act where he has a duty to do so. It prevents the assertion of a claim for protection of riparian rights where to uphold them would operate as an injustice on another party. Applying these principles in the negative—where the silence of a riparian proprietor has not led another in good faith to obstruct a water course by erecting a dam, for example—the court will not prevent the riparian proprietor from asserting his rights.²²³

2. CONDEMNATION AND DAMAGES IN LIEU OF INJUNCTION:

A riparian proprietor is ordinarily entitled to damages for the invasion of his right to exercise his riparian rights.²²⁴ Where the action which causes him injury threatens to continue, he may appeal to the court to enjoin the other party from continuing such conduct. Thus, where water is being diverted from a water course,²²⁵ or the flow of a water course is being obstructed,²²⁶ or the water is being polluted to the injury of the riparian proprietor,²²⁷ the court may order the cessation of these offensive activities.

In cases which vitally affect the public well-being, however, the court may refuse to grant an injunction. In lieu thereof, they

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will award to the riparian proprietor damages.²²⁸ In effect, this gives the offending party judicial sanction to continue the offensive conduct subject only to the periodic requirement of paying damages. Thus, where an injunction would cut off the water supply of a municipality, endangering the health, safety, and welfare of its inhabitants, the injunction will be refused.²²⁹ If the public welfare is not threatened because the municipality or water supplier has an adequate reserve and the power of eminent domain, the court may grant an injunction, but only to force the water supplier into exercising the right to divert by condemnation.²³⁰

Although the riparian cannot in some cases protect his right to exercise his prerogatives of water use, he has not lost the right to receive continuing compensation for being divested of his use of the water. Three cases between the Platt Brothers Company and the City of Waterbury clearly illustrate the proposition that the riparian retains his riparian rights although he cannot use them. In the first case, the court awarded the Platt Brothers Company damages for pollution caused by the city.²³¹ In the second case, the court allowed the city to condemn the special right to pollute the water.²³² In the third case, the company was allowed to recover for damages inflicted between the first case and the condemnation action.²³³ An interesting point was made by the court to the effect that the right to damages accrues as the injury is suffered and once vested it is not extinguished by a condemnation action which prospectively compensates the riparian proprietor for the "taking" of his rights.

By condemnation the prospective rights of a riparian are "taken" for public use. The nature of the right so acquired by the condemnor has been characterized as an easement.²³⁴ In theory, the measure of compensation reflects the value of the riparian proprietor's loss of his right to use the water.²³⁵ The riparian retains all rights of use which are not inconsistent with the easement acquired by the condemnor. If, however, the easement acquired is broadly stated, so as to encompass the expansion of use, then the riparian will have no cause to complain. In *King v. Fountain Water Company*²³⁶ the water company purchased the right to dam a stream for the purpose of supplying water to the inhabitants of West Ansonia. As the town grew, so did the demands of the water company. The plaintiff brought an action to enjoin the diversion of additional water. The court held that the water company had the right to

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furnish all necessary water needs of the community and that the right granted the company previously was an elastic one measured by the need for water in the town of West Ansonia.

It is possible, however, if the interest acquired clearly does not encompass a new or novel use which would cause additional loss to the riparian proprietor, that he may be able to recover damages for his "new" injuries. This possibility was illustrated by *Rockville Water and Aqueduct Company v. Koelsch*.²³⁷ Therein, the water company had acquired the right to use the water of Snipsic Lake as a reservoir. Koelsch was the proprietor of a resort area abutting the lake. In order to protect the reservoir water supply the company sought an injunction to prevent Koelsch from using his premises and the water as he had rightfully assumed to conduct his business. The court held that although an injunction would issue, the water company would have to pay damages for depriving a riparian proprietor of his lawful rights of use.

3. POLICE POWER REGULATIONS:

A riparian proprietor may retain his riparian rights and yet be prohibited from exercising them where to do so would endanger the public health, safety, and welfare. In *State v. Heller*²³⁸ the defendant was prohibited from bathing, swimming, or otherwise utilizing his normal riparian rights in a lake set aside as a municipal reservoir. The sole value of the water to the defendant was for recreation use. The court held that the State had the inherent power to prevent the contamination of pure water supplies where their destruction would be harmful to the public interest. The defendant protested that his property had been thereby "taken" without "just compensation." The court broadly upheld the exercise of the police power and refused to follow the defendant's "just compensation" argument:

The foundation of the police power of a State is the overruling necessity of the public welfare. Thus it has been referred to as that inherent and plenary power which enables the State 'to make and enforce rules and regulations concerning and to prevent and prohibit all things hurtful to the comfort and welfare of society.' It has been aptly termed 'The Law of Overruling Necessity,' and compared with the right of self-protection of the individual, it is involved in the very right and idea of government itself, and based on the two maxims that, 'The Public Welfare is the Highest Law,' and that 'One must so use his own right as not to injure that of an-

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other.' . . . Accordingly all property of every person is owned subject to this power resting in the State. . . .

It is pursuant to these principles that the State may regulate one's use of his property. 'In short, it [the police power] may regulate any business or the use of any property in the interest of the public health, safety or welfare, provided this be done reasonably. To that extent the public interest is supreme and the private interest must yield. Eminent domain takes property because it is useful to the public. The police power regulates the use of property or impairs the rights in property, because the free exercise of these rights is detrimental to public interest.' . . . 'The use of property may be regulated as the public welfare demands. . . . Beyond this, private property cannot be interfered with under the police power, but resort must be had to the power of eminent domain and compensation made.' . . . 'The protection of the public safety, health or morals, by the exercise of the police power, is not within the inhibitions of the Constitution. And since all property is held subject to such regulation, there is no obligation upon the State to indemnify the owner of property for the damage done him by the legitimate exercise of the police power. Property so damaged is not taken: its use is regulated in order to promote the public welfare.'²³⁹

4. PRESCRIPTIVE RIGHTS:

A riparian proprietor may lose his right to use the water of a water course to the extent that another person has by prescription acquired a special right to make an inconsistent use of the waters. By modern definition, a prescriptive right is an: (1) adverse use, (2) exercised openly and notoriously, (3) hostile to the rights of another, (4) which is continuous for the statutory period of time—in Connecticut, fifteen years. The purposes of recognizing such a vested right²⁴⁰ in one other than the legal owner are mixed. To some extent the recognition of the prescriptive right fosters the beneficial use of property by rewarding the user and penalizing the owner-nonuser. By according the prescriptive user a perfected right to continue his use, protection is given to existing economic investments and expectations. Finally, as a matter of judicial policy, the courts are kept free of ancient and stale claims of ownership which would be extremely difficult of proof.

The elements and objectives of the prescription doctrine have not always been the same as they are under the accepted modern definition. Two distinct concepts historically vied for the label

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"prescription." Both have been utilized in the Connecticut courts. The modern definition did not gain especial prominence until the middle of the nineteenth century.

The earliest definition of prescription accepted by the courts coincided with the English doctrine of "Lost Grants." Where one exercised a right from "time immemorial," or "beyond the memories of living man," he was presumed to have acquired this right by a lost grant. It was the unexplained fact of use, without more, that after the passage of time ripened into a right which would be protected by the courts.

The doctrine of lost grants was applied in *Ingraham v. Hutchinson*²⁴¹ where the court held that the exclusive enjoyment of the water of a stream for a period of fifteen years gave rise to a special right based upon a presumed grant. They rejected any requirement that during the period of usage the interest asserted by the prescriptive taker be adverse to the riparian proprietor. The rule thus set forth was as follows:

[A] special right, different from the general one, may be acquired by an adjoining proprietor, by grant, or by such length of time as will furnish presumptive evidence of a grant. In *England*, it has been decided, that twenty years exclusive enjoyment of water in a particular manner, affords a conclusive presumption of a right in the party enjoying it, derived from some individual having the power to make it, or from the legislature; and in this state, fifteen years exclusive enjoyment will furnish the same evidence.²⁴²

Justice Gould dissented in the *Ingraham* case from the adoption of the "Lost Grant" doctrine. He insisted that no special right could be acquired by prescription except where the use of water was adverse to a riparian during the entire prescriptive period. The injured party must have had the ability to protect himself by bringing an action for injunction or damages. The distinction between "prescription" which is analogous to adverse possession and "prescription" which approximates "Lost Grants" was very carefully drawn by Justice Gould as follows:

As . . . incorporeal interests, [riparian rights] are not within the statute of limitations; courts of justice have virtually extended the benefit of that statute, to those who have been long in the exercise, or enjoyment, of such rights, or interests, by the application of the doctrine of *presumption*; a doctrine, founded in sound policy, and of great practical convenience. And though the principle of quieting long possession lies at the foundation of this doctrine; it must,

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still, have some limit, and be governed by some definite principle. It has, therefore, been framed, and wisely framed, in strict *analogy* to the statute limitations, or, as is sometimes expressed, in *imitation* of that statute. And according to my present view of the subject, a presumption from lapse of time, cannot, on principle, be conclusive upon incorporeal rights, except in circumstances, in which the statute would *bar* the possessory title to corporeal hereditaments. But the statute never operates, as a bar to a right, once existing, except where one is *wrongfully ousted* of his possession, and voluntarily acquiesces in the wrong, for twenty years, under the *English* statute, or fifteen, under ours. In other words, there must have been a *usurpation* of right, by one party, to the *injury* of the other, and for which the latter might have maintained an action, before the expiration of the term, prescribed in the statute; or the original right is not barred. . . . When . . . the enjoyment of an easement, or of any incorporeal thing, must, if unaccompanied with title, have been an *infracton of another's right*; the voluntary acquiescence of the latter, for fifteen years, furnishes presumptive evidence of a grant, or agreement, legalizing such enjoyment. For it is a fair presumption, that no one would voluntarily, and gratuitously submit, for such a period of time, to a continued trespass, or other infracton of his legal rights. In such cases, therefore, there is a reasonable foundation for the presumption of a grant. Upon this principle it is, that one may, by length of adverse user, acquire a right of way, over the land of another, to divert a natural stream from it, or to overflow it.

But where such enjoyment, by one party, has occasioned no *injury*, or *inconvenience*, of which the the other could have complained, there is no such *acquiescence* by the latter, as to raise any presumption whatever; no acquiescence, in a sense, which implies *submission* to a violation of his own rights; and his silence, or inaction, cannot, therefore, upon any principle, I think, be construed into a presumption of his having granted away, or abandoned, any of them.²⁴³

The decision of the majority of the court in *Ingraham* was literally and in the words of the court followed "without questioning" in *King v. Tiffany*.²⁴⁴ This court noted that the principle of prescription (Lost Grant) was established to an even greater extent than set forth by the court in *Ingraham*.

Although they did not expressly overrule the decision of the court in the *Ingraham* case, the court in *Parker v. Griswold*²⁴⁵ made a very effective effort at discrediting the presumption of "Lost

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Grant" by assuming that the riparian proprietor has a right to bring an action to preserve his rights even though he had suffered no other injury than the threat of losing them by the passage of time; this the court denominated an adverse use. The dissenting opinion of Gould in the *Ingraham* case was assimilated into the majority opinion by this means. The rather extensive analysis offered by the court proceeded as follows:

Whatever doubt may have been entertained formerly upon this subject, it is now settled, by the uniform course of decision, both in *England* and in this country that where one has a right to the use of a stream naturally flowing through his land, capable of being used for a beneficial purpose, and it is diverted therefrom by another, it is not necessary for the person having such right, in an action for such diversion, to prove, that he has actually applied the water running through his land for any beneficial purpose; or, in other words, that he sustained any specific damage by such diversion, interfering with his application of the water; but that he has a right to recover, notwithstanding he has sustained no perceptible or actual damage by such diversion. And we think, that these decisions rest on the most satisfactory reasons. They proceed upon two grounds; first, that every injury from its very nature, legally imports damage; and, secondly, that an injury to a right is a damage to the person entitled to that right, by jeopardizing its continuance, and leading to its very destruction.

An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his rights. It is an ancient maxim, that a damage to one without an injury in this sense, (*damnum absque injuria*,) does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain. But as an injury or violation of his right necessarily imports damage, there can be no such thing as an injury without damage. An injury is a wrong; and for the redress of every wrong there is a remedy; a wrong is a violation of one's right; and for the vindication of every right there is a remedy. Want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action. If he is entitled to an action, he is entitled at least to nominal damages, or else he would not be entitled to a recovery. . . . [I]n many instances, the act is committed under a claim of right in the aggressor. In such cases, the injury is to the right itself which is thus claimed; and it tends to the absolute destruction and extinction of such right, because the person

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entitled to it would be divested of it, by a continued and uninterrupted repetition of such injury for a certain length of time. The hazard in which the right is placed by such injuries, presents a case of damage more palpable and substantial than in those where there is no other damage than that which is merely implied by law, and which seems to exist only in legal contemplation, and one in which it is obvious that it is eminently just, and proper, and necessary, that an action should be sustained, not only for its vindication, but for its preservation. The act complained of, in such a case, is an actual damage to the plaintiff, because it constitutes one of a series of similar acts, which, continued for a certain length of time, under such claim of right, will deprive the plaintiff of his property.²⁴⁶

In *Parker v. Hotchkiss*²⁴⁷ the court resolved most lingering doubts as to which rule obtained in Connecticut. Therein, they explicitly adopted the rule that adverse user was necessary for prescription; adverse use was distinguished from a presumed Lost Grant. The court said:

[I]f the plaintiffs have done nothing more than merely to use their own property, and in such a manner as to do the defendant no injury, and give him no right to interfere with their use of their property, it is difficult to see how, by such an use, they can acquire a title as against the defendant.²⁴⁸

In order to be adverse a use cannot be permissive or without the intent to appropriate another's property to one's own use. Thus, where a dam is raised or lowered pursuant to a written agreement between a riparian owner and the party claiming to have acquired prescriptive rights, the necessary hostile or adverse intent has been held lacking.²⁴⁹ Further, if the user is permissive although without written agreement, the element of hostility and adverse intent has been found to be absent.²⁵⁰

The special interest acquired by prescription *i.e.*, the prescriptive right, is measured by the extent of use during the entire running of the prescriptive period. This rule is the same as that set forth in *Ingraham v. Hutchinson*,²⁵¹ to wit, the prescriptive right "must be measured and limited by the extent of its enjoyment, and the occupier can no more enlarge it than he can assume a new right." The particular use which gave rise to the prescriptive right may be altered if as altered it is consistent with the previously acquired prescriptive right.²⁵² If, on the other hand, an attempt is made to increase the established use, as by raising the level of a dam, an

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entirely new period of adverse use is started with regard to the excess user.²⁵³

There are two notable instances wherein a prescriptive right cannot be obtained: First, the claims of individuals purporting to exercise their rights as members of the general public do not give rise to a prescriptive right in the public.²⁵⁴ Second, a prescriptive right cannot be obtained to continue an unlawful activity, or to continue a nuisance. Thus, where the discharge of pollution into a stream amounts to a nuisance, the court will refuse to recognize the acquisition of a prescriptive right.²⁵⁵

5. GRANTS:

A riparian proprietor may grant (by deed or contract) the right to use a water course. This does not convey the riparian right and any purported attempt to do so would be invalid.²⁵⁶ It does create a right of use, however, which is good against the grantor-riparian and his successors in interest.²⁵⁷ A riparian cannot grant a right which will be good against other riparians without their assent.²⁵⁸ A riparian proprietor, having a residual riparian right may contest any excess use beyond that purported to be conveyed by the language of the grant.²⁵⁹

SECTION 10. LITTORAL RIGHTS ON LAKES AND PONDS²⁶⁰

THE RIGHT of an owner of land abutting upon a lake or pond to use the lake for all reasonable and necessary purposes is commonly called a riparian right. While it makes no substantive difference, the right to use water accorded the ownership of land surrounding or touching upon a lake or pond is properly designated a littoral right.²⁶¹

Definitions of what bodies of water constitute lakes, ponds, marshes,²⁶² and water courses are by no means constant. The Connecticut courts have not yet defined them. One accepted definition has been put forth by the Restatement of Torts.²⁶³ This definition was adopted by the Nebraska Supreme Court as follows:

The term 'lake,' as used in the Restatement of this Subject, comprehends a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, and also the depression, both depression and body of water being of natural origin or a part of a watercourse. . . . A distinction is sometimes made

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between lakes and ponds; the term 'lake' connoting a large body of water and the term 'pond' connoting a small body of water ordinarily containing considerable aquatic growth. But since this distinction is based mainly on the size of the body of water, it is not essential for legal purposes, and the term 'lake' as here defined includes both large and small bodies of water. . . . A lake is distinguished from a stream by the fact that in the former the body of water is substantially at rest while in the latter it has a perceptible flow. . . . To constitute a lake, a body of water must have a reasonably permanent existence. Many lakes have a permanent body of water. But the body of water need not be permanent in order to constitute a lake. Thus, a body of water which occasionally dries upon periods of drought is still a lake. On the other hand bodies of water, even though of considerable size, which collect only in times of heavy rain, flood or melting snow, and which soon dry up, are not lakes within the meaning of that term as here defined.²⁶⁴

The Connecticut countryside is dotted with large and small lakes and ponds. These bodies of water are at a casual glance indistinguishable from one another as either natural or artificial; in many instances they are both.²⁶⁵ The difficulty of attempting broad distinctions between natural and artificial lakes and ponds is further complicated by the suspicion that there are more artificial bodies of inland waters in Connecticut than there are natural lakes or ponds.

Both natural and artificial lakes and ponds have been used historically in Connecticut for the generation of power to run mills and factories, watering cattle, irrigating land, and providing pure water supplies for municipal and domestic consumption. Shortly after the turn of the last century recreational use of these lake facilities began to achieve an especial prominence. The trend toward increased recreational use of Connecticut's inland lakes has continued and is constantly being accelerated by increasing urbanization, a growing state population, and significantly increased leisure time for recreational activities. Recreational activities include, but are not limited to, swimming, bathing, boating, fishing, water skiing, hunting, aesthetics, and the like.

Most of the major Connecticut cases involving questions of littoral rights have come about because of conflicts between recreational uses and pure water supplies, or the maintenance of lake levels by diverters for power or other purposes. Surprisingly, no conflict between two recreational users has ever come before the Supreme Court of this state.²⁶⁶

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One incident of littoral ownership is title to subaqueous lands.²⁶⁷ Bed ownership has been recognized in the Connecticut courts as being in: (1) the owner of "all" land around a lake or pond with clear title to the pond itself; (2) the fee owner of lands held subject to a flowage easement. In no instance has the court attempted to delineate or divide bed ownership on the basis of littoral proprietorship.

The ownership of subaqueous lands can be important because of the control accorded the title holder of land to prevent trespassers from entering upon or using the land. Where bed ownership has been severed from the upland, the bed owner may control the use of both the bed and the surface of a pond or lake.²⁶⁸ In *Schroder v. Battistoni*²⁶⁹ the individual owner of the bed of Lake Garda was permitted to remove encroaching wharves and docks which belonged to abutting (non-littoral) landowners. The court construed the construction of wharves and docks as a trespass on the owner's land (the lake bed) and an invasion of his exclusive rights of use.

Ownership of a lake bed has also been held in Connecticut to include exclusive control over surface water use. In *Turner v. Hebron*²⁷⁰ the court noted that in most cases ownership of the soil beneath the water gives the owner the exclusive right to fish above his lands.

In *Gager v. Carlson*²⁷¹ the holder of a flowage easement brought an action to determine title to the bed of a pond. The defendant counter-claimed in the same action to enjoin the plaintiff from interfering with use of the surface for swimming, boating, and fishing. The court held that as to the water overlying the land which the defendant owned, such uses were clearly proper. As to the land which the plaintiff owned outright, (as distinguished from the lands of the defendant over which he had a flowage easement) "he may well have exclusive rights of boating, swimming and fishing." The court's decision was somewhat based upon their interpretation of the leading New Jersey case—*Baker v. Normanoch Association*.²⁷² The New Jersey court was not deciding between the conflicting elements of the holder of a flowage easement and the fee title owner of flooded lands, as was the court in *Gager*; rather they were resolving a dispute over use of the lake surface by two littoral proprietors—a clearly distinguishable situation.

The prevailing American view is that where title to the bed is based upon littoral ownership, rather than bed ownership in

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severalty, or of almost all the land around a lake, the right to the use of the surface of the lake for all necessary and proper purposes is common to all littoral proprietors.²⁷³ Several reasons have been advanced for this position. One reason given by the courts lies in the practical difficulty which attends attempts to ascertain proper boundaries beneath lake waters where lake beds have not been surveyed for individual ownership.²⁷⁴ Another reason assigned to support this rule resides in the nature of lake surface water use and the unreasonableness of restricting a littoral proprietor to the small, wedge-shaped portion of the surface overlying the portion of the bed which he may own.²⁷⁵ The rule that has been accepted as the majority view was set forth by the Minnesota Supreme Court as follows:

[A]n abutting or riparian owner of a lake suitable for fishing, boating, hunting, swimming, and other domestic or recreational uses to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners, regardless of the navigable or public character of the lake and regardless also of the ownership of the bed thereof.²⁷⁶

The language of the majority rule appears very similar to that of the Connecticut court in *Harvey Realty Company v. Wallingford*.²⁷⁷ Therein, the court noted the extent of littoral rights as follows:

Each riparian proprietor has an equal right to the use of the water to drink and for the ordinary uses of domestic life, although such use may in some degree lessen the volume or affect the purity of the water, and this right extends to such use 'both by the owner himself and all living things in his legitimate employment.' . . . The right includes use of water for drinking, culinary and other domestic purposes, and for watering of animals. . . . The right, being to use '*ad lavandum et potandum*,' logically includes ordinary and reasonable bathing privileges by the riparian owner, his family, and inmates and guests of his household, in the stream or pond as well as in waters drawn therefrom. . . .

Each riparian owner is limited to a reasonable use of the waters, with due regard to the rights and necessities of other such owners.²⁷⁸

This rule would appear to be the prevailing one in Connecticut

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with regard to littoral use of lake surfaces despite the cloud of confusion created by the *Gager* case. This should be evident by the restrictive language used in the *Normanoch* case on which *Gager* relied:

For the purposes of the present controversy we need go no farther than to hold that where, as here, one party is the undisputed owner of the substantial portion of the bed he may exclude therefrom owners of minimal portions of the bed. These plaintiffs are restricted to the use of such portions of the waters of the lake, the bed of which they may own.²⁷⁹

A littoral proprietor by the majority rule has a right to make a "reasonable use" of the lake for riparian purposes. In *Harvey Realty Company v. Wallingford*,²⁸⁰ it was held that extending the use of one's riparian rights to members of the general public and non-littoral proprietors was an unreasonable riparian use. The unique factual circumstance wherein the realty company's use was called unreasonable should not be lightly construed as extending beyond the protection of the lake for public water supply purposes. The prevailing practice of lake front property owners and developers is to extend to non-riparians the privilege of using lake waters for recreational purposes. This practice, which has not been extensively challenged in the courts, has great economic and social significance in this state. If the question appears before the courts, they will probably uphold the right of a littoral proprietor to extend his rights of use to cover non-riparians until such time as the effects of overcrowding, contamination of the waters, and dangerous activities threaten the reasonable use of other riparian proprietors.²⁸¹

Any attempt to convey the riparian or littoral right itself to an individual who is not the proprietor of land abutting upon a lake is void in Connecticut.²⁸² In other states, developers of land around a lake or pond have tried to avoid this rule by dredging odd shaped channels and ditches into the upland to increase the total number of riparian lots.²⁸³ If the main objection of the Connecticut courts is directed at the technical violation of the riparian doctrine, new lots may be made riparian by a developer under this scheme where they do not endanger the lake or unduly burden it. The courts have given no reason why this developers' device might not be upheld in this state.

Riparian proprietors abutting a lake or pond ordinarily have the right to have the water level maintained, particularly where

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exposure of a lake bed during the summer months poses a threat of stagnation and foul odors. To the extent necessary to protect a riparian owner, the court will enjoin the diversion of waters from the lake, making every attempt to reconcile the economic needs and rights of a diverter with those of the riparian.²⁸⁴ In order to have the lake level maintained, however, one must show a right either as a riparian proprietor, or by prescription.²⁸⁵

The right to make normal recreational use of one's littoral rights is properly subject to the reasonable exercise of the police power and the power of eminent domain. In *State v. Heller*²⁸⁶ the court upheld a state statute which forbade the use of water in a lake or reservoir for recreational purposes. The court noted that regulation to protect public water supplies does not violate the constitutional requirement of "just compensation." All private property is held subject to the reasonable exercise of the police power—this, despite the fact that the riparian proprietor was deprived of the only reasonable exercise of his riparian rights.

FOOTNOTES—PART ONE

1. See *infra*, Part Two.
2. Relatively little attention has been given to the aesthetic and colorful beauty of Connecticut's lakes and streams in judicial decisions. One of the few cases which recognized this fact was *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951). On the potential of inland lakes for recreational and aesthetic purposes see generally, Reis, *Recreational Use of Inland Waters*, 40 Temple L. Quarterly 155-193 (1967).
3. Riparian herein will be used to include both riparian and littoral rights. Riparian properly should be applied to land adjoining rivers, streams and other water courses, while littoral refers to ownership of land abutting the sea or lakes and ponds. For purposes of clarity, however, the one term will be used to mean both. For a fuller discussion of the differences see 56 Am. Jur. *Waters* § 273 (1947); *Chamberlain v. Hemingway*, 63 Conn. 1, 27 Atl. 239 (1893).
4. See for example extensive analysis in *Tide Water Oil Sales Corp. v. Shimelman*, 114 Conn. 182, 158 Atl. 229 (1932).
5. 56 Am. Jur. *Waters* § 6 (1942).
6. *Supra* note 3.
7. *Id.*, at 5, 27 Atl. at 240.
8. 18 Conn. 389 (1847).
9. 30 Conn. 180 (1861).
10. *Id.*, at 183.
11. 112 Conn. 563, 153 Atl. 164 (1931).

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12. 86 Conn. 597, 86 Atl. 585 (1913).
13. *Id.*, at 605, 606, 86 Atl. at 588.
14. 10 Conn. 213 (1834).
15. *Id.*, at 218, 19.
16. 15 Conn. 366 (1843).
17. *Id.*, at 373.
18. See generally *infra*, sections on Municipal Water Supplies and Municipal Sewerage.
19. 72 Conn. 531, 45 Atl. 154 (1900). Subsequent litigations between these parties appear in *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856 (1904). (City attempted to condemn the necessary water right); and *Platt Bros. & Co. v. Waterbury*, 80 Conn. 179, 67 Atl. 508 (1907). (Platt Brothers attempted to recover damages arising between first action and condemnation.)
20. 138 Conn. 205, 83 A.2d 177 (1951). In the subsequent case, *Greenwich Water Co. v. Adams*, 145 Conn. 535, 144 A.2d 323 (1958), the water company brought an action to condemn the plaintiffs' water rights.
21. *Supra* note 19 at 552, 45 Atl. at 162, 63.
22. *Buddington v. Bradley*, 10 Conn. 213 (1834).
23. 17 Conn. 288 (1845).
24. *Id.*, at 300.
25. 146 Conn. 288, 150 A.2d 302 (1959).
26. *Id.*, at 295, 150 A.2d at 307.
27. 62 Conn. 398, 26 Atl. 394 (1892).
28. 83 Conn. 417, 76 Atl. 986 (1910).
29. See *e.g.*, *Greer v. Rockwell*, 65 Conn. 316, 32 Atl. 924 (1895); *Ognio v. Elm Farm Milk Co.*, 90 Conn. 393, 97 Atl. 308 (1916).
30. *Parker v. Griswold*, 17 Conn. 288, 301 (1845):
A right to the use of a stream being inseparably annexed and incident to the land over which it flows, it follows, that it is illegal to divert it from that land. This principle applies, whether the proprietor owns the whole, or a part only, of the bed of the stream.
31. 61 Conn. 175, 22 Atl. 951 (1891).
32. *Id.*, at 188, 22 Atl. at 952.
33. 126 Conn. 364, 11 A.2d 396 (1940).
34. *Supra* note 25.
35. See *e.g.*, *Schroder v. Battistoni*, 151 Conn. 458, 199 A.2d 10 (1964); *Gager v. Carlson*, *supra* note 25; *Great Hill Lake, Inc. v. Caswell*, *supra* note 33; *Turner v. Hebron*, *supra* note 31.
In this connection, see also *Catherine Roraback v. Twin Lakes Ski Club, Inc.* (Filed Sept. 7, 1966, Superior Court, County of Litchfield, Connecticut) and *Reis, Policy and Planning for Recreational Use of Inland Waters*, 40 Temple Law Quarterly 155-193 (1967).
36. *Wadsworth v. Tillotson*, 15 Conn. 366 (1843); *Parker v. Griswold*, 17 Conn. 288 (1845).
37. 51 Conn. 277 (1883).
38. *Id.*, at 304, 305.

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39. 101 Conn. 310, 125 Atl. 623 (1924).
40. 111 Conn. 352, 150 Atl. 60 (1930).
41. *Id.*, at 358, 59, 150 Atl. at 63.
42. *Supra* notes 37 and 40.
43. Perkins v. Dow, 1 Root 535 (1793).
44. Tyler v. Wilkinson, 24 Fed. Cas. 472, 4 Mason 397 (1827); Embrey v. Owen, 6 Exch. 353, 155 Eng. Rep. 579 (1851).
45. Blackstone, *Commentaries*, Part II, 403, as cited Galbreath, *Maryland Water Law* (1965).
46. See generally, Hutchins, *The California Law of Water Rights*, (State of California, 1956).
47. 24 Fed. Cas. 472, 4 Mason 397 (1827).
48. *Id.*, at 474.
49. 6 Exch. 353, 155 Eng. Rep. 579 (1851).
50. *Id.*, at 369, 155 Eng. Rep. at 585.
51. 2 Conn. 584 (1818).
52. *Id.*, at 592-599.
53. 9 Conn. 162 (1832).
54. *Id.*, at 166.
55. See generally, Ingraham v. Hutchinson, *supra* note 51; King v. Tiffany, *supra* note 53; Buddington v. Bradley, 10 Conn. 213 (1834).
56. *Supra* note 51.
57. *Id.*, at 590.
58. 15 Conn. 366 (1843).
59. *Id.*, at 375.
60. 6 Exch. 353, 155 Eng. Rep. 579 (1851).
61. 24 Fed. Cas. 472, 4 Mason 397 (1827).
62. *Id.*, at 474.
63. *Supra* note 60.
64. *Id.*, at 369-373, 155 Eng. Rep. 586-87.
65. 1 Root 535 (1793).
66. *Id.*, at 536.
67. *Id.*, at 536, 37.
68. 15 Conn. 366 (1843).
69. *Id.*, at 375.
70. See generally, Wadsworth v. Tillotson, 15 Conn. 366 (1843); Parker v. Griswold, 17 Conn. 288 (1845); Gillett v. Johnson, 30 Conn. 180 (1861); Keeney & Wood Manf. Co. v. Union Manf. Co., 39 Conn. 576 (1873); Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 45 Atl. 154 (1900); Thompson v. New Haven Water Co., 86 Conn. 597, 86 Atl. 585 (1913); Stamford Extract Mfg. Co. v. Stamford Rolling Mills Co., 101 Conn. 310, 125 Atl. 623 (1924); Harvey Realty Co. v. Wallingford, 111 Conn. 352, 150 Atl. 60 (1930).
71. Parker v. Hotchkiss, 25 Conn. 321 (1856).
72. 6 Exch. 353, 155 Eng. Rep. 579 (1851).
73. *Id.*, at 371, 72, 155 Eng. Rep. at 587.
74. *Supra* note 70.

