Riparian Rights in Artificial Lakes and Streams

Alvin E. Evans
RIPARIAN RIGHTS IN ARTIFICIAL LAKES AND STREAMS

ALVIN E. EVANS*

An owner of land bordering on a stream or lake finds it to his advantage to erect a dam and flood the lands above. For present purposes let it be assumed that he meets with no resistance and in time acquires by adverse user the right to the flowage over the lands in question. One important consequence often is that the upper owners of the lands so overflowed make use of the raised level of the water and build summer cottages, around the lake so formed, or use it for the creation of summer pleasure resorts, boating and other things.¹ Based on what theory may they claim a continuance of this situation?

Again problems arise where a stream has been diverted from its original channel into a new one. Two types of interests may arise in the alternative, i.e., (a) the proprietor of the lands along the recently created channel may desire to have present flow continue, thus conflicting with the purpose of the diverter to restore the original flow; or (b) such owners may wish to avoid the return of the water to the old bed so that thus again conflict arises between him and the diverter who decides to redirect the water to its original channel. There is also the case where water from one natural course is diverted into another natural course as appears in the Mathewson case discussed infra.

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¹ The periodical literature on this subject is not impressive. It consists principally of the following short case notes: 31 CAL. L. REV. 612 (1943); 32 CAL. L. REV. 108 (1944); 11 COL. L. REV. 770 (1911); 15 COL. L. REV. 366 (1915); 15 HARV. L. REV. 238 (1902); 173 L. T. 297 (1932) (A good survey of the English cases); 34 MICH. L. REV. 299 (1936); 36 MICH. L. REV. 1432 (1938); 22 MINN. L. REV. 427 (1938); 13 NEBR. L. BULL. 195 (1935); 12 N. Y. U. L. Q. REV. 542 (1935); 7 SO. CALIF. L. REV. 344 (1934); 3 TEMP. L. Q. 450 (1929); 12 WIS. L. REV. 114 (1937); 35 YALE L. J. 385 (1926). There are brief discussions in the various treatises on Water Rights and on Real Property.

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I. General Statement of the Problem

A fairly typical lake case is *Kray v. Muggli.*² There the Cold Springs Mill Company, owner of land bordering on the Sauk River, constructed a dam for the purpose of creating water power for its mill. It flooded the lands above to a distance of sixteen miles and raised the water level seven and one half feet. This situation continued over a period of forty years. A part of the lands thus overflowed were not privately owned. As to the other lands, some proprietors seem not to have objected and all of them adjusted themselves to this artificial arrangement. One of them, a plaintiff here, had developed a pleasure resort for boating, fishing and other amusements, and operated a steamboat for about twenty miles up the river for the transportation of passengers. In another case,⁴ consolidated and tried with this one, the plaintiff's lands were used for farming and his improvements were erected with reference to the artificial stage of the waters and he would have been seriously injured by the removal of the dam.

It appears that the defendant *Muggli,* substantially the present owner of the mill property and dam, had attempted to transfer to the other defendants for a large consideration the right to remove the dam. The two principal plaintiffs sought an injunction against the removal of it and appealed from an adverse decree of the trial court. That decree was overruled.

The Supreme Court of Minnesota suggested several reasons for its holding.⁴ (a) It declared that a dam so maintained for forty years had created an artificial level which was now to be regarded as natural and the upper proprietor had now acquired a vested interest in the maintenance of the new level. The theory, however, which is developed later in this paper was not clearly spelled out. (b) The concept of resulting reciprocal easements was the one most relied upon. That would imply that each side acquired rights in the property of the other by a similar course of conduct, adverse user or prescription. (c) A third suggestion was that originally the plan inaugurating the flowage grew out of an understanding and assent of all concerned else why did not the upper owners resist the encroachments? This idea was not based upon any evidence of actual consent or bargaining, but it seemed reasonable to the court that the parties would balance damages to their interests against possible gains. Perhaps this line of reasoning suggests estoppel as the basis of relief. It is believed that these positions

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2. 84 Minn. 90, 86 N.W. 882 (1901).
3. See Friedman v. Muggli, 84 Minn. 90, 86 N.W. 882 and 1102 (1901).
are mutually exclusive each of the other and the adoption of all three indicates strongly that the court felt that the plaintiffs should prevail and was none too careful of its analysis of the problem.

Certainly the argument that the artificial has now become the natural water adjustment has much to justify it though little was said by the court respecting the permanent or impermanent character of the dam. It had been maintained for forty years. Not only had the statute run in favor of the dam builder, but its continuance implied a settled state of affairs. The land had been unsurveyed when the dam was built and the subsequent government survey was made upon the basis of the conditions then existing. It seems to be granted that the parties in interest contemplated the continued high level of the water and perhaps for this reason it was unnecessary to examine the nature of the dam construction carefully. In fact it is fair to assume a reasonably permanent structure existed in view of its continuance for over forty years.

One interesting further statement was made by the court that "prescriptive rights find no support in pecuniary considerations." It seems incredible that in the year 1901 an important American court of last resort should declare itself indifferent to the social interests involved in the case.

Two matters the court did not directly pass upon though intimating its probable position, i.e., must the defendant continue to maintain the dam? Probably not. Must the defendant permit the plaintiffs to enter and repair it? Probably so. There is a number of lake or reservoir cases similar to the Kray case with respect to the issues raised. Thus in Fin and Feather Club v. Thomas6 the defendants had impounded the waters of a lake for a considerable period and had created upon the defendant's land a larger artificial body with its level appreciably raised. As in the Kray case, the plaintiff had made extensive and profitable use of the lake and had caused large and expensive improvements to be erected in reliance upon the water level thus created. It was held that he could enjoin the defendant from lowering the water. Much was made of the implied consent (as noted in the Kray case) of all interested parties at the time of the initiation of the flowage though there was no direct proof of an agreement, oral or otherwise, that permission to overflow the plaintiff's land was given for the consideration that the dam builder would maintain the dam. It was said that the

5. 138 S.W. 150 (Tex. Civ. App. 1911). The observation in the text is not strictly accurate in that it was held that the prescriptive period had not run for the dam builder but the court adopted the Kray theory fully.
dam was in effect a joint undertaking of the parties. Hence it was inferred that reciprocal easements by prescription were created and it was over-looked that the creation of an easement by implication requires adverse user. The Kray case was approved. The case declares that estoppel is applicable. Nothing is said about the artificial lake becoming a natural one. In Adams v. Manning where the damming of a stream created a reservoir so that the stream practically ceased to exist, it was concluded that the owners bordering the reservoir were riparian proprietors. Thus the artificial condition was regarded as the equivalent of a natural one.

