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Drainage of Surface Waters Under the Civil Law Rule as Applied in Maryland - Bishop v. Richard Biberman v. Funkhouser

DRAINAGE OF SURFACE WATERS UNDER THE CIVIL LAW RULE AS APPLIED IN MARYLAND

Bishop v. Richard[1]
Biberman v. Funkhouser[2]

In the case of *Bishop v. Richard*,[3] the plaintiff, Richard, filed a bill in equity to have the defendant, Bishop, enjoined from interfering in any way with the plaintiff's going on defendant's land and "cleaning the said ditches in a reasonable and proper manner so that the ditches may be restored to their former condition in order that they will

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[1] 65 A. 2d 334 (Md. 1949).
[2] 58 A. 2d 668 (Md. 1948).
[3] *Supra*, n. 1. Since the two recent Maryland cases of Bishop v. Richard and Biberman v. Funkhouser are closely related cases on the problem of the right of drainage of surface waters under the civil law rule, they are combined in this casenote for the purpose of discussion of the civil law rule in Maryland.

properly operate".[4] The general fall of the land and the natural flow of the surface water, although slight, is from plaintiff's lands over the lands of defendant, who is the lower or servient landowner. For a period of about fifty years, four or five well defined ditches have existed across the defendant's farm and have drained various portions of the plaintiff's farm. The ditches on the defendant's farm have been continued across the plaintiff's property, and at different times in recent years tile drains have been installed in the bed of the ditches that are on the plaintiff's property. The water from the ditches is finally discharged into a main ditch on the defendant's farm and is carried into the Choptank River. The plaintiff made several requests of defendant for permission to clean the ditches which were refused. Then in order to prevent an overflow of the water, the plaintiff went on the defendant's land to clean the ditches and he was ordered off by defendant. The opinion of the Court, in affirming the decree for the plaintiff, declared that from the facts before the Court, the increase in the flow of the water in the ditches had not been substantial as a result of the tiles placed in them by the plaintiff; and that Maryland had adopted the civil law rule, wherein the owner of land is entitled to have surface water flow naturally over the land of the lower or servient landowner.

In *Biberman v. Funkhouser*,[5] the plaintiff filed suit to enjoin the defendant from permitting water and dirt from his property to drain over and upon the plaintiff's property. The elevation of the defendant Biberman's lot was originally higher than plaintiff's. Before any grading was done on either property the bulk of the water from the defendant's lot naturally flowed over the plaintiff Funkhouser's lot, and no water flowed onto the defendant's lot at any point. The Mayor and Council of Hagerstown in regrading the street in front of the two lots raised the street higher than the whole of the front part of the plaintiff's lot and higher than a large part of the front of the defendant's lot. Plaintiff then filled in his lot, which was about five feet below the street, grading from his house to the street; and as a result of this grading the front of his lot was raised above the defendant's lot, causing water to accumulate on the

[4] The prayer also originally requested that the defendant be enjoined from filling up or in any manner preventing the ditches on his property from properly functioning. This relief was not decreed by the lower court and there was no cross appeal taken by plaintiff, therefore this question was not before the Court.

[5] *Supra*, n. 2.

corner of the defendant's lot. Then the defendant graded his lot, thereby causing a bank to be erected along the plaintiff's property. Before the defendant's property was graded, the water flowed naturally from the higher ground in several directions, thereby scattering the drainage; but after the defendant's lot was graded and put at its present level, part of the water from defendant's lot flowed onto the plaintiff's property and part of it flowed into the street. Before defendant did this grading, there apparently had been no trouble about water collecting in the plaintiff's cellar as occurred after defendant's grading. The Court, in reversing the decree of the lower court granting relief to the plaintiff, stated that where the upper or dominant proprietor by regrading had slightly increased the amount of flow of surface water onto the servient owner's property with the resulting greater concentration of water, and it could be remedied by the construction of open drains between the properties at small cost, the lower owner would be required to construct the drain on his own land rather than compel the higher owner to remove an expensive hedge on his land; but the upper owner, the defendant, would be required to retard the flow as much as possible by closing the gullies resulting from the concentration of the waters due to his regrading.

Two principal rules have grown up as to whether the lower landowner has the right to create obstructions or, by regrading his land, repel surface water flowing naturally from the higher tenement: one is the civil law rule and the other is the common law rule.[6] Both the *Bishop*[7] and *Biberman*[8] cases quoted from the Maryland case of *Philadelphia, Wilmington & Baltimore Railroad Co. v. Davis*,[9] where it was stated by the Court that: "The prevailing doctrine in this country seems to be that the owner of the upper land has a right to the uninterrupted flowage of the water caused by falling rain and melting snow, and that the proprietor of the lower land, to which the water naturally descends, has no right to make embankments whereby the current may be arrested and accumulated on the property of his neighbor. This is the rule of the civil law apparently

[6] Actually the term "common law" rule is a misnomer as England has always applied the rule of the civil law to surface waters. The common law theory is also stated as the Massachusetts rule since it was first propounded by Massachusetts, and the leading case under the common law rule is Gannon v. Hargadon, 10 Allen 106, 87 Am. Dec. 625 (Mass. 1865), or as the "common enemy" doctrine, as it was later extended by New Jersey.