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75. *Id.*, at 301.
76. 9 Conn. 291 (1832).
77. *Id.*, at 305.
78. 39 Conn. 190 (1872).
79. *Id.*, at 204, 205.
80. 39 Conn. 576 (1873).
81. *Id.*, at 582-85.
82. 78 Conn. 171, 61 Atl. 519 (1905).
83. 36 Conn. 310 (1869).
84. 10 Conn. 213 (1834).
85. 25 Conn. 321 (1856).
86. 56 Conn. 255, 14 Atl. 786 (1888).
87. *Id.*, at 262-264, 14 Atl. at 788, 89.
88. For a further discussion of Flowage Acts and their history, see *infra*, part four.
89. See generally, Occum Co. v. Sprague Manufacturing Co., 35 Conn. 496 (1868); Robertson v. Miller, 40 Conn. 40 (1873).
90. 9 Conn. 162 (1832).
91. 50 Conn. 346 (1882).
92. 130 Conn. 170, 32 A.2d. 644 (1943).
93. 18 Conn. 494 (1847).
94. 125 Conn. 76, 3 A.2d 315 (1938).
95. *Id.*, at 78, 3 A.2d at 317.
96. *Id.*, at 81, 82, 3 A.2d at 318.
97. *Id.*, at 82, 3 A.2d at 318.
98. 127 Conn. 629, 18 A.2d 924 (1941). See also, Krupa v. Farmington River Power Company, 147 Conn. 153, 157 A.2d 914 (1959).
99. 77 Conn. 530, 60 Atl. 113 (1905).
100. *Id.*, at 536, 60 Atl. at 114, 15.
101. See *e.g.*, Smith v. Moodus Water Power Co., 33 Conn. 460 (1866); Bierce v. Sharon Electric Light Co., 73 Conn. 300, 47 Atl. 324 (1900); Labbadia v. Bailey, 147 Conn. 82, 157 A.2d 237 (1959); Labbadia v. Bailey, 152 Conn. 187, 205 A.2d 377 (1964).
102. 1 Root 535 (1793).
103. 10 Conn. 213 (1834).
104. 30 Conn. 180 (1861).
105. *Id.*, at 183.
106. 15 Conn. 366 (1848).
107. *Id.*, at 374, 375.
108. 36 Conn. 359, 364 (1870).
109. 113 Conn. 402, 155 Atl. 498 (1931).
110. 55 Conn. 373, 11 Atl. 294 (1887).
111. 22 Conn. 89 (1852).
112. *Id.*, at 100.
113. Avon Manufacturing Co. v. Andrews, 30 Conn. 476 (1862).
114. 51 Conn. 277 (1883).
115. See *e.g.*, *Ibid.*

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116. See *e.g.*, *Parker v. Griswold*, 17 Conn. 288 (1845); *Sisters of St. Joseph Corp. v. Atlas Sand, G. & S. Co.*, 120 Conn. 168, 180 Atl. 303 (1935).
117. 126 Conn. 194, 10 A.2d 587 (1940).
118. *Harvey Realty Co. v. Wallingford*, 111 Conn. 352, 150 Atl. 60 (1930).
119. 12 Conn. 317 (1837).
120. See *e.g.*, *supra* note 110.
121. *Supra* notes 114 and 116.
122. 17 Conn. 402 (1845).
123. On the question of securing releases, see *e.g.*, *Williams v. Wadsworth*, 51 Conn. 277 (1883), and textual treatment *infra* this section.
124. 111 Conn. 352, 359, 360, 150 Atl. 60, 63 (1930).
125. 83 Conn. 417, 76 Atl. 986 (1910).
126. *Id.*, at 424, 76 Atl. at 989.
127. 101 Conn. 310, 125 Atl. 623 (1924).
128. *Id.*, at 316, 125 Atl. at 625.
129. See § 7 *infra* on municipal water supplies for a fuller discussion of the protection accorded these rights against municipal encroachments.
130. 90 Conn. 171, 96 Atl. 947 (1916).
131. 111 Conn. 352, 150 Atl. 60 (1930).
132. *Id.*, at 359, 150 Atl. at 63.
133. The term municipal water supplier is used as to include any public, quasi-public or private water company or supplier.
134. *Hutchins, California Law of Water Rights* (State of California, 1956).
135. 41 Conn. 87 (1874).
136. *Id.*, at 92 (emphasis added).
137. 77 Conn. 663, 60 Atl. 645 (1905).
138. *Id.*, at 664, 60 Atl. at 645.
139. An excellent example of this seemingly obvious distinction is furnished by the lengthy litigation between Platt Brothers & Company and the City of Waterbury. See *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154 (1900); *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856 (1904); *Platt Bros. & Co. v. Waterbury*, 80 Conn. 179, 67 Atl. 508 (1907). The first action was for damages, the second an action to condemn the right to pollute, and the third another action for the damages which accrued between the first action and the condemnation of their water rights.
140. See *e.g.*, *Denslow v. New Haven and Northampton Co.*, 16 Conn. 98 (1844); *Harding v. Stamford Water Co.*, 41 Conn. 87 (1874); *City of New Britain v. Sargent*, 42 Conn. 137 (1875); *Town of Suffield v. Hathaway*, 44 Conn. 521 (1877); *Board of Water Commissioners of New London v. Perry*, 69 Conn. 461, 37 Atl. 1059 (1897); *Fisk v. Hartford*, 70 Conn. 720, 40 Atl. 906 (1898); *Watson v. New Milford Water Co.*, 71 Conn. 442, 42 Atl. 265 (1899); *Osborn v. Norwalk*, 77 Conn. 663, 60 Atl. 645 (1905); *Thompson v. New Haven Water Co.*, 86 Conn. 597, 86 Atl. 585 (1913); *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951); *Greenwich Water Co. v. Adams*, 145 Conn. 535, 144 A.2d 323 (1958).

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141. 71 Conn. 442, 42 Atl. 265 (1899).
142. *Id.*, at 450, 451, 42 Atl. at 267, 268.
143. See for example *Hartford Rayon Corp. v. Cromwell Water Co.*, 126 Conn. 194, 10 A.2d 587 (1940).
144. See for example *Board of Water Commissioners of New London v. Perry*, 69 Conn. 461, 37 Atl. 1059 (1897).
145. See *e.g.*, *Fisk v. Hartford*, 70 Conn. 720, 40 Atl. 906 (1898); *Watson v. New Milford Water Co.*, 71 Conn. 442, 42 Atl. 265 (1899); *New Haven Water Co. v. Wallingford*, 72 Conn. 293, 44 Atl. 235 (1899); *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951).
146. 70 Conn. 720, 40 Atl. 906 (1898).
147. *Id.*, at 732, 40 Atl. at 910.
148. *Supra* note 145.
149. *Id.*, at 304, 305, 44 Atl. at 239, 240 (emphasis added).
150. 138 Conn. 205, 83 A.2d 177 (1951).
151. *Id.*, at 218, 219, 83 A.2d at 184.
152. *Id.*, at 219, 220, 83 A.2d at 184. The subsequent condemnation action later came before the Supreme Court of Errors in *Greenwich Water Co. v. Adams*, 145 Conn. 535, 144 A.2d 323 (1958).
153. *Beckerle v. Danbury*, 80 Conn. 124, 67 Atl. 371 (1907).
154. *Hartford Rayon Corp. v. Cromwell Water Co.*, 126 Conn. 194, 10 A.2d 587 (1940).
155. Article V, U.S. Const.
156. Art. I, § 11 Conn. Const.
157. See *e.g.*, *Denslow v. New Haven and Northampton Co.*, 16 Conn. 98 (1844); *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856 (1904); *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951).
158. *Ibid.*
159. *Denslow v. New Haven and Northampton Co.*, *supra* note 157; *Harding v. Stamford Water Co.*, 41 Conn. 87 (1874).
160. *Supra* note 150.
161. See parties listed in *Greenwich Water Co. v. Adams*, 145 Conn. 535, 536 (1958).
162. *Adams v. Greenwich Water Co.*, 138 Conn. 205, 208, 83 A.2d 177, 179 (1951).
163. *Id.*, at 213-215, 83 A.2d at 181, 182.
164. 145 Conn. 535, 144 A.2d 323 (1958).
165. 42 Conn. 137 (1875).
166. See *e.g.*, *Watson v. New Milford Water Co.*, 71 Conn. 442, 42 Atl. 265 (1899).
167. 76 Conn. 435, 56 Atl. 856 (1904).
168. *Id.*, at 440, 441, 56 Atl. at 858.
169. *Id.*, at 446, 447, 56 Atl. at 860.
170. 72 Conn. 293, 44 Atl. 235 (1899).
171. Some of the current multiple use controversies in Connecticut center around the use of Barkhamsted Compensating Reservoir and Rainbow

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- Dam for recreational and pure water supply purposes. Recreational water use advocates and some municipal water planners believe that recreational use benefits pure water supplies.
172. See Legislation Appendices B, D and E *infra*.
 173. 55 Conn. 378, 11 Atl. 354 (1887).
 174. *Id.*, at 383, 11 Atl. at 355.
 175. 90 Conn. 171, 96 Atl. 947 (1916).
 176. For a summary of pertinent legislation see Appendix E *infra*.
 177. *Supra* note 175, at 173, 174, 96 Atl. at 948.
 178. *Id.*, at 175, 96 Atl. at 949.
 179. 111 Conn. 352, 150 Atl. 60 (1930).
 180. *Id.*, at 357, 150 Atl. at 62.
 181. On the extent of the riparian right for recreational purposes see generally *supra* section 6, this part.
 182. See *e.g.*, the broad zoning powers recently upheld by the Supreme Court of the United States in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L.Ed. 303 (1926); *Gorieb v. Fox*, 274 U.S. 603, 47 S. Ct. 675, 71 L.Ed. 1228 (1927); *Nectow v. Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 (1928).
 183. 123 Conn. 492, 196 Atl. 337 (1937).
 184. *Id.*, at 494-97, 196 Atl. at 339,340.
 185. *Id.*, at 503, 504, 196 Atl. at 342,343.
 186. But see *Fisk v. Hartford*, 69 Conn. 375, 37 Atl. 983 (1897).
 187. Courts on occasion have noted the foul odor and stagnation which polluted water can cause and held them invasions of the right of enjoyment of one's property. See *e.g.*, *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499 (1896); *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703 (1897); *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154 (1900).
 188. See generally *Kellogg v. City of New Britain*, 62 Conn. 232, 24 Atl. 995 (1892); *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499 (1896); *Fisk v. Hartford*, 70 Conn. 720, 40 Atl. 906 (1898); *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703 (1897); *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154 (1900); *Watson v. New Milford*, 72 Conn. 561, 45 Atl. 167 (1900); *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 586 (1904); *Dudley v. New Britain*, 77 Conn. 322, 59 Atl. 89 (1904); *Platt Bros. & Co. v. Waterbury*, 80 Conn. 179, 67 Atl. 508 (1907); *Fendl v. New Britain*, 88 Conn. 125, 90 Atl. 35 (1914); *Donnelly Brick Co., Inc. v. New Britain*, 106 Conn. 167, 137 Atl. 745 (1927). But see *Gorham v. New Haven*, 79 Conn. 670, 66 Atl. 505 (1907).
 189. 69 Conn. 668, 38 Atl. 703 (1897).
 190. *Id.*, at 678, 38 Atl. at 706.
 191. 72 Conn. 531, 45 Atl. 154 (1900).
 192. *Id.*, at 547, 45 Atl. at 161.
 193. See *Nolan v. New Britain*, *supra* note 189.
 194. *Fisk v. City of Hartford*, 69 Conn. 375, 37 Atl. 983 (1897). This case also held that a riparian is not entitled to demand the continuation of polluted water for power purposes.

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195. 62 Conn. 232, 24 Atl. 996 (1892).
196. *Morgan v. Danbury*, 67 Conn. 484, 35 Atl. 499 (1896); *Nolan v. New Britain*, 69 Conn. 668, 38 Atl. 703 (1897).
197. *Supra* note 191, at 551, 45 Atl. at 162.
198. 76 Conn. 435, 56 Atl. 856 (1904).
199. See generally *supra* note 196.
200. *Supra* note 198, at 554, 45 Atl. at 163.
201. *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856 (1904).
202. *Id.*, at 444, 445, 56 Atl. at 859,860.
203. See text *supra* section 7 on Eminent Domain for a more complete discussion of this case and just compensation.
204. 77 Conn. 322, 59 Atl. 89 (1904).
205. *Id.*, at 325, 59 Atl. at 90.
206. *Platt Bros. & Co. v. Waterbury*, 80 Conn. 179, 67 Atl. 508 (1907).
207. See *e.g.*, *Sisters of St. Joseph Corp. v. Atlas Sand, G. & S. Co.*, 120 Conn. 168, 180 Atl. 303 (1935).
208. 73 Conn. 416, 47 Atl. 687 (1900).
209. *Id.*, at 422, 47 Atl. at 689,690.
210. *Supra* note 207.
211. *Id.*, at 174, 180 Atl. at 306.
212. 88 Conn. 125, 90 Atl. 35 (1914).
213. 77 Conn. 663, 60 Atl. 645 (1905).
214. 106 Conn. 167, 137 Atl. 745 (1927).
215. See *e.g.*, *Parker v. Griswold*, 17 Conn. 288 (1845).
216. See *e.g.*, *Wadsworth v. Tillotson*, 15 Conn. 366 (1843).
217. 56 Am. Jur. *Waters* § 287 (1947).
218. See *e.g.*, *Kennedy v. Scovil*, 12 Conn. 317 (1837).
219. See *e.g.*, *Waterbury v. Platt Bros. and Co.*, 76 Conn. 435, 56 Atl. 856 (1904).
220. See *e.g.*, *Branch v. Doane*, 17 Conn. 402 (1845).
221. 151 Conn. 458, 199 A.2d 10 (1964).
222. 55 Conn. 292, 10 Atl. 565 (1887).
223. See *e.g.*, *Johnson v. Lewis*, 13 Conn. 303 (1839). See also, *Hickox v. Parmelee*, 21 Conn. 86 (1851).
224. See text and cases cited *supra* note 140.
225. See *e.g.* *Williams v. Wadsworth*, 51 Conn. 277 (1883).
226. See *e.g.*, *Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786 (1888).
227. See *e.g.*, *Lawton v. Herrick*, 83 Conn. 417, 76 Atl. 986 (1910).
228. See cases and text cited *supra* note 145.
229. See *e.g.*, *New Haven Water Co. v. Wallingford*, 72 Conn. 293, 44 Atl. 235 (1899).
230. See *e.g.*, *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (1951).
231. *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154 (1900).
232. *Waterbury v. Platt Bros. & Co.*, 76 Conn. 435, 56 Atl. 856 (1904).
233. *Platt Bros. & Co. v. Waterbury*, 80 Conn. 179, 67 Atl. 508 (1907).
234. *Waterbury v. Platt Bros. & Co.*, *supra* note 232.

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235. See *e.g.*, *City of New Britain v. Sargent*, 42 Conn. 137 (1875); *Board of Water Commissioners of New London v. Perry*, 69 Conn. 461, 37 Atl. 1059 (1897).
236. 75 Conn. 621, 55 Atl. 10 (1903).
237. 90 Conn. 171, 96 Atl. 947 (1916).
238. 123 Conn. 492, 196 Atl. 337 (1937).
239. *Id.*, at 495-497, 196 Atl. at 339, 340.
240. See *e.g.*, *Hughes v. Graves*, 39 Vt. 359, 94 Am. Dec. 331 (1867); *Chapin v. Freeland*, 142 Mass. 383, 8 N.E. 128 (1886).
241. 2 Conn. 584 (1818).
242. *Id.*, at 591.
243. *Id.*, at 592-594.
244. 9 Conn. 162 (1832).
245. 17 Conn. 288 (1845).
246. *Id.*, at 302-304.
247. 25 Conn. 321 (1856).
248. *Id.*, at 330.
249. *Betts v. Davenport*, 3 Conn. 286 (1820).
250. *Schroder v. Battistoni*, 151 Conn. 458, 199 A.2d 10 (1964).
251. 2 Conn. 584, 591 (1818).
252. See *e.g.*, *King v. Tiffany*, *supra* note 244; *Buddington v. Bradley*, 10 Conn. 212 (1834).
253. *Branch v. Doane*, 18 Conn. 233 (1846).
254. *Turner v. Selectmen of Hebron*, 61 Conn. 175, 22 Atl. 951 (1891).
255. See *e.g.*, *Platt Bros. & Co. v. Waterbury*, 72 Conn. 531, 45 Atl. 154 (1900); *Lawton v. Herrick*, 83 Conn. 417, 76 Atl. 986 (1910).
256. *Harvey Realty Co. v. Wallingford*, 111 Conn. 352, 150 Atl. 60 (1930).
257. *Brigham v. Ross*, 55 Conn. 373, 11 Atl. 294 (1887).
258. *Supra* note 256. See also *Williams v. Wadsworth*, 51 Conn. 277 (1883).
259. See *e.g.*, *King v. Fountain Water Co.*, 75 Conn. 621, 55 Atl. 10 (1903).
260. The distinction between a lake and a pond is primarily one of size. The two terms are used interchangeably herein.
261. *Chamberlain v. Hemingway*, 63 Conn. 1, 27 Atl. 239 (1893). The two terms are used interchangeably herein.
262. The court in *Brignall v. Hannah*, 34 N.D. 174, 180-81, 157 N.W. 1042, 1043 (1916) distinguished lakes and marshes as follows:
Appellants' first contention is that the land within the meandered lines of survey was never a lake in the proper sense of the word, such as to give occasion for application of the doctrines applicable to riparian ownership. Funk & Wagnall's New Standard Dictionary defines a lake as an inland body of water or natural inclosed basin serving to drain the surrounding country. According to Webster's International Dictionary a lake is a considerable body of standing water in a depression of land; and when a body of standing water is so shallow that aquatic plants grow in most of it, it is usually called a pond; when the *pond* is mostly filled with vegetation it becomes a *marsh*.
263. Restatement, Torts, § 842, at 324.

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264. *Block v. Franzen*, 163 Neb. 270, 276-77, 79 N.W.2d 446, 450 (1956).
265. See *e.g.*, *Turner v. Selectmen of Hebron*, *supra* note 254.
266. The seeds of a major controversy were planted in *Catherine Roraback v. Twin Lakes Ski Club, Inc.*, (Filed Sept. 7, 1966, Superior Court, County of Litchfield, Connecticut). The action was amicably settled, however, before trial. See also, Reis, *Policy and Planning for Recreational use of Inland Waters*, 40 Temple Law Quarterly 155-193 (1967).
267. See *e.g.*, *Turner v. Selectmen of Hebron*, 61 Conn. 175, 22 Atl. 951 (1891); *Mad River Co. v. Pracney*, 100 Conn. 466, 123 Atl. 918 (1924).
268. See *Camp Clearwater, Inc. v. Plock*, 52 N.J. Super. 583, 146 A.2d 527 (1958), *aff'd*, 59 N.J. Super. 1, 157 A.2d 15 (1959) (title to bed in one owner as bed was severed from adjoining ownership—no riparian rights); *Shaffer v. Baylor's Lake Ass'n*, 392 Pa. 493, 141 A.2d 583 (1958) (ownership of bed separated from upland ownership by reservation of title in original grantor); *Miller v. Lutheran Conference & Camp Ass'n*, 331 Pa. 241, 200 Atl. 646 (1938) (title to bed of artificial lake held apart from adjoining ownership may warrant exclusive use of surface); *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127 (Tex. Civ. App. 1935) (bed of lake severed from adjacent land ownership in grant from state). *Cf.*, *Goloskie v. La Lancette*, 91 R.I. 317, 163 A.2d 325 (1960), *cert. denied* 364 U.S. 919 (1960) (owner of land now abutting water was not riparian to original brook—cannot use surface of pond).
269. 151 Conn. 458, 199 A.2d 10 (1964).
270. *Supra* note 267.
271. 146 Conn. 288, 150 A.2d 203 (1959).
272. 25 N.J. 407, 136 A.2d 645 (1957).
273. Under the riparian view see, *e.g.*, *Floria v. State*, 119 So.2d 305 (Fla. 1960) (rights of riparians to use of whole lake are equal so long as reasonable—skiing); *Taylor v. Tampa Coal Co.*, 46 So.2d 392 (Fla. 1950) (equal use of lake waters by all riparians); *Thompson v. Enz*, 2 Mich. App. 404, 140 N.W.2d 563 (1966) (common use of surface subject to restriction that it be reasonable—case where canal was dug to (create?) allow greater access to lake); *Burt v. Munger*, 314 Mich. 659, 23 N.W.2d 117 (1946) (each riparian has the right to use the whole surface, unobstructed by the others) (removal of obstruction ordered); *Swartz v. Sherston*, 299 Mich. 423, 300 N.W. 148 (1941) (reasonable use of entire surface with other riparian owners for boating and fishing, etc., so long as doesn't "unduly" interfere with others); *Waters of White Lake, Inc. v. Fricke*, 308 N.Y. 899, 126 N.E.2d 568 (1955) (New York accepts reasonable use of surface rule); *Taylor Fishing Club v. Hammett*, 88 S.W.2d 127, 130 (Tex. Civ. App. 1935) ("All riparian owners whose lands abut on . . . a lake have a right to the joint use of the entire lake for fishing and boating."); *Improved Realty Corp. v. Sowers*, 195 Va. 317, 78 S.E.2d 588 (1953) (common, reasonable use of entire surface by all riparians); *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956) (all riparians have an

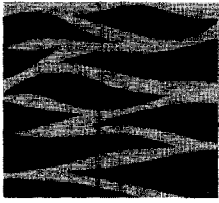
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- equal right to the use of surface in a reasonable manner not obstructing the use of others—this extends to licensees and invitees); *Providence Fishing & Hunting Club v. Miller Mfg.*, 117 Va. 129, 83 S.E. 1047 (1915) (riparians on stream subsequently dammed to form pond have equal right to use of surface).
274. See *e.g.*, *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956). See also *Gager v. Carlson*, *supra* note 271.
275. *Snively v. Jaber*, *supra* note 274.
276. *Flynn v. Beisel*, 257 Minn. 531, 539, 102 N.W.2d 284, 290, 291 (1960).
277. 111 Conn. 352, 150 Atl. 60 (1930).
278. *Id.*, at 359, 150 Atl. at 63.
279. *Baker v. Normanoch Ass'n Inc.*, *supra* note 271 at 419, 136 A.2d at 652 (1957).
280. *Supra* note 279.
281. The unreasonableness of riparian use can be raised as a violation of riparian rights, a breach of covenant, or a nuisance. See generally *florio v. State*, 119 So.2d 305 (Fla. 1960) (skiing, high powered boats, etc., held: injunction should be granted where the defendant's use interfered with the use of other riparians) (injunction could not prohibit "all" activities, only those which were a "real" nuisance); *Thompson v. Enz*, 2 Mich. App. 404, 407, 140 N.W.2d 563, 565 (1966) (here, defendant attempted to give his lots access to lake by dredging a canal—"in a proper case, a use which adversely affects the rights of other riparian owners will be enjoined. If the pleadings raise the issue that a proposed use will, for example—adversely affect the level of the lake or will contaminate the waters, spoil the view or hurt the fishing or otherwise impair the rightful use of riparian owners, such proposed use may be enjoined upon proof of the fact."); *Ottawa Shores Home Owners Ass'n v. Lechlak*, 344 Mich. 366, 73 N.W.2d 840 (1955) (restrictive covenant—consideration of effect of noise of boating, etc., activities held in violation thereof); *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950) (Defendant owned a large motorboat. Each of the users of the lake acted pursuant to an easement of use, rather than in the exercise of a riparian right. The issue was tried on the question of nuisance, however, and the court held that an injunction would only issue where the defendant's use was unreasonable. Plaintiff tried to have "all" boating banned. The court refused. The plaintiff had the reserved express power under the easement to "reasonably regulate" the use of boats on the lake and defendant had stated his willingness to comply therewith. Plaintiff failed to show that the boat had been operated unreasonably so as to create a nuisance, although the court recognized that operation of the boat in this manner was possible); *Snively v. Jaber*, 48 Wash.2d 815, 296 P.2d 1015 (1956) (states the traditional doctrine of reasonable use and then questions nuisance value of "raft" near "unused" shore, because it did not conflict with use of any riparians; held not a nuisance).
282. *Supra* note 277.
283. For an excellent general discussion of riparian uses and a specific analysis

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of an attempt by a land developer to increase the supply of "water-front" property, see Note, 1966 Wis. L. Rev. 172 (1966).

- 284. See *e.g.*, *DeWitt v. Bissell*, 77 Conn. 530, 60 Atl. 113 (1905).
- 285. See *e.g.*, *Great Hill Lake, Inc. v. Caswell*, 126 Conn. 364, 11 A.2d 396 (1940); *Gager v. Carlson*, 146 Conn. 288, 150 A.2d 302 (1959); *Labbadia v. Bailey*, 147 Conn. 82, 157 A.2d 237 (1959); *Labbadia v. Bailey*, 152 Conn. 187, 205 A.2d 377 (1964).
- 286. 123 Conn. 429, 196 Atl. 337 (1937); Cert. den. 303 U.S. 627, 82 L.Ed. 1088, 58 S.Ct. 765.



PART TWO:

Doctrines of Public and Private Rights in Navigable Waters

SECTION 1. INTRODUCTION

THE EASTERN seaboard of the United States has direct and useful access to the great navigable waters of the Atlantic Ocean. Connecticut not only has access via Long Island Sound, but has traversing it the Connecticut River, a natural highway for trade and commerce. Quantitatively, there is probably more water in Connecticut which is either in and of itself useful for the navigational purposes of trade and commerce or tributary to navigable waters than there is water which is not. Many of the waters abutting or running off the Long Island Sound are affected by the tides of the ocean.¹

The historical role that these waters have played in the settlement and development of this state cannot be underestimated. One only has to look at a map of Connecticut to realize that most of the great settlements were within easy access to these waters. They have served as modes of transportation, sources of food and building supplies, sources of reclaimed land for development, means of personal travel and communications, and for power and waste distribution. It is appropriate that these waters have been classified public waters by the courts as either being navigable in law under the common law test or navigable in fact under the customary laws of this state and under the Federal tests of navigation.

The present role of these waters has not greatly changed from that of the past. Primarily, the change which has taken place has been the result of increased use for some purposes and diminished use for others. The historical balance which may have been achieved through judicial decisions has thus been altered. What present uses are being made of the River? Waste discharge has become one of the most important industrial uses. At points where the river is not so polluted as to make fish and wild life impossible, recreational fishing has become important, diminishing, at the same time, the

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importance of fishing for sustenance. Although travel and transportation are still carried out on the river, this function has greatly diminished in importance with the advent of the railroad and the automobile. They are today less the objects of immediate population use in the nature of survival than they are the objects of industrial and recreational use by a more sophisticated and maturing urban settlement. These waters could also be classified as the industrial washwaters of the East. Vast amounts of effluent are discharged daily into the river—ultimately beyond the capacity of the river to filter and cleanse them. Obviously, polluted waters are inconsistent with the major recreational uses which can be made of the waters. Thus, where these heavy areas of concentrated pollution appear, the waters become unusable for purposes of swimming, boating, fishing and the like.

As industrial reliance and economic investment based on river use for waste discharge grows, the conflict between the use of the water for recreational purposes and industrial use will also increase. The courts will be called upon, along with the legislature, to make profound value judgments affecting the vital organs of the Connecticut economic structure and the non-economic desirability of living in this state. In public waters, to a much greater extent than with private waters, the relationships which exist in the use of the water are tripartite. The State as such has a proprietary or quasi-proprietary interest in the water and its use; the State represents the right of the public to beneficially use the waters in their rights as individual members of the public; and finally, there are "private" rights or franchises to land and water use along the great navigable bodies of water.

It is in the historical development of public and private rights in and to the use of navigable (public) waters that one finds written a history of the development of the State of Connecticut—history which any current or future legislation cannot ignore.

SECTION 2. THE NAVIGATION DOCTRINE:

HISTORICAL DEVELOPMENT AND APPLICATION OF RULES DISTINGUISHING PUBLIC AND PRIVATE WATERS.

A. The English Rule:

The doctrine of public and private waters developed in England in direct relation to the physical situation of an island surrounded by

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oceans and in direct response to the needs of the English people. England is so situated that almost any major water course traversing the island flows to or from the sea. There is almost a complete absence of any great inland water course not so situated or affected by the ebb and flow of these tidal waters.²

In early England, this vast network of inland water courses which connected with the sea provided the main basis for transportation both of commercial products and of people. Since inland water courses were the main transportation thoroughfares of England, it was imperative that they remain free of private controls and restrictions. This was accomplished by equating inland waters affected by the tides with the concept of Crown ownership and control of the seas for the benefit of the public. The common law courts were thus able to extend public jurisdiction over inland waters. It is interesting to note two propositions in this context: First, that the great water passways of England have been preserved for public use by this device; Second, that the real reasons have never been made explicit by the courts. This fictionalized ownership of ocean waters by the Crown remains the historical explanation for the dichotomy between public and private waters.

Title to the soil underlying public waters was also held by the courts to have been retained by the King. Bed ownership would have been inconsistent with the right of the public to free passage on these waters. It is not clear, however, whether the King held the title to subaqueous lands in a proprietary or a trust capacity for the benefit of the people.³

B. Transplantation of English Rules to Connecticut:

The earliest areas of colonial settlement in New England proved fertile soil to sow the seeds of English distinctions between public and private waters. Connecticut is an excellent example of an area in which the English rule would *prima facie* operate on the same basis as in the English context. Notably, when early colonists accepted the complete body of the English common law, the distinction made between public and private waters served a very useful function. Waters affected by the ebb and flow of the tide include the Long Island Sound, the lower part of the Connecticut River and several other water courses. All were used by the colonists for transportation, trade and commerce.

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Title to the soil underlying navigable waters pursuant to the common law test remained in the King of England during early colonial days. The King had withheld the royal prerogatives from the colony in 1647—one of these prerogatives being ownership and control of the seas.⁴ It was not until after the American Revolution that the state of Connecticut succeeded to the rights of sovereign prerogative.⁵ It has been consistently held since that time that the state holds title to the soil beneath navigable waters in trust for the people of the state of Connecticut.⁶

C. Early Modification of the Common Law Rule:

Connecticut's unique situation led to an early modification of the narrowly construed common law rule. While waters affected by the ebb and flow of the tide remained navigable in law,⁷ the courts began to give recognition to the need for greater public control of water courses which were not traditionally included under the strict ebb and flow of the tides test. The first, and perhaps the most decisive case wherein the doctrine of waters *customarily* utilized for navigation began to evolve was *Adams v. Pease*,⁸ decided by the Supreme Court of Connecticut in 1818. Chief Justice Swift succinctly set forth his concept of public waters as follows:

Rivers are considered to be navigable as far as the sea flows and reflows. . . . Above the ebbing and flowing of the tide . . . the public have a right or easement in such rivers, as common highways, for passing and repassing with vessels, boats, or any watercraft. . . . A more perfect system of regulations on this subject could not be devised. It secures common rights, as far as the public interest requires; and furnishes a proper line of demarcation between them and private rights.⁹

Taken in the physical context of the conflict the court was deciding and the nature of the use that was being made of these waters at this point, it becomes clear just how Swift extended the common law rule:

The plaintiff owns a large farm in *Suffield*, bounded *East* on Connecticut river. The *locus in quo* lies between the shore and the centre of the river, against the farm. It is above *Enfield* falls; and is passable with flat-bottomed boats, carrying from five to thirty tons burden, up and down the river, but not with ships and vessels; though some vessels, built above, have been floated down. The waters there, and for a considerable distance below, are never affected by the rising and falling of the sea. The river from its

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mouth to this place, and far above, is, and always has been, used for the purpose of transportation by water, and is, for that purpose, of great public importance; the right of such use being common to all the citizens of the state.¹⁰

Justice Hosmer reacted to modification of the common law rule with vigor. His conception of navigable waters serves to round out the nature of the change the *Adams* case wrought on the common law rule as follows:

The case is reduced to this question merely, whether the river *Connecticut* is a navigable river, where the tide does not ebb and flow? If the term navigable is construed according to its popular import, every river capable of being sailed upon by a boat, however small or shallow, is embraced by it. Many of the inconsiderable streams which fall into *Connecticut* river, are of this description. The same common law, however, which has established the principle, has furnished a definite explication of the disputed term. Every river, where the sea ebbs and flows, is, by the common law, considered as navigable; and all rivers not thus distinguished, are not navigable. . . .