Wisconsin has declared a similar rule. At the outlet of Lake Beulah a dam had been erected for the creation of power and was maintained for forty years. The lake level was raised six feet and the land around it had been purchased for the construction of summer cottages. The present owners of the dam claimed the right to lower it and an action was brought to restrain them. Here again it was said that it was a "fair inference that the owners whose lands were flowed had been induced to consent in view of the compensating advantages." There was no evidence of such an arrange-ment in the record. The court talked about reciprocal easements, though the result is not sustainable on that ground. Oral consent could scarcely give rise to reciprocal easements. The defendant may abandon his dam but save by abandoning he cannot lower the water level. This opinion is relied on and the Kray position is cited in a subsequent case where the city of Madison desired to abate a dam on a lake which it had built and main-tained, raising the lake level. The persons in the latter case who had built cottages around the lake were held to be necessary parties defendant.

Similarly, in a Supreme Court case from New York, Hammond v. Antwerp L. & P. Co. the defendant had created a lake above by his dam and the period of the statute had run for his benefit. He claimed the right to draw the water off down to the original level. It was held expressly that riparian rights had attached to the lands surrounding the lake and the dam owner could not interfere with them. Reciprocal easements were declared to exist and the principle was referred back to an early case decided

6. 48 Conn. 477 (1881).
7. Smith v. Youmans, 96 Wis. 103, 70 N.W. 115 (1897).
9. See also Pewaukee v. Savoy, 103 Wis. 271, 79 N.W. 436 (1899). A Missouri case, Greisinger v. Klinhardt, 321 Mo. 186, 9 S.W. 2d 978 (1928), reaching the same conclusion for a different reason is referred to later.
10. 230 N.Y. Supp. 621 (Sup. Ct. 1928). Finley v. Hershey, 41 Iowa 389 (1873) holds that where an artificial pond is created riparian rights attach.
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by Chancellor Kent, Belknap v. Trimble. 11 It was also said that although the dam owner could abandon the dam, yet the upper proprietors were entitled to enter for the purpose of repairing it. The plaintiffs had built summer homes on the lake, boat houses and pleasure resorts. This was stated in order to show their reliance upon the settled state of the lake. The Kray case was cited in support of the conclusion.

An earlier New York Supreme Court case, however, is scarcely in accord with this one. 12 There the defendant's dam had existed for fifty years. It created a lake upon which the plaintiff was wont to float logs to his mill. The defendant lowered the water level so rapidly that the plaintiff could no longer do so. An injunction, however, was denied the plaintiff on the ground that no rights had attached on the land bordering the artificial lake. Does the character of the use made by the owner of lands bordering on an artificial lake determine whether or not he acquires vested rights as a riparian owner? There had been no important expenditures in reliance upon the level thus created. It is submitted, however, that the first case reaches a more desirable result. Nothing was said about comparative values or losses. The earlier case also confirms the view of Chancellor Kent in Belknap v. Trimble 13 but since this is a case of diverting a stream and the creation of a new one, it will be considered later.

It must be admitted that some other courts are in conflict with the opinions above discussed. Perhaps the strongest of these is from Michigan. 14 In one case the defendant's dam had existed for sixty-seven years and had raised the lake level by three feet. The plaintiffs had built cottages and hotels along the shore. The dam was constructed of earth and timbers and it was destroyed without any act of the defendant. The plaintiffs thereupon entered and rebuilt the dam which the defendants immediately tore out. The former filed a bill to enjoin interference with the dam and even to require the defendant to rebuild and maintain it. The injunction was refused. The case is either authority for a rule that the riparian owners cannot enter to rebuild a dam in case of its abandonment or else that no riparian rights had vested. Inferentially in Michigan, in the absence of

11. 3 Paige 377 (N.Y. Ch. 1832).
13. 3 Paige 577 (N.Y. 1832).
malice, the defendant may remove the dam. This is the position taken by Farnham.\footnote{15}

II. THE CONVERSE CASE, REMOVAL OF OBSTRUCTIONS

A case somewhat the converse arose in Vermont\footnote{16} where instead of erecting a dam upon certain water falls, the owners had removed a natural obstruction and had thus reduced the water level about two feet. Eighty years later the successor in title attempted to restore the original level by a dam. In such a case the lower rather than the upper owner claims a vested interest in the present flow. It was held that the present level had become the natural one and the lower owners had vested rights in the lake level as it then stood. The court added certain inconsequential and rather contradictory arguments about dedication and reliance (estoppel), but the case supports the position that certain rights had been created by virtue of the artificial becoming the natural condition. The court also said that when this happens, the running of the period of limitations is without decisive significance. In that case a contract seems to have been made eighty years earlier between the parties then interested, but it was observed that it did not run with the land. It is noteworthy that there are so few cases involving natural lakes or streams where an obstruction has been removed.

III. APPARENT AND QUASI EASEMENTS APPLIED TO WATER COURSES

It is said that an easement may be implied from the pre-existence of a so called quasi-easement, that is, where the owner of an entire tract of land uses one part of it for the benefit of another part, then sells the one tract and retains the other.\footnote{17} So also when the dominant tenement is first conveyed an easement may be inferred for the benefit of the land retained.\footnote{18} In a Missouri case\footnote{19} a certain club owning a tract of land through which

\footnote{15} Farnham, Water and Water Rights § 819 (1904). However, the structure of the dam must be considered.
\footnote{16} Cloyes v. Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039 (1907). See also Lakeside Paper Co. v. State, 44 N.Y. Supp. 281 (3d Dep't 1897) where the plaintiffs, upper proprietors, had built factories in reliance upon the lowered water level of the lake.
\footnote{17} 3 Tiffany, Real Property §§ 781, 782, 784 (3rd Ed. 1939).
\footnote{18} See Elliott v. Sallee, 14 Ohio St. 10 (1862); Read v. Webster, 95 Vt. 239, 113 Atl. 814 (1921); and Burwell v. Hobson, 12 Gratt. 322 (Va. 1855).
\footnote{19} Greisinger v. Klinhardt, 321 Mo. 186, 9 S.W. 2d 978 (1928). See also Marshall Ice Co. v. La Plant, 136 Iowa 62, 111 N.W. 1016 (1907); Hall v. Morton, 102 S.W. 570 (Mo. App. 1907); Zanamaneeck v. Jelineck, 69 Neb. 110, 95 N.W. 28 (1903).
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a creek flowed, built a dam on it which flooded one hundred seventy-five acres of its land, thus using one part of the land to benefit another part. This area later was conveyed, one parcel to the plaintiff and another parcel to the defendant. Each of these grantees built cottages on their respective lands for rent, and operated boats and recreational resorts. Later the defendant lowered the lake level to the disadvantage of the plaintiff, it being possible for the defendant to operate at the lowered level, but not for the plaintiff. The latter asked an injunction to restrain the defendant from continuing to draw the water level down, and it was granted.