The distinction between rivers navigable and not navigable, that is, where the sea does, or does not, ebb and flow, is very ancient. The former are called *arms of the sea*, while the latter pass under the denomination of *private* or *inland* rivers. 'That is called an arm of the sea where the tide flows and reflows, and so far only, as the tide flows and reflows.' . . . 'If a river runs continuously between the land of two persons, each of them is owner of that part of the river, which is next to his land, of common right.' . . .

The detriment, which, it has been argued, the public must derive from this doctrine, is entirely ideal; and rests on a misconception of the law. All rivers above the flow of the tide, in reference to the use of them, are public, and of consequence, are subservient to the public accommodation. Hence, the fisheries, ferries, bridges, and the internal navigation are subject to the regulation of government.

The argument, from inconvenience, must be very powerful, to cast a shade on a long established principle. Here I discern no inconvenience. On the other hand, the doctrine of the common law, as I have stated it, promotes the grand ends of civil society, by pursuing that wise and orderly maxim of assigning to everything capable of ownership, a legal and determinate owner.¹¹

The distinction between the positions of these two eminent justices is clouded by semantics. Clearly, Justice Hosmer believes that the

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public has a right to the use of the waters for purposes of transportation. The major disagreement between these two justices would seem directed at the denomination of the waters as being *public*—for with such a denomination would go title to the bed of the river and security of shore ownership.¹²

Most of the fears expressed in the separate opinion of Justice Hosmer have not been realized in the judicial designations of navigable bodies of water in Connecticut. In fact, aside from the Connecticut river whose designation as public remains essential to the well-being of the state, few rivers or tributaries have been judicially recognized as “navigable” under the customary usage test of the *Adams* case.

Connecticut is in the peculiar situation of having innumerable inlets and coves abutting navigable water courses and the Long Island Sound. The *Adams* test was early modified because of these extensive coves and shallow tributaries to navigable waters. If applied, the test would have rendered an inordinate number of limited utility water courses navigable. Thus, where a body of water abuts or adjoins a navigable river, it must be navigable in its own right in order to have affixed to it the label of *public* water course. In *Wethersfield v. Humphrey*¹³ the court was concerned with the designation of Keeney’s cove as either navigable or non-navigable. The town committees of Wethersfield and Glastonbury had designated a highway to be built across the mouth of the cove. Humphrey contended that a highway thus located would obstruct navigation in and to the Connecticut river. Justice Ellsworth responded as follows:

If it [the road] be indeed a nuisance, as claimed, the objection would deserve serious consideration; and if it be an obstruction to navigation, which is carried on between the states, or with foreign nations, even the consent of our legislature would not be enough to secure this interruption of commerce. But there is no such navigation here, which belongs to the jurisdiction of one or the other. This cove cannot be said to be navigable, by any craft whatever, though at times, a fish-boat, or skiff, or Indian canoe may be pushed through its waters; or, in the winter months occasionally, a small sea-boat is laid up to avoid the ice of the river. But this is not navigation. That only is such, and those only are navigable waters, where the public pass and repass upon them, with vessels or boats, in the prosecution of useful occupations. There must be some commerce or navigation which is essentially valuable. A hunter or fisherman, by drawing his boat through the waters of a brook

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or shallow creek, does not create navigation, or constitute their waters channels of commerce . . . The doctrine contended for, by the plaintiffs, would convert numerous bridges over private rivers and inlets on the margin of Long Island Sound, into unconstitutional obstructions and public nuisances. And so too, if this highway cannot be laid out, for the reasons alleged, then most of the highways and private ways, cross the inlets and coves, from Stonington to Greenwich, are unconstitutional and unlawful; for they were not laid out by permission from the state or the United States. Such a doctrine has not received, and never can receive, the sanction of any court of justice.¹⁴

By the year 1850, Connecticut state courts had evolved what today remains the primary threefold state test for public waters. The first two are joined in the following test. If the water course is an arm of the sea subject to the ebbing and flowing of the tide then it is presumptively navigable in law under the common law test.¹⁵ In *Orange v. Resnick*¹⁶ the Supreme Court of Connecticut noted that tide waters, being only presumptively navigable, must meet the test of commercial utility for purposes of judicial action to restrict alleged obstructions to navigation by private development along the shore. The court said as follows:

The only substantial paramount public right is the right to the free and unobstructed use of navigable waters for navigation. What waters are navigable is a question of fact. All tidewater is *prima facie* navigable, but it is not necessarily so.¹⁷

The second aspect of the Connecticut test can be applied to fresh water alone. If a water course is not subject to the influences of the sea and is fresh water it is navigable only where it has customarily been used as a highway for transportation whereupon ships pass and repass.¹⁸ By way of dicta rather than decision, the court in *Welles v. Bailey*¹⁹ established this position and elevated the judicial thought process regarding customary usage of waters by calling waters navigable in fact the equivalent of waters navigable in law. They said:

It is not necessary for us, in our inquiry into the rights of the parties, to consider whether the Connecticut River is at this point in law a navigable or non-navigable river. It is in constant use for purposes of navigation and the tide slightly ebbs and flows there, which would seem to make it at common law a navigable river, and especially would it be so under the rule generally adopted in the states of the Union, though never formally adopted in this state, that rivers that are navigable in fact are so in law.²⁰

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Whether or not the river or water course is so used for navigation is a question of fact for the jury.²¹ Finally, whether tide or fresh water, the transportation or usage for passage made of a water course must be for useful gain and occupation.²²

D. Federal Standards for Navigation— Federal-State Relations:

The federal test for navigation coincides with the language of the Connecticut “navigable in fact” definition for navigable waters. Dissimilarities appear in application, however, because of the basis of the respective state and federal power to designate public and private waters and the purposes behind such classification. While the state test for navigation is based upon the inherent right of sovereignty and is responsive to the immediate social and economic needs of the state, the federal test is uniform in application throughout the several states and is based solely upon express powers granted in the Constitution. The Federal power is directed at the satisfaction of interstate rather than intrastate needs.

To meet the federal test of navigable waters, two major criteria would have to be satisfied: First, a water course would have to be physically capable of supporting boats and other floatable objects; second, either the floatable objects themselves, or the products they carry must be involved in some useful commerce. Thus, it has been stated that:

To meet the test of navigability as understood in the American law a water course should be susceptible of use for purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs. It should be of practical usefulness to the public as a public highway in its natural state and without the aid of artificial means. A theoretical or potential navigability, or one that is temporary, precarious, and unprofitable, is not sufficient. While the navigable quality of a water course need not be continuous, yet it should continue long enough to be useful and valuable in transportation; and the fluctuations should come regularly with the seasons, so that the period of navigability may be depended upon.²³

The federal test accords with the commercial utility of factual navigation required by the Supreme Court of Connecticut. As the federal test, however, relates to the commerce power of the Constitution of the United States,²⁴ only those waters used in or affecting

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interstate commerce come within the purview of federal designation. Just as intrastate commerce often affects interstate commerce, so too can intrastate waters affect interstate waters. Likewise, nonnavigable bodies of water under both the federal and state tests can affect navigable bodies of water. The Farmington River in Connecticut is an excellent example of a body of water which though not in itself navigable for purposes of transportation, trade or commerce, is a tributary to a navigable water course—the Connecticut river; it might thus be brought within the purview of federal controls. Recalling that Justice Hosmer's admonition in the *Adams* case, regarding the extension of the label *public* to nonnavigable tributaries has not been realized under state law, as a federal question, one might reasonably believe that his fears have come to bear fruit. The Farmington river could properly be designated navigable, under the federal test because of federal flood control activities as they relate to navigation on the Connecticut river.²⁵ The navigable tributary rule was applied for flood control purposes by the court in *Oklahoma v. Atkinson Company*,²⁶ as follows:

There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries. Nor is there a constitutional necessity for viewing each reservoir project in isolation from a comprehensive plan covering the entire basin of a particular river. We need no survey to know that the Mississippi is a navigable river. We need no survey to know that the tributaries are generous contributors to the floods of the Mississippi. And it is common knowledge that Mississippi floods have paralyzed commerce in the affected areas and have impaired navigation itself. We have recently recognized that 'Flood protection, watershed development, recovery of the cost of improvements through utilization of power are . . . parts of commerce control.' . . . And we now add that the power of flood control extends to the tributaries of navigable streams. For, just as control over the non-navigable part of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries.²⁷

The quality of federal interest sustained by the denomination of waters as navigable under the federal test can be varied depending upon both the time and place of designation. Where the federal government presently, or at some past time, held title to lands surrounding a water course, the federal government held title to the

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bed of the water course.²⁸ These subaqueous lands passed to the states upon admission to the union, unless the federal government, prior to the admission of the territory into the union as a state, had acted in a manner creating private rights in the river or water course.²⁹ In the case of a state which was one of the original thirteen colonies, title to the bed of navigable waters never passed through federal ownership and may be traced to the Crown of England. In both instances of state bed ownership, that is whether title to the bed passed from the Crown or through the federal government, the federal interest in the use and maintenance of the waters today is in the nature of a navigation servitude rather than a proprietary interest.³⁰ The same would be true of the federal interest if title to subaqueous lands passed into private ownership under state law, either as an outright conveyance or, if the water course were nonnavigable, under state law.³¹

In Connecticut the state navigation test so closely parallels the federal test (with the exception of the application of the public interest to navigable tributaries) that the federal navigational servitude rarely causes any basic alteration despite its supremacy over state law in the state scheme of public and private waters. In relatively few instances has state litigation had to invoke federal rules in arriving at a determination of the controversy.³² In *Wethersfield v. Humphrey*,³³ the court noted that the state test for the obstruction of navigation and the federal test were similar in their application. If they were not, then permitted state obstructions to navigation without the consent of the United States would be unconstitutional—implicitly because of the constitutional power to regulate commerce. Likewise, in *Groton and Ledyard v. Hurlburt*,³⁴ the relative powers of federal and state governments were put to the question where the state authorized a highway across the mouth of a cove or creek which fed the Thames river. At the point of obstruction of the cove, the river Thames was subject to the ebb and flow of the tide, but was not capable of factual navigation. The court said, in the first instance, that:

The plaintiffs insist, that this portion of the highway will interrupt commerce, and is contrary to the constitution of the United States, and acts of Congress, whose power is supreme, in regulating commerce in this creek. . . .

It is a familiar principle, that that commerce, which is rightfully regulated and protected by the acts of Congress, can not be

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essentially interrupted, even with the license of a state legislature. But it is an equally familiar principle, that not everything which relates to commerce, is a regulation of it; much less to foreign commerce, and that between the states, which is the only commerce to be regulated by Congress, such as the deepening of rivers, making canals, railroads, turnpikes and the like.³⁵

And finally that:

Quite to much importance has been given to the supposed commercial character of this cove. It is time the public should understand, that not every ditch, in which the tide ebbs and flows, through the extensive salt marshes along the coast, and which serve to admit and drain off the salt water from the marshes, can be considered a navigable stream. Nor is every small creek, in which a fishing skiff or gunning canoe can be made to float, deemed navigable; but in order to have this character, it must be navigable for some general purpose, useful to trade or business.³⁶

Two other cases involving federal-state relations are worthy of mention at this point. The first is that of *Holyoke Water Power Company v. Connecticut River Company*,³⁷ wherein the court held that the Connecticut legislature could not grant authority to the Connecticut River Company to obstruct or alter the level of the Connecticut river where it affected interests in Massachusetts. The second is the ability of the federal government to itself order the obstruction of navigable waters under an extension of the war powers, along with the general commerce power. This was recognized by the court in *Edward Balf Company v. Hartford Electric Light Company*.³⁸

SECTION 3. PUBLIC RIGHTS IN NAVIGABLE WATERS: NON-RIPARIAN RIGHTS

NUMEROUS public rights exist in navigable waters. They can be broadly classified under three headings: (1) Transportation and navigation; (2) Recreational activities; and, finally, (3) Commercial and consumer use of sea produce.

A. Transportation and Navigation:

Utilization of public waters for navigational purposes is the *sine qua non* of the public interest in ownership and control of major water bodies and water courses. The public have the right to pass and repass on navigable waters without interference or obstruction.³⁹ Where an obstruction does in fact occur, it constitutes a public

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nuisance.⁴⁰ A public nuisance, however, will not be enjoined at the behest of a private individual unless the injury complained of is peculiar to the individual; that is, unless the harm he suffers is distinct from the injury caused the public at large. The reasoning behind this rule was first stated in *Bigelow v. The Hartford Bridge Company*,⁴¹ as follows:

To preserve and enforce the rights of persons, as individuals, and not as members of the community at large, is the very object of all suits, both at law and in equity. The remedies which the law provides in cases where the rights of the public are affected, and especially in cases of public nuisance, are ample and appropriate; and to them recourse should be had, when such rights are violated. The courts of equity, in England, will indeed entertain informations, not by individuals, but at the suit of the attorney-general, or the proper crown officer, for the purpose of abating public nuisances, and what are termed *purprestures*. That mode of proceeding has been, however, hitherto unknown here; and whether it would be tolerated in any case, it is unnecessary to consider.⁴²

Subsequent cases assume the validity of the public-private nuisance dichotomy and concentrates on the application of the key phrase in the distinction, to wit: the injury suffered must be one distinct from that suffered by the general public. This has developed into an extremely difficult burden of proof for the individual to bear. In most instances, the difference is not one of kind, but rather of degree. Thus, in *Bigelow* the plaintiff alleged that the rebuilding of a bridge would endanger his property because of floods and ice. The court applied the peculiar injury test and found that the injury the plaintiff would suffer was not certain, subject to speculation as to its extent, and no more so than would have been suffered had the causeway not been built. The threatened diminution in the value of his lands is the same as that which was suffered by the public at large along the river and not peculiar to him.

In *O'Brien v. The Norwich and Worchester Rail-Road Company*⁴³ the plaintiff alleged that as an inhabitant of the town of Preston he and other residents of the town had used Poquetannuck Cove which connects with the Thames River and thence with the Sound for purposes of valuable navigation. He claimed that his use of the river would be almost entirely rendered useless by a proposed road extending across the mouth of the cove. The court considered his allegation as follows:

If this road, when built, will become a public nuisance upon

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the cove, the next inquiry is, what special damage will the plaintiff sustain—what injury distinct from that done to the public at large? He says, that the right to pass up and down that cove, is a *common right*, the enjoyment of which is valuable to the plaintiff, both in respect to trade and commerce, the building and launching of vessels, and for agricultural purposes and fisheries; and that he is in danger of being deprived of his lawful right to navigate the same, unless relieved by the court as a court of equity. The same injury might result to every other citizen, who might have occasion to pass up and down that cove for similar purposes. He does indeed state, that his residence is in the village, at the head of that cove; but he complains of no injury that will be done to his house, his wharf, or his land, by means of the defendants' road. He will be merely deprived of the enjoyment of a right to navigate public waters, common to him and all others, as he otherwise might. For such an injury it is for the government to interfere, and not a private individual. The court could then look to the rights of the whole community, and not, as in the present case, to those of a single individual.⁴⁴

In *Frink v. Lawrence*,⁴⁵ the court sustained the contention of plaintiff that blockage of access to his wharf constitutes a special private injury. Although the driving of piles into the bed of New London harbor creates an obstruction to navigation and thereby might constitute a public nuisance, to the extent that it completely blocks access to plaintiff's wharf it is also a private nuisance.

Subsequently, in *New York, New Haven and Hartford Railroad Company v. Long*⁴⁶ the court reverted somewhat to its original abhorrence of enjoining public nuisances and held that the blockage of a public landing or a public wharf was a purely public nuisance. In order for an individual plaintiff to recover damages for the obstruction he must show that the injury is peculiar to him.

In this light, the right of an individual member of the public to enjoin an obstruction on navigable waters on his own initiative is almost non-existent. The courts will act only on the application of one who has a defined interest which is being affected by the obstruction. It must be a property interest which is distinguishable from rights of the general public. In most instances this will be a property right which itself relates to navigation; for example, the right of access accorded the riparian owner.⁴⁷

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B. Recreational Activities:

Public control and use of navigable waters includes usage for recreational purposes. To the extent that members of the public can gain access to navigable waters without trespassing on the adjoining uplands of riparian owners,⁴⁸ they may use navigable waters for boating,⁴⁹ swimming,⁵⁰ and related activities.

Assuming members of the public have the right to use public waters for these activities, the question of their right of access is most important. It has been said that the right of access to public waters is the most significant aspect of riparian or littoral ownership of land abutting on public waters and that this distinguishes the riparian owner from members of the general public. Where title to the upland is in private ownership, individual access to public waters may be denied the public by the upland owner over his lands. In order to secure the right of access to the public the upland may be acquired by the state through condemnation.⁵¹

In *Delinks v. McGowan*,⁵² the court had an opportunity to rule on the manifold problems of public access in a modern context. The question was presented whether the State Board of Fisheries and Game could condemn land for recreational access and related parking facilities. The court reiterated the basic proposition that:

[A]lthough the public has the right to boat, hunt and fish below the high-water mark on the navigable waters of the state, the upland owner has the right to prevent the public from crossing the private lands which border on these public domains and are above the high-water mark.⁵³

The State Board of Fisheries and Game had long exercised the power pursuant to statute to purchase hunting and fishing rights for the benefit of the public. In upholding the power of the Board to condemn upland for recreational access and related purposes, the court noted as follows:

The legislature is aware of the increasing interest of the public in hunting and fishing. It has responded in recent years with larger appropriations for the propagation of game birds and fish and the acquisition of land and waters for hunting and fishing purposes. It can be presumed that the legislature has taken cognizance of the greater use of boats powered by outboard motors and transported on trailers to inland waters of the state and salt water, and the need for providing facilities for launching and parking purposes. The legislature could not have intended, as claimed by the plain-

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tiffs, that the board should have the power to acquire access to nonnavigable inland lakes, ponds, streams and hunting grounds but not the power to acquire access for members of the public to the navigable streams and rivers and the long coast line of this state. Such a construction of the statute would thwart the obvious purposes of its broad terms.⁵⁴

C. Commercial and Consumer Use of Sea Produce:

Consumer use of sea produce includes but is not limited to fishing, the taking of clams and oysters, gathering seaweed and taking the same from the bed of navigable water courses. Foremost among these rights is that of fishing in public waters. In fact, the earliest recorded cases in Connecticut question and delineate the extent of this right. Thus, in the context of upholding state regulatory action governing the personage, time and manner of taking fish on the Husatonic River, the court in *Eastman v. Curtis*⁵⁵ implicitly recognized the public right to fish in navigable waters. In *Chalker v. Dickinson*,⁵⁶ the court made explicit this right on the Connecticut River and further noted the role of the state with regard thereto as follows:

The right of fishery by the common law in the ocean, in arms of the sea, and navigable rivers below high-water mark, is common to all, and the state only can grant an exclusive right. In rivers not navigable, the adjoining proprietors own the fishery, and can grant a right of fishing. *Connecticut* river being navigable in the place where this right of fishery is claimed, it could be acquired only in such manner as a public right can be appropriated or transferred.⁵⁷

In a second appeal of *Chalker v. Dickinson*,⁵⁸ the court further clarified the nature of common and individual rights to fish in navigable waters. Thus, while the adjoining owner of upland has a right to fish in navigable waters, his right is distinguishable from members of the general public only on the basis of his greater access to the waters. His fishing itself is exercised in his right as a member of the public and not as the proprietor of upland. Further, the upland owner does not have an exclusive right to fish in front of his land unless he has acquired such right by legislative grant. All members of the public, in the absence of an exclusive legislative grant, may fish there if they can gain access without trespassing on his lands. And, finally, that while he may have exclusively fished in front of

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his land for a period equal to that necessary to acquire prescriptive rights, no individual rights can be obtained against the general public to fish in public waters by prescription. These three basic principles have been consistently reaffirmed by the Connecticut courts.⁵⁹

The public have the right to take seaweed found below the high water mark. At one time seaweed was a valuable product for agricultural purposes and an important commercial by-product of the sea. Justice Daggett, in *Chapman v. Kimball*,⁶⁰ reviewed the basic legal principles applicable to public and private rights to seaweed.

As the sea-weed on the sea-shore, and on navigable rivers, has become a very considerable article of manure, conflicts, in many instances, of late, have arisen, respecting the rights of riparian proprietors and others, to gather and appropriate it. Hence, it becomes important to settle these questions, so far as cases which occur will afford opportunities. . . .

The doctrine of the common law is, that the right to the soil of the proprietors of land on navigable rivers, extends only to high water mark: all below is *publici juris*—in the king, in England. That is the law in Connecticut; for we have no statute abrogating it. It was the law brought by our ancestors:—it is our law;—the soil being not indeed owned by the king, but by the state. . . .

This sea-weed, as the case states, was not collected *on the shores*, but grew and *accumulated below low water mark*. In no sense, then, could the adjoining proprietor be entitled to any exclusive right to it. He might, with equal propriety, insist on an exclusive right to the weed or the fish below low water mark, because they were *against his land*. There is no principle of law for such a pretence.⁶¹

In *Church v. Meeker*,⁶² Justice Butler characterized the right to take seaweed as one of “trifling pecuniary consequence. . . .”, but presenting “question[s] of public right to an extended line of beach, the determination of which involves other questions of considerable interest. . . .” The plaintiff had gathered seaweed from below high water mark and heaped it above on dry land. Defendant then came along and gathered it away in a cart. In a rather lengthy and elaborate opinion, the court dispelled any of the ambiguities left by the opinion in the *Chapman* case as follows:

The question has been raised in the case and fully argued, whether or not sea-weed cast by the tide and waves on the land of a proprietor at or above high water mark, belongs to the owner of the

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land. The same question was raised in *Chapman v. Kimball* . . . but not decided. . . .

As the weed grown upon land to which no individual has title as against the public, which will give a title to it, and is detached by the waves, and floats with the currents of the sea there is no individual title in it, and it becomes the property of the first occupant. The mere fact that it is cast like wreck upon the land of a riparian proprietor does not therefore give him title, and so the court in *Emans v. Turnbull* impliedly admitted. But it is unlike wreck in this, that no person has ever had title before it is cast on the shore, and there is a seeming equity in giving it to the riparian owner on whose land it is cast. . . .

But this does not aid the plaintiff. He is not a riparian proprietor, and did not own the beach on which the weed was cast. . . .

The legislature [of the state has] undertaken to regulate the title to sea-weed which can be acquired by occupancy, where it is cast on a public beach, as this was; and have said that the first occupant *shall not have title*, unless he removes the weed within twenty-four hours. The plaintiff heaped up the weed, but did not remove it within that time.⁶³

The last case decided on the question of seaweed was *Mathers v. Chapman*.⁶⁴ In an even more exhaustive analysis of public and private rights to collect seaweed the court affirmed the basic position of the *Meeker* case and added that where seaweed is piled above high water mark by one who either owns the upland, or who has an easement giving him the right to so collect seaweed, it becomes the property of the individual who first set it above the high water mark and its removal constitutes a trespass.

The right to remove sand and gravel from beneath navigable waters or below the high water mark was at one time thought a matter of public right. Such was the impression created by the court in *Merwin v. Wheeler*.⁶⁵ Although the court was concerned with the claim of defendant to take sand on the beach above high water mark, their reference to acts of the general public in entering upon the beach and taking gravel may have been misleading.

It was not until the middle of this century that the limited circumstances under which the public could take sand and gravel were finally clarified. In an action by the State of Connecticut in its "sovereign capacity" against the Knowles-Lombard Company⁶⁶ to enjoin further taking of gravel and sand from a beach on the Long

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Island Sound, the court held that the “. . . settled law in this State [is] that the public, whose representative is the State, is the owner of the soil between high and low-water mark upon navigable water where the tide ebbs and flows.”⁶⁷ Neither the public generally, nor riparian owners, has the right to remove sand where that act is an act of ownership. The riparian, however, does have an implicit right to remove sand in furtherance of the right of access accorded upland ownership. This point was explicitly made the basis of distinguishing permissible removals of large quantities of sand and gravel from beneath navigable waters in *Shorehaven Golf Club, Incorporated v. Water Resources Commission*.⁶⁸ Under the pretext of exercising the riparian right of access by dredging a canal, the Golf Club proposed to remove the soil of a large subaqueous area. The State Water Resources Commission refused to grant a permit for the removal. The permit was required under the Removal of Sand and Gravel Act of 1958. The Commission's refusal was based upon the fact that the area to be dredged and the amount of soil to be removed was so large as to be unreasonable. The court upheld the refusal of the Commission to grant the petition despite the petitioner's claim of riparian rights of access as follows:

It [the Commission] has not denied the plaintiff upland owners all right of access to deep water. It has simply denied access in the manner suggested in the application. The reason was a cogent one. The plaintiffs' proposal entails an operation which, from its size and scope, appears to be primarily a commercial venture by the plaintiff Manhattan Sand Company, Inc. This venture would have enabled the other plaintiffs to develop their shore properties at a modest cost to them or at no cost at all. The commission could properly conclude that a channel of the proportions proposed was an unreasonable exercise of the rights of the plaintiff upland owners and would require the taking of unwarranted quantities of state-owned underwater lands for private purposes.⁶⁹

Justice Murphy, in a concurring opinion,⁷⁰ would have apparently distinguished the two parties to the appeal; that is, separate the appeals of the Shorehaven Golf Club and the Manhattan Sand Company because the latter, not being a riparian owner, had no rights under any circumstances to remove gravel from state waters. If this position had been taken by the majority of the court, there clearly would be no further question of a public right to remove sand and gravel from public waters.

One of the most heavily regulated and litigated public right in

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the use of navigable waters is that of clamming and oyster growing. Both have had important economic overtones in Connecticut because of the large shore areas of natural shellfish growth and extensive places for artificial cultivation. On both a state and local level, regulations of time, manner, quantity, duration, number, and personage of cultivation and removal have been abundantly forthcoming.

In *Pratt v. State*⁷¹ the jurisdiction of towns along the Connecticut river to regulate who, when, how and in what quantities oysters could be removed was indirectly put into question. Defendant had assaulted a constable of the town of Lyme when the latter attempted to serve him with process in the middle of the river. The court held, in a rather vivid fashion, that towns along the Connecticut river had jurisdiction to regulate navigable waters within their geographic bounds as follows:

That it is within the jurisdiction of *Lyme*, so far as relates to the service of process and enforcement of the laws, I cannot entertain a doubt. If it is not, there is no pretence that it is within the town of *Saybrook*, or either of the adjoining counties, which are only commensurate with the towns; and hence, although within the State, it is without the sphere of its laws, and the jurisdiction of its courts. And what is still more extraordinary, for nearly two centuries, it has been permitted, by the legislature, to remain in this condition. The magnitude of the general inconvenience, that must have resulted from this state of things, demonstrates that it does not exist; and that if it had been considered as existing, a year would not have elapsed without the correction of so monstrous an evil. Upon the supposition that *Connecticut* river is without our towns and counties, there is within the heart of the State a place of secure refuge for debtors and criminals; a sanctuary, to which a man covered with blood, may fly, and be safe; where no one can be legally arrested; from which no witness can be summoned; a theatre for the perpetration of murder, and duelling, and every species of iniquity, with the most perfect impunity. These evils, so fearful in prospect, never existed; and, if anticipated, are the mere product of imagination. Our towns adjoining *Connecticut* river, probably from their origin, and certainly beyond the memory of man, have exercised jurisdiction over its waters.⁷²

Once the question of town jurisdiction was settled as extended over navigable waters, other questions arose. The court in *Hayden v. Noyes*⁷³ proceeded to question how local jurisdiction must be formally exercised. They declared void an attempted regulation by the

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town of Lyme of shell-fisheries because the town meeting at which the by-law was passed was not lawfully convened. The principle, however, that the towns could regulate the taking of clams and oysters was explicitly affirmed. In *Southport v. Ogden*,⁷⁴ the power of a local governmental unit to regulate the taking of clams and oysters was further limited by the question of state-local relations. To the extent the state legislature acted on the same question—to the extent that there might be a duplication of regulations—the of the local unit to act was suspended.

The more generalized public right to oysters and clams was made the subject of private property by the Connecticut legislature in the "Act for Encouraging and Regulating Fisheries," section 43, as follows:

Every inhabitant of this state may lay down or plant oysters, in any of the navigable waters of this state; and with the consent of a committee appointed for that purpose by the town in which the same shall lie, may mark and stake out the ground upon which said oysters shall have been laid down or planted, and enclose it with stakes set at suitable distances, and of such length as to be at least two feet above high water mark; and every such inhabitant who shall so lay down, or plant, or inclose oysters, shall hold, possess and enjoy the same, and shall have the exclusive right and privilege of taking up and disposing of such oysters; provided that nothing herein contained, shall affect the rights of any owner or proprietor of any meadow or other lands in which there may be salt water creeks or inlets, or which may be opposite or contiguous to such navigable waters, nor be construed to interfere with the rights of individuals, or the bylaws of any city, town, or borough, now existing.⁷⁵

Once the town committee has granted a right to stake out an oyster bed, pursuant to which permission an individual acts, the right of an individual vests and he may maintain an action in trespass where another unlawfully enters and appropriates his oysters.⁷⁶

No natural oyster bed may be made the subject of committee action and enclosure.⁷⁷ Such oyster beds are *publici juris*. Thus in *The Gulf Pond Oyster Company v. Baldwin*,⁷⁸ pursuant to Revised Statutes of 1866,⁷⁹ the court limited the right to privately appropriate an oyster bed as follows:

The claim of the plaintiff to the exclusive right of taking oysters in the bed of the water described in the declaration, and of maintaining trespass against all other persons who should enter upon

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the *locus in quo* for the purpose of also taking and removing them, must depend for its validity upon whether the *locus* is a natural oyster bed, so that the public have a right to the common enjoyment of the privilege, and if not such, whether the plaintiff has taken proper measures under the statute to obtain the right to dam the creek and use it as a private oyster pond. . . .

The fact that oysters grow naturally at the mouth of Indian River and upon the harder portions of the bed of the pond, and that they have immemorially existed in great abundance and have been openly and constantly taken by the public until the incorporation of the plaintiff in 1867, furnishes very high if not conclusive evidence of the existence of a natural oyster bed, and of a public and common right to the enjoyment of it as such.⁸⁰

In 1881, the legislature authorized town committees to locate and designate natural oyster, clam, and mussel beds. The Clinton Oyster Ground Committee designated all of Clinton Harbor such an area. Plaintiffs were individuals who prior to the act of 1881 had areas staked out as private beds. The court phrased the issue in *In re Application of Clinton Oyster Ground Committee*,⁸¹ as follows:

Does the statute under which the proceeding is had give the committee jurisdiction over any natural oyster, clam and mussel beds which may be included in any grounds previously designated to individuals?

This is question-begging because (theoretically at least) before the Act of 1881 no private rights could be acquired, whether staked out or not, as local town committees did not have jurisdiction over natural oyster bed areas.⁸² Despite this, the court held that private rights had vested in staked out areas to the extent that it would require an adjudication to determine otherwise, and action on them was without the powers of the Ground Committee.⁸³ The courts' justification for this sleight-of-hand is in itself interesting:

For nearly forty years it had been the policy of the state to encourage the cultivation of oysters. Under that policy a very large industry had been developed, and the wealth of the state had materially increased. Individuals had been permitted and encouraged to acquire private property to a large amount in certain designated area for raising oysters. A considerable portion of the waters of the state had been designated and set apart for that purpose. But there had always been an express provision in the statute that no natural oyster beds should be so designated. Thus the law has always been careful to protect and preserve to the public the right to take oysters in natural oyster beds, and it was in further-

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ance of that same design that the law of 1881 was passed, requiring the natural oyster beds to be so defined that the oyster ground committee and all others might know where they were, and that they might not be designated to individuals. Thus, at the time of the passage of the act, the waters of the state were divided into two parts—those that were set apart for private use and those that were not. Theoretically the latter contained all the natural oyster beds; the former were not supposed to contain any, or, if any, comparatively few. The law, like most laws, had been generally observed; at least we see nothing to indicate that the legislature supposed that it had been generally disregarded. Grant that there were instances in which the law had been violated. Still, the rights of the public were reasonably protected. Any one prosecuted for taking oysters from grounds so designated might show in defense that they were a natural oyster bed. . . . And in 1870 a specific remedy was given by statute in such cases, which is still in force. Thus the law stood when the act in question was passed. We must assume that members of the legislature were familiar with the operation and results of those laws, and that they knew that large sums of money had been invested in consequence thereof, that large interests had been acquired, and that large industries had grown up dependent entirely upon the good faith of the state and the integrity of its laws. Now to suppose that the legislature intended to put those interests in jeopardy by placing them at the mercy of an irresponsible committee, a committee relieved in a great measure from the observance of those rules and regulations which govern the admission of testimony in all judicial tribunals, a committee liable to be influenced by local jealousies and prejudices, is little less than preposterous.