The court applied the principle of an implied easement. It was not shown which tract was the first to be transferred. Reciprocal easements it was held do not require a direct conveyance by the owner but may arise from a foreclosure proceeding. Malice was suggested but it did not clearly affect the result. So in Shepardson v. Perkins where the now dominant and servient lands had been in one ownership when the artificial channel was constructed, the later conveyance of a parcel of the land to the plaintiff who built a mill on it, carried with it an appurtenant easement in the artificial stream. Thus no question of the artificial lake becoming natural was raised.

IV. DIVERSION OF WATER COURSES

The second division of this study deals with artificial water courses rather than with lakes or reservoirs. It is believed that the issues are inherently similar. It seems evident that a problem like that discussed above arises where a stream is diverted from its natural course into an artificial channel. Such diversion is likely to be made for purposes of drainage, or for water power at a different location, or for irrigation, or for domestic purposes. The problem poses a diverter seeking to restore the original condition and the objector claiming that the artificial condition should be continued. In many cases the plaintiff wants the water which now reaches him by the artificial channel. In quite as many other cases he wants to avoid the water and for that reason demands that the diversion continue. The plaintiff, usually the one who desires the maintenance of the present status, maintains his position by urging various rules and doctrines, such as an easement by prescription or presumed grant, involving commonly the statute of limitations by analogy; by reliance and estoppel; sometimes something analogous to dedication. The absence of adverse user is frequently

disregarded. Implied consent of the parties at the time of the original diversion is often assumed as if it were made for the benefit of all concerned. In view of the exceeding conflict in legal theory found in these several cases, it seems important to sift the various arguments and seek at least a plausible solution. Occasionally it is intimated that the diverter's principal reason for the rediversion grows out of his malice toward the claimant. In such cases it is the view that though he may abandon the course or dam involved, so long as he does not do so, he can cause only a reasonable interference with the water flow.\textsuperscript{21}

The fact that there was no malice on the part of the diverter was mentioned in refusing relief in \textit{Hanson v. McCue}.\textsuperscript{22} Here the defendant by a wooden trough carried the water from his spring across the lot later acquired by the plaintiff and the latter used it for domestic purposes for a long time. The former thereafter diverted the water for sale purposes. A distinction was here taken respecting percolating waters coming to a head in a spring which fact gives the diverter absolute control.\textsuperscript{23} This case also illustrates a fairly clear temporary purpose.

\textbf{V. THE INTENDED BENEFICIARY OF THE DIVERSION}

A considerable number of cases make the question whether the plaintiff may require the diversion to be continued or at least not wilfully interrupted depend upon the fact whether or not the diversion was made originally for the sole benefit of the diverter or was intended to benefit other parties either directly or incidentally. If the benefit was for the sole advantage of the diverter these cases assert that the other parties affected cannot claim a continuance of the diversion. Thus in an Ontario case, \textit{Oliver v. Lockie},\textsuperscript{24} the reason for refusing relief to the plaintiff was the fact that the

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\item 21. Pere Marquette Ry. v. Siegle, 260 Mich. 89, 244 N.W. 239 (1932). \textit{Cf.} Fin and Feather Club v. Thomas, 138 S.W. 150 (Tex. Civ. App. 1911). \textit{Cf.} Taft v. Bridgeton Worst Co., 237 Mass. 385, 130 N.E. 48 (1921). (The defendant and required flowage rights and created a lake from which the plaintiff was wont to cut ice. It was held that though the former may abandon his dam, he may not maliciously lower it so as to interfere with ice cutting.)
\item 22. \textit{42 Cal. 303} (1871).
\item 23. On malice respecting the diversion of percolating waters, see 3 \textit{Tiffany, Real Property} § 747 (3rd Ed. 1939); Trustees v. Youmans, 50 Barb. 316 (N.Y. 1867). See generally, \textit{How Far an Act May Be a Tort Because of Wrongful Motive}, in \textit{Ames, Lectures on Legal History} p. 399 (1913); \textit{Holmes, Collected Legal Papers} pp. 117-137 (1920), \textit{Privilege, Malice and Intent}.
\end{enumerate}
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sole purpose of the diversion was to benefit the diverter and that the plain-
tiff had notice of it because the course was an artificial one, which seems
like reasoning in a circle.

In a South Carolina case however, *Middleton v. Gregorie*,\(^{25}\) even though
the diverter had his own sole interests in mind, still it was held that others
affected thereby who had accomodated their arrangements to the diversion
had a right to retain the present status, the court however mistakenly calling
it a right arising by prescription rather than by estoppel, though it was as-
sumed that the whole matter had occurred under an arrangement of mutual
consent. In this case the plaintiff did not want the water.

In many cases it is assumed that the diversion originated in the mutual
consent of all concerned without evidence of it. Thus in Vermont, *Cloyes
v. Middlebury Electric Co.*,\(^{26}\) an obstruction in a water course had been
removed from certain falls by the owner of the land and for eighty years
the falls had been reduced by two feet, and had made certain upper lands
farmable. Thereafter the successor proposed to restore the obstruction
by means of a dam. The right to do so was denied on the ground that in
fact the original change had been made with the actual consent of all (which
consent would normally be given since it was to their advantage), and they
were entitled to rely on it. If there were active consent then estoppel
seems a proper ground for relief. To so agree would be a natural thing to
do, but without evidence of it there seems to be no adequate basis for
estoppel.\(^{27}\)

It is often said that there is a fair inference from the circumstances
that the diversion or overflow, as the case may be, caused by the defendant
arose from the consent of all concerned even though the act benefited only
the actor at the time.\(^{28}\) Why else would the servient owners permit the


\(^{26}\) 80 Vt. 109, 66 Atl. 1039 (1907).

\(^{27}\) See Cox v. Derrick, 272 Ill. 575, 111 N.E. 560 (1916) (a ditch made for
drainage, maker cannot dam it); Baily & Co. v. Clark Son & Marland, [1902] 1
Ch. 649 (an artificial channel existed for centuries—proper inference is that is
was made for the benefit of all concerned, and so with their consent, suggesting
a lost grant); Blackburn v. Somers, 5 L. R. Irish 1 (Ch. D. 1879) (an injunction
against befouling an artificial course); Strough v. Conley, 297 N.Y. Supp. 785
(3rd Dep't 1937) (city diverted waters from the natural course for fifty years
by contract right originally; the contract does not run but the city cannot redivert;
estoppel is suggested as the reason).

\(^{28}\) Kray v. Muggli, 84 Minn. 90, 86 N.W. 882 (1901); Smith v. Youmans, 96
Wis. 103, 70 N.W. 1115 (1897) (the dam had raised the lake level six feet; the
defendant may abandon it but he may not actively interfere); Hanna v. Pollock,
[1900] 2 I.R. 664 (mutual benefit suggests a permissive origin and so a lost grant).
period of limitations to run? This theory assumes the existence of easements by implication arising from oral consent rather than from hostility of user and should depend upon the principle of estoppel. The sharp objections to the rule in the Kray case made by various writers arises not so much from the way the actual decision affects the parties, as it does from the theory that reciprocal easements are thus created. If it be assumed that the parties concerned orally consented to the alteration, the only logical result would be that they are individually estopped to deny the privileges so agreed upon even though not evidenced by a writing. The former status could presumably be restored if restoration were done at once, but not after the new situation had become settled. The running of the period of limitations would thus not be necessary for the creation of new rights.