We must therefore hold that the act of 1881, notwithstanding the general language in which it is framed, does not apply to oyster grounds previously designated. It follows that the facts set up in the remonstrance are sufficient. The committee exceeded their jurisdiction. They invaded private property and assumed to settle disputed rights and titles, which the law did not authorize.⁸⁴

In the subsequent case of *State v. Bassett*⁸⁵ the court upheld a private designation by the town of East-Haven of natural oyster beds which the court conceded they did not have the authority to make because of curative legislation enacted by the state in 1877. This legislation said as follows:

Section 2. All designations of places for the planting or cultivation of oysters, within the navigable waters of any town, which

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have heretofore been made by authority of such town, through its selectmen, or Oyster Ground Committee are hereby validated and confirmed.⁸⁶

The court felt that this Statute literally meant that where the private staking out was pursuant to local "authority," even though improperly granted, this legislation perfected the rights of the individual.

Justice Hamersley, in *Cook v. Raymond*,⁸⁷ reversed this entire line of reasoning by reconstruing prior cases. He expressly held that:

By the Act of April 14th, 1881, the legislature placed all shell fisheries within the area therein described, under the exclusive jurisdiction and control of the State, and empowered the commissioners of shell fisheries to grant, in the name of the State, franchises for cultivating shell fish within that area; it placed all shell fisheries not within that area, within the jurisdiction and control of the towns in which they are located, and authorized the town authorities to grant franchises for cultivating shell fish within this area of town jurisdiction; it provided for the record of future grants that might be made either by the State, or by the town; it forbade all future grants of franchises in any natural oyster or clam bed; it validated all designations and transfers of oyster grounds previously made, except designations made of natural oyster beds, such designations remaining after the passage of the Act, as they were before, absolutely void. . . .⁸⁸

The perfected private right of an individual to an oyster bed does not curtail the power of an upland owner to exercise his rights of riparian access. This is true even where the exercise of the upland proprietors' rights will destroy the oyster bed. In *Prior v. Swartz*⁸⁹ the plaintiff had perfected his rights to a designated oyster bed in Stamford Harbor. The defendant, an upland proprietor, erected a wharf out into the waters of the harbor and dredged a channel below low water mark to assist navigation. The channel was constructed through the plaintiff's oyster grounds. The court held that the statute permitting the designation of private oyster beds did not affect the rights of the riparian proprietor to wharf out or dredge channels. Even if the statute purported to have this effect, it would be "ineffectual for that purpose."

In *Lane v. Smith*⁹⁰ the court again held that the right of the proprietor of oyster beds is subservient to the rights of public navigation and riparian access. In this case, however, Justice Baldwin wrote a separate opinion wherein he made a strong plea for the exercise

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of riparian rights in a reasonable manner so as to prevent the wanton and needless destruction of oysters already planted and growing. Thus, he said:

That the plaintiff's oysters and hardening materials were his property is unquestionable. He held them subject to the paramount right to improve navigation; but that could only be exercised by private individuals in a reasonable manner, whether acting under State or national authority. Granting, therefore, that by the subsequent ratification the license issued by a majority of the harbor commissioners became, by relation, the act of the board from the date of its original issue, and assuming further that the board could thus authorize one to excavate through another's grounds, who was not otherwise entitled, it seems to me that the answer [of the defendant] was insufficient in that it contained nothing to excuse the injury to the plaintiff's property which it confesses, and which, as his pleading declared, could have been avoided, had he had reasonable notice and opportunity to preserve it.⁹¹

Perhaps the most interesting contemporary question affecting the growth of oysters is that of the relationship which exists between pollution control and shell fisheries within this State. Oysters, clams and mussels are filter feeding shell-fish which strain the water for organic nutrition. High levels of bacterial content in the water destroy their utility as food products. As the court in *Lovejoy v. Norwalk*⁹² pointed out:

The discharge of sewage into tidal waters by the defendant does not interfere with the health and growth of oysters upon the plaintiff's beds, but does introduce into those waters bacteria known as *B. Coli*, derived from human excrement. Certain intestinal diseases may be communicated through pollution of food from excrement of persons afflicted with such diseases, and it has been the policy of the State Department of Health in recent years to forbid the marketing of shellfish directly from grounds where pollution had gone beyond certain standards. Such standards are determined, not by the demonstrated presence of communicable disease under forbidden conditions, but by the consideration that the greater the degree of pollution, the greater would be the risk of communicating disease. In 1925 the Department, for the first time, adopted the policy of forbidding the marketing of oysters for human consumption from grounds within the jurisdiction of the State, unless a certificate authorizing such marketing was obtained. The effect is not to prevent the planting, growing or fattening of oysters upon such grounds, but is limited to the privilege

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of marketing them directly therefrom. Oysters may be planted and grown upon such area and then transplanted to other areas not within the restricted region and after fifteen days may be sold.⁹³

In *Lovejoy*, the plaintiff's oysters were polluted by waste discharge of the city and town of Norwalk. Ample authority permitting the discharge of sewerage into navigable waters could be found in decisions of the Supreme Court of the United States. The court in *Lovejoy* relied therefore on *Darling v. City of Newport News*,⁹⁴ wherein the court, when confronted with a similar question, said:

The fundamental question as to the rights of holders of land under tide waters does not present the conflict of two vitally important interests that exist with regard to fresh water streams. There the needs of water supply and of drainage compete. . . . The ocean hitherto has been treated as open to the discharge of sewerage from the cities upon its shores. Whatever science may accomplish in the future we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin. Unless precluded by some right of a neighboring State, such as is not in question here, or by some act of its own, or of the United States, clearly a State may authorize a city to empty its drains into the sea. Such at least would be its power unless it should create a nuisance that so seriously interfered with private property as to infringe constitutional rights. And we apprehend that the mere ownership of a tract of land under the salt water would not be enough of itself to give a right to prevent the fouling of the water as supposed. The ownership of such land, as distinguished from the shore, would be subject to the natural uses of the water.⁹⁵

Although not necessary to the decision of the case, the court in *Lovejoy* went further and by way of dicta noted that the right to pollute was private as well as municipal:

One great natural office of the sea and of all running waters is to carry off and dissipate, by their perpetual motion and currents, the impurities and off-scourings of the land. The owner of any lands bordering upon the sea may lawfully throw refuse matter into it, provided he does not create a nuisance to others. And there can be no doubt that public bodies and officers, charged by law with the power and duty of constructing and maintaining sewers and drains for the benefit of the public health, have an equal right.⁹⁶

It is this type of unnecessarily broad language that is the source

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of the supposed present-day private right to pollute public waters. Perhaps this also accounts for the modern hesitancy of the state effectively to regulate, control, and curtail the discharge of enormous amounts of effluent into the Connecticut river and the Sound daily. In any case, it is a reality of the sixties that pollution continues and regulation is but in its infancy in Connecticut.

The harm caused the individual oyster grower by pollution under this broad judicial treatment is *damnum absque injuria*. The court in *Lovejoy v. Darien*,⁹⁷ however, held that while pollution alone would not give rise to damages, the construction of sewers and the laying of outfall pipes through oyster beds constituted a physical taking and destruction of private property without just compensation. This distinction between the indirect injury occasioned by the indirect effects of pollution discharge and the direct effects of sewer construction as a means of waste discharge is a difficult one to reconcile with the realities of economic injuries caused—in this case to oyster growers—but it indicates that the “right” to pollute has some recognizable limits.

SECTION 4. RIPARIAN RIGHTS IN NAVIGABLE WATERS: RIGHTS OF ACCESS AND RELATED ACTIVITIES

A. Access Generally:

Riparian rights in navigable waters are private rights arising from the ownership of upland adjoining the navigable waters. All such rights relate to the purposes of public water classification in that they are defined and delineated by utilization of public waters for purposes of navigation. The riparian right of access to a navigable water course is totally distinct from that of the general public right to use the waters.⁹⁸ It has been said that:

Every owner of land bounded on tide-water has a right to use this water for access to his land. . . . The right of access has been properly described as ‘the fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land.’⁹⁹

Rights of a riparian owner in the context of access to navigable waters would include those of wharfage, channeling, reclamation, control over the beach, and the right to accretions of the soil along navigable waters.

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The exercise of riparian rights must be viewed from dual but not mutually exclusive vantages. In the first place, the exercise of the riparian right must not interfere with rights of the State and the general public. To the extent that state activity and regulation is necessary to secure the benefits of public waters for the well-being of the public, the individual riparian right is subservient and inferior. In the second instance, all riparian rights must be exercised with due regard for the rights of other riparian owners.

In order to qualify for riparian rights of access, the land must abut on navigable waters. Whether or not land abuts the water course in which riparian rights are claimed becomes a significant question where the upland has been severed from the beach,¹⁰⁰ where a water course has altered its line of flow,¹⁰¹ or where the upland is on a cove adjoining navigable waters rather than abutting on the water itself. In *Richards v. New York, New Haven & Hartford Railroad Company*¹⁰² the plaintiff owned land abutting on Clark's Cove which flows off the Thames river. Defendant constructed a railroad embankment across the mouth of the cove, but left an opening sixteen feet wide, closed at the top, ten feet above the water level. In upholding the defendant railroad's right to build across the mouth of the cove the court noted as follows:

It is undoubtedly true that so far as the public rights of fishing, and navigation, and others of like nature, are concerned, Clark's Cove is a part of the Thames River; . . . but it does not follow from this that for all purposes the cove is to be regarded as a part of the river. It does not follow, for instance, that the riparian owner at the south end of the cove has rights of wharfage, or reclamation, of alluvion, in the main river. The situation of his land precludes the existence of any such rights; and this is equally true of other owners of land fronting upon the waters of the cove. They have undoubtedly certain exclusive, yet qualified, rights and privileges in the waters and submerged land adjoining their upland; but they must take their riparian rights as they find them, and they are entitled only to such as the condition of the cove and the situation of their land with respect to the cove will afford. . . . Among the most important of these rights and privileges in the cove and its waters are, (1) the right of access by water to and from their upland; (2) the right to wharf out their front; and (3) the right of reclamation or accretion. . . . Riparian proprietors in the cove have the right to wharf out, and to reclaim, but they are rights confined to the cove, and to be exercised therein, and not in the main river. . . .¹⁰³

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B. Wharfage—Nature of Right and Public Regulation:

Once the existence of the land abutting navigable waters has been determined, the right of a riparian owner to attain access to the water by means of wharfage attains the status of a constitutionally protected property interest in the nature of a franchise.¹⁰⁴ Although the state retains title to the subaqueous bed of the river, the upland owner may occupy the bed as far as necessary and so long as he does not impede navigation.¹⁰⁵

The riparian right to wharf out is severable from the upland and freely alienable. As was ably set forth by the court in *Simons v. French*,¹⁰⁶ the following would characterize the nature of the right and its alienability:

In Connecticut, it is now settled that the public, representing the former title of the king, is the owner in fee of such flats up to high water-mark, but that the owner of the upland adjoining such flats becomes entitled, by virtue of his ownership of the upland, to the exclusive right of wharfing out over them, in front of said upland, to the channel of an arm of the sea adjoining such flats. This right of wharfage—which, if in England it were vested in an individual, would be a franchise, being a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject—is with us, in the owner of the upland, a franchise, by the definition of that term as applicable here, and constitutes, like other franchises, a species of property, which, like other property, is alienable by the owner. We do not consider that such right of wharfage, or franchise, is an inseparable incident or accessory to the upland, in such a sense that it inheres in, and is a part of, such upland itself, so as to be within the operation of the maxim, '*Accessorium non ducit sed sequitur suum principale*,' and so, therefore, that a grant of the upland necessarily conveys said franchise. It is true that such right of wharfage originates in, and is derived from, the ownership of the adjoining upland, and it was deemed by our courts to be attached thereto, undoubtedly from motives of general policy and convenience, and perhaps because in the early settlement of the state the establishment of such a principle would be an inducement to persons owning upland, to erect on the adjoining flats, wharves, and other conveniences for the accommodation of commerce, when the colony was unable to build them at its own expense. But this right, being once acquired by this, or whatever means, becomes in our view as separable from the ownership of the adjoining upland, and consequently as alienable by

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itself, as any other property, right, or franchise. And we can not perceive that a conveyance or reservation of it, by the owner of the upland, is not as valid as the conveyance of a similar right by the king in England to one of his subjects; nor why the exclusive right to erect wharves upon a piece of flats before it has been used for that purpose, is not as alienable by the owner of such right, as it would be after a wharf had been erected upon it; and in the latter case, there is no doubt that the wharf might be conveyed by itself, like other property, or if unconveyed by the owner in his lifetime, would descend to his heirs like other real estate.

It is obviously of no consequence in itself, as it respects the public, whether the right of erecting and maintaining wharves upon such flats, be vested in the owner of the adjoining upland, or in any other person. The public in either case are equally secured, as it respects their right of navigation and commerce. Nor do we perceive any principle of public policy whatever, which requires that such right should be inseparably united with the ownership of the adjoining upland.¹⁰⁷

Ironically, although the right to wharf out had been the subject of general discussion by the court, the first case wherein the extent of the riparian right to wharf out was itself determinative of the outcome of a judiciable controversy involved a limitation upon the exercise of the right. The state attempted to regulate the right to wharf out in *State v. Sargent*.¹⁰⁸ In question was the Act of 1872 establishing the board of harbor commissioners for New Haven Harbor whose duties included the prevention of obstructions to navigation in the harbor. The board prohibited the Sargent company from extending its wharfs out beyond eight-hundred feet. The court acknowledged the company's riparian right of access as follows:

The respondents as owners of land bounded on a harbor, own only to high-water mark. It is true they have a right to construct wharves upon the soil below that line if they conform to such regulations as the state shall see fit to impose upon them and do not obstruct the paramount right of navigation.¹⁰⁹

The inherent infirmity, if it might be called such, whereby the exercise of the right of wharfage may not interfere with the public right of navigation serves as the main basis for state regulation. Without considering this "infirmity," however, the interest of the state in regulating an activity of vital importance to the economic well-being of the state would also suffice to justify public control over wharfage. The diminution in value suffered by the riparian is not an unconstitutional deprivation of property without just com-

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pensation. The court in the *Sargent* case did not distinguish what served as the basis for the power of the commission to limit the exercise of riparian rights of wharfage, but did note the relationship of regulation and eminent domain. Their justification for upholding the commission's limitation appeared as follows:

The enactment of the law is in no sense an exercise of the right of eminent domain; it is not that taking of private property for public use for which compensation is to be made. The public do not propose in any manner to appropriate or use any right of the respondents in the soil of the shore, but only to guard against any invasion by them of the paramount right of the public to navigate the waters over it; to enforce against them the maxim—*sic utere tuo ut alienum non loedas*. It is only the exercise of the police or supervisory power vested in the legislature—the power to enact such laws as they deem reasonable and necessary for the regulation of the use by riparian proprietors of their qualified right to the soil of the shore. Indeed no individual is the absolute owner of any land in so high a sense as that he can set the legislature at defiance as to the use he may make of it; as part of the price to be paid for the privilege of living under law he subjects himself to certain restrictions for the public good; to limitation upon the profitable use of his property for the promotion of the general welfare. The prohibitions against wooden buildings, powder magazines and slaughterhouses in cities, are common instances of this.¹¹⁰

Several significant propositions regarding the power of the state to regulate the riparian right of wharfage appeared in *Farist Steel Company v. City of Bridgeport*.¹¹¹ They represent a retreat from the unquestioning view of noncompensable regulation put forth in the *Sargent* case. The court sets forth the first of these propositions in a clear and compelling manner:

The first question therefore which we shall consider relates to the general right of the owner of lands abutting on navigable waters to damages for the legal establishment of a harbor line over the abutting flats, between high and low water marks.

In Connecticut the public is the owner in fee of the flats adjoining navigable waters up to high water mark, such title being vested in the public for purposes of navigation and commerce. . . .

The owner of the adjoining uplands has the exclusive privilege of wharfing and erecting stores and piers over and upon such soil and of using it for any purpose which does not interfere with navigation, and it may be conveyed separately from the adjoining up-

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lands. Over it he has the exclusive right of access to the water, the right to accretions, and generally to reclamations.

Because the soil, between high and low water marks, is held to be *publici juris*, the right of the owner of the adjoining upland in it is termed a franchise. But it is none the less a well recognized, substantial and valuable right. It constitutes . . . speaking of the right of wharfage, like other franchises, a species of property which like other property is alienable by the owner, and alienable as well before the right has been exercised as it would be after a wharf had been actually erected.

It is claimed by the appellee that, inasmuch as the fee of the flats is in the state, therefore the state has the undoubted right, by itself or by those to whom it delegates the right, to take and use them for any public purpose without giving compensation therefor, so long, at least, as the upland proprietor has not appropriated them to such uses as he legally may.

There are cases which sustain such a claim. On the contrary there are cases which hold that riparian owners upon navigable waters have rights appurtenant to their estates of which they cannot be deprived, when once vested, except in accordance with established law and upon due compensation.

This, says Lewis, in his recent work on Eminent Domain, after reviewing the cases, seems the better and sounder rule. It certainly seems more in harmony with our Connecticut decisions that the right of wharfage, perhaps the most valuable franchise attached to the upland, is as much the subject of sale by the owner of the right before it has been exercised as it would be after.

The common council of Bridgeport in establishing harbor lines acts under the delegated power of the state. If the state might take the mud-flats of the appellant, in the legal establishment of harbor lines, without granting compensation therefor, on the ground that it owns them, and if the council representing the power of the state might, if it were so authorized, possess the same power, yet no such power is given or intended. The state has a right to give compensation and to require the city to do so; and this it has expressly done.¹¹²

The second proposition is that under the guise of harbor regulation other objectives, like aesthetics, cannot be realized even on the payment of compensation. Thus:

[E]xcept for public uses, private property cannot be taken even upon the payment of just compensation. We presume that no one will question the correctness of that proposition. The taking of private property in the legal establishment of harbor lines is *prima*

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facie a taking for public use. The legislature so considered it in granting the charter to the city of Bridgeport, and, though that fact is not conclusive, inasmuch as it is held almost universally that whether a particular use is public or not within the meaning of the constitution is a question for the judiciary, still there can be no question but that property taken in the legal establishment of harbor lines is taken for public use. But the right to establish harbor lines, and to take private property for that purpose, must be exercised in good faith and for a public use naturally connected with their establishment. Private property cannot be taken for other than public uses under the guise of taking it for public use. There may be difficulty in many cases in applying this rule, as where nothing appears in the proceedings of the purpose for which the lines were established, and the presumption would be that they were established in the interest of navigation. But where, as in the present case, all the proceedings declare the purpose to be an ulterior one, which no one would claim to be a public one within the meaning of the constitution, when this purpose is spread upon the very records which are laid before us as containing the authority on which the assessment committee acted, we should be shutting our eyes to the real state of affairs, and permitting property to be taken under the excuse of the right of eminent domain in a case where no public use was contemplated, if we should decide in accordance with the appellee's claim. That would commit us to the doctrine that we are bound by the fact that it was a harbor line that was established, no matter for what purpose it appears to have been established nor how far it is removed from the harbor. We cannot accept that conclusion, but must hold that, whereas it appears from the records themselves, which are introduced to show the facts upon which the legality of the assessment depends, that the harbor lines were laid out for the purpose of preventing a new bridge from being marred by the building of structures connected with it which would obscure it, and not in the interests of navigation or any other public use, private property cannot be taken without violating constitutional rights.¹¹³

Likewise, neither a redevelopment agency¹¹⁴ nor an upland owner, under the pretext of wharfing out or digging a channel can achieve purposes unrelated to navigation.¹¹⁵

*Lane v. Harbor Commissioners*¹¹⁶ carries the relationship of the state and the upland proprietor who desires to wharf out further than prior cases. In the first instance the court set forth a new dichotomy of unexercised and vested rights for determining the property of regulation:

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Over the tide-waters in question . . . the right of public navigation is a dominant right in relation to the *unexercised* right of wharfing out; and whenever such right to wharf out conflicts with the exercise of this dominant right, the right to wharf out must give way.¹¹⁷

Secondly, the court said that the:

[P]ower to protect the dominant right, includes not only the power to keep the navigable waters free from encroachments and obstructions, but also the power to improve the navigability of those waters by deepening, straightening or widening old channels, or digging new channels, or otherwise, anywhere below high-water mark, certainly as against the unexercised right to wharf out.¹¹⁸

And, finally, as to the plaintiff's claim that a revocation of a previously issued permit to him by the commission for the purposes of wharfing out constituted a "taking" of his property without just compensation, the court said:

This new channel, then, was rightfully made across these flats, unless the mere digging of it constituted an invasion of the appellant's rights of property. If it was rightfully dug, we think the board cise of this dominant right, the right to wharf out must give way.¹¹⁷ had full power to modify the permit of 1892, and was fully justified in modifying it. . . . The privilege of wharfing out is given to the owner of the upland to enable him to reach deep water. When by his wharf he reached deep water, there is no reason why he should wharf out further; and if, as in this case, before he has wharfed out, deep water is brought nearer to him than it was before, there is no reason why that deep water should not be the limit of his privilege.¹¹⁹

C. Wharfage—Conflicts Between Private Individuals:

The right to wharf out is not an absolute right. It must be exercised with due regard to the rights of neighboring riparian or littoral proprietors. Interference with the right of free access to a wharf already constructed is an actionable private injury as well as (in some instances) an obstruction of the public right of navigation¹²⁰ constituting a public nuisance.

In *Frink v. Lawrence*,¹²¹ the plaintiff erected a valuable wharf in the shape of a "T" with the head of the wharf parallel to the shore. Defendant had a wharf adjoining plaintiff's which did not, as originally constructed, impede access to the latter. Defendant threatened to set piles into the bed of the harbor in such a manner as to

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completely obstruct passage to one side of plaintiff's wharf. In prohibiting defendant's proposed piles the court said:

It has, however, been claimed, that the defendant, as owner of land adjoining navigable waters, has the exclusive right of wharfage in front of his land; and that the piles which he intended to drive would be within the limits of that right. . . . But the committee have not found, that the acts complained of, would be done in the exercise of that right. Hence, it becomes unnecessary to inquire, whether the facts reported by them show that the defendant has the right of wharfing in the line in which the piles were about to be driven; a claim denied on the part of the plaintiffs. For we are entirely satisfied, that the contemplated obstruction, whether placed in front of the defendant's land or not, would be a public nuisance, and may be treated as such.¹²²

The court in *Lane v. Smith Brothers*¹²³ set forth two further principles of lasting significance: First, they established rules regulating the direction of wharfing out on a convex shore; Second, they refused to act on behalf of an upland proprietor who himself exceeded his right to wharf out. With regard to the first principle the court said:

Littoral proprietors on a convex shore, having appurtenant rights of wharfage, may generally, in constructing wharves, extend them to lines on either side which are at right angles to the general contour of the shore. . . .

There is no occasion to inquire whether under some circumstances a littoral proprietor on a convex shore may, in wharfing out, extend the sides of his wharf, at any point, beyond lines at right angles to the general contour of the shore. It is clear that such a right, if it exists, must be exercised with due regard to corresponding rights of other littoral proprietors.¹²⁴

Since the plaintiff had himself violated the above principle, the court then said:

[S]o far as the legal rights of the parties are concerned, the defendant has done no damage to the plaintiff; and also that there is no equity in the plaintiff's case. He does not come into court with clean hands. If he, and his predecessors in title, had so wharfed out that the westerly boundary of the structure had been parallel to its easterly boundary, there would have been no interference with the full enjoyment of the public slip by reason of the extension of the defendant's wharf which is the subject of complaint. But the plaintiff's wharf extends westerly so far beyond a line at right angles to South Water Street, as to narrow the natural width of the slip, and in view of the rights of the public and of

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the defendant, he could not extend it seaward upon the same line for its westerly boundary without exceeding the privileges incident to his littoral title.¹²⁵

*McGibney v. Waucome Yacht Club, Incorporated*¹²⁶ presented the question of whether a prescriptive right could be acquired to maintain a dock or wharf in a manner which blocked the access of a neighboring littoral proprietor. The facts of the controversy are succinctly stated by the court as follows:

The Quinnipiac River runs in a generally southerly direction through the town of New Haven into New Haven harbor. The main channel, in the area in question, is in about the middle of the river, which is navigable. The defendant, for about forty years, has owned land on the westerly bank of the river, abutting, and immediately south of, land which the plaintiff, between 1935 and 1952, leased from Elijah E. Ball and which he purchased from Ball in 1952. Continuously since 1935, the plaintiff has operated on this property a restaurant known as the 'Old Barge.' Increasingly through the years, the restaurant has received patronage from rivercraft. In 1955, the plaintiff built a small dock which he extended by adding floats until, by 1960, he had a "T" dock on the river in front of his property. He has rented seasonal mooring space for ten boats but has maintained one space clear for transient boat trade.

During the ownership of its property, the defendant has operated a yacht club. Its members, since as far back as 1930, usually have owned, and during the season have kept moored in front of or near the defendant's premises, about forty boats of various sizes. In 1960, the defendant erected a string of floating docks, each about fifteen feet long. They were held stationary, end to end, by stakes. The string ran substantially parallel to the shore, was about 112 feet out therefrom, and extended northerly from in front of the defendant's property along nearly the entire frontage of the plaintiff's property. Later on, in 1960, the defendant ran a dock perpendicularly from the shore out to the string of floating docks. The effect of these actions of the defendant was to block direct access from the main channel to the plaintiff's property, completely to block access at low water, and to obscure the view of the plaintiff's dock from boats navigating the main channel. A passage west of the main channel which was occasionally used by boats in going to the plaintiff's dock is completely blocked by the defendant's perpendicular dock.¹²⁷

The defendant claimed that it had maintained the mooring lines in the same place the docks now stood for the statutory length of time and that it now had a prescriptive right to continue their mainten-

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ance. During the course of the statutory period oystermen and fishermen had removed the stakes when they needed access to the area; and during the winter months ice had often broken the stakes. These facts led the court to conclude that the defendants failed to satisfy one of the essential requisites of prescription, i.e., that of continuity of use. As such, the defendant did not establish a prescriptive right and the plaintiff had not lost his rights of access.

D. Channeling—Private Rights and Public Regulation:

The littoral or riparian upland owner has the right to construct access channels in the bed of navigable waters for the purpose of enhancing navigation and improving the path to and from his riparian lands. Although a channel is actually constructed on soil to which the state holds legal title, the riparian is accorded a valuable franchise right to utilize the bed. This right is in the nature of a property right of which he cannot be deprived without compensation.

Although the statement was made in some early cases that the riparian had a right to subaqueous lands fronting on his upland,¹²⁸ by the early part of the nineteenth century it clearly appeared that this statement was too broad and thereby misleading.¹²⁹ The right of a riparian to occupy the bed of a navigable river extends only to wharfage and channeling in the furtherance of navigation.¹³⁰ Several cases illustrate this limitation.

In *Prior v. Swartz*,¹³¹ the plaintiff had a designated oyster bed fronting on defendant's upland. The defendant constructed a wharf and channel through the plaintiff's oyster bed. The court held that the upland proprietor had an exclusive right to the land below high-water mark for the purpose of achieving access to deep water. They further stated that the right of access was superior to the designation of an oyster ground and that the upland proprietor could not be deprived of this valuable right without compensation.

In *Lane v. Smith*,¹³² the superiority of the right to channel out was again upheld. The single limitation placed upon the right when its exercise conflicted with cultivated oyster beds was that construction must proceed in a reasonable manner. Justice Baldwin, in a separate opinion,¹³³ would have imposed the additional requirements that the upland proprietor give the oyster bed owner: (1) reasonable notice and (2) the opportunity to remove the growing oysters and

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hardening material from the bed. The right to channel out, subject to this limitation, continued in his eyes to be recognized as superior to the planting of oyster beds.

Where the state or federal government undertakes to construct a channel, adequate to serve the needs of the individual upland proprietors and others desiring access, the right of an individual to privately channel out is modified accordingly. The state has the power to improve navigation¹³⁴ and to regulate the exercise of the private right to wharf out and dig channels when it affects navigation.¹³⁵ Thus, in *Lane v. Harbor Commissioners*¹³⁶ the court upheld the revocation of a previously issued wharfing permit and limited the right of the upland proprietor to channel and wharf out according to the specifications of a recently constructed government channel.

The right to channel out must be limited to rights of access and does not include the right to take the substance of the bed under the pretext of exercising this valuable franchise. In *Shorehaven Golf Club, Incorporated v. Water Resources Commission*,¹³⁷ the owner of property on the Long Island Sound in collusion with the Manhattan Sand Company, proposed to engage in dredging sand and gravel for commercial purposes. This was done under the guise of improving navigation and access to the upland owned by the Golf Club.

The court prohibited the plaintiffs' activities as follows:

It [the commission] has not denied the plaintiff upland owners all right of access to deep water. It has simply denied access in the manner suggested in the application. The reason was a cogent one. The plaintiffs' proposal entails an operation which, from its size and scope, appears to be primarily a commercial venture by the plaintiff Manhattan Sand Company. This venture would have enabled the other plaintiffs to develop their shore properties at a modest cost to them or at no cost at all. The commission could properly conclude that a channel of the proportions proposed was an unreasonable exercise of the rights of the plaintiff upland owners and would require the taking of unwarranted quantities of state-owned underwater lands for private purposes. It was urged that the width and the depth proposed for the channel were necessary to accommodate the equipment, including dredge, tugs and barges, used in the operation, but it was not shown that the dredging of the marsh and of an adequate channel could not be accomplished in any other way.¹³⁸

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E. Reclamation and Accretion— Private Rights and Public Regulation:

The right of reclamation consists of the right to fill in land below the high-water mark and annex it thereby to the upland. Once land is reclaimed, title is perfected in the littoral proprietor and is treated as any other species of upland ownership. As the act of reclamation involves the gradual extension of the shore lines, it must be exercised with due regard to the paramount interests of navigation.

In *Lockwood v. New York & New Haven Railroad Company*,¹³⁹ the court set forth the essential attributes of the right of reclamation as follows:

[I]n Connecticut the owners of land bounded on a harbor own only to high water mark, and that whatever rights such owners have of reclaiming the shore are mere franchises. When however such reclamations are made the reclaimed portions in general become integral parts of the owners' adjoining lands. By means of such reclamations the line of high water mark is changed and carried into the harbor, and the owners' lands have gained the reclaimed shore by accretion; the principles governing the case being the same as those which prevail where the sea recedes gradually by accession of soil to the land.¹⁴⁰

The right of access follows changes in the contour and extent of the shore even where artificially altered by reclamation.¹⁴¹ In the *Lockwood* case, the defendant railroad company had an easement of access to the waters of the Sound by virtue of a conveyance from the present owner's predecessor in title. Any attempted reclamation of land or gradual accretion to the shore was held subject to the dominant right of access of the railroad. Thus, plaintiff fee owners' claim that the right of access was fixed by the terms of the original grant to the then existing high water mark was rejected by the court as follows:

If the grant had been in terms of a right of way to and from the harbor the grantees would be entitled to come to the harbor, over whatever intervening accessions of soil might accrue between high and low water mark. If the line of high water mark should be changed by natural or by artificial causes the rights of way would follow the changed line of the harbor, and this deed in connection with the map shows that the object of the deed was to enable the grantees to reach the harbor and by means of the right of way therein granted to connect their road on the east with the harbor

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and their road across the harbor on the west. The defendants by their charter had received from the state the general right to cross the public waters, and under this right so conferred and under the rights conferred by the deed in question the defendants have constructed their railroad and bridge and have without objection occupied so much of the surveyed way as they have had occasion to use. . . . [T]he plaintiff may not lawfully within those limits do any act interfering with or interrupting the defendants' right of way.¹⁴²

The fee title to mud-flats and the right to reclaim land below the high-water mark may be conveyed separate and apart from the upland. In *Ladies' Seamen's Friend Society v. Halstead*,¹⁴³ the court reviewed the history of the riparian right leading to the severability concept as follows:

We have assumed that these deeds were operative. In *Simons v. French* . . . it was held that the title to the upland and the appurtenant rights in the shore were separable, and that either might be conveyed without the other. In *Church v. Meeker* . . . the validity of a deed, given in 1828, of a portion of the shore, bounded by a highway as this is, where it did not appear that the grantor had any interest in the highway, or in the upland on the other side was recognized. In *New Haven Steamboat Co. v. Sargent & Co.* . . . this court recognized and gave effect to the validity of a deed given in 1807 of the premises now in dispute south of Water Street, by a committee of the proprietors of the common and undivided lands and the selectmen. The nature of the property in the shore suggests sufficient reasons why such deed should be considered operative. In *East Haven v. Hemingway* . . . it is described as ownership of the soil for the purpose of constructing wharves and stores thereon. In *Church v. Meeker* it is the right to cut sedge grass; and we suppose the property may be used for any purpose which does not interfere with navigation. Like other property it may be alienated freely.¹⁴⁴

The right of reclamation is not affected where one of a number of proprietors of land abutting upon a cove fills in land on a cove beyond the frontage of his own lands. Thus, in *Ockerhausen v. Tyson*¹⁴⁵ the defendant exceeded his line of wharfage and reclamation rights by filling in land in front of plaintiffs' property. The court held that by these unauthorized acts title to the reclaimed land belonged to the plaintiff and not the defendant. Thus:

That that of the plaintiffs [the right of reclamation] had never been exercised, did not impair or abridge it. It was in its nature a con-

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tinuing one to be put to use at their own convenience, as and when their interests might require. For any act which directly tended to obstruct its full enjoyment, whenever, in the future, they might see fit to exercise it, they were entitled to bring immediate suit. An action in the nature of ejectment will also lie by a riparian proprietor to recover possession of what had been unreclaimed tide-water flats adjacent to his land, upon which the owner of the adjoining land has wrongfully, though under a claim of right, constructed a wharf. . . . In such a case, the wharf, as soon as it is built, becomes by accretion the property of him who alone had the right to build it; the flats upon which the filling rests being turned into real estate, the title to which follows the franchise. . . .

The defendant, by filling up the flats immediately adjacent to the plaintiffs' upland, which were the subject of their riparian rights and franchise, converted the short of the river within the cove, north of a line connecting the point of the tongue at its entrance with the northwest corner of his own upland, into real estate. He thus did what only the plaintiffs could lawfully do, and the land so made became an accession to their land, precisely as if they had made it.¹⁴⁶

The line of permissible reclamation may change where through natural accretion the shore line is altered.¹⁴⁷ Before the right of reclamation will be modified and given judicial sanction, however, the change must be substantial and of a permanent nature. Thus, in *Moran v. Denison*¹⁴⁸ the court said as follows:

[L]ittoral rights are to be determined by conditions as they exist at the time, and not as they may have at some time in the past. It is unnecessary to stop to analyze this proposition to discover what of truth it expresses or to mark the bounds of the truth which doubtless lies within it. Certain it is, that the rights of reclamation and wharfing out which are incident to ownership of land upon the sea do not shift with every passing change in conditions, and that those new conditions which accomplish changes in these rights must at least be definite and substantial in their character, possess the appearance of stability and permanence, produce an essentially new situation and require a new adjustment of rights in order that a fair and reasonable access to the sea may be afforded to all.¹⁴⁹

In *Rochester v. Barney*¹⁵⁰ the court redefined the boundaries of permissible reclamation on the basis of an equitable division apportionment formula. They set forth the following principles:

In apportioning these riparian rights, the object to be kept in view is to so extend the lateral lines of adjoining owners of upland

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as to secure to each rights appropriate to, and over an area proportioned in extent to, his shore lines. . . . Also, the aim of all rules, 'as applied to the rights of adjoining riparian proprietors on an irregular shore [is] to give each, as far as may be, a fair and reasonable opportunity of access to the channel.' . . . For the purpose of reaching an equitable division in many cases a satisfactory result has been obtained by running a perpendicular from the intersection of the upland boundary line with the high-water mark to a theoretical base line. Where the general course of the shore is a straight line, the division of riparian rights between adjoining land-owners is along a perpendicular to the straight line from the intersection of the upland boundary line between the parties with the high-water mark. . . . Where the general course of the shore is a curved convex line, the division is along the line of the radius of the curve extended from the intersection of the upland boundary line between the parties with the high-water mark. . . . Where the general course of the shore is a broad concave curve, the division is along a perpendicular from the intersection of the upland boundary line between the parties with the high-water mark to a base line drawn across the mouth of the curve. . . . However, no rule can be laid down which is applicable to every situation, since much must depend in every instance upon the shape of the upland, the arm of the sea and their relative position to each other.¹⁵¹

Where the right of access and reclamation is impeded, this gives rise to a cause of action for damages. In *Norwalk v. Podmore*¹⁵² a highway was laid across mud-flats belonging to the plaintiff. The road and bridge were so constructed that the upland owner would be deprived of access to the mud-flats and the ability to reclaim his land below high-water mark. In a straight-forward statement, the court held that the upland owner was entitled to compensation for interference with his riparian rights:

If the highway be laid out across mud flats over which the tide ebbs and flows, the occupancy of the soil for the highway deprives the owner of his right of reclamation; so long, at least, as it is occupied by the public, he has no right or interest in it. . . . All the interest he had has been taken. Hence, there is no presumption that such abutting owner owns to the middle of the highway. But he does have the right of access from his abutting land to the highway. His interest in the soil, though a mere franchise, may be sold apart from the upland. Subject to the right of navigation, he may reclaim, and, when he does, it becomes upland, and generally with all of its incidents.

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. . . To deny him the right of access to an adjoining highway would make his ownership of land not attached to the upland, and his right of reclamation, of little or no value. When the land has been reclaimed, he has the same absolute right of access as any other owner abutting upon a highway. The right of access exists whether the abutting owner owns the soil to the middle of the highway or not.

. . . The right of access is a property right appurtenant to his land through which the public highways are open to him in common with all other citizens. Over land abutting that part of this bridge which spans the water below low water, the right of reclamation, in all probability, could not exist, since it would be an interference with the right of navigation, and since access could not be had without injury to the bridge and to public travel. Over the defendant's land abutting that part of this bridge which is above the point of low water, the right of reclamation exists; and, wherever reclamation may be and has been had, access to the abutting highway is a settled property right of the abutting landowner, provided no substantial injury be done the highway or the bridge structure, or the public travel be made unsafe. The defendant may reclaim her land and have access to the highway from it, and ordinarily use her land so reclaimed for any purpose other land adjoining a public highway may be used, provided no substantial injury be done the highway or the bridge structure, or the public travel be made unsafe.¹⁵³

In *Orange v. Resnick*,¹⁵⁴ the town sought to fill in land between the high and low-water mark and enjoin a riparian proprietor from placing a bathing pavilion on the flats. The court deemed that these were unconstitutional attempts to appropriate private property to public use without just compensation. They further noted that these objectives of the town could only be accomplished by the exercise of the power of eminent domain. With regard to the basis of the town's source of authority, the court stated:

It does not necessarily follow that the Act of 1913 is unconstitutional. In and of itself it is inoperative in so far as it purports to authorize the town to fill in the shore between high and low-water marks, or in any other way to extinguish the riparian rights of an adjoining upland owner. Nor can the town by injunction restrain any proper exercise of such riparian rights, without condemning them. It may have power to condemn the riparian rights on this shore. . . . If so, the town, on complying with these statutes, will be in a position to carry the Act of 1913 into effect.¹⁵⁵

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In a condemnation proceeding for the purpose of acquiring the right to build across the mud-flats, the condemnation award must reflect the value of the upland riparian rights. In *Walz v. Bennett*,¹⁵⁶ the value of the land taken was \$1,750 without considering the value of riparian rights; the value of the land would have been \$2,250 if they were taken into account. The court ordered that the riparian rights must be included in the valuation and the figure of \$2,250 was properly used by the lower court.

In *First National Bank and Trust Company v. Zoning Board of Appeals*,¹⁵⁷ the upland owner had not exercised his rights of reclamation. He attempted to use his shore property for "accessory" uses related to the conduct of business on an island unconnected with the shore. In a residential zone parking lots and other business uses could only be conducted if the lot in the residential zone was connected with a proper business lot. The court held that use of the shore lot for parking purposes did not satisfy the "accessory use" test of the zoning ordinance. Had the upland owner reclaimed the land between the shore and the island there might have been unified lot ownership sufficient to satisfy the test.

Zoning ordinances apply with equal efficacy to reclaimed land and upland. Thus in *Poneleit v. Dudas*,¹⁵⁸ pursuant to the general principle that reclaimed land be treated as part and parcel of the upland, the court held that a local zoning ordinance effectively restricted the use of the reclaimed land area on the same basis as it limited the right to use the original upland. Thus:

The defendants' original upland was increased by the reclaimed land. Their entire property is located within the geographical limits of the city of Bridgeport. . . . As the defendants' land was enlarged by reclamation, the additions became part of it and were in a residence B zone. The defendants gain nothing by their claim that the regulations did not cover water. The plaintiff has only complained of the defendants use of their land.¹⁵⁹

F. Mud-Flats and Beaches—Public and Private Rights:

The value of what are now known as beaches for contemporary recreation purposes is only of relatively recent origin.¹⁶⁰ For the most part, the right to use and occupy the land immediately above the high-water mark and between high and low-water marks, has been associated with the exercise of riparian rights of access; including wharfage¹⁶¹ and reclamation,¹⁶² and for purposes of collecting

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sand¹⁶³ and seaweed¹⁶⁴ for commercial or consumptive uses. Little attention was given to the independent value of beaches for recreational use before the turn of the century.

In *Merwin v. Wheeler*,¹⁶⁵ the court noted that there was no precise legal meaning for the term "beach":

We see no reason for holding that in law the beach means the shore of Long Island Sound. . . . The word 'beach' has no such inflexible meaning that it must denote land between high and low water mark.¹⁶⁶

Prior courts had called what this court here refers to as a beach, mud-flats, sedge-flats, or shore. These terms could apply equally to land above the high-water mark as to land between high and low-water marks.¹⁶⁷ The apparent contradictions and uncertainties in judicial terminology became obvious when two attempted definitions, one in 1867 and a second in 1873, are compared with each other. Justice Butler attempted one definition for the purpose of deed construction in *Church v. Meeker*¹⁶⁸ as follows:

Salt 'sedge' grown only on land covered by the tide at ordinary high water, and the term 'flat,' when used as descriptive of anything respecting an arm of the sea, means a level place over which the water stands or flows. The term 'sedge-flat' therefore imports a tract of land below high water mark. Such also is the meaning of the other descriptive term used, 'shore.' Applied to the sea, or an arm of it, it has a technical, legal meaning. Bouvier, in his Law Dictionary, defines the 'sea shore' as 'that space of land on the borders of the sea which is alternately covered and left dry by the rising and falling of the tide—or in other words, that space between high and low water mark.' . . . The legal meaning of the term is indisputable.¹⁶⁹

Justice Seymour, six years later, preferred to agree with the reasoning of the court in the *Merwin* case and said that there was no finite legal definition or meaning to any of these terms:

The defendant's argument is that the word "shore" has a definite and inflexible meaning in law, denoting the space between ordinary high and low-water mark. It is true that the word is now generally used in treatises on navigable waters in that sense, but Lord Hale says there be three kinds of shore. . . . One of these three kinds is the space between high and low-water mark. Both the other kinds embrace portions of the land above ordinary high-water mark.

Webster, in his Dictionary, defines shore thus:—"The coast or land adjacent to the ocean, sea or a large lake or river." He says

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we use the word to express the land near the border of the sea or of a great lake to an indefinite extent, as when we say 'a town stands on the shore.' Bouvier defines shore as 'land on the side of the sea or a lake or river.' He gives to the compound word 'seashore' the more limited meaning of land between high and low-water mark.¹⁷⁰

It is abundantly clear that there is no single definition of any of these terms for legal purposes. Whether reference is made to land above or below high-water mark depends upon the circumstances in which the question arises, including the combinations of expression used to describe the land.¹⁷¹ It is further evident, once capable of definition, that mud-flats, sedge-flats, shore land, and beaches are capable of being conveyed separate from the upland¹⁷² and that rights less than fee ownership can be created therein.¹⁷³

The distinction between public and private beaches is of increasing significance as the use of beaches for recreational purposes becomes more widespread. If a beach is designated public, then members of the public may use the area; if private, then entrance upon the land would constitute a trespass.

In *Dawson v. Orange*,¹⁷⁴ the court exhaustingly questioned the manner in which a beach could be properly designated public. One of several basic principles must be satisfied before public ownership will be found. First:

A public beach is one left by the State, or those claiming under it, open to the common use of the public, and which the unorganized public and each of its members have a right to use while it remains such.¹⁷⁵

Second:

It may, however, have since been dedicated . . . to the use of the general public. This would make it a public beach, and acts of use by the general public might serve to establish such a dedication.¹⁷⁶

Also, the land may have been preserved by the proprietors of the town and held by them as a common for use by the town. Absent any of these sources of public right a beach would have passed into and remained in private ownership.

A fourth means of the public acquiring title was set forth in *Brower v. Wakeman*.¹⁷⁷ Thus, if the owner of the upland apparently abandons the premises to the use of the general public, the state or its representative may assume ownership:

[T]his part of the beach formerly belonged to the early proprietors . . . they never conveyed it . . . it has always been used by the gen-

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eral public, and was finally abandoned by the proprietors to the general public and became common and undivided land. This did not give the town any title to or proprietary interest in this undivided land of the shore. The proper representatives of the interest of the general public would be . . . a member of the public, or the State. The State through the General Assembly, could convey the rights of the public in the shore between high and low-water mark. . . . Likewise the General Assembly could convey the rights of the public to the part of the beach above high-water mark abandoned to them. This it did by Special Act. . . . By virtue of this Act Westport became the owner of this part of the beach; and, since this Act went into effect, has had the right to its exclusive control.¹⁷⁸

Where the public, in this case the town of Westport, has the right to exclusive occupation and control over the beach any structure erected by a private individual will be ordered removed as a public nuisance. If the beach is private the structure would have been lawfully erected and maintained and a town could not secure its removal.¹⁷⁹

Two further means of the public acquisition of title to the beach are available—either voluntary purchase or condemnation.¹⁸⁰ The condemnation of beaches and upland by the state (through its responsible agencies) was upheld by the court in *Delinks v. McGowan*¹⁸¹ as a proper expenditure of public funds for public use. The court reiterated the basic proposition that without the acquisition of land adjoining public waters the public would be deprived of access thereto over private lands.

FOOTNOTES—PART TWO

1. Parsons, Brinckerhoff, Hogan & Macdonald, *Connecticut Ports: An Economic and Engineering Survey of all Navigable Waters in the State for the Connecticut Port Survey Commission* (1946).
2. *Adams v. Pease*, 2 Conn. 481, at 482, 483 (1818); In *England*, the sea flows and ebbs in rivers about as far as they are navigable; which accounts for the indiscriminate use of these terms.
3. See generally, 23 A.L.R. 757 (1922). The first case reputed to make this distinction was *Murphy v. Ryan*, Ir. R. 2 C.L. 143 [1868], 16 Weekly L.R. 678 (as cited in 23 A.L.R. 757 (1922)). See also, *Chapman v. Kimball*, 9 Conn. 38 (1831).
4. *Church v. Meeker*, 34 Conn. 421 (1867).
5. *Rowe v. Smith*, 48 Conn. 444, 446-47 (1880).
6. See *e.g.*, *Adams v. Pease*, *supra* note 2; *East-Haven v. Hemingway*, 7

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- Conn. 186 (1828); *Middletown v. Sage*, 8 Conn. 221 (1830); *Simons v. French*, 24 Conn. 15 (1855). This rule is expressly stated in *State v. Knowles-Lombard Co.*, 122 Conn. 263, 266, 188 Atl. 275, 276 (1936).
7. See *e.g.*, *Brown v. Towns of Preston and Ledyard*, 38 Conn. 219 (1871).
 8. *Adams v. Pease*, *supra* note 2, at 483.
 9. *Ibid.*
 10. *Id.*, at 481-82.
 11. *Id.*, at 484-85.
 12. See *Hollister v. The Union Company*, 9 Conn. 436 (1833) wherein the court held that damages suffered by an adjoining landowner to the Connecticut river were non-compensable because of the public right to improve navigation on public waters. Under Hosmer's classification of the Connecticut river, the landowner would have had a recognized property right which would probably have had to be compensated under the Federal and State Constitutions.
- Other early cases adjudicating the Connecticut river factually navigable would include: *The Enfield Bridge Co. v. The Hartford and New Haven Railroad Co.*, 17 Conn. 40 (1845).
13. 20 Conn. 217 (1850).
 14. *Id.*, at 226-27.
 15. *Middletown v. Sage*, 8 Conn. 221 (1830). The court appears to delimit the efficacy of the common law test by utilizing, in addition to the ebb and flow of the tides, actual navigation as decisive. The reporters commentaries on the facts indicate this inclusion at 222:
". . . the river is, and always has been, navigable, by vessels of large burthen; it is subject to the ebbing and flowing of the tide; and is an arm of the sea."
 16. 94 Conn. 573, 109 Atl. 864 (1920).
 17. *Id.*, at 578, 109 Atl. 866 (1920).
 18. *Adams v. Pease*, 2 Conn. 481 (1818).
 19. 55 Conn. 292, 10 Atl. 565 (1887).
 20. *Id.*, at 315-16, 10 Atl. at 566.
 21. *Nies v. Connecticut River Bridge & Highway District*, 104 Conn. 382, 132 Atl. 873 (1926).
 22. *Wethersfield v. Humphrey*, *supra* note 13.
 23. *Harrison v. Fitz*, 148 Fed. 781, 783-84 (8th Cir., 1906).
 24. U.S. Const. Art. I, § 8.
 25. It is reputed that for some purposes the Farmington River has already been designated as a navigable tributary under the federal test of navigability.
 26. 313 U.S. 508, 85 L.Ed. 1487, 61 S.Ct. 1050 (1940).
 27. *Id.*, at 525-26, 85 L.Ed., at 1500, 61 S.Ct., at 1059-60.
 28. See *e.g.*, *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 94 L.Ed. 1231, 70 S.Ct. 955 (1950); *United States v. Grand River Dam Authority*, 363 U.S. 229, 4 L.Ed.2d 1186, 80 S.Ct. 1134 (1960).
 29. See *e.g.*, *Brewer Oil Co. v. United States*, 260 U.S. 77, 67 L.Ed. 140,

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- 43 S.Ct. 60 (1922); *United States v. Grand River Dam Authority*, *supra* note 28.
30. For a fuller discussion of the federal navigation servitude, see *United States v. Gerlach Live Stock Co.*, *supra* note 28.
31. If this did not follow, then we might have a very real question of a taking of property without just compensation. Thus, the Farmington River has traditionally been treated under State law as non-navigable. Assuming its designation as a navigable tributary under the Federal test is proper, what effect does this have on bed ownership?
32. See *e.g.*, *Hollister v. The Union Company*, 9 Conn. 436 (1833); *Groton and Ledyard v. Hurburt*, 20 Conn. 217 (1850); *State v. Sargent*, 45 Conn. 358 (1877).
33. 20 Conn. 217 (1850).
34. 22 Conn. 179 (1852).
35. *Id.*, at 183.
36. *Id.*, at 186.
37. 52 Conn. 570 (C.C.D.Ct. 1884).
38. 106 Conn. 315, 138 Atl. 122 (1927).
39. See *e.g.*, *The Enfield Toll Bridge Co. v. The Hartford and New Haven Rail-Road Co.*, 17 Conn. 40, 63 (1815), where the court interprets *Adams v. Pease* as follows:

" . . . that the public have a right or easement in such rivers [above tide waters], as common highways, for passing with vessels, boats, or any water craft."
40. See *e.g.*, *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565 (1842); *O'Brien v. Norwich and Worchester Rail-Road Co.*, 17 Conn. 372 (1845); and, *Frink v. Lawrence*, 20 Conn. 117 (1849).
41. *Supra* note 40.
42. *Id.*, at 579.
43. *Supra* note 40.
44. *Id.*, at 376.
45. *Supra* note 40.
46. 72 Conn. 10, 43 Atl. 559 (1899).
47. See *Rochester v. Barney*, 117 Conn. 462, 468-470, 169 Atl. 45, 47-48 (1933), and cases cited therein.
48. *Delinks v. McGowan*, 148 Conn. 614, 173 A.2d 488 (1961).
49. See *Waite, Pleasure Boating in a Federal Union*, 10 Buffalo L.Rev. 427 (1961).
50. *Skelly v. Pleasure Beach Park Corp.*, 115 Conn. 92, 160 Atl. 309 (1932).
51. *Orange v. Resnick*, 94 Conn. 573, 109 Atl. 864 (1920).
52. *Supra* note 48.
53. *Id.*, at 620.
54. *Id.*, at 620-621.
55. 1 Conn. 323 (1815).
56. 1 Conn. 382 (1815).
57. *Id.*, at 383.
58. 1 Conn. 510 (1816).

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59. See in addition to the three cases already cited, *Curtis v. Hurburt*, 2 Conn. 309 (1817); *Adams v. Pease*, 2 Conn. 481 (1818); *Munson v. Baldwin*, 7 Conn. 168 (1828); *Bristol v. Ousatonie Water Co.*, 42 Conn. 403 (1875) (Exhaustive survey of public right to fish). *Delinks v. McGowan*, 148 Conn. 614, 173 A.2d 488 (1961).
60. 9 Conn. 38 (1831).
61. *Id.*, at 39-42.
62. 34 Conn. 421, 422 (1867).
63. *Id.*, at 431-433.
64. 40 Conn. 382 (1873).
65. 41 Conn. 14 (1874).
66. *State v. Knowles-Lombard Co.*, 122 Conn. 263, 188 Atl. 275 (1936).
67. *Id.*, at 265, 188 Atl. at 275-76.
68. 146 Conn. 619, 153 A.2d 444 (1959).
69. *Id.*, at 625-26, 153 A.2d at 447.
70. *Id.*, at 626, 153 A.2d at 447.
71. 5 Conn. 388 (1824). The geographic extent of jurisdiction was subsequently considered in *Rowe v. Smith*, 48 Conn. 444 (1880) and *Keister's Appeal*, 89 Conn. 7, 92 Atl. 744 (1914).
72. *Supra* note 71, at 390-91.
73. 5 Conn. 391 (1824). To the same effect see, *Willard v. Killingworth Borough*, 8 Conn. 247 (1830).
74. 23 Conn. 128 (1854).
75. Conn. Rev. Stat. p. 562 as cited in *Gallup v. Tracy*, 25 Conn. 10, 11 (1856).
76. *Gallup v. Tracy*, 25 Conn. 10 (1856).
77. *Averill v. Hull*, 37 Conn. 320 (1870).
78. 42 Conn. 255 (1875).
79. *Id.*, at 256 as follows:

By section 72, of chapter 2, of title 23, of the Revised Statutes of 1866, the method to be pursued is clearly prescribed in the following language:

"Whenever the owner of any land in this state in which there may be any salt water creek or inlet, shall desire to dam, gate or lock the said creek or inlet for an oyster pond for the growing of oysters, he may make application therefor to the selectmen of the town where such creek or inlet may be; and the selectmen, such application being made, shall visit and examine the creek or inlet, and if in their opinion the damming of such creek or inlet will not injure navigation, or deprive the public of any rights or privileges they enjoy, they shall mark off or set bounds where a dam may be built, and report their opinion to any annual or special town meeting of the town wherein such creek or inlet is situated; and if the town meeting shall approve the opinion of the selectmen, then the owner of said creek or inlet may construct a dam, gate or lock across said creek or inlet as an oyster pond for the growing of oysters."
80. *Id.*, at 256, 258.
81. 52 Conn. 5, 7 (1884).

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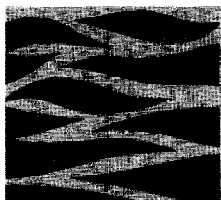
82. *Town of Clinton v. Buell*, 55 Conn. 263, 11 Atl. 38 (1887). This court further notes that if a legislative remedy is provided, this is exclusive of common law judicial forms of action. Where, however, the remedy provided is for either clams, oysters, or mussels, but does not include the others, the statutory remedy is not applicable to the latter.
83. To the same effect, see *White v. Petty*, 57 Conn. 576, 18 Atl. 253 (1889).
84. *Supra* note 81, at 9-10.
85. 64 Conn. 217, 29 Atl. 471 (1894).
86. *Id.*, at 222, 29 Atl. at 473.
87. 66 Conn. 285, 33 Atl. 1006 (1895).
88. *Id.*, at 289, 33 Atl. at 1007.
89. 62 Conn. 132, 25 Atl. 398 (1892).
90. 71 Conn. 65, 41 Atl. 18 (1898).
91. *Id.*, at 71, 41 Atl. at 20.
92. 112 Conn. 199, 152 Atl. 210 (1930).
93. *Id.*, at 201-2, 152 Atl. at 211.
94. 249 U.S. 540, 63 L.Ed. 759, 39 S.Ct. 371 (1918).
95. *Id.*, at 542-43, 63 L.Ed. at 763, 39 S.Ct. at 371-72.
96. *Supra* note 92, at 206, 152 Atl. at 212-13.
97. 131 Conn. 533, 41 A.2d 98 (1945).
98. *Orange v. Resnick*, 94 Conn. 573, 109 Atl. 864 (1920). See also *Richards v. New York, New-Haven and Hartford Railroad Co.*, 77 Conn. 501, 60 Atl. 295 (1905).
99. *Id.*, at 582, 109 Atl. at 867.
100. *Lockwood v. New York & New Haven Railroad Co.*, 37 Conn. 387 (1870); *Barri v. Schwartz Bros. Co.*, 93 Conn. 501, 107 Atl. 3 (1919).
101. See *e.g.*, *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565 (1887).
102. 77 Conn. 501, 60 Atl. 295 (1905).
103. *Id.*, at 504-5, 60 Atl. at 296-97.
104. *Supra* note 98.
105. *Supra* note 102.
106. 25 Conn. 346 (1856).
107. *Id.*, at 352-53.
108. 45 Conn. 358 (1877).
109. *Id.*, at 373.
110. *Id.*, at 374.
111. 60 Conn. 278, 22 Atl. 561 (1891).
112. *Id.*, at 282-84, 22 Atl. at 562-63.
113. *Id.*, at 291-92, 22 Atl. at 565-66.
114. See *e.g.*, *Sheehan v. Altschuler*, 148 Conn. 517, 172 A.2d 897 (1961).
115. *Supra* note 66 and textual discussion following.
116. 70 Conn. 685, 40 Atl. 1058 (1898).
117. *Id.*, at 694, 40 Atl. at 1061 (emphasis added).
118. *Id.*, at 695, 40 Atl. at 1061.
119. *Id.*, at 697-98, 40 Atl. at 1062.
120. *New York, New Haven & Hartford Railroad Co. v. Long*, 72 Conn. 10, 43 Atl. 559 (1899).

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121. 20 Conn. 117 (1849).
122. *Id.*, at 121.
123. 80 Conn. 185, 67 Atl. 558 (1907).
124. *Id.*, at 188, 189, 67 Atl. at 559.
125. *Id.*, at 189, 97 Atl. at 559.
126. 149 Conn. 560, 182 A.2d 622 (1862).
127. *Id.*, at 561-62, 182 A.2d at 623.
128. *Peck v. Lockwood*, 5 Day 22 (1811).
129. *Chapman v. Kimball*, 9 Conn. 38 (1831).
130. *Simons v. French*, 25 Conn. 346 (1856).
131. 62 Conn. 132, 25 Atl. 398 (1892).
132. 71 Conn. 65, 41 Atl. 18 (1898).
133. *Id.*, at 69-71, 41 Atl. at 20.
134. *Hollister v. The Union Company*, 9 Conn. 436 (1833).
135. *State v. Sargent*, 45 Conn. 358 (1877).
136. 70 Conn. 685, 40 Atl. 1058 (1898).
137. 146 Conn. 619, 153 A.2d 444 (1959).
138. *Id.*, at 625-26, 153 A.2d at 447.
139. 37 Conn. 387 (1870).
140. *Id.*, at 391.
141. See *Welles v. Bailey*, 55 Conn. 292, 10 Atl. 565 (1887).
142. *Supra* note 139, at 391-92.
143. 58 Conn. 144, 19 Atl. 658 (1889).
144. *Id.*, at 150-51, 19 Atl. at 660.
145. 71 Conn. 31, 40 Atl. 1041 (1898).
146. *Id.*, at 38, 40 Atl. at 1042.
147. *Supra* note 141.
148. 79 Conn. 325, 65 Atl. 291 (1906).
149. *Id.*, at 330, 65 Atl. at 294.
150. 117 Conn. 462, 169 Atl. 45 (1933).
151. *Id.*, at 469-70, 169 Atl. at 47-48.
152. 86 Conn. 658, 86 Atl. 582 (1913).
153. *Id.*, at 665-66, 86 Atl. at 584.
154. 94 Conn. 573, 109 Atl. 864 (1920).
155. *Id.*, at 582, 109 Atl. at 867.
156. 95 Conn. 537, 111 Atl. 834 (1920).
157. 126 Conn. 228, 10 A.2d 691 (1940).
158. 141 Conn. 413, 106 A.2d 479 (1954).
159. *Id.*, at 420, 106 A.2d at 482.
160. See *Berger v. Guilford*, 136 Conn. 71, 68 A.2d 371 (1949) where the owners of the beach had suffered public use until recent times as an example of the recent increase in the significance of beach ownership.
161. See *e.g.*, *Simons v. French*, 25 Conn. 346 (1856).
162. See *e.g.*, *East-Haven v. Hemingway*, 7 Conn. 186 (1828); *Middletown v. Sage*, 8 Conn. 221 (1830); *Hollister v. The Union Company*, 9 Conn. 436 (1833).
163. See *e.g.*, *Merwin v. Wheeler*, 41 Conn. 14 (1874).

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164. See *e.g.*, *Chapman v. Kimball*, 9 Conn. 38 (1831); *Church v. Meeker*, 34 Conn. 421 (1867); *Mather v. Chapman*, 40 Conn. 382 (1873).
165. *Supra* note 163.
166. *Id.*, at 26.
167. See *e.g.*, *East-Haven v. Hemingway*, 7 Conn. 186 (1828); *Simons v. French*, 25 Conn. 346 (1856).
168. 34 Conn. 421 (1867).
169. *Id.*, at 424.
170. *Mather v. Chapman*, 40 Conn. 382, 400-401 (1873).
171. See *e.g.*, *Wakeman v. Glover*, 75 Conn. 23, 52 Atl. 622 (1902).
172. See *e.g.*, *Simons v. French*, 25 Conn. 346 (1856).
173. *Lockwood v. New York & New Haven Railroad Co.*, 37 Conn. 387 (1870).
174. 78 Conn. 96, 61 Atl. 101 (1905).
175. *Id.*, at 119, 61 Atl. at 109.
176. *Ibid.*
177. 88 Conn. 8, 89 Atl. 913 (1914).
178. *Id.*, at 12, 89 Atl. at 914-15.
179. *Orange v. Resnick*, 94 Conn. 573, 109 Atl. 864 (1920).
180. See *e.g.*, *Ibid.*
181. 148 Conn. 614, 183 A.2d 273 (1961).