In *Chowchilla Farms v. Martin* the plaintiff sought to enjoin the defendant from diverting water from an alleged artificial channel which diversion interfered with his claimed riparian rights. The channel had existed forty years and the court declared that whether the stream was now or was originally artificial or natural was an issue of fact. The land through which the ditch ran had been swampy and the water had followed no certain course. The fact issues were: the character of the original terrain; length of time of the channel's existence; amount of diversion, i.e., did the ditch follow the course of a swamp, was it a complete substitution and was the creation accomplished by the hand of man or by natural causes or by both. Based upon findings in these matters as facts, an issue of law was presented, and the plaintiff prevailed. The present course was a complete substitute for any former one, and so at least at the time of the suit resembled a natural course. The existence of the plaintiff's rights depended upon the present character of the course, and if the new one is a complete substitute for the old, the original character is immaterial. It was observed that riparian rights are created in Oregon where permanency of the new course is indicated.

For a case where the contract runs, see Shaber v. St. Paul Water Co., 30 Minn. 179 (1883).

29. See 4 TIFFANY, REAL PROPERTY, § 1210 (3rd ed. 1939); 3 FARMHAM, WATER RIGHTS § 819b (1904). See also WIEL, WATER RIGHTS § 60 (3rd ed. 1911).
30. Woodbury v. Short, 17 Vt. 387 (1845); Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901).
31. 219 Cal. 1, 25 P. 2d 435 (1933). So in Natural Soda Products Co. v. Los Angeles, 23 Cal. 2d 193, 143 P. 2d 12 (1943) it was held that where substantial expenditures had been made in reliance on long continued diversion which appeared permanent, the same protection would be accorded as would be where the condition was natural.
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It is of course clear that cases may occur where the diversion was made for the sole benefit of the maker and no intent existed to benefit another, and no new rights are created. Perhaps the owner did not show an intention of abandoning his right to redivert. Any other result might well prevent convenient but temporary alterations. A good illustration would be the construction of a ditch for draining a mine.\textsuperscript{32} The English cases tend to emphasize the matter of the sole benefit of the diverter as conclusive against the claims of the plaintiff. Thus in \textit{Mason v. Shrewsbury Ry. Co.}\textsuperscript{33} a canal company had diverted the water from a brook at a point above the plaintiff's land and forty some years later restored the water to its natural channel. This caused injury to the plaintiff's crops but he was given no remedy because the diversion was made solely for the diverter's benefit. There is little evidence of consent of the parties found in most cases and the appearances may indicate that the diverter alone was intended to be benefitted.

VI. Influence of the Running of the Period of Limitations

Very many cases mention the running of the period of limitations as a possible factor whether the diverter may redivert. It seems that this consideration may be (a) conclusive\textsuperscript{34} that the artificial state has become natural or (b) it may be simply one of the factors\textsuperscript{35} or (c) it may have no influence.\textsuperscript{36} In a California case\textsuperscript{37} it was held that the diversion had continued for such a long time that the origin of the ditch was now immaterial. It was observed that the statement in 25 \textit{California Jurisprudence},\textsuperscript{38} to the effect that riparian rights could exist only in natural water courses, was

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\item \textsuperscript{34} Shepardson v. Perkins, 58 N. H. 354 (1878); Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901).
\item \textsuperscript{35} Mathewson v. Hoffman, 77 Mich. 420, 43 N.W. 879 (1889); Huston v. Byber, 17 Ore. 140, 20 Pac. 51 (1888); Norton v. Valentine, 14 Vt. 235 (1842); Ford v. Whitlock, 27 Vt. 265 (1835).
\item \textsuperscript{36} King v. Chicago B. & O. Ry., 71 Iowa 696, 29 N.W. 406 (1886); Mitchell v. Parks, 26 Ind. 365 (1866); Mason v. Shrewsbury etc. Ry., L. R., 6 Q. B. 578 (1871); Felton v. Simpson, 33 N. C. 84 (1850); Drainage District v. Everett, 171 Wash. 471, 18 P. 2d 53 (1933).
\item \textsuperscript{37} Chowchilla Farms v. Martin, 219 Cal. 1, 25 P. 2d 435 (1933).
\item \textsuperscript{38} P. 1097 [\textit{CALIFORNIA JURISPRUDENCE} in 27 Vols. (1926), 1942 Pocket Parts & Supplements to 1949].
\end{itemize}
not borne out by the cases cited. The question whether the artificial condition had become natural was thus one of fact. The running of the full period of limitations was a factor only. In Michigan it seems to have been thought that a course is no longer artificial after twenty years. Mathewson v. Hoffman held in effect that each of all three theories, prescription, lost grant and the period of limitations alone, or in combination with the others, was determinative and all three were held to exist.

In North Carolina the period of limitations seems not to be a factor and the whole issue is one of permanency determined by physical circumstances which the court tends to treat as an issue of law. In Vermont, in a case where the diversion had continued for ten years, the consequence was the reverse of that in North Carolina and the artificial course was regarded as having become natural. Emphasis was laid upon the acquiescence of all concerned which should logically eliminate the period as a decisive factor. This position is supported by a later case where time was only one factor and the court said that the diversion was analogous to the creation of a highway by user and so figuratively like a dedication. In Diana Shooting Club v. Laneoreaux, however, it is assumed in a dictum that the running of the limitations period of itself is sufficient to change an artificial lake or stream into a natural one.