PART THREE:

Ground Water

THE TERM ground water, when used in its legal sense, includes both water which flows predictably in underground streams and water which collects as a definite underground body of water. As a physical reality, neither of these descriptions adequately characterizes subterranean waters. Ground water does not generally collect, or flow, in one large body as it would on the surface; rather it permeates and filters within porous and pervious sub-surface soil.

There have been only a few decisions relating to ground water in the State of Connecticut. Although there are probably extensive ground water basins, the use of ground water has never attained a primary significance as the main source of water supply for urban, residential, and industrial usage. Surface water streams remain the primary source of water supply in the Northeast. For this reason, there have been relatively few conflicts requiring adjudication and judicial allocation of the right to use ground water in this State.

Problems regarding ground water relate to the ability of a landowner to bring it to the surface for use and the quality of the water once brought to the surface. Several factors affect the ability of a landowner to bring water to the surface: the level of the water table, the proximity of other wells and the intensity of pumping in each well. Ground water can be pumped faster than it can flow through the soil. If the water is pumped out faster than it flows, a water depression is formed. This lowers the water level and can hinder or prevent the water from reaching another well within the area of the depression. Ground water does not respect land ownership boundaries. Any noxious substance which is allowed to penetrate the ground and contaminate subterranean waters will adversely affect the water quality in neighboring wells.

In both of these situations, *i.e.*, physical ability to reach and quality of water once captured, the courts must weigh the interests of conflicting claims to the use of ground water and determine the

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most logical and equitable method of apportioning the right to the use of ground water. The more intensive ground water use becomes, the greater will be the likelihood of physical intrusions upon neighboring uses. While relatively sparse authority is available in Connecticut for the resolution of potential disputes, the several cases which have been decided do suggest some broad principles to govern the behavior of neighboring landowners.

Questions concerning the allocation of ground water resources were first litigated in England in *Acton v. Blundell* in 1843.¹ In this case one landowner's removal of ground water interfered with his neighbor's well. The court stated that rules governing ground water were different from those governing surface water and that a land owner could do *whatever he pleased with the water which flowed under his property*. The court was quite explicit in adopting a rule tantamount to "absolute ownership" of ground water:

[W]e think the present case for the reasons given is not to be governed by the law which applies to rivers and flowing streams but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface, that the land below is his property whether it be solid rock . . . part soil, part water; that the person who owns the surface may dig the vein and apply all that is found to his own purpose at his free will and pleasure, and if in the exercise of such right he intercepts or draws off the water collected from underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of damage without fault, which cannot become the ground of any action.²

During the nineteenth century this decision was widely accepted throughout America; Connecticut was no exception. The first Connecticut case allocating ground water resources was *Roath v. Driscoll* in 1850.³ In this case the plaintiff owned a flourishing well on his own land. The defendant, who owned land adjacent to the plaintiff's decided to excavate thereon. This resulted in a lowering of the water level in plaintiff's well. The court adopted the principle of *Acton v. Blundell* and held for the defendant. They said that:

Each owner has an equal and complete right to the use of his land, and to the water which is *in it*. Water combined with the earth, or passing through it, by percolation, or by filtration, or chemical attraction, has no distinctive character of ownership from the earth itself; not more than the metallic oxides of which the earth is composed. Water, whether moving or motionless *in the earth*, is

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not, in the eye of the law, distinct from the earth. The laws of its existence and progress, while there, are not uniform, and cannot be known or regulated. It rises to great heights and moves collaterally, by influences beyond our apprehension. These influences are so secret, changeable, and uncontrollable, we cannot subject them to the regulations of law, nor build upon them a system of rules, as has been done with streams upon the surface. Priority of enjoyment does not, in like cases, abridge the natural rights of adjoining proprietors.⁴

As one can easily discern from the above, the court's decision was subject to two primary factors: (1) their failure to differentiate ground water from the land in which it flows and (2) their lack of scientific knowledge regarding the nature of ground water and the pattern by which it moves. As scientific knowledge in this area began to increase, the *Acton* rule was gradually modified in Connecticut.

The first Connecticut case dealing specifically with the pollution of ground water was *Brown v. Illius* in 1857.⁵ In this case plaintiffs' well was polluted when the defendant placed noxious gases in close proximity to it. These gases were absorbed into the ground water basin and carried into plaintiffs' well. The court was requested to decide whether the pollution of ground water constituted a recognized legal injury. The court avoided the issue by classifying all waters into three areas: (1) surface water (2) underground streams and (3) water near the surface. The latter term afforded the majority of the court the opportunity to evade the primary question. The court noted:

It is true that the plaintiffs claimed that the noxious matter placed by the defendant on his land was not only washed along the surface into the well, but also soaked into the ground and thence into the soil around the well and into the well, but the plaintiffs here manifestly contemplated nothing more than its transmission by means of the surface moisture and along with the surface water produced by rains and claimed nothing from the corruption thereby of any underground current or stream of water that may have supplied the well. The well was in close contiguity to the noxious matter, and the communication of the latter with the former was obviously direct and immediate. There is no substantial difference between the migration of the particles of corrupt matter along the surface upon the temporary currents caused by the rain, and their penetration into the soil in connection with and by the agency of the same water. Both are entirely different from the corrupting of

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subterranean streams and currents. The nuisance is wholly one of the surface, producing its noxious effect by modes of communication incident to the surface and under the action of superficial agencies, although its operation may be in some measure beneath the surface.⁶

Justice Ellsworth who had written the opinion in the *Roath* case was not willing to accept the classification set forth by the majority. He felt that the problem should have been squarely faced and that the trend started by *Roath* should be abandoned. Basing his position on the ancient maxim "*sic utere tuo ut alienum non loedas*,"⁷ he pointed out that the main issue should not be the location of the water, but rather the predicability of the damage. In advising against a new trial he stated:

The distinction is not as has been intimated, between streams running on the surface and those running below it, but it is whether the waters are streams i.e. water running in fixed and defined channels, or water in combination with the earth, either in a state of quiescence or percolation and not under the power of a uniform law, as surface streams under that of gravitation, but moving under influences unknown and unappreciable. If there be a clearly defined continuous stream in the earth which is appreciable, and can be known and is known, I see not why it may not fall within the law of surface streams as well as any other stream.⁸

Two years later,⁹ the court was forced to take a definite stand on the points raised previously by Ellsworth. Following the logic of the *Roath* case the majority stated:

It seems very obvious to us that the plaintiffs could no more complain of the inconvenience to them caused by the particles of the noxious matter deposited on the defendant's land being carried by the rains into the subterranean currents or streams beneath it and thence into the plaintiffs' land and well, than they could if the defendant had dug a well on his own land and thereby dried up a well on that of the plaintiffs. His ownership of the land sanctioned and justified the use he made of it, and protected him against the consequences of such use, although attended with damage to the plaintiffs, so far as those consequences depended on or resulted from the operation of subterranean streams or currents through his land. In regard to such streams and currents there is not, to adopt the mode of expression of one of the counsel in *Acton v. Blundell*, any *Jus Alienum* on the part of the owners of other land, and therefore the maxim *sic utere tuo ut alienum non loedas*, does not apply.¹⁰

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Once again Justice Ellsworth dissented from the majority decision:

Now, my brethren admit, if I understand them, that if water passes over and from the noxious substances into the plaintiffs' well by soaking or percolation, irrespective of the depth below the surface, it may be a nuisance, but the moment it strikes subterranean streams and water courses, and mingling with them flows into the plaintiffs' well, it can not be a nuisance, let there never be so much negligence, and knowledge, or even wantonness in the use of the supposed right, and let the injury be never so direct, unnecessary and aggravated. If I understand my brethren aright, I must humbly express my dissent to their doctrine.¹¹

Justice Ellsworth distinguished *Brown* from *Roath* on the basis that the use of ground water and the pollution of it were two entirely different questions requiring two entirely different approaches. He noted:

That every man is to enjoy his own land according to his pleasure, as a general principle, I admit to be true. He may dig in it and excavate it for wells, quarries or building purposes, although, by so doing, he interrupts the water that is percolating under the soil, for otherwise he can not beneficially enjoy what is his own. This is the doctrine of *Roath v. Driscoll* and *Acton v. Blundell*. But if we are to understand by streams and water courses more than this, currents and rivulets, it is not settled by those cases that a person may unnecessarily or wantonly stop the water to the prejudice of his neighbor, or suffer it to flow carrying filth and poison into his well.¹²

The logic of the majority of the court was at best questionable; in evaluating the decision, however, it must not be forgotten that it was made in 1857; the decision was rendered at a time when very little was known about ground water.

By the turn of the century, as knowledge in the area of ground water increased, the concept of absolute ownership gradually yielded to concepts of reasonable use or correlative rights. Undoubtedly the most influential decision in effecting this change was the California case of *Katz v. Walkinshaw*.¹³ A substantial quantity of water used in Southern California for residential, agricultural, and industrial purposes is taken from ground water basins. It is not surprising, therefore, that judicial allocation of ground water resources has yielded its most significant results in California. The court in the *Katz* case was able to deal with the problem in an entirely distinct

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manner from the court in *Acton v. Blundell*. Their new system of allocation was based on two major principles:

(1) Water belonged first to those who used it upon the land (overlying owners); these users had co-equal rights to the supply and had to share equally in times of shortage or in instances where their uses were in conflict.

(2) When overlying needs were satisfied, then, and only then, could water be used for industrial, urban and non-overlying uses by *appropriative takers*. These pumpers took water on the basis of proximities in time of use: first in time was first in right and the last in time had to yield when there were shortages or conflicting uses.¹⁴

Since the advent of the doctrine of correlative rights regarding the use of ground water, there have only been two Connecticut cases in this area. The first (and indeed the more influential one) was *Swift & Company v. People's Coal & Oil Company* in 1936.¹⁵ Citing a Kentucky decision for support, the case specifically rejects and overrules the categories established in the *Brown* case:

In our judgment the distinction is not based upon sound principle. 'It is a familiar doctrine, that one must so use his property as not to injure his neighbor; and, because the owner has the right to make an appropriation of all the underground water, and thus prevent its use by another, he has no right to poison it, however innocently, or to contaminate it, so that when it reaches his neighbor's land it is in such condition as to be unfit for use, either by man or beast. One may be entitled, by contract with his neighbor, to all the water that flows in a stream on the surface that passes through the land of both; and, while he can thus appropriate it, the has no right to pollute the water in such a manner as, when it passes to his neighbor, its use becomes dangerous or unhealthy to his family, or to the beasts on his farm. . . . The owner of the land has the same right to the use and enjoyment of the air that is around and over his premises as he has to use and enjoy the water under his ground. He is entitled to the use of what is above the ground as well as that below it; and, still, it will scarcely be insisted that he can poison the atmosphere with noxious odors that reach the dwelling of his neighbor to the injury of the health of himself or family; if not, we see no reason why he should be permitted to so contaminate the water that flows from his land to his neighbor, producing the same results, and still escape liability for the damages sustained.' . . . [I]n so far as *Brown & Brothers v. Illius* makes a distinction between pollution brought

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to another's land by subterranean currents and that carried by percolating waters, it must be overruled.¹⁶

The court thereby established in Connecticut the doctrine of correlative rights regarding the pollution of ground water. It did not, however, overrule *Roath* with regard to physical interference with water levels. However, the court acknowledges the modern trend by stating:

There is, however, a strong tendency among the decisions to qualify the absolute right which a landowner was formerly considered to have to immunity from liability for interference with the percolation or flow of subterranean waters, . . .¹⁷

This decision left the status of the *Roath* case uncertain, but the court held that the primary element establishing liability for the pollution of ground water in Connecticut is knowledge and not negligence:

An examination of the decisions suggests, however, that in some of them the court was really addressing itself to the question whether the person charged with the pollution should have known that it was likely to result from his conduct rather than to the inquiry whether there had been a want of reasonable care in the conduct of his business. . . . The latter view accords with the fundamental concepts of negligence and nuisance.¹⁸

In *Hartford Rayon Corporation v. Cromwell Water Company*¹⁹ the court had an opportunity to overrule the *Roath* case, but again declined to do so. In this case plaintiff sought an injunction to prevent the defendant from sinking a well which he thought would divert water from a stream and severely impede his own water supply. The court held that since no actual interference with the water supply had yet been shown, this was not the time to overrule *Roath*:

[T]he decision in *Roath v. Driscoll* . . . has not been overruled and stands as the law of this state. If we continue to adhere to it, plainly the plaintiff has no cause of action, and it urges in this case that we reconsider the matter and adopt the principle established in those American jurisdictions which have departed from the English rule.

As the case stands before us there is no occasion to do this.²⁰

Although this is the most recent Connecticut case concerning the usurpation of ground water to the detriment of another, it should be noted that if water supplies continue to decrease at the present rate, the amount of litigation in this area will increase accordingly. Eventually, in order to prevent such ground water basins

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from being permanently and irreparably injured, the court (or the legislature) may have to establish a pattern of regulatory measures. When conflict with regard to ground water usage reaches a point where the amount of water available for use is less than the demand therefor, it is possible that Connecticut would follow a rule similar to that established in *Pasadena v. Alhambra*.²¹ In the *Pasadena* case, the court applied a rule of "mutual prescription" and held that each of the pumpers who were parties to the action were acting adversely to each other's interest in the preservation of the water supply. Thus:

All parties were restricted to a proportionate reduction in the quantities of water they had been pumping, the total annual pumpage from the basin being limited to the safe yield.²²

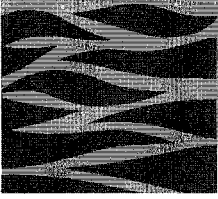
Because the use of ground water in Connecticut is limited, and because problems regarding its use and abuse have arisen so infrequently in the past, there are no statutes either defining or regulating it. The only regulation of ground water resources requires that anyone in the business of drilling or constructing wells must register with the Water Resources Commission and report to it the location of every well drilled so that it can be charted with reasonable accuracy on a geological map.²³

FOOTNOTES—PART THREE

1. 12 M. & W. 324 (1843).
2. As quoted in Galbreath, *Maryland Water Law* at 36 (1965).
3. 30 Conn. 533 (1850).
4. *Id.*, at 541.
5. 25 Conn. 583 (1857).
6. *Id.*, at 590.
7. Use your own property in such a way as not to injure that of another.
8. *Supra* note 5, at 594.
9. *Brown & Bros. v. Illius*, 27 Conn. 84 (1858).
10. *Id.*, at 95.
11. *Id.*, at 101.
12. *Id.*, at 102, 103.
13. 141 Cal. 116, 74 Pac. 766 (1903).
14. Reis, *Legal Planning for Ground Water Production*, 38 So. Cal. L. Rev. 484, 487 (1965).
15. 121 Conn. 579, 186 Atl. 629 (1936).
16. *Id.*, at 590-592, 186 Atl. at 634.
17. *Id.*, at 586, 587, 186 Atl. at 632.
18. *Id.*, at 588, 186 Atl. at 633.

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19. 126 Conn. 194, 10 A.2d 587 (1940).
20. *Id.*, at 197, 198, 10 A.2d at 588.
21. 33 Cal.2d 908, 207 P.2d 17 (1949).
22. Hutchins, *The California Law of Water Rights*, 446 (1956).
23. Public Acts, 1963, P. 187.



PART FOUR:

Surface Water

CONNECTICUT cases dealing with the multiple problems of surface water date back to 1855.¹ Astonishingly over 35 decisions and 50 years elapsed before the courts deemed it necessary to define exactly what was meant by the term itself. The first attempt to define surface water was made in the case of *Thompson v. New Haven Water Company*,² where it was stated that:

Surface water may be defined as waters on the surface of the ground which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence, and which are lost by being diffused over the surface of the ground, through percolation into the soil or evaporation.³

Surface water was distinguished from a water course in *Sozans v. Stratford*.⁴ Thus:

We have heretofore had occasion to consider the distinction between those sources of a natural stream or water course and those which comprehensively though not always with strict accuracy, have been designated surface waters. While we did not attempt to frame an exact definition of the latter, we did say that such waters had their source in fallen moisture and 'as to the form which the water assumed upon the surface of the ground, it was not in any case water collected or flowing in mass, but always water scattered and diffused over the earth as conditions of the weather and the conformation and character of the ground dictated, and standing still or moving aimlessly along until it should be dissipated by percolation or evaporation, or lost in the current of a stream.' . . . On the other hand 'the distinguishing mark' of a water course is a supply which is permanent in the sense that similar conditions will always produce a flow of water and that the conditions recur with some degree of regularity so that they establish and maintain for considerable periods of time a running stream.⁵

The definition of surface water which has gained the widest American support and which was adopted by Connecticut in 1952⁶ is that proposed by the Restatement of Torts:

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[T]hose causal waters which accumulate from natural sources and which have not yet evaporated, been absorbed into the earth or found their way into a stream or lake. The term does not comprehend waters impounded in artificial ponds, tanks, or water mains.⁷

A. Mills and Mill Ponds:

Between 1855 and 1892 the majority of surface water cases dealt with the problem of erecting mills and mill ponds which resulted in flooding of adjacent land. During this period much of the industrial life of Connecticut was centered around such mills; these mills were clearly beneficial to the public well-being because they provided jobs for numerous people and enabled communities to develop and prosper. In order to facilitate the building of mills and protect the rights of the individual land owners, the legislature passed the Flowage Act in 1853.⁸ As revised in 1864, the Flowage Act provided that if one wished to erect a dam for working a water mill:

Which dam would flow water upon land belonging to any other person, he may obtain a right to flow said land upon the terms and conditions expressed in the act.⁹

The act provided that land could not be utilized for flowage purposes without justly compensating its owner. Almost immediately the constitutionality of the act was challenged in *Olmstead v. Camp*¹⁰ and *Todd v. Austin*.¹¹ The court quickly acknowledged the enormous benefit to the public welfare which the act afforded:

If there were any doubt on the subject of first principles, we understand it to be the settled law of the country that the flowing of land for the purposes of mills and manufactories, in view of its effect upon the community, is to be considered as a taking it for public use. It would be difficult to conceive a great public benefit than garnering up the waste waters of innumerable streams and rivers and ponds and lakes, and compelling them with a gigantic energy to turn machinery and drive mills, and thereby build up cities and villages, and extend the business, the wealth, the population and the prosperity of the state. It is obvious that those sections of the country which afford the greatest facilities for the business of manufacturing and the mechanic arts, must become the workshops and warehouses of other vast regions not possessing these advantages; and must receive in exchange for the results of their industry and skill an abundant return of the rich products of the earth, including the precious metals. It is of incalculable im-

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portance to this state to keep pace with others in the progress of improvements, and to render to its citizens the fullest opportunity for success in an industrial competition.¹²

The court upheld the constitutionality of the act as a proper exercise of the power of eminent domain:

The power exercised is the right of eminent domain, which is a part of the legislative power, and is unquestionably delegated in the first clause of the third article of the constitution. This right is a paramount right attached to every man's land, and he holds it subject to its exercise. Bouvier defines it to be the right which the people or government retain over the estates of individuals to resume the same for public use; and that definition is sufficiently comprehensive and in accordance with the authorities.¹³

As distinct from the right of flowage, the court has imposed liability on persons for negligently constructing and maintaining mills resulting in damage to the lands of the adjacent owners. In *State v. Ousatonic Water Company*,¹⁴ which first dealt with this problem, it was stated that:

When the defendants built their dam they were bound to know the habits and peculiarities of this river—what effects had been produced along its banks by its ordinary freshets in the spring of the year when the ice breaks up; they were bound to notice the configuration of the shore, the contracted space at places for the waters of the river to pass, the formation of ice dams, and so far as science could reasonably discover, what would be the effect of a pond created by raising the water twenty-two feet above the natural flow of the stream at the place where the dam was erected and they were bound to act in view of all these facts. The defendants were bound to provide against all the natural result of ordinary freshets in the river, whenever they might occur, and with whatever ordinary combination of circumstances they might be attended.¹⁵

The duty to act responsibly was again emphasized in *Schwab v. Parker Company*.¹⁶ In this case the defendant failed to maintain an embankment sufficiently high to prevent plaintiff's land from being flooded. The court noted:

[T]he defendant is the owner of a mill privilege thereon and ponds the water to a higher level than that of the plaintiff's land and restrains it therefrom by an embankment; that he has neglected to maintain this properly and that, as a consequence of such neglect, water flowed upon and injured the plaintiff's land. . . . there is certainty as to the defendant's duty to maintain the embankment.

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. . . and the judgment is based upon its failure to maintain the portion as to which there is certainty of duty.¹⁷

The majority of cases in this area deal with competing claims to the same water¹⁸ when two parties want to use the same water for milling purposes. This problem first arose in the case of *Curtiss v. Smith*,¹⁹ where the rule was established that if two parties are seeking to avail themselves of the same water to furnish power for a mill and one party is claiming under color of title and the other under the Flowage Act, the law favors the owner:

This statute unmistakably shows a desire and intention on the part of the legislature, that all the water-power of the state shall be improved by somebody for milling purposes. A preference is shown for the owner, and if it appears in a given case that a mill or mill-dam has been erected and used upon a mill site, it shall be deemed to be sufficient assurance that it will be improved again by the owner for milling purposes, and the mill-site shall be exempt from the operation of the statute, unless it appears that, by long-continued non use, all intention so to improve it at any time has been abandoned, when all right on the part of the owner so to improve it, in preference to other proprietors on the stream, shall be deemed to be lost or defeated by abandonment or otherwise. It shall be preserved to him, and he shall have the right to maintain a mill on the site in preference to others, so long as there is any reasonable expectation that the object that the statute has in view will be carried out by the owner; but when that ceases to exist, his preferred right to maintain a mill on the site becomes lost or defeated by abandonment or otherwise. It may be said that in the exercise of the right of eminent domain the law appropriates all mill-sites to public use, but leaves the privilege of carrying out the object of the statute in each particular case to the owner and other proprietors on the stream. To the owner it gives a superior right, and to the other proprietors an inchoate right to the same mill-site. If the owner abandons his privilege, then his superior right is gone, and the case is the same as it would have been if no mill or mill-dam had ever been erected on the site and the maxim applies, *prior tempore prior jure*. No other sensible construction can be given to the statute. No reason can be shown why a distinction should be made in favor of a mill-site upon which, two hundred years ago, a mill-dam was lawfully erected and used for a temporary purpose, but which during the period intervening has never been improved for milling purposes, and against a mill-site upon which no such erections were ever made.²⁰

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In 1893 the Flowage Act was enlarged to cover the making of ice. This amendment provided that:

All of the provisions of § 1216 of the General Statutes shall be applicable in case any person desires to build a dam on his own land to create a pond or reservoir from which to take ice.²¹

A dam owner could only avail himself of ice on his own land and was not allowed to flood the land of another. As was stated in *Greer v. Rockwell*:²²

Statutes authorizing the taking or flowage of land by compulsory process should be construed strictly, and whoever claims under them is confined to a clear and plain exercise of such powers as are expressly granted. . . . An express grant for such a purpose carries, no doubt, whatever is plainly and necessarily incident to it; but it is not plain in the present instance how much if any, of what follows § 1216 can be treated as applicable to proceedings to create an ice-pond. The express mention of one section would naturally seem to import an intention to exclude the others. *Expressio unius exclusio est alterius*. The intention of a legislature can only be gathered from the language it has employed. . . . The statute does not purport to be an amendment of § 1216. It enlarges its applicability but not its terms. The application of the subsequent sections, therefore, is not necessarily enlarged; and as without such an enlargement, and, indeed, without an extension as respects the right to be secured, which is far beyond their original scope, they can afford no aid to the plaintiff, the statute is insufficient to enable him to secure the right of flowage which he seeks, and the demurrer was properly sustained.²³

With the development of modern methods of producing power, decisions concerning the Flowage Act for mill purposes have almost completely ceased.

B. Sewerage Assessments:

In order to rid the land of surface water, towns developed elaborate and efficient sewerage systems. To pay for these systems, assessments were levied on persons owning adjacent lands and who were benefited by the improvement. It was felt that since sewerage systems were unquestionably in the public interest and, since land owners were only being assessed to the extent of the benefit conferred upon them, an attempt to attack the constitutionality of the power itself would be futile. In *Cone v. Hartford*,²⁴ the plaintiff tried to claim that the construction of a sewerage system was a taking of his

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property for which he should be compensated. The court held that this was not a taking; it was merely incident to the original taking of land to build a highway for which compensation had already been made:

There can not be a doubt that, in the laying out and establishment of a highway, the right of repairing and maintaining, as well as of originally constructing it, is embraced, and that therefore when damages are assessed to a person for laying out and constructing a road upon his land, those damages include compensation as well for the repairing of such road as its original construction. Such reparation embraces and extends to the making of such gutters, drains and sewers as are necessary and proper in order to preserve the highway in good condition for the purposes for which it was made. And for those purposes we have no doubt that it is as competent to construct drains and sewers below, as it is upon the surface of the ground. On ordinary country roads the gutters upon their sides are usually deemed sufficient to carry off the water and filth upon them. In populous places however, where they accumulate in greater quantities, or where it may be necessary for the public to use for passing and other proper purposes every part of the highway, it is frequently requisite to make the drains of the highway beneath its surface, and the safety as well as the commodiousness of the public travel, and the healthfulness of the people in its vicinity, may also require it. It is no objection therefore to a sewer in a highway that it is made beneath the surface of the ground, if the circumstances render it proper so to construct it; and that the sewer in question was, in this respect, properly made, is not denied. Such a sewer, like ordinary drains and gutters, falls within the class of ordinary repairs of the highway, and the right of making such a repair is therefore included in the damages which were assessed to the owner of the land on its original establishment. And the original right and duty of the town of Hartford being devolved upon the city, the latter had a clear right to construct the sewer in question, unless that right is taken away or abridged by some other amendment of the charter. We look in vain for any such amendment.²⁵

While conceding the power of towns to make such assessments later owners contested the extent of benefit conferred upon them.²⁶ A typical case is *Sargent & Company v. New Haven*²⁷ where the plaintiff claimed that he was not benefiting from a public sewer. In deciding against him the court stated:

As we have seen, the use of the public sewer is practically essential to the use of the private sewer. That being so, it cannot be said

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that the assessment is unjust. Nor can it be said that it is unjust on the ground that the plaintiff loses the expense incurred, or any considerable part of it, in constructing the private sewer. The plaintiff voluntarily constructed that sewer with knowledge of the situation and circumstances, and had the use of it for ten years before the city sewer was constructed. That of itself may have been worth all that it cost. Be that as it may, the plaintiff took the chances. Moreover, the plaintiff now utilizes its whole system of sewer and drain except the portion between the point of intersection and the outlet, without expense, and has all its sewage carried into deep water, whereby a nuisance is abated and the expense is saved of extending the sewer. Assuming as we do that the plaintiff and all others were bound to make connection with the main sewer at their own expense, we see nothing in this case to distinguish the plaintiff from others specially benefited.²⁸

C. Diffuse Surface Water:

Undoubtedly the major problem regarding surface water exists where one party seeks to prevent such water from entering his land (or to remove it therefrom). When the conflicting landowners are both private citizens, American courts have dealt with the problem in three different ways. Perhaps these best can be labeled the common law approach, the civil law approach, and the reasonable use approach.²⁹ According to the common law approach, surface water is considered a common enemy and anyone is permitted (without liability) to take any steps necessary to prevent it from coming onto or remaining on his land. According to the civil law approach of dominant and servient estates, both parties are required to allow the water to flow in its natural course and cannot take any preventive measures. Under this approach one may not interfere with the natural flow of surface water to the detriment of another's interest. Under the reasonable use approach,³⁰ liability exists only when the interference with the flow of surface water is unreasonable in light of all of the surrounding circumstances. This approach seeks to deal with each case individually and does not attempt to set up any absolute standards.

The Connecticut approach to the problem is a hybrid between the common law and civil law approaches. As early as 1874 with the case of *Grant v. Allen*³¹ the court implied that it was permissible to erect a barrier on ones own land to prevent surface water from flowing onto it from the land of another:

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The right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water, the result of falling rain or melting snow.³²

In *Chadeayne v. Robinson*³³ the court held that:

[I]t is the right of the defendants to erect for the entire depth of their lot a structure which will be a perfect barrier to surface water. Of course that which they may do perfectly and permanently, they may do imperfectly and temporarily; and the plaintiffs must accept the consequences. And this rule is neither suspended nor modified in the present case by the agreement as to the portion of fence to be constructed by each. That agreement was not intended, and is not by either party to be interpreted, as a permanent quit-claim by the other of the right to improve his property to the fullest extent.³⁴

As early as 1867 the court in *Adams v. Walker*³⁵ held that a land owner could not grade his land so that the surface water which would normally remain there would flow onto the land of another:

It of course is immaterial whether the water is turned upon another's land by means of a spout or through projecting from the roof of a building or whether it is lend there by a gutter or ditch, or turned upon it by means of an embankment upon the side of a hill. The effect is the same in turning the water from its natural course upon another's land, and the injury to the party upon whose land it is turned is the same in either case. . . . The jury therefore must, we think, have understood that the defendant had an absolute right to get rid of the inconvenience arising from the surface water upon his land by turning it directly upon the land of the plaintiff. As thus understood the charge was clearly wrong according to well established and acknowledged principles; and we do not feel it necessary to enter further into the principles of law applicable to adjacent land-owners in respect to rain or surface water, which have been so fully argued before us.³⁶

*Stein v. Coleman*³⁷ casts some doubt on exactly what a party had to allege in order to avail himself of this doctrine. Subsequent cases returned to the original formulation noted above.³⁸ Thus in *Shea v. Gavitt*³⁹ the court noted:

[I]t is plain that the right to dispose of surface water by allowing so much of it as is not absorbed by the ground to pursue its natural course, is quite a different thing from the right, claimed in this case, to intercept rainfall and divert it upon adjoining property before it

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reaches the ground at all. . . . [F]or one to construct the roof of his house in such a manner as to discharge the water falling thereon in rain, upon the land of an adjacent proprietor, is a violation of the right of such proprietor, if done without his consent. . . .⁴⁰

In Connecticut a party is not only held liable for altering the natural direction of the flow of surface water, but also for causing it to flow in greater quantities than normal. In *Melin v. Richman*⁴¹ the court stated:

The general principles of law relating to such a situation, gathered from our cases, may be stated as follows: A land-owner cannot collect surface water in an artificial volume and turn it from its natural course in an increased volume upon his neighbor's land to his substantial injury. . . . This is true although no more water is collected than would have naturally flowed upon the property in a diffused condition, for it is evident that, while a given piece of land may receive a large amount of surface water without injury thereto, when it gently flows thereon from natural causes, yet when collected and discharged in considerable volume at a given point, it may become very destructive and injurious.⁴²

The present Connecticut position regarding this problem may be found in the leading Connecticut case of *Tide Water Oil Sales Corporation v. Shimelman*,⁴³ which is far the most scholarly treatment of the problem in Connecticut. Chief Justice Maltbie noted:

[The] law may be summarized as follows: A land owner is under no duty to receive upon his land surface water from the adjacent properties, but in the use or improvement of it he may repel such water at his boundary. On the other hand, he incurs no liability by reason of the fact that surface water falling or running onto his land flows thence to the property of others in its natural manner. But he may not use or improve his land in such a way as to increase the total volume of surface water which flows from it to adjacent property, or as to discharge it or any part of it upon such property in a manner different in volume or course from its natural flow to the substantial damage of the owner of that property.⁴⁴

There have been two recent decisions in this area—*Rutka v. Rzegocki* in 1945,⁴⁵ and *Taylor v. Conti* in 1962.⁴⁶ Both of these cases follow the rule of the *Tide Water* case.

When one of the parties is a municipality, the surface water problem is dealt with in a distinct manner. As early as 1871 in *Judge v. Meriden*,⁴⁷ it was held that when a city is improving a highway by grading it and thus alters the natural flow of surface water causing damage to adjacent private property, the city would

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not be held liable. In *Bronson v. Wallingford*,⁴⁸ it was stated that it would be almost impossible for a city to prevent surface water from flowing onto the land of adjacent property when making road repairs and to hold the town responsible would be unrealistic:

The defendant so graded the streets and constructed its drains, sewers and culverts (presumptively in the best manner), as to cause the water to flow on the plaintiff's land. The intent charged we consider as an intent simply to change the grade, and not a malicious intent to injure the plaintiff. Surface water must be turned from the roadbed into drains and gutters, and at times will flow in considerable quantity. It would be practically impossible for towns, cities and boroughs in most cases to prevent such water from flowing on to the lands of the adjoining proprietors. To hold them responsible for not doing so in all cases, would be unreasonable.⁴⁹

Unless the damage comes within one of the drainage statutes, the sovereign immunity of a municipality prevents it from being liable.⁵⁰ However, this seems to be in conflict with the Constitution of Connecticut,⁵¹ as well as the Constitution of the United States,⁵² both of which prohibit the taking of private property for public use without just compensation. When this question was raised in *Rudnyai v. Harwinton*,⁵³ the court simply evaded it by saying that such repairs could only be made if necessary:

Whether even under such circumstances it could be done without compensation to the owner, we need not decide, as the court has found that in order to dispose of the water collected upon the highway in the manner described, it was not necessary to turn it upon the plaintiffs' land, but that by a moderate expenditure of money it could have been and still could be carried off by the ditches upon the sides of the road and so as not to injure the plaintiffs' property.⁵⁴

When the same problem arose two years later in the case of *Salzman v. New Haven*,⁵⁵ the question of the constitutionality of municipal action was not raised by the plaintiff. Likewise, in two more recent decisions, *Somers v. Hill*⁵⁶ and *Taylor v. Conti*,⁵⁷ the question of constitutionality was not considered. This may be due in part to the earlier case of *Torrington v. Messenger*⁵⁸ where it was stated that:

Any construction accorded to it must bear the test of constitutionality, if the section is to be an operative one. Clearly, its language must be kept within such bounds that it shall not authorize the taking of private property without due process of law and just com-

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pensation. It seems quite apparent that if full meaning and scope is to be given to the language employed, as the ordinary man might read it, rights would be conferred which it would be hard to defend under constitutional limitations. We have no occasion in this case to enter upon a further discussion of this subject. We have, however, felt it our duty to sound a note of warning to any who may wish to avail themselves of the powers conferred, or apparently conferred, by this statute, to be well advised that their action is such as is not forbidden by organic law.⁵⁹

The basis for subsequent misinterpretation results from the simple assumption by this court that no taking occurred and a failure by later courts to realize this.

The court again succumbed to this faulty logic in *Postemski v. Watrous*,⁶⁰ where the court stated that the highway drainage statute did not create an encumbrance upon an adjoining landowner's property because it would be unconstitutional:

If the statute is construed as creating a right in the land which diminishes its value and thereby constitutes an encumbrance, its constitutionality would be open to serious question as permitting a taking of private property without compensation. On the other hand, if it is construed only as a limitation on the state's liability for concentrating the discharge of surface water upon the land of a private owner in derogation of the common law, it has a firmer basis.⁶¹

It is interesting to note that the highway drainage statute with which the *Potemski* case dealt has been repealed and been replaced. The former section was boldly entitled "Highway may be drained into private lands." It said:

Persons authorized to construct or to repair highways may make or clear any watercourse or place for draining off the water therefrom into or through any person's land so far as necessary to drain off such water and, when it is necessary to make any drain upon or through any person's land for the purpose named in this section, it shall be done in such way as to do the least damage to such land; provided nothing in this section shall be so construed as to allow the drainage of water from such highways into, upon, through or under the yard of any dwelling house, or into or upon the yards and enclosures used exclusively for the storage and sale of goods and merchandise.⁶²

The new section reads:

The commissioner may make alterations in the state highway system and in making any such alteration he shall consider the best interest

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of the state, taking into consideration but not being limited to the following factors: Traffic flow, origin and destination of traffic, integration and circulation of traffic, continuity of routes, alternate available routes and changes in traffic patterns. The relative weight to be given to any factor shall be determined by the commissioner. All alterations in said highway system shall be reported to the legislature each biennium.⁶³

Possibly this change was due to an increasing recognition in the legislature of the constitutional problems involved.⁶⁴

Although Connecticut cases in the area of surface water have been fairly numerous, it has been pointed out that there are no Connecticut cases dealing with the use of such water.⁶⁵ The reason for this seems fairly obvious, since it is accepted almost universally that:

[A]n owner of land owns its surface water by the same title as he owns the land itself, and he has the right to collect and appropriate it to his own use without liability to others. Riparian rights do not attach to surface waters and a lower proprietor has no right to have surface water flow to his land from higher land.⁶⁶

As a final note it should be observed that the two most recent Connecticut cases⁶⁷ dealing with the problem of surface water have been decided on the basis of nuisance doctrine. It is possible that a new trend is being established.

FOOTNOTES—PART FOUR

1. *French v. White*, 24 Conn. 170 (1855).
2. 86 Conn. 597, 86 Atl. 585 (1913).
3. *Id.*, at 603, 86 Atl. at 588 (1913).
4. 112 Conn. 563, 153 Atl. 164 (1931).
5. *Id.*, at 566-67, 153 Atl. at 165 (1931).
6. *Taylor v. Conti*, 149 Conn. 174, 177 A.2d 670 (1962).
7. Restatement, *Torts* § 846, comment B.
8. Revised Statutes, 1853, Title 47.
9. Revised Statutes, 1866, P. 89.
10. 33 Conn. 532 (1866).
11. 34 Conn. 78 (1867).
12. *Supra* note 10, at 550-51.
13. *Supra* note 11, at 87.
14. 51 Conn. 137 (1883).
15. *Id.*, at 141-42.
16. 55 Conn. 370, 11 Atl. 183 (1887).
17. *Id.*, at 371-372, 11 Atl. at 183.
18. *Curtiss v. Smith*, 35 Conn. 156 (1868); *Cccum Co. v. Sprague Mfg. Co.*,

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- 35 Conn. 496 (1868); *Elting Woolen Co. v. Williams*, 36 Conn. 310 (1869); *Robertson v. Miller*, 40 Conn. 40 (1873); *McArthur v. Morgan*, 49 Conn. 347 (1881).
19. 35 Conn. 156 (1868).
20. *Id.*, at 159-60.
21. Public Acts, 1893, Chapter 76 § 1216.
22. 65 Conn. 316, 32 Atl. 924 (1895).
23. *Id.*, at 323-24, 32 Atl. at 925.
24. 28 Conn. 363 (1859).
25. *Id.*, at 372-73.
26. *Clapp v. Hartford*, 35 Conn. 66 (1868); *Hungerford v. Hartford*, 39 Conn. 279 (1872); *Sargent & Co. v. New Haven*, 62 Conn. 510, 26 Atl. 1057 (1893); *Downs v. Ansonia*, 73 Conn. 33, 46 Atl. 243 (1900).
27. 62 Conn. 510, 26 Atl. 1057 (1893).
28. *Id.*, at 514, 26 Atl. at 1059.
29. *Kinyon and McClure, Interferences with Surface Waters*, 24 Minn. L. Rev. 891, 893 (1940).
30. *Id.*, at 904.
31. 41 Conn. 156 (1874).
32. *Id.*, at 160.
33. 55 Conn. 345, 11 Atl. 592 (1887).
34. *Id.*, at 350-51, 11 Atl. at 593 (1887).
35. 34 Conn. 466 (1867).
36. *Id.*, at 467, 468.
37. 73 Conn. 524, 48 Atl. 206 (1901).
38. *Goldman v. New York, N.H. & H.R. Co.*, 83 Conn. 59, 75 Atl. 148 (1910); *Shea v. Cavitt*, 89 Conn. 359, 94 Atl. 360 (1915).
39. *Supra* note 38.
40. *Id.*, at 365-66, 94 Atl. at 362.
41. 96 Conn. 686, 115 Atl. 426 (1921).
42. *Id.*, at 688, 115 Atl. 426, 427.
43. 114 Conn. 182, 158 Atl. 229 (1932).
44. *Id.*, at 189, 90, 158 Atl. at 231.
45. 132 Conn. 319, 43 A.2d 658 (1945).
46. 149 Conn. 174, 177 A.2d 670 (1962).
47. 38 Conn. 90 (1871).
48. 54 Conn. 513, 9 Atl. 393 (1887).
49. *Id.*, at 520, 9 Atl. 394.
50. *Sellick v. Hall*, 47 Conn. 260 (1879); *Downs v. Ansonia*, 73 Conn. 33, 46 Atl. 243 (1900); *Goodspeed's Appeal*, 75 Conn. 271, 53 Atl. 728 (1902).
51. Art. 1, Sect. 2.
52. Amendment V, United States Constitution.
53. 79 Conn. 91, 63 Atl. 948 (1906).
54. *Id.*, at 96-97, 63 Atl. at 951.
55. 81 Conn. 389, 71 Atl. 500 (1908).
56. 143 Conn. 476, 123 A.2d 468 (1956).

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57. 149 Conn. 174, 177 A.2d 670 (1962).
58. 74 Conn. 321, 50 Atl. 873 (1902).
59. *Id.*, at 323-24, 50 Atl. at 874.
60. 151 Conn. 183, 195 A.2d 425 (1963).
61. *Id.*, at 187-88, 195 A.2d at 428.
62. Revised Statutes, 1958, Title 13, Sect. 18.
63. Revised Statutes, 1966, Title 13A, Sect. 18.
64. Other statutory sections which one should be acquainted with are Conn. Gen. Statutes §§ 52-456 to 52-461. These sections deal with the drainage of land.
65. Fisher, *Connecticut Law of Water Rights* (Mimeo., 1957).
66. 93 C.J.S. 803.
67. *Brennan v. West Haven*, 151 Conn. 689, 202 A.2d 134 (1964); *Cyr v. Brookfield*, 153 Conn. 261, 216 A.2d 198 (1965).

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APPENDIX B:

ESTABLISHMENT OF WATER RESOURCES COMMISSION AND GENERAL POWERS

Sec. 25-1. Appointment and qualifications of commission. There is established a water resources commission for the purpose of planning and coordinating all activities concerning the abatement of pollution, problems involving flood control, shore erosion and water policy and problems involving the construction of dams, dikes and reservoirs. Said commission shall be composed of seven members appointed in the manner hereinafter provided. One of said members shall be a representative of the state department of health and the other members shall represent one each of the following interests: Agriculture; fish, wild life and recreation; manufacturing; electric or water utilities; municipalities; and the public at large. On or before June first in the years in which the terms of any such members expire, the governor shall, with the advice and consent of the senate, appoint commissioners to succeed such members for terms of four years from June first in the year of their appointment. If any vacancy occurs in said commission, the governor shall fill the same until the third Wednesday of the next succeeding regular session of the general assembly.

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SEC. 25-2. Chairman; employees. The commission shall elect from its membership a chairman; and it may employ a director and a deputy director, and, subject to the provisions of chapter 63, such assistants as may be required. Said commission may make use of the Connecticut Agricultural Experiment Station and the facilities of the station, and may cooperate with any other public or private agency in carrying out the provisions of this title. Any commissioner or any assistant or employee of said commission may, at any reasonable time, enter any premises while engaged in the performance of duty under the provisions of this title.

Sec. 25-3. Powers. (a) The water resources commission is authorized, as the representative of the state of Connecticut, to negotiate, cooperate and enter into agreements or compacts with authorized agencies representing any one or more states or commonwealths, or the United States, or any combination thereof, relative to flood control, river and harbor improvements or obstructions, navigation, pollution of interstate waters, diversion of interstate waters, and the use of such interstate waters by any agency of the United States, or any one or more states or commonwealths, which will tend to increase the hazard of damage to persons or property located or situated in this state by reason of flood waters or which will in any way interfere adversely with the navigability of any stream or river located wholly or partially within this state during periods of low flow in the main stream or any of its tributaries. (b) Said commission is designated as the shore erosion agency of the state for the purpose of cooperating with the beach erosion board of the department of defense, as provided for in section 2 of the "River and Harbor Act" adopted by congress and approved July 3, 1930, and known as H.R. Number 11781 of the second session of the 71st congress Said commission shall carry out investigations and studies of conditions along the shore line, harbors, rivers and islands within the territorial waters of the state in order to promote and encourage the healthful recreation of its citizens and with a view to devising and projecting economical and effective methods and works for preventing and correcting shore erosion and damage to public and private property therefrom and to prevent inundation of improved property by storms, erosion and ravages of the sea.

Sec. 25-4. Approval of agreements or compacts. No agreement or compact provided for in subsection (a) of section 25-3 shall be entered into by said commission until it has been approved by the governor and any such agreement or compact shall contain a provision that the agreement or compact shall not become effective until ratified by the general assembly of this state.

Sec. 25-7a. Sale of water by public water systems. (a) Whenever any public water system has water reserves in excess of those required to maintain an abundant supply of water to inhabitants of its service

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area, such system may sell such excess water to any other public water system upon approval of the water resources commission. Such approval shall be given only after the applicant has clearly established to the satisfaction of the commission that such abundant supplies are in existence and will continue to be in existence for five years or for such longer period as the applicant seeks permission to sell excess water. The commission shall make such determination on the basis of generally accepted engineering principles and techniques. The commission shall make an appropriate investigation in making such determination or may have an investigation made by an independent person; in either event the cost of such investigation shall be borne by the applicant. Permission granted under this subsection shall be valid for such period up to ten years as the commission shall approve, and may be renewed in the same manner as an original application. "Public water system" includes a corporation, company, association, joint stock association, partnership or person, or lessee thereof, owning, maintaining, operating managing or controlling any pond lake, reservoir or distributing plant employed for the purpose of supplying water for general domestic use in any town, city or borough, or portion thereof, within this state. Permission granted under this section shall be in addition to any approval or other authorization which a public water system must by law receive from the public utilities commission, and nothing in this section shall be construed to impair the jurisdiction of the public utilities commission. (b) Any company, town, city, borough, corporation or person may appeal from any decision of said commission issued under the provisions of subsection (a) of this section to the superior court as provided in sections 16-35 to 16-39, inclusive.

APPENDIX C:

STATE WATER RESOURCES COMMISSION— REMOVAL OF SAND AND GRAVEL FROM TIDAL WATERS

Sec. 25-10. Removal of sand and gravel from lands under tidal and coastal waters. The water resources commission, which, for the purpose of this part, shall include in its membership * * * *a member designated by the shell-fish commission*, shall regulate the taking and removal of sand, gravel and other materials from * * * lands under tidal and coastal waters with due regard for the prevention *or alleviation* of shore erosion, the protection of necessary shell-fish grounds and fin-fish habitats, the preservation of necessary wildlife habitats, * * * the development of adjoining uplands, * * * *the rights of riparian property owners*, the creation and improvement of channels and boat basins, the improvement of coastal and

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inland navigation for all vessels including small craft * * * for recreational purposes and the improvement, protection or development of uplands bordering upon * * * tidal and coastal waters, *with due regard for the rights and interests of all persons concerned.*

Sec. 25-11. Permit. Except for purposes of maintaining existing channels, turning basins, vessel berths, *mooring areas* and other * * * waterfront facilities, no person, firm or corporation, *public or private*, shall * * * remove * * * sand, gravel or other material lying below the mean high water mark of the tidal and coastal waters of the state unless such person, firm or corporation * * * first obtains a * * * permit from the commission and agrees to comply with the conditions prescribed in such * * * permit, *including a certification by the commission that payment for such sand, gravel and other materials shall be made to the state, the amount of any such payment and the time or times of payment, when such materials are disposed of for commercial purposes.*

Sec. 25-12. Hearings on permit applications. Conditions for removal. The commission or a *designated subcommittee* shall hold public hearings upon all applications for removal permits and, at any such hearing, any person may appear and be heard. At least ten days prior to the hearing on any application, notice of such application and hearing shall be published in a newspaper having a circulation in the town in which, or nearest which, the proposed removal is to be conducted. All applications, maps and documents relating thereto shall be open for public inspection at the office of the commission. The commission may make such further regulations for the receipt and processing of applications as it deems necessary or proper. The commission shall, upon granting an application, prescribe conditions regulating the removal and disposal of sand, gravel or other material to be taken and may make reasonable regulations and require bonds to enforce the conditions prescribed by it, and may revoke or suspend any removal permit upon violation of such conditions. The affirmative vote of a majority of the members shall be necessary to grant, deny, revoke or suspend a permit. The commission shall state upon its records its finding and reason for the action taken.

Sec. 25-14. Layout of channels. The creation, widening, deepening or lengthening of channels in, across or upon state lands under tidal and coastal waters is hereby declared to be affected with the public interest. In addition to its other powers and duties and in conformity with the purposes thereof, the commission shall have the power and authority, after a public hearing, subject to the issuance of a permit by the corps of engineers of the United States Army, to designate and lay out channels across state lands under tidal and coastal waters for the purpose of providing access to and from deep water to uplands adjacent to or bordering state lands under tidal and coastal waters and for the im-

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provement of coastal and inland navigation by vessels, including small craft for recreational purposes.

Sec. 25-15. Bond of permittee. After the layout and designation of any channel by the commission, the commission may authorize any person, firm or corporation to take sand, gravel or other material from state lands under tidal and coastal waters in any such proposed channel in accordance with section 25-12. When any damage may arise to any person, firm or corporation from the taking of sand, gravel or other material from any channel so laid out or designated, if the applicant authorized by the commission to take sand, gravel or other material from such channel cannot agree with such person, firm or corporation as to the amount of damage which may result from such taking, the commission shall require the applicant, as a condition precedent to the taking of sand, gravel or material pursuant to any permit hereunder, to post bond, with good and sufficient surety, or to deposit such sum with the state treasurer, for the protection of any person, firm or corporation claiming damage which may result from such taking, as the commission determines sufficient to cover all damages, including interest from the date of the taking, which could reasonably result to any person, firm or corporation from such taking.

SEC. 25-16. Determination of damage. The procedure for the subsequent determination of the amount of actual damage shall be as follows: The commission shall prefer a petition to the superior court for Hartford county or to a judge thereof in vacation, praying that the amount of such damage may be determined. Such petition shall be accompanied by a summons signed by competent authority, to be served as process in civil action before said court, notifying the applicant and any person, firm or corporation claiming damage from the taking, to appear before said court or such judge, and thereupon said court or judge shall appoint a committee of three disinterested persons, one of whom may be a state referee, who shall be sworn before commencing their duties. Such committee, after giving reasonable notice to all parties of the time and place of hearing, shall hear and receive evidence from all parties concerning the damage and shall make an award. Such committee shall make a report of its doings and the award to said court or such judge, who may accept such report or reject it for irregular or improper conduct by the committee in the performance of its duties. If the report is rejected, the court or judge shall appoint another committee, which shall proceed in the same manner as the first committee was required to proceed. If the report is accepted, such acceptance shall have the effect of a judgment and the applicant shall pay the amount of any such award to the clerk of the superior court for the account of the persons entitled thereto within sixty days after the judgment is entered or,

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in the case of an appeal, after the final judgment. Any party may, within sixty days, appeal such judgment in the manner provided by law.

Sec. 25-17. Appeal from commission. Any person, firm or corporation, whether public or private, aggrieved by any order, authorization or decision of the commission may appeal therefrom to the superior court for Hartford county within fifteen days after the issuance of such order, authorization or decision. Such appeal shall have precedence in the order of trial in accordance with the provisions of section 52-192.

Sec. 25-18. Penalty. Any person who removes any sand, gravel or other material in violation of section 25-11 shall, for each offense, be fined not more than one hundred dollars or imprisoned not more than thirty days or both and each day of continuing violation shall be construed to be a separate offense.

APPENDIX D:

SEWERAGE DISCHARGE

Sec. 25-25. Definitions. As used in this part, "waters of the state" includes that portion of the Atlantic Ocean and its estuaries and Long Island sound and its estuaries within the state, and all springs, ponds, streams, lakes, rivers, wells and bodies of surface or underground water, whether natural or artificial, within the boundaries of this state or subject to its jurisdiction and "sewage" means human and animal excretions and all domestic and such manufacturing wastes as may tend to the detriment of the public health.

Sec. 25-26. Pollution of waterways. No person, corporation or municipality shall place in or permit to be placed in, or discharge or permit to flow into, any of the waters of the state, any sewage prejudicial to public health. The * * * *commissioner* of health *shall* investigate all points of sewage discharge and *shall* examine all existing or proposed public sewerage systems, refuse disposal plants *and refuse disposal areas*, and *shall* compel their operation in a manner which shall protect the public health *and shall* order their alteration, extension and replacement when necessary for the protection of public health, and the qualifications of the operators of sewage treatment plants shall be subject to the approval of the state department of health. No public sewerage system or refuse disposal plant shall be built *or refuse disposal area established* until the plan or design of the same *and the method of operation thereof* have been filed with * * * *said commissioner*, and no such system or plant shall be built, extended or replaced, the effluent or discharge from which may directly or indirectly mingle or come in contact with the waters of the

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state until the plan for the same has been approved by the water resources commission under the provisions of part I. (February, 1965, P.A. 385, S. 1; 508.) Provision shifting jurisdiction from department to commissioner and including refuse disposal areas effective July 1, 1965; remainder effective October 1, 1965.

Sec. 25-27. Complaints concerning pollution of waters; investigation; orders. Whenever complaint, in writing, is made to the state department of health by the mayor of a city, any of the selectmen of a town, the warden or any of the burgesses of a borough, any committeeman of a fire district or the local director of health of a city or town, of an existing or threatened pollution of any of the waters of the state, said department shall investigate such complaint, and whenever said department has reason to believe that any of the waters of the state are being polluted in a manner prejudicial to the public health, it may, upon its own motion, investigate such pollution. If said department finds that any of the waters of the state are being polluted in a manner prejudicial to the public health, it may issue such orders as may be necessary to prevent the continuance of such pollution.

Sec. 25-28. Orders of state department; appeals. Any person, corporation or municipality aggrieved by any order of said department may appeal to the superior court for the county wherein the pollution occurs or wherein the sewerage system or refuse disposal plant is located. Such appeal shall be by a petition in writing and shall be taken within thirty days from the date on which the order appealed from is mailed or served. A copy of such petition shall be served on the commissioner of health at least twelve days before the return day. Said court may hear such appeal and determine all questions thereon, either by itself or a committee, in the same manner as upon complaints for equitable relief, and make such order as may be equitable. Such appeal shall be a supersedeas of the order appealed from until final action of the court thereon.

Sec. 25-29. Failure to comply with order. If any person, corporation or municipality fails to comply with any order issued under the provisions of this part, the state department of health shall bring a complaint against such person, corporation or municipality to the superior court for Hartford county, and said court may enforce such order in any appropriate manner.

Sec. 25-30. Rights not to vest. Nothing contained in this part shall be construed as recognizing a vested right in any person, corporation or municipality to discharge sewage into the waters of the state, or as legalizing such disposal of sewage.

Sec. 25-31. Penalty. Any person, the directors of any private corporation or the trustee of any institution, who discharge sewage or permit the same to flow into the waters of the state contrary to the

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provisions of this part, shall be fined not more than five hundred dollars for each offense or imprisoned not more than six months or both.

APPENDIX E:

PROTECTION AND ACQUISITION OF PURE WATER SUPPLIES BY STATE DEPARTMENT OF HEALTH, LOCAL TOWNS, CITIES, AND AUTHORITIES

Sec. 25-32. Water and ice supplies; jurisdiction of state department of health. The state department of health shall have jurisdiction over all matters concerning the purity of any source of water or ice supply used by any municipality, public institution or water or ice company for obtaining water or ice. The qualifications of the operators of plants for the treatment of water furnished or intended to be furnished to any such water supply shall be subject to the approval of said department. The term "source of water or ice supply" includes all springs, streams, water courses, brooks, rivers, lakes, ponds, wells or underground waters from which water or ice is taken, and all springs, streams, water courses, brooks, rivers, lakes, ponds, wells or underground waters tributary thereto and all lands drained thereby.

Sec. 25-33. Water supply; statement to department. Each person, firm or corporation supplying water to the public shall, on request, furnish the state department of health with all reasonable information regarding its water works and the source from which its supply of water is derived. No system of water supply owned or used by such municipal or private corporation or individual shall be constructed until the plans therefor have been submitted to and approved by said department. Said department shall consult with and advise any municipality or private corporation or individual having or desiring to have any system of public water supply as to proposed sources of water supply and methods of assuring their purity. Each petition to the general assembly for authority to develop or introduce any system of public water supply shall be accompanied by a copy of the recommendation and advice of said department thereon.

Sec. 25-34. Investigation of water supply. The state department of health may, and upon complaint shall, investigate any system of water supply or source of water or ice supply from which water or ice used by the public is obtained, and, if it finds any pollution or threatened pollution which in its judgment is prejudicial to public health, it shall notify the owner of such system of water or ice supply, or the person or corpora-

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tion causing or permitting such pollution or threatened pollution, of its findings and after hearing shall make such orders as it deems necessary to protect such water or ice supply and render such water or ice safe for domestic use.

Sec. 25-39. Pollution of drinking water. Any person who puts anything into a well, spring, fountain, cistern or other place from which water is procured for drinking or other purposes, with the intent to injure the quality of such water, shall be fined not more than five hundred dollars or imprisoned not more than six months.

Sec. 25-40. Analysis of water. Town, city and borough directors of health shall, when in their judgment health may be menaced or impaired through a water supply, send, subject to the approval of the state department of health, samples of such water to said department for examination and analysis, and the expense of such examination and analysis shall be paid out of the funds appropriated to said department. Any person, firm or corporation which operates or maintains a laboratory in which any determination, examination or analysis is made of any sample of water or sewage as a basis for advice as to the sanitary quality of such water or sewage or as to any possible danger to health involved, unless such laboratory has been approved specifically for that purpose by the state department of health, after meeting the requirements established by said department, shall be fined not more than one hundred dollars.

Sec. 25-42. Power to take lands and streams. Any town, city, borough or corporation authorized by law to supply the inhabitants of any town, city or borough with pure water for public or domestic use may take and use such lands, springs, streams or ponds, or such rights or interests therein, as the superior court, or any judge thereof in vacation, on application, deems necessary for the purposes of such supply. For the purpose of preserving the purity of such water and preventing any contamination thereof, such town, city, borough or corporation may take such lands or rights as the superior court, or any judge thereof in vacation, on application, deems necessary therefor. In any case in which the law requires compensation to be made to any person whose rights, interests or property may be injuriously affected by such orders, said court or such judge shall appoint a committee of three disinterested property owners of the county, who shall determine and award the amount to be paid by such authorities before such order is carried into effect.

Sec. 25-43. Bathing in and pollution of reservoirs. (a) Any person who bathes in any reservoir from which the inhabitants of any town, city or borough are supplied with water, or in any lake, pond or stream tributary to such reservoir, or who casts any filthy or impure substance into such reservoir, or any of its tributaries, or commits any nuisance in or about it or them, shall be fined not more than one hundred dollars or

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imprisoned not more than six months or both. Prosecutions under this subsection may be had in the town in which such city or borough is located. (b) No person, after notice has been posted that any reservoir, lake or pond, or any stream tributary thereto, is used for supplying the inhabitants of a town, city or borough with water, shall wash any animal or clothing or other article therein. No person shall throw any noxious or harmful substance into such reservoir, lake, pond or stream, nor shall any person, after receipt of written notice from the director of health having jurisdiction that the same is detrimental to such water supply, permit any such substance to be placed upon land owned, occupied or controlled by him, so that the same may be carried by rains or freshets into the water of such reservoir, lake, pond or stream, or allow to be drained any sewage from such land into such water. Any person who violates any provision of this subsection shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

Sec. 25-43, subsec. (a). Bathing or swimming in reservoirs and tributaries. Any person who bathes or swims in any reservoir from which the inhabitants of any town, city or borough are supplied with water, or in any lake, pond or stream tributary to * * * *any distribution reservoir, or in any part of any lake, pond or stream tributary to any storage reservoir, which part is distant less than two miles measured along the flow of water from any part of such storage reservoir, and any person who casts any filthy or impure substance into any such reservoir, whether distribution or storage, or any of its tributaries, or commits any nuisance in or about it or them, shall be fined not more than one hundred dollars or imprisoned not more than six months, or both. * * * For the purposes of this section, a storage reservoir is defined as an artificial impoundment of substantial amounts of water, used or designed for the storage of a public water supply and the release thereof to a distribution reservoir, defined for the purpose of this section as a reservoir from which water is directly released into pipes or pipelines leading to treatment or purification facilities or connected directly with distribution mains of a public water system.*

Sec. 25-45. Local ordinances concerning reservoirs. The legislative body of any city or borough may make, alter and repeal ordinances to regulate or prevent fishing, trespassing or any nuisance in or upon any property of such city or borough or of any subdivision thereof. Such ordinances may provide for the imposition of a fine not exceeding fifty dollars or imprisonment for not more than six months, or both, for any violation thereof. The common council of any city or the warden and burgesses of any borough may appoint special constables to protect reservoir property and to execute any such ordinance and any provision of the statutes relating to protection of water supply, and for that purpose

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such constables shall have all the powers of constables of towns.

SEC. 25-46. Interstate waters used for drinking water supply. For the purpose of protecting the purity of interstate waters used or intended for use by any municipality, public institution or water company of this or of any adjoining state or states as sources of drinking water supply, and with a view to reciprocal action by adjoining states for the benefit of this state, the state department of health is authorized, at the request of the department of health, or the official body having similar powers and duties, of an adjoining state, to provide in the sanitary code regulations for the protection of the purity of the waters of any lakes, ponds, streams and reservoirs, within any specified drainage area in this state, tributary to any such drinking water supply of an adjoining state.

Sec. 25-47. Ice; pollution of source; notices; exception. No person shall, without having obtained permission or right, cut, damage or pollute ice upon any river, brook, lake, pond, reservoir or other waters from which ice is taken for domestic use or for use as an article of merchandise, after the owner of such waters, or the person, firm or corporation having control of the same, has posted notices as provided in section 25-48, nor shall any person throw or deposit any stick, stone or other substance upon such ice whereby the cutting thereof is interfered with or the quality or value of such ice is affected, or put any filthy or impure substance into any waters from which such ice may be taken; but the provisions of this section shall not affect the rights any manufacturing establishment had, on October 1, 1909, to use any waters in carrying on its business.

Sec. 25-48. Ice; control of sources of supply; notices. Whenever any person, firm or corporation has the right to take ice from any river, brook, lake, pond, reservoir or other waters, and such person, firm or corporation has posted printed notices in conspicuous places upon the land adjacent to such waters, substantially setting forth the provisions of sections 25-47 and 25-49 and also containing a statement that ice is to be taken from such waters for domestic use or for use as an article of merchandise, no person shall trespass upon the premises or ice which has been posted in accordance with the provisions of this section without having obtained permission from the owner or person, firm or corporation having control of such ice. Whenever the ownership or right to take all the ice on any body of water is not in one person, firm or corporation, such notices shall describe the limits of ownership of such ice and posts shall be placed thereon to indicate the boundaries of such posted area.

Sec. 25-51. Injunction against injury to ice or water supply. Whenever any land or building is so used, occupied or suffered to remain that it is a source of pollution to any river, brook or water which flows into any lake, pond or water from which ice is procured for domestic use or for use as an article of merchandise, and such ice is liable to

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pollution therefrom, or whenever any land or building is so used, occupied or suffered to remain that it is a source of pollution to the water stored in a reservoir used for supplying residents of a town, city or borough with water or ice, or to any source of supply to such reservoir, or when such water or ice is liable to pollution in consequence of the use of the same, the authorities of such town, city or borough, or the town director of health, or the person, firm or corporation having charge of such reservoir or the right to procure ice therefrom, may apply for relief to the superior court for the county wherein such reservoir or water is located, and said court may make any order in the premises, temporary or permanent, which in its judgment, may be necessary to preserve the purity of such water or ice. Such town, city, borough or company, by its officers or agents duly appointed, or the town director of health, may, at all reasonable times, enter upon and inspect any premises within the watershed tributary to such water supply or waters from which such ice is procured, and, if any nuisance likely to pollute such water or ice is found therein, such officers may abate such nuisance after reasonable notice to the owners, or occupants of such premises and their refusal or neglect to abate the same, and such town, city, borough or company shall be liable for all unnecessary or unreasonable damage done to such premises.