VII. Maintenance and Abandonment

In the Kray case the court expressly refused to pass upon the questions whether the creator of an artificial body of water could abandon his dam, and whether he was under any obligation actively to maintain it. The implication was that he might both refuse to maintain it and might abandon

39. Freeman v. Weeks, 45 Mich. 335, 7 N.W. 904 (1881) (nothing said about adverse user which consideration is usually overlooked).
41. See also Huston v. Byber, 17 Ore. 140, 20 Pac. 51 (1888) (since the plaintiff's use was not hostile, the principle was inapplicable).
42. Lake Drummond Canal & Water Co. v. Burnham, 147 N.C. 41, 60 S.E. 605 (1908). Cf. Greatrex v. Hayward, 8 Ex. 291, 155 Eng. Rep. 1357 (1853); Oliver v. Lockie, 26 Ont. 28 (1895) (length of time of enjoyment held to be without significance where the diversion is made for the sole benefit of the diverter).
43. Woodbury v. Short, 17 Vt. 387 (1845).
45. 114 Wis. 44, 89 N.W. 880 (1902).
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it. It has been directly held in other cases that the creator may abandon
his creation and refuse longer to maintain it.46

But the privilege of abandoning one's project and refusing to maintain
it cannot be said to be completely at large. Thus he may not maliciously
lower the level for the purpose of preventing an upper owner from cutting
ice.47 Many courts hold that he cannot abandon by a rediversion.48 He
cannot lower the water level save by abandonment and this possibly sug-
gests that until he abandons it, he must maintain it.49 or putting it differ-
ently, he cannot refuse to maintain it save by abandonment.50 Probably
many courts which adopt the doctrine of reciprocal rights would sustain
both the defendant's privilege of abandonment and the plaintiff's right
to repair.51 In cases where the courts have rejected the theory of prescrip-
tive and reciprocal rights, and have found no other basis to support the
plaintiff's cause, probably the right of the claimant to repair and maintain
would be denied.52

There remains the case53 where the beneficiary of the prescriptive right
to flow has abandoned his privilege after the period has run. It appears
that a third party cannot maintain the dam without tacking his interest
to that of the prior owner.

46. Drainage Distr. v. Everett, 171 Wash. 471, 18 P. 2d 53, 88 A.L.R. 123 (1923); Case v. Hoffman, 84 Wis. 438, 100 Wis. 574, 72 N.W. 390, 74 N.W. 220,
75 N.W. 220, 75 N.W. 945 (1897, 1898). Cf. Matheson v. Ward, 24 Wash. 407, 64
Pac. 520 (1901). See also text at note 10 above but cf. also text at note 14 above.
47. Taft v. Bridgeon Worsted Co., 237 Mass. 385, 130 N.E. 48 (1921); Fin
48. See among others Strough v. Conley, 297 N.Y. Supp. 785 (3rd Dep't
1937).
49. Albert Lea v. Davies, 80 Minn. 101, 82 N.W. 1104 (1900).
50. Pere Marquette Ry. v. Siegle, 260 Mich. 89, 244 N.W. 239 (1932); Smith
v. Youmans, 96 Wis. 103, 70 N.W. 1115 (1897); cf. Fin & Feather Club v. Thomas
Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901). It has been the common
1615) that the creation of an easement carries with it the incidental privilege to
make necessary repairs. See further cases in 11 Col. L. Rev. 770, 772 n. 25 (1911).
In Harp v. Iowa Falls Elec. Co., 196 Iowa 317, 191 N.W. 520 (1923), the claimant,
having no direct interest in the dam, was not permitted to rebuild in a different
place a dam that had been destroyed so as to maintain the prior level.
(1922); Whitcher v. State, 87 N. H. 405, 181 Atl. 549 (1935).
Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901). See further discussion at
note 76, infra.
At common law riparian rights attached to natural water courses. For the purposes of this discussion it does not seem necessary to define precisely the content of that concept, it being the case that there are differences between the various American and English authorities. It has been said (whatever riparian rights may include) that they do not attach to artificial courses and conditions.\(^{54}\)

So in New York the Supreme Court held that a dam creating a lake and maintained for fifty years by the creator did not give rise to rights in the owner of the land about the lake even though the limitations period had run because the lake was artificial. It was created for the sole benefit of the creator as a reserve supply when the natural stream ran low.\(^{55}\) This, however, does not seem to be a temporary purpose. In North Carolina\(^ {56}\) a similar rule was announced and some emphasis was placed upon the matter of permanency or impermanency. The question of permanency, or more exactly, the intent of the diverter respecting continuance, was apparently not put into the evidence, it being assumed as a matter of law that where an owner opened up a canal to draw water from a lake on his own land which carried the water away from the plaintiff's land for a long period (nearly one hundred years) the diversion was not intended to be permanent. The long settled condition was not enough to make it natural. Similarly in Mason v. Shrewsbury etc. Ry. Co.\(^ {57}\) a canal diverting water from a brook ceased to be used and the builder redverted the water after forty-seven years to the injury of the plaintiff. Apparently as a matter of law it was

\(^{54}\) See 2 Washburn, Real Property § 1294 (6th ed. 1902). "There is a marked distinction between the rights that may be acquired by a land or mill owner in a natural stream and an artificial one," and he then adds, "created for temporary purposes." He suggests that the riparian owner is without redress if the diverter redverts the course even after twenty years. In 3 Tiffany, Real Property § 767 (3rd ed. 1939) it is stated:

"Any rights or privileges as to the use of the water of an artificial watercourse in favor of the owners of the land thereon or thereunder, even a superficial resemblance to the 'natural rights' of riparian landowners, are in the nature of easements, . . . ." (But cf. Tiffany's § 720.)


56. Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 60 S.E. 650 (1908). See also Green v. Carotto, 72 Cal. 267, 13 Pac. 685 (1887); Mitchell v. Parks, 26 Ind. 363 (1866); Ranney v. St. Louis & S. F. R.R., 119 S.W. 484 (Mo. App. 1909); Peter v. Caswell, 38 Ohio 448 (1882); Huston v. Byber, 17 Ore. 140, 20 Pac. 51 (1888); Oliver v. Lockie, 26 Ont. 28 (1895).

57. L. R. 6 Q. B. 578 (1871).
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held that the artificial course had not become a natural one because the easement of the creator through the plaintiff’s land was intended to be for the sole benefit of the creator. Surely in such cases the length of time of the continuance of the new course is some evidence of permanency if permanency is a significant fact.

A Nebraska case held that where the defendant had constructed an irrigation ditch from which the plaintiff had for a long time intercepted the seepage and waste water, the latter was not entitled to a continuance of the flow of such waters since he had notice from the fact that the defendant had made a gate and spillway, that the diversion was not permanent and so the artificial course had not become a natural one. The court therefore took judicial notice of the diverter’s intent as it was alleged to have been shown by the existence of the gate and spillway. These seepage cases, however, do not add much to the solution of the problem since the water courses involved were comparatively insignificant, and the seepage was an unintended consequence.

It is not clear why the exact means whereby a stream or body of water comes into being is necessarily determinative of the existence of the rights of the adjoining owners. Suppose a flood has caused an overflow from a natural stream, which overflow finally created a new course. The old course may in time fill with silt and cease to carry a considerable body of water while the new course aided by scrapers and spades or bull-dozers carries the whole of it. Is this new course artificial? Does a body of water which has flowed for certainly four centuries in a man-made course (how much longer is unknown) still continue its artificial character? Is a lake suddenly created by an earthquake and wholly separated from the original source of its waters, which settles into a permanent changeless condition within a matter of days, considered artificial, or is it natural? Does nature have strictly limited means of creating courses and bodies of water? If powerful dirt removing machinery should succeed in creating a lake within a few days, completely separated from the original source of water supply, and with all the appearances of permanency, would the

60. Baily & Co. v. Clark, Son & Marland (1902) 1 Ch. 649.
lake be artificial, *i.e.*, would the legal consequences be different from what they would be if it were caused by an earthquake?\(^4\)

It has been suggested that changes in the scope of possession of property might be effected indifferently by tornado, fire, flood, erosion, accretion, reliction, or by the hand of man.\(^6\) The recent diversions created by such enterprises as the T.V.A. would probably be considered to have developed new rights in view of the assured permanency of the dams, dykes, spillways and other indicia of a new, settled condition.\(^6\) Many courts, however, largely overlook the question of permanency and the original intent of the diverter in determining the rights in the new body of water. This seems to mean that the artificial is to be regarded as the natural condition.\(^6\)

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61. In Vol. 26 of the *Encyclopaedia Britannica* p. 619 (11th Ed. 1912), under the subject Tennessee may be found the following: "In the northern portion principally in Lake County is Realfoot Lake which occupies a depression formed by an earthquake in 1811. It is eighteen miles long, has a maximum width of three miles and is the only large lake in the state." In Volume 18 of the same work, p. 612, under the subject Missouri, it is said: "... In 1812-13 a remarkable earthquake devastated the region about Madrid. A large region was sunken; enormous fissures were opened in the earth; the surface of the soil was displaced and altered, and great lakes were formed along the Mississippi. One of these, Realfoot Lake east of the River, is thirty miles long and seven miles wide and the banks are so steep that boats sail over the submerged tops of the trees." What interest do the owners of lands bordering on Realfoot have in the new situation thus created?

Streptomyces is said to be a fungus that grows in manured fields. Is it thus a product of nature while in the form of fungus? Are we to say it is no longer such after it has been converted into a powder and put for convenient use into a glass vial?


63. In Minehan v. Murphy, 149 Wis. 14, 134 N.W. 1130 (1912) evidence was introduced on the issue whether a certain unnavigable river either became a lake (after a dam had altered its condition) or continued to be a river. If it was still a river, though rendered navigable by the dam, riparian rights in the bed of the stream/lake were preserved. The court then pointed out the characteristics of streams and lakes and concluded that the water still constituted a river and not a lake.

64. Only a few of the many cases will be cited. See Adams v. Manning, 48 Conn. 477 (1881) (reservoir created by a dam and the stream ceased to exist); Delaney v. Boston, 2 Harr. 489 (Del. 1839) (riparian rights arise, being acquired by prescription, presumed grant or dedication); Burk v. Simonson, 104 Ind. 173, 2 N.E. 309, 3 N.E. 826 (1885) (an artificial course cannot be rediverted after a long period of acquiescence); Stimson v. Brookline, 197 Mass. 368, 83 N.E. 893 (1908); Cary v. Daniels, 5 Met. 236 (Mass. 1842) (it is immaterial respecting riparian rights whether the course is artificial or natural); Freeman v. Weeks, 45 Mich. 335, 7 N.W. 904 (1881) (artificial becomes natural, emphasis upon the new settled condition, no mention of original intent of diverter); Mathewson v. Hoffman, 77 Mich. 420, 43 N.W. 879 (1889) (injunction against reconversion after forty-eight years on three grounds, period of limitations, prescription and implied grant); Brill v. Mo. K. & T. Ry., 144 S.W. 174 (Mo. 1912) (complete substitution); Middleton v. Gregorie, 2 Rich. L. 631 (S. C. 1842) (accommodation of the lands and structures to the new condition indicates an original agreement, but no riparian rights since plaintiff avoids the water); Mueller v. Fruen, 36 Minn. 273, 30 N.W.
The emphasis in these cases is placed upon the matter of accommodation of the premises, the general benefits, appearance of permanency, length of time, though not necessarily the period of limitations, the degree of completeness of the substitution, the new settled condition and the factual immateriality of the distinction between what is artificial and what is natural. In *Kray v. Muggli*, the court observed that not only had the claimants adapted their arrangements to meet the conditions, but nature itself had done so, as witness the growth of hardwood timber along the shores "giving a natural effect and appearance to the conditions created by the dam." The government survey also had recognized the artificial as the natural state and the parties for many years had acquiesced as if there were a well settled condition. The court's discussion of estoppel and reciprocal easements by adverse user were simply devices employed to reach a desired result without analyzing the problem with care. Only incidental reference was made to the matter of permanency. One is tempted also to think that a page was borrowed unconsciously from contract law, that of constructive condition, to the effect that when a diverter had enjoyed his easement for a long time, his right is subject to the constructive condition that the others affected should have corresponding rights. This seems to be the essence of the importance upon presumed consent.

In England it was held in an early case, *Magor v. Chadwick* that it was no misdirection to instruct a jury that the law of water courses is the same whether natural or artificial. Chief Baron Pollock however sharply dissented from this view nine years later. He made the test between them one of apparent permanency or the reverse and suggested that a stream diverted or penned up by permanent embankments might be regarded as natural. Thus in England emphasis is laid upon the purpose of the diverter, whether he intended the alteration to be permanent or not,

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In Woodbury v. Short, 17 Vt. 387 (1845) the court said that the artificial becomes the natural course "when the stream cements and coalesces with the soil."—a somewhat difficult test to apply. See note 20, p. 118 of 12 Wis. L. Rev. (1937).

yet it was held in another case to be error to instruct a jury that the diverter is not liable for polluting an artificial stream. In *Baily v. Clark, Son and Moreland* it was concluded that a man-made channel existing longer than four hundred years may for some purposes be artificial still and for others natural. The court said that there was a presumption that the channel was created for the benefit of all concerned and all owners must be considered. The consequence was that full riparian rights had not been acquired, but an easement was created instead by the original arrangement in favor of the lower owners which did not fully correspond to riparian rights. It is admitted in *England*, however, that the change may be of such character that the diverter may not redivert, and although this result is alleged to be reached by prescription, it seems better to say that the artificial situation has become natural through the settled condition of things. Thus new rights have attached.

IX. Estoppel, Reliance, Reciprocal Easements

*Kray v. Muggli* is typical of the cases which assign reliance by the plaintiff as the reason for granting new rights in the artificial body of water created by the defendant, and the consequent estoppel against interference by the defendant. This results, so it is said, in reciprocal easements. There are more than a score of decisions to this effect by the most prominent courts. *Belknap v. Trimble* is commonly regarded as the ancestor. That case differs from the *Kray* case in that an artificial water course was involved rather than a lake. In a bill for a declaration of rights the plaintiffs, lower mill owners, obtained a declaration against the removal of the gates causing the diversion. They had enjoyed the privilege for twenty years and although the user was not adverse, there was held to be presumption of the existence of a grant resulting in reciprocal easements.