Sec. 25-53. Abatement of nuisance. Whenever any order is made by the superior court for the abatement of any nuisance to such water or ice, and said court finds that compliance with such order will damage any person or corporation or deprive him or it of any substantial right, said court may assess just damages in favor of such person or corporation, to be paid by such municipality, person or corporation as the court decrees.

Sec 25-54. Sale of ice regulated. Any person who sells or offers to sell, for family, hotel, boarding-house or restaurant use, ice cut or taken from a pond, lake or stream other than a river, into which any sewer empties, or from such part of a river as is below and within two miles of the point where the discharge from any sewer enters such river, or ice cut from a body or stream of water within two hundred feet from the place where any house drain enters such body or stream of water, or ice cut from any body of water or stream the water or ice from which has been condemned as unfit for use or dangerous to public health by the local director of health of the town, city or borough where such body of water or stream is located, or ice which has been placed in a yard, building or cart, with ice taken from any of the foregoing sources, shall be fined fifty dollars or imprisoned not more than sixty days or both. Any person aggrieved by an order issued or made by a director of health

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under the provisions of this section may appeal, with two weeks from the date of such order, in the manner provided for appeals from the orders of town directors of health.

APPENDIX F:

1967 POLLUTION CONTROL ACT—CONNECTICUT

PUBLIC ACT NO. 57

AN ACT CONCERNING THE ELIMINATION OF POLLUTION OF THE WATERS OF THE STATE.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

SECTION 1. It is found and declared that the pollution of the waters of the state is inimical to the public health, safety and welfare of the inhabitants of the state, is a public nuisance and is harmful to wildlife, fish and aquatic life and impairs domestic, agricultural, industrial, recreational and other legitimate beneficial uses of water, and that the use of public funds and the granting of tax exemptions for the purpose of controlling and eliminating such pollution is a public use and purpose for which public monies may be expended and tax exemptions granted, and the necessity and public interest for the enactment of this act and the elimination of pollution is hereby declared as a matter of legislative determination.

SEC. 2. As used in this act: "Commission" means the water resources commission; "waters" means all tidal waters, harbors, estuaries, rivers, brooks, watercourses, waterways, wells, springs, lakes, ponds, marshes, drainage systems, and all other surface or underground streams, bodies or accumulations of water, natural or artificial, public or private, which are contained within, flow through or border upon this state or any portion thereof; "wastes" means sewage or any substance, liquid, gaseous, solid or radioactive, which may pollute or tend to pollute any of the waters of the state; "pollution" means harmful thermal effect or the contamination or rendering unclean or impure of any waters of the state by reason of any wastes or other material discharged or deposited therein by any public or private sewer or otherwise so as directly or indirectly to come in contact with any waters; "rendering unclean or impure" means any alteration of the physical, chemical or biological properties of any of the waters of the state, including, but not limited to, change in odor, color, turbidity or taste; "harmful thermal effect" means any significant

change in the temperature of any waters resulting from a discharge therein, the magnitude of which temperature change does or is likely to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life; "person" means any individual, partnership, association, firm, corporation or other entity, except a municipality, and includes any officer or governing or managing body of any partnership, association, firm or corporation; "community pollution problem" means the existence of pollution which, in the sole discretion of the commission, can best be abated by the action of a municipality; "municipality" means any metropolitan district, town, consolidated town and city, consolidated town and borough, city, borough, village, fire and sewer district, sewer district and each municipal organization having authority to levy and collect taxes or make charges for its authorized function; "discharge" means the emission of any water, substance or material into the waters of the state, whether or not such substance causes pollution; "pollution abatement facility" means treatment works which are used in the treatment of waters, including the necessary intercepting sewers, outfall sewers, pumping, power and other equipment, and their appurtenances, and includes any extensions, improvements, remodeling, additions and alterations thereof; "disposal system" means a system for disposing of or eliminating wastes, either by surface or underground methods, and includes sewage systems, pollution abatement facilities, disposal wells and other systems; "federal water pollution control act" means the Federal Water Pollution Control Act, 33 U.S.C. section 466 et seq., including amendments thereto and regulations thereunder; "order to abate pollution" includes an order to abate existing pollution or to prevent reasonably anticipated sources of pollution.

SEC. 3. The commission shall have the following powers and duties: (a) To exercise general supervision of the administration and enforcement of this act; (b) to develop comprehensive programs for the prevention, control and abatement of new or existing pollution of the waters of the state; (c) to advise, consult and cooperate with other agencies of the state, the federal government, other states and interstate agencies and with affected groups, political subdivisions and industries in furtherance of the purposes of this act; (d) to submit plans for the prevention and control of water pollution and to render reports and accounts to the United States secretary of the interior, the federal water pollution control administration and to any other federal officer or agency on such forms containing such information as the said secretary and the federal water pollution control administration, or any other federal officer or agency, may reasonably require, in order to qualify the state and

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its municipalities for grants from the United States government; (e) to encourage, participate in or conduct studies, investigations, research and demonstrations, and collect and disseminate information, relating to water pollution and the causes, prevention, control and abatement thereof; (f) to issue, modify or revoke orders prohibiting or abating pollution of the waters of the state, or requiring the construction, modification, extension or alteration of pollution abatement facilities or any parts thereof, or adopting such other remedial measures as are necessary to prevent, control or abate pollution; (g) to hold such hearings as may be required under the provisions of this act, for which it shall have the power to issue notices by certified mail, administer oaths, take testimony and subpoena witnesses and evidence; (h) to require the submission of plans, specifications and other necessary data for, and inspect the construction of, pollution abatement facilities and disposal systems in connection with the issuance of such permits or approvals as may be required by this act; (i) to issue, continue in effect, revoke, modify or deny permits, under such conditions as it may prescribe, for the discharge of any water, substance or material into the waters of the state, or orders for or approval of the installation, modification or operation of pollution abatement facilities; (j) to require proper maintenance and operation of disposal systems; (k) to exercise all incidental powers necessary to carry out the purposes of this act.

SEC. 4. The commission may require any person or municipality to maintain such records relating to pollution, possible pollution or the operation of pollution abatement facilities as it deems necessary to carry out the provisions of this act. The commission or any authorized representative thereof shall have access to such records, and may examine and copy any such records or memoranda pertaining thereto, or shall be furnished copies of such records on request. Such representative shall have the power to enter upon any public or private property, at reasonable times, to secure such information and the owner, managing agent or occupant of any such property shall permit such entry; provided any information relating to secret processes or methods of manufacture or production ascertained or discovered by the commission or its agents during, or as a result of, any inspection, investigation, hearing or otherwise, shall not be disclosed and shall be kept confidential.

SEC. 5. (a) The commission shall adopt, and may thereafter amend, standards of water quality applicable to the various waters of the state or portions thereof. Such standards shall be consistent with the federal water pollution control act and shall be for the purpose of qualifying the state and its municipalities for available federal grants and for the purpose of providing clear and objective public policy statements of a general program to improve the water resources of the state; pro-

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vided no standard of water quality adopted shall plan for, encourage or permit any wastes to be discharged into any of the waters of the state without having first received the treatment available and necessary for the elimination of pollution. Such standards of quality shall: (1) Apply to interstate waters or portions thereof within the state; (2) apply to such other waters within the state as the commission may determine is necessary; (3) protect the public health and welfare and promote the economic development of the state; (4) preserve and enhance the quality of state waters for present and prospective future use for public water supplies, propagation of fish and aquatic life and wildlife, recreational purposes and agricultural, industrial and other legitimate uses; (5) be consistent with health standards as established by the state department of health. (b) Prior to adopting, amending or repealing standards of water quality, the commission shall conduct a public hearing. Notice of such hearing specifying the waters for which standards are sought to be adopted, amended or repealed and the time, date, and place of such hearing shall be published at least twice during the thirty-day period preceding the date of the hearing in a newspaper having a general circulation in the area affected and shall be given by certified mail to the chief executive officer of each municipality in such area. Prior to the hearing the commission shall make available to any interested person any information it has as to the water which is the subject of the hearing and the standards under consideration, and shall afford to any interested person the opportunity to submit to the commission any written material. At the hearing, any person shall have the right to make a written or oral presentation. A full transcript or recording of each hearing shall be made and kept available in the commission's files. (c) The commission shall establish the effective date of the adoption, amendment or repeal of standards of water quality. Notice of such adoption, amendment or repeal shall be published in the Connecticut Law Journal upon acceptance thereof by the federal government. (d) The commission shall monitor the quality of the subject waters to demonstrate the results of its program to abate pollution.

SEC. 6. No person or municipality shall cause pollution of any of the waters of the state or maintain a discharge of any treated or untreated wastes in violation of any provision of this act.

SEC. 7. If the commission finds that any municipality is causing pollution of the waters of the state, or that a community pollution problem exists, or that pollution by a municipality or a community pollution problem can reasonably be anticipated in the future, the commission shall issue to the municipality an order to abate pollution. If a community pollution problem exists in, or if pollution is caused by, a municipality geo-

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graphically located all or partly within the territorial limits of another municipality, the commission shall, after giving due regard to regional factors determine which municipality shall be ordered to abate the pollution or shall, after giving due regard to regional factors, issue an order to two or more municipalities jointly to provide the facilities necessary to abate the pollution. Such order shall include a time schedule for action by the municipality or municipalities, as the case may be, which may require, but is not limited to, the following steps to be taken by such municipality or municipalities: (a) Submission of an engineering report outlining the problem and recommended solution therefor for approval by the commission; (b) submission of contract plans and specifications for approval by the commission; (c) arrangement of financing; (d) acceptance of state and federal construction grants; (e) advertisement for construction bids; (f) start of construction; (g) placing in operation.

SEC. 8. If the commission finds that any person prior to the effective date of this act has caused pollution of any of the waters of the state, which pollution recurs or continues after said date, the commission shall issue an order to abate pollution to such person. The order shall include a time schedule for the accomplishment of the necessary steps leading to the abatement of the pollution. This section shall not apply to any person who is subject to the provisions of section 9 of this act.

SEC. 9. (a) No person shall, after the effective date of this act, initiate, create or originate any new discharge of water, substance or material into the waters of the state without first obtaining a permit for such discharge from the commission. Application for such permit shall be on a form prescribed by the commission and shall include such information as the commission may therein require.

(b) If, upon receipt of an application for a permit as required in subsection (a), the commission finds that such discharge would not cause pollution of any of the waters of the state, it shall issue a permit for such discharge. If the commission finds that such discharge would cause pollution of any of the waters of the state, it shall require the applicant to submit plans and specifications of a proposed system to treat such discharge. If the commission finds that the proposed system to treat such discharge will protect the waters of the state from pollution, it shall notify the applicant of its approval and, when such applicant has installed such system, in full compliance with the approval thereof, the commission shall issue a permit for such discharge. If the commission finds that the proposed system to treat such discharge does not protect the waters of the state from pollution, it shall promptly notify the applicant that its application is denied and the reasons therefor. If any applicant, after having submitted plans and specifications pursuant to the provisions of

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this section for a proposed system to treat such discharge, is denied a permit by the commission, such applicant shall have the right to a hearing and an appeal therefrom in the same manner as provided for in sections 15 and 16 of this act.

(c) The permits issued pursuant to this section shall be for a period of five years, except that any such permit shall be subject to the provisions of section 10 of this act. Such permit: (1) Shall specify the manner, nature and volume of discharge: (2) shall require proper operation and maintenance of any pollution abatement facility required by such permit; (3) may be renewable for like periods in accordance with procedures and requirements established by the commission; and (4) shall be subject to such other requirements and restrictions as the commission deems necessary to comply fully with the purposes of this act.

(d) If the commission finds that any person has, after the effective date of this act, initiated, created or originated any discharge into the waters of the state without a permit as required in subsection (a) hereof, or in violation of such a permit, it shall, notwithstanding any request for a hearing pursuant to section 15 of this act or the pendency of an appeal therefrom, request the attorney general to bring an action in the superior court for Hartford county to enjoin such discharge by such person until he has received a permit from the commission or has complied with a permit which the commission has issued pursuant to this section. Any such action brought by the attorney general shall have precedence in the order of trial as provided in section 52-191 of the general statutes.

SEC. 10. The commission shall periodically investigate and review those sources of discharge which are operating pursuant to any order, permit, directive or decision of the commission issued before or after the effective date of this act and, if it determines that there has been any substantial change in the manner, nature or volume of such discharge which will cause or threaten pollution to any of the waters of the state, or if it finds that the system treating such discharge, or the operation thereof, no longer insures or adequately protects against pollution of the waters of the state, the commission shall issue an order to abate such pollution to such person or municipality. Such order shall include a time schedule for the accomplishment of the necessary steps leading to the abatement of the pollution.

SEC. 11. If the commission finds that any person is maintaining any facility or condition which reasonably can be expected to create a source of pollution to the waters of the state, it shall issue an order to such person maintaining such facility or condition to take the necessary steps to correct such potential source of pollution. Any person who receives an order pursuant to this section shall have the right to a hearing and an appeal in the same manner as is provided in sections 15 and 16 of this act. If the

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commission finds that the recipient of any such order fails to comply therewith, it shall request the attorney general to bring an action in the superior court for Hartford county to enjoin such person from maintaining such potential source of pollution to the waters of the state. All actions brought by the attorney general pursuant to the provisions of this section shall have precedence in the order of trial as provided in section 52-191 of the general statutes.

SEC. 12. Whenever the commission issues an order to abate pollution to any person pursuant to the provisions of section 8 or 10 of this act, and the commission finds that such person is not the owner of the land from which such source of pollution emanates, the commission may issue a like order to the owner of such land or shall send a certified copy of such order, by certified mail, return receipt requested, to the owner at his last-known post-office address. When the commission issues an order to an owner, the owner and the person causing such pollution shall be jointly and severally responsible. Any owner to whom an order is issued or who receives a certified copy of an order pursuant to this section shall be entitled to all notices of, and rights to participate in, any proceedings before or orders of the commission and to such hearing and rights of appeal as are provided for in section 15 and 16 of this act.

SEC. 13. When the commission issues an order to any person to abate pollution, it may cause a certified copy thereof to be filed on the land records in the town wherein the land is located, and such order shall constitute a notice to the owner's heirs, successors and assigns. When the order has been fully complied with, the commission shall issue a certificate showing such compliance, which certificate the commission shall cause to be recorded on the land records in the town wherein the order was previously recorded.

SEC. 14. If any person or municipality fails to comply with any order to abate pollution, or any part thereof, issued pursuant to the provisions of section 7, 8, 10 or 12 of this act, and no request for a hearing on such order or appeal therefrom is pending and the time for making such request or taking such appeal has expired, the commission shall request the attorney general to bring an action in the superior court for Hartford county to enjoin such person or municipality from maintaining such pollution and to comply fully with such order or any part thereof. All actions brought by the attorney general pursuant to the provisions of this section shall have precedence in the order of trial as provided in section 52-191 of the general statutes.

SEC. 15. Each order to abate pollution issued under section 7, 8 or 10 of this act shall be sent by certified mail, return receipt requested, to the subject of such order and shall be deemed issued upon deposit in the mail. Any person or municipality aggrieved by any such order may,

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within thirty days from the date such order is sent, request a hearing before the commission. After such hearing, the commission shall consider the facts presented to it by the person or municipality, including, but not limited to, technological feasibility, shall consider the rebuttal or other evidence presented to or by it, and shall then revise and resubmit the order to the person or municipality, or inform the person or municipality that the previous order has been affirmed and remains in effect. The request for a hearing as provided for in this section shall be a condition precedent to the taking of an appeal by the person or municipality under the provisions of section 16 of this act. The commission may, after the hearing provided for in this section, or at any time after the issuance of its order, modify such order by agreement or extend the time schedule therefor if it deems such modification or extension advisable or necessary, and any such modification or extension shall be deemed to be a revision of an existing order and shall not constitute a new order. There shall be no hearing subsequent to or any appeal from any such modification or extension.

SEC. 16. Any person or municipality aggrieved by any order of the commission to abate pollution may, after a hearing by the commission as provided for in section 15 of this act, appeal from the final determination of the commission based on such hearing to the superior court for Hartford county within fifteen days after the issuance of such final determination. Such final determination shall be sent by certified mail, return receipt requested, and shall be deemed issued upon deposit in the mail. Such appeal shall have precedence in the order of trial as provided in section 52-192 of the general statutes. All appeals taken pursuant to this section shall be based solely upon the record of the hearing required in section 15 of this act. The court shall determine whether the commission acted arbitrarily, unreasonably or contrary to law. If upon any such appeal, any question of law is raised which any party claims should be reviewed by the supreme court, the superior court judge shall forthwith transmit a certificate of his decision, including therein such question of law, together with a proper finding of fact, to the chief justice of the supreme court who shall thereupon call a special session of said court for the purpose of an immediate hearing upon the questions of law so certified. The chief justice of the supreme court may make such orders as will expedite said appeal including orders specifying the manner in which the record on appeal may be prepared.

SEC. 17. Any person or municipality which knowingly violates any provision of this act shall forfeit to the state a sum not to exceed one thousand dollars, to be fixed by the court, for each offense. Each violation shall be a separate and distinct offense and, in case of a continuing viola-

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tion, each day's continuance thereof shall be deemed to be a separate and distinct offense. The attorney general, upon complaint of the commission, shall institute a civil action to recover such forfeiture.

SEC. 18. The commission shall make a grant to any municipality which, after the effective date of this act, constructs, rebuilds, expands or acquires a pollution abatement facility. In the case of a municipality which, on said date, is in the process of constructing, rebuilding, expanding or acquiring such a facility, such grant shall apply only to that part of the facility constructed, rebuilt, expanded or acquired after said date. The grants under this section shall be subject to the following conditions: (1) No grant shall be made for any pollution abatement facility unless such facility, and the plans and specifications therefor, are approved by the commission, and such facility is constructed in accordance with a time schedule of the commission, and subject to such requirements as the commission shall impose. If the commission requires that the facility be approved by the federal water pollution control administration, such grant shall be conditioned upon the municipality complying with all of the requirements of said water pollution control administration; (2) no grant shall be made until the municipality has agreed to pay that part of the total cost of the facility which is in excess of the applicable state and federal grants; (3) the grant to each municipality shall equal thirty per cent of the cost of such facility, which cost shall be that cost which the federal water pollution control administration uses or would use in making a federal grant, except that where the commission has approved plans for a facility exceeding the requirements of the federal act, the grant shall be thirty per cent of the actual cost; (4) the state grant under this section shall be paid to the municipality in partial payments similar to the time schedule that such payments are or would be provided to the municipality by the federal water pollution control administration; (5) no grant shall be made unless the municipality assures the commission of the proper and efficient operation and maintenance of the pollution abatement facility after construction; (6) no grant shall be made unless the municipality has filed properly executed forms and applications prescribed by the commission; (7) any municipality receiving state or federal grants for pollution abatement facilities shall keep separate accounts by project for the receipt and disposal of such eligible project funds.

SEC. 19. The commission may provide a grant of thirty per cent to a municipality for the cost of those projects which it determines to be essential to a storm and sanitary sewer separation program when it finds that such project is primarily for the separation of storm and sanitary sewage and will eliminate a substantial source of pollution. The cost of the project used to determine the state grant in this section shall not

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include any cost for the acquisition of land or any rights or interests therein.

SEC. 20. If federal funds are not available to the municipality at the time of its scheduled construction of a pollution abatement facility, the commission shall advance to such municipality, in addition to the state contribution provided for in section 18, that sum of money which would equal the amount of the federal grant, provided the municipality shall agree that any federal contribution thereafter made for the project shall be forwarded to the state as reimbursement for the funds expended under this section. Prior to advancing the federal share, the commission shall require the municipality to agree in its project contract with the commission to do all that is necessary to qualify for the federal grant. The municipality shall also agree to pay over to the commission any instalment of a grant received from the federal water pollution control administration on which the state has made an advance under this section. Said monies received from the municipality shall be deposited in a sinking fund which is hereby established for payment of the debt service costs of bonds issued under section 25 of this act.

SEC. 21. If federal funds for contract plans and specifications for the construction of a pollution abatement facility are not available to the municipality at the time of its scheduled planning, the commission shall advance to such municipality a sum equal to seven per cent of the estimated construction cost, said amount to be used by the municipality for the purpose of preparing contract plans and specifications; provided any remaining balance of the seven per cent advanced under this section shall be applied to the cost of construction of the facility. The funds advanced to the municipality under this section shall be considered a part of the total amount of the state grant provided for in section 18 of this act. Such facility shall be constructed in accordance with a schedule of the commission and shall be in conformance with an engineering report approved by the commission. Before approving the engineering report required in this section, and in section 7 of this act, and as may be required under section 10 of this act, the commission shall, among other factors, give due regard to whether such report is in conformance with its applicable guidelines, whether such report makes adequate recommendations concerning all existing and anticipated community discharges, whether such report conforms with existing planning studies and whether satisfactory considerations have been given to all regional problems outlined to the engineer in a pre-report conference with the commission.

SEC. 22. If federal funds for an engineering report are not available, and the schedule of the commission as provided for in section 7 of this act requires that a municipality prepare such a report before July 1,

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1968, and the commission finds that the charter of such municipality does not authorize a reasonable method for providing the required funds to proceed on such a report in time to accomplish its completion as scheduled, the commission may advance funds to such municipality in the amount necessary to provide such report, said funds to be used by the municipality for the purpose of preparing such report. Any funds advanced to the municipality under this section shall be considered a part of the total amount of the state grant provided for in section 18 of this act.

SEC. 23. The commissioner of agriculture and natural resources is designated as the officer of the state to manage, administer and control funds appropriated by the general assembly or authorized by the state bond commission to carry out the provisions of this act. All grants made pursuant to this act shall be made only with the advice and consent of the commissioner and no grant shall be made under this act if such grant, together with all grants awarded prior thereto, exceeds the amount of funds available therefor.

SEC. 24. The water resources commission is designated as the administrative agency of the state, acting with the advice and consent of the commissioner of agriculture and natural resources to apply for and accept any funds or other aid and to cooperate and enter into contracts and agreements with the federal government relating to the planning, developing, maintaining and enforcing of the program to provide clean water and pollution abatement of the waters of the state, or for any other related purpose which the congress of the United States has authorized or may authorize. The commission, with the advice and consent of the commissioner of agriculture and natural resources, is authorized in the name of the state to make such applications, sign such documents, give such assurances and do such other things as are necessary to obtain such aid from or cooperate with the United States or any agency thereof. The commission may, with the advice and consent of the commissioner of agriculture and natural resources, enter into contracts and agreements and cooperate with any other state agency, municipality, person or other state when the same is necessary to carry out the provisions of this act. Such contracts shall be subject to the approval of the attorney general as to form.

SEC. 25. (a) The state bond commission is empowered to authorize the issuance of bonds of the state in one or more series in an aggregate principal amount not exceeding one hundred fifty million dollars. The proceeds of the sale of said bonds shall be used for the making of advances and grants under sections 18 to 22, inclusive, and 35 of this act and for the payment of expenses incurred by the department of agriculture

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and natural resources in carrying out the provisions of this act which are not otherwise provided for from the state general fund. Not more than one-half of one per cent of said proceeds shall be used for the payment of such expenses. Said bonds shall be issued in accordance with section 3-20 of the general statutes and the full faith and credit of the state are pledged for the payment of the principal of and interest on said bonds as the same become due.

(b) All of said bonds shall be payable at such place or places as may be determined by the treasurer pursuant to section 3-19 of the general statutes and shall bear such date or dates, mature at such time or times not exceeding twenty years from their respective dates, bear interest at such rate or different or varying rates and payable at such time or times, be in such denominations, be in such form with or without interest coupons attached, carry such registration and transfer privileges, be payable in such medium of payment and be subject to such terms of redemption with or without premium as, irrespective of the provisions of section 3-20 of the general statutes, may be provided in the determination authorizing the same or fixed in accordance therewith. Notwithstanding the provisions of said section 3-20, any of said bonds may be sold to the United States or any agency or instrumentality thereof in such manner and on such terms as may be provided in the determination authorizing the same or fixed in accordance therewith.

SEC. 26. Any town may, by ordinance, establish a special taxing district for the purpose of defraying, by taxes levied solely upon properties within such district, any of the costs of acquisition or construction of a sewerage system in accordance with the provisions of chapter 103 of the general statutes. Such special taxes shall be based upon annual budget appropriations and estimates of receipts from special benefit assessments and use charges levied with respect to such system approved by such town for the special taxing district in the manner required for the adopting of the annual budgets of such town and shall be included but shown separately in the annual tax levies of such town. Such town may, from time to time, by ordinance, alter the boundaries of such special taxing district. To meet any costs of acquisition or construction, including planning, of any such sewerage system the town may issue its general or special obligation bonds in accordance with the laws applicable thereto, the principal and interest on which shall be paid from the budgets of such special taxing district. For the purposes of this section "town" means town, consolidated town and city and consolidated town and borough.

SEC. 27. Subsection (51) of section 12-81 of the 1965 supplement to the general statutes is repealed and the following is substituted in lieu thereof: [Any structure, building, machinery or other equipment after

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July 1, 1965, constructed, installed and used primarily for the purpose of eliminating industrial waste, or pollution of waters as defined in section 25-19. A certification by the water resources commission that such structure, building, machinery or other equipment is approved for the elimination of industrial waste or for water pollution control shall require the assessors of the town where such property is located to exempt such property from taxation. This exemption shall not apply to any water company as defined by section 16-1.] *Structures and equipment acquired after July 1, 1965, for the treatment of industrial waste before the discharge thereof into any waters of the state or into any sewerage system emptying into such waters, the primary purpose of which is the reduction, control or elimination of pollution of such waters, certified as approved for such purpose by the water resources commission. For the purpose of this subsection "industrial waste" means any harmful thermal effect or any liquid, gaseous or solid substance or combination thereof resulting from any process of industry, manufacture, trade or business, or from the development or recovery of any natural resource.*

SEC. 28. Section 12-412 of the general statutes is amended by adding subdivision (u) as follows: Sales of and the storage, use or other consumption of tangible personal property acquired for incorporation into facilities for the treatment of industrial waste before the discharge thereof into any waters of the state or into any sewerage system emptying into such waters, the primary purpose of which is the reduction, control or elimination of pollution of such waters, certified as approved for such purpose by the water resources commission. For the purposes of this subdivision "industrial waste" means any harmful thermal effect or any liquid, gaseous or solid substance or combination thereof resulting from any process of industry, manufacture, trade or business or from the development or recovery of any natural resource.

SEC. 29. There shall be allowed as a credit against the tax imposed by chapter 208 of the general statutes in any income year an amount equal to the product of the tax rate imposed by section 12-214 of the 1965 supplement to the general statutes for such income year multiplied by the amount of expenditures paid or incurred during such income year for the construction, rebuilding, acquisition or expansion of pollution abatement facilities, including the planning thereof, provided (a) such credit shall be allowed only with respect to pollution abatement facilities approved as such by the water resources commission, the construction, rebuilding, acquisition or expansion of which was commenced after January 1, 1967; (b) the net income for such income year and succeeding income years shall be computed without any deductions for such expenditures or for depreciation of such facilities, except to the extent the

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cost or other basis of such facilities may be attributable to factors other than such expenditures or in case a credit is allowable pursuant to this section for only a part of such expenditures, any deduction allowable under the federal internal revenue code for such expenditures or for depreciation of such facilities shall be proportionately reduced in computing net income for the income year and all succeeding income years; and (c) upon the sale or other disposition of such facilities in any income year the gain or loss on such sale or other disposition shall be the gain or loss which would have resulted if the cost or other basis of such facilities had been reduced by straight line depreciation based on the useful life of such facilities, except that, if such sale or other disposition occurs within three years after the date such facilities were placed in operation, the basis of such facilities for the purpose of determining gain or loss shall be zero.

SEC. 30. In determining gross income subject to tax under chapter 213 of the general statutes a taxpayer at its election may either deduct expenditures made or incurred for the construction, rebuilding, acquisition or expansion of pollution abatement facilities, including the planning thereof, in the income year in which such expenditures were paid or incurred, or amortize such expenditures over a period of not more than five taxable years commencing with the year in which such expenditures were paid or incurred, by deducting an equal portion thereof in each income year during such period, provided no such deduction shall be allowed with respect to expenditures made or incurred for pollution abatement facilities not approved as such by the water resources commission, or the construction, rebuilding, acquisition or expansion of which was commenced prior to January 1, 1967.

SEC. 31. There shall be allowed as a credit against the tax imposed by chapter 211 of the general statutes in any tax year an amount equal to the product of the tax rate imposed by section 12-258 of the 1965 supplement to the general statutes for such tax year multiplied by the amount of expenditures paid or incurred during such tax year for the construction, rebuilding, acquisition or expansion of pollution abatement facilities, including the planning thereof, provided such credit shall be allowed only with respect to pollution abatement facilities approved as such by the water resources commission, the construction, rebuilding, acquisition or expansion of which was commenced after January 1, 1967.

SEC. 32. There shall be allowed as a credit against the tax imposed by chapter 212 of the general statutes in any tax year an amount equal to the product of the tax rate imposed by section 12-264 of the general statutes for such tax year multiplied by the amount of expenditures paid or incurred during such tax year for the construction, rebuilding, acqui-

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tion or expansion of pollution abatement facilities, including the planning thereof, provided such credit shall be allowed only with respect to pollution abatement facilities approved as such by the water resources commission, the construction, rebuilding, acquisition or expansion of which was commenced after January 1, 1967.

SEC. 33. Section 25-3a of the 1965 supplement to the general statutes is repealed and the following is substituted in lieu thereof: In all cases wherein the water resources commission is required to hold hearings, public or otherwise, on any matter within its jurisdiction, said commission *may hold such hearing sitting as a body or may designate a subcommittee* consisting of not fewer than three members of said commission, *or may designate a member of the commission or a member of its staff to act as a hearing examiner, said subcommittee or hearing examiner* to hold such hearing, at the time and place designated by said commission. *When the commission designates a subcommittee to hold the hearing*, one member of said subcommittee shall be designated as chairman. The subcommittee designated to hold such hearing shall be known as the hearing subcommittee. The hearing subcommittee chairman for any hearing before the subcommittee, or any member of the commission for any hearing before the commission, *or the hearing examiner*, may issue subpoenas, administer oaths and cause the attendance of witnesses and the production of evidence and testimony in any proceeding pending before it. The subcommittee *or the hearing examiner* shall, after each hearing, file with the commission a report including a finding of fact and recommendations. After considering the report of the subcommittee *or the hearing examiner* and the testimony of the hearing, the commission shall issue such order or permit as is applicable to the particular proceeding.

SEC. 34. All orders, directives or decisions of the water resources commission which are in existence on the effective date of this act shall continue in force until rescinded, amended or repealed by the commission.

SEC. 35. The commission shall make a grant to any municipality which, prior to the effective date of this act, constructed, rebuilt, acquired or expanded a pollution abatement facility, which grant shall be thirty per cent of the principal amount of bond or note obligations of such municipality, issued to finance such construction, rebuilding, acquisition or expansion and outstanding on said date, exclusive of all interest costs and for which grant application is made on an application prescribed by the commission. Such grant shall be paid in equal annual instalments at least thirty days prior to the date the municipality is obligated to make payment on such bonds or notes, provided any grant under this section shall be reduced by any amount payable to such municipality under the

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provisions of section 18 of this act for the same construction, rebuilding, acquisition or expansion project, such reduction to be prorated over the period remaining for the payment of such bonds or notes.

SEC. 36. Section 25-19 to 25-24, inclusive, of the general statutes as amended, are repealed.

SEC. 37. This act shall take effect from its passage.