In *Mathewson v. Hoffman* if the waters should be rediverted by the

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71. *3 Paige 577* (N. Y. 1832).
72. *77 Mich. 420*, 43 N.W. 879 (1889). Substantially the same result is reached in *Matheson v. Ward*, 24 Wash. 407, 64 Pac. 520 (1901). Nothing is said about reciprocal easements but reliance seems to be on estoppel though the word is not spelled out.
removal of the dam certain agricultural lands would be injured and the resulting malaria and poisonous gases would affect the public health. The dam had endured for forty years and the claimants had relied on it but there is nothing otherwise to show a reasonable reliance. The case holds that reciprocal easements were created but it also suggests the theory that when a condition appears to be settled, (which the length of time implies) a degree of permanency may be assumed as a matter of law in the absence of contrary evidence. The case, however, also talks about adverse user, the period of limitations and a presumed grant which seem to be mere filler. Since the plaintiff sought to avoid the water, there is no issue of riparian rights. In general, however, Michigan disagrees with the Kray case.

Smith v. Youmans\(^73\) is almost identical with the Kray case and reaches the same result. The dam had been in existence for forty years. The court here also speaks of reciprocal easements. The inference is that the claimants through their predecessors in title had consented, being induced to do so by the prospective advantages. Perhaps this may be translated into the doctrine of presumed grant to them, or even estoppel arising from reliance on the agreement. An early South Carolina case is relied upon where the facts were similar.\(^74\) The right of the claimant in South Carolina was regarded as derived through prescription, reliance and adjustment to the new condition. Other cases reaching the same result add very little in the sum total.\(^76\)

It is conceded that there are cases contra. In addition to those mentioned, the case Albert Lea v. Davies\(^76\) calls for comment. A grant of flowage had been made by the state to an owner on a semi-navigable stream, (under the mill dam act) for the purpose of constructing a dam to supply

\(^73\) 96 Wis. 103, 70 N.W. 1115 (1897).
\(^75\) Chowchilla Farms v. Martin, 219 Cal. 1, 25 P. 2d 435 (1933) (the length of time was great; there had been no regular course but the ditch was through a swamp; it appeared to be a permanent arrangement and the origin of the ditch was immaterial); Adams v. Manning, 48 Conn. 477 (1881) (thirty years); DeLaney v. Boston, 2 Harr. 489 (Del. 1839) (fifty years, presumptive grant, dedication); Broadwell Drainage District, 231 Ill. 86, 83 N.E. 104 (1907) (thirty years, reciprocal easements, prescription); Fin and Feather Club v. Thomas, 138 S.W. 150 (Tex. Civ. App. 1911) (facts similar to Kray case—save as to time; claimant’s predecessors in title had contributed to the building of the dam; implied covenant by defendant to maintain it; reliance by the claimant, and improvements; reciprocal easements); Hollet v. Davis, 54 Wash. 326, 103 Pac. 423 (1909) (Limitations period had run, estoppel and reliance but prescription not urged).
\(^76\) 80 Minn. 101, 82 N.W. 1104 (1900). See also Mitchell Drainage Co. v. Farmers Irr. Dist., 127 Neb. 484, 256 N.W. 15 (1934) (the diverter may discontinue the course and restore the former one).
power to his mill. The upper owners also had deeded flowage rights to the mill owner and an artificial lake was created. Before the present action arose, the lake had existed for more than twenty years. This action was brought against the city Albert Lea for damages for flowage on lands above the dam. When the mill was abandoned, the city took over the maintenance and repair of the dam. In the reliance upon the settled condition of the lake, it had created public recreational facilities on its banks, had erected a waterworks plant there, and had platted its streets in accomodation to the lake front. Four years later this suit was brought. It appears that the city made no effort to tack its right of maintenance of the dam to that of the dam owner.

Might the city not well claim riparian rights arising from the appearance of settled condition of the lake? Perhaps this should be ruled out by a showing that it had constructive notice from the records of the dam's temporary character. At any rate no discussion of possible riparian rights appears and the case is not very satisfactory. It is not a clear authority that an owner of land on an artificial lake which has assumed a natural condition cannot enter to repair the dam. The city having undisturbed possession of the dam for purposes of repair, and the condition of the lake level, being long settled it could well be argued that riparian rights had accrued to the city. The court distinguished two Wisconsin cases, Mendota Club v. Anderson and Pewaukee v. Savoy, which held in effect that riparian rights accrue when an artificial lake has assumed a new settled condition after a long period has elapsed. The court said the dam builders here had abandoned the dam, and all rights to overflow the lands had ceased, there being no sufficiently long adverse user by the city. The earlier Kray case was approved. The second Kray case, though later, made no reference to the Albert Lea case. Some consideration might well have been given to the acquisition of riparian rights even under the conditions mentioned.

In Diana Shooting Club v. Lanoreaux is a dictum that if an artificial lake or level is maintained for the statutory period, the artificial condition becomes the natural one, apparently by that fact alone, and riparian rights attach. That rule, however, would not apply to the flooding of lands within the United States domain so as to bring such lands within the swamp land

77. 101 Wis. 314, 78 N.W. 185 (1899).
78. 103 Wis. 271, 79 N.W. 436 (1899).
80. 114 Wis. 44, 89 N.W. 880 (1902).
act. This act vested swamp lands in the state, divesting them from the United States.

It accordingly appears, that estoppel, reliance, reciprocal easements, dedication and other doctrines are not in fact the reasons for reaching the result such as that in the Kray case, but rather indicate incautious arguments which superficially appear to justify it.

X. Riparian Rights

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

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

As observed above in England the resulting natural condition does not lead to complete riparian rights. It is assumed that the consent of all affected was originally obtained and that the water will be distributed on the basis of what all desired at the time of the diversion. This view that there may be an easement but no riparian rights in such cases makes for confusion and requires evidence which after long years may no longer exist.81 This theory, however, seems to be adopted by Tiffany.82 He cites

82. 3 TIFFANY, REAL PROPERTY § 767 (3rd Ed. 1939): "... when the water of a natural watercourse is permanently diverted in part by the construction of a millrace or 'cut-off,' the flow of water in this new channel might well be regarded as part of a natural watercourse. The cases, however, tend to regard such flow as constituting, originally at least, an artificial ... watercourse. Any rights or privileges
English cases only. There appears to be no point in limiting his proposition as he does to "mill-races or cut-offs" and to exclude diversions generally or lakes and reservoirs.

In cases from many states artificial diversions of streams and artificial lakes and reservoirs have been held to afford the owners riparian rights in the lands so affected. Thus, in the above mentioned case from California, *Chowchilla Farms v. Martin*, riparian rights on an artificial channel were expressly protected. In Delaware the same result was declared though the court talked about dedication and a quasi-prescriptive right. Massachusetts has declared that owners on such streams acquire an incorporeal hereditament in the stream, which is here assumed to mean riparian rights, not a mere easement. In New York riparian rights were said to attach to lands on an artificial stream which had continued to exist for fifty years. The later cases contra in Washington do not seem to overrule the earlier one, *Hollet v. Davis*, where a right to redivert was denied because rediversion would sacrifice acquired riparian rights. With but little dissent Wisconsin also is committed to the theory that riparian rights may be created on an artificial stream.

In many cases riparian rights are not mentioned, but their existence is inferable from the conclusions reached. *Kray v. Muggli* which is in this

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83. 219 Cal. 1, 25 P. 2d 435 (1933). See Hanson v. McCue, 42 Cal. 303 (1871), and Green v. Carotta, 72 Cal. 267, 13 Pac. 685 (1887) where they were held not to have come into existence.

84. Delaney v. Boston, 2 Harr. 489 (Del. 1839). See also Finley v. Hershey, 41 Iowa 389 (1875).


88. 54 Wash. 326, 103 Pac. 423 (1909).

89. Smith v. Youmans, 96 Wis. 103, 70 N.W. 1115 (1897) (a leading case on reciprocal easements, the riparian owners being induced to acquiesce); Mendota Club v. Anderson, 101 Wis. 314, 78 N.W. 185 (1899); Minehan v. Murphy, 149 Wis. 14, 134 N.W. 1130 (1912); Castle v. Madison, 113 Wis. 346, 89 N.W. 156 (1902).

90. See e.g. Shepardson v. Perkins, 58 N. H. 354 (1878); Belknap v. Trimble, 3 Paige 577, 605 (N. Y. Ch. 1832); Diana Shooting Club v. Lamoineaux, 114 Wis. 44, 89 N.W. 880 (1902) (dictum). In State ex rel. O'Connor v. Sorenson, 22 Iowa 1248, 271 N.W. 234 (1937), a dam diverted a stream into a new channel. Held that the state acquired the same title to the new channel as it had in the natural one, and so may require the diversion to be permanent. The court loosely
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group, however, seems to conflict with earlier Minnesota cases, Schulenberg v. Zimmerman and Albert Lea v. Davies, by implication, an artificial lake case to which, however, it does not refer. Michigan is perhaps to be regarded as opposed to the Kray case rule though a case similar on its facts, Goodrich v. McMillan, seems to conflict with certain diversion cases. It is somewhat contradictory to Pere Marquette Ry. Co. v. Siegle which holds that although the dam builder cannot be required to maintain it, he cannot unreasonably interfere with it. It must be pointed out that where the party seeks to avoid the water on the basis of the new settled condition, there is no issue as to riparian rights. A case from Washington, Matheson v. Ward, a water course diversion, illustrates the point:

The Dungeness river flows north into the straits of Fuca. It originally divided into three forks about four miles from its mouth, Hurd's Creek Channel, the East Channel and the West Channel. The owner of land on West Channel had diverted the water from it into the other two in 1865 so that it ceased to exist as a water course. In 1895 the plaintiffs who were the owners of land on the other two channels rediverted the water into West Channel. Thus the later owners bordering West Channel were damaged by the return of the water. They thereupon began proceedings to halt the rediversion. The plaintiffs claiming the right to redivert sought injunctive relief to prevent interference with the rediversion.

The findings of the trial court favoring the defendants were sustained on appeal. The court said inter alia "The Channels (East and Hurd's Creek) had become the natural channels after thirty years and the attempt to restore water to West Channel is unlawful." The rediversion could have been made within a reasonable time said the court. This means that a settled condition had developed from lapse of time and it suggests that the

speaks of the "artificial channel of a natural stream." Cf. Dardenne Realty Co. v. Abeken, 106 S.W. 2d 966 (Mo. App. 1937) (dictum that riparian rights may be acquired in artificial water courses).
91. 84 Minn. 90, 86 N.W. 882 (1901).
92. 86 Minn. 70, 90 N.W. 156 (1902); Mueller v. Fruen, 36 Minn. 273, 30 N.W. 886 (1886), a diversion case.
93. 80 Minn. 101, 82 N.W. 1104 (1900).
96. 260 Mich. 89, 244 N.W. 239 (1932).
97. 24 Wash. 407, 64 Pac. 520 (1901). The court cites Gould on Waters § 159 (2d. ed. 1891) which intimates that riparian rights may be affected here. This seems to be erroneous inasmuch as no riparian rights existed at the time in the proprietors of lands in West Channel.
transfer of the water from West Channel to the others was in effect an artificial arrangement, which after a long lapse of time had become permanent and so natural. The defendant in the case could make no claim on the basis of riparian rights since he rejected the return of the water to its original course through his lands. Nothing hinges on the fact that Hurd's channel and the east channel had always been natural courses.

CONCLUSION

By way of recapitulation, it is observable that Kray v. Muggli presents an exceedingly important legal issue involving social interests as is to some degree indicated by the large number of decisions which present the problem of rights of owners of land upon artificial streams and lakes. The reasoning that rights corresponding to riparian rights in natural streams and lakes cannot exist seems unconvincing. It appears, however, that many writers on the topic have been so offended by the doctrine of reciprocal easements as applied in these cases that they have failed to recognize the real situation. There can, of course, be no easement at least in our American law, not acquired by grant or by adverse use or possibly estoppel. That fact prevents an easement from accruing to those owners who enjoy benefits created by the diversion of another by prescription. Rights arise but they seem to be riparian rights and not mere easements. The doctrine of reciprocal easements here must be discarded as also the implication found in the declaration that "It is not material that its removal (the dam) will result in less injury and damage to them than to the defendants."98

Emphasis should be placed upon the appearance of a settled condition rather than on the issue whether the water course or lake originated by an event happening in nature or by the hand of man.99 There is a distinction to be observed between artificially created lakes on the one hand and diverted water courses on the other. In many cases of diverted water courses the complainant does not want the water. In that event he relies not upon his riparian rights as his ultimate basis of claim but upon the later established condition. Apparent quasi-easements should give rise to the same results. It should also be without significance whether the original diversion was made for the sole benefit of the diverter or was intended to

98. Cf. Restatement, Torts § 854 (1939). See also Harp v. Iowa Falls Electric Co., 196 Iowa 317, 191 N.W. 520 (1923) (the court considered the question which party would sustain the lesser burden).
99. See Restatement, Torts § 841 and comment h. (1939).
benefit all those affected by it. If the new condition appears to be permanent and settled, the length of time of its continuance is only one factor, though an important one, and the period of limitations of itself has no unusual significance.

It is clear that the creator of the artificial condition should not be required to maintain it where there is no obligation running with land, and the other beneficiaries should usually be privileged to enter and repair. It would seem that if it be granted that a condition once caused by the hand of man may readily assume the appearance of a natural development then riparian rights arise and we need no longer refer to reciprocal easements in such cases.