[7] *Supra*, n. 1, 336, 337.

[8] *Supra*, n. 2, 671.

[9] 68 Md. 281, 289, 11 A. 822, 824, 6 Am. St. Rep. 440, 442 (1888).

founded on the principles of justice, and said to be 'received with constantly increasing favor in the United States'."[10] It has been held that the civil law rule is founded upon and in accord with the fundamental common law maxim of watercourses: *Aqua currit et debet currere, ut currere solebat,*[11] and because of this descendible nature of water the dominant land has an easement in the lower tenement for the natural flow of all waters that arise in, flow onto or fall upon the upper or dominant land. The theory supporting the civil law rule is that the superior or higher land originally cost more when it was purchased than the servient lands did, and that the respective parties purchased their properties with knowledge of the descendible nature of water in its natural state. Agricultural states have found it to be a desirable rule; and as most states are agricultural states, the civil law doctrine is the majority rule in the United States.[12]

For the purpose of discussion, the common law or "common enemy" doctrine may be briefly set forth as stated in American Jurisprudence: "No natural easement or servitude exists in favor of the higher land for the drainage of surface water; the proprietor of the lower tenement or estate may at his option lawfully obstruct or hinder the flow of such water thereon, and in so doing may turn it back or away from his own lands, and onto and over the lands of other proprietors without liability by reason of such obstruction or diversion . . . each landowner may fight off surface water and dispose of it as best he can."[13] The common law doctrine is based on the belief that surface waters are a detriment, and thus are to be fought off by adjoining landowners with impunity as a common enemy.

[10] Also cited by Baltimore & S. P. R. Co. v. Hackett, 87 Md. 224, 39 A. 510 (1898), which was a similar case and holding; Fahnestock v. Feldner, 98 Md. 335, 56 A. 785 (1904); Sentman v. B. & O. R. R. Co., 78 Md. 222, 27 A. 1074 (1893); City Dairy Co. v. Scott, 129 Md. 548, 100 A. 295 (1916); and Whitman v. Forney, 181 Md. 652, 31 A. 2d 630 (1943), which also quoted, in support of the civil law rule, III TIFFANY, REAL PROPERTY (3rd Ed.), Sec. 743: "In some states the rule of the civil law has been adopted, according to which land on which surface water naturally flows from another tenement is regarded as subject to a servitude of receiving such flow, and consequently the owner has no right, by any erection or improvement, to prevent the escape thereon of water from the higher land."

[11] Water runs, and ought to run, as it has used to run. See 3 KENT, COMM. 439, and Kauffman v. Griesemer, 26 Pa. 407, 67 Am. Dec. 437 (1856).

[12] Shahan v. Brown, 179 Ala. 425, 60 So. 891, 43 L. R. A. (N. S.) 792 (1913); Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am. St. Rep. 169 (1902); Bradbury v. Vandalia Levee and Drainage Dist., 236 Ill. 36, 86 N. E. 163, 19 L. R. A. (N. S.) 991, 15 Ann. Cas. 904 (1908); Greenwood v. Southern R. Co., 144 N. C. 446, 57 S. E. 157, 119 Am. St. Rep 967 (1907); Meixell v. Morgan, 149 Pa. 415, 24 A. 216, 34 Am. St. Rep. 614 (1892).

[13] 56 Am. Jur., Waters, Sec. 69.

It tends to encourage the landowner to build up or improve the lower areas;[14] therefore it has been adopted by many of the large urban states.[15]

In strict theory the two rules are directly opposed to each other, but in almost all jurisdictions the doctrines have been modified, so that in practice similar results have been reached in cases in different jurisdictions professing to follow opposing rules as to the rights and liabilities of upper and lower landowners in regard to the drainage of surface waters. The New Hampshire case of *Franklin v. Durgee*[16] has not only stated that these doctrines, advanced for the purpose of determining the liability and rights of the adjoining landowners, should be modified, but that in order to do complete justice in such cases in regard to surface waters neither rule should be adopted in full. The doctrine of reasonable use,[17] as declared by that Court, depends solely on the reasonableness of the lower proprietor's use of his land as compared to the damage inflicted on the higher land due to the lower owner's interference with the surface waters. The question of reasonability is a question of fact for the jury. The reasonable use doctrine, however, is subject to criticism on the grounds that it is especially desirable in the field of real property to have certainty in the law, and that certainty in the law will, in the long run, produce just results.

In its opinion in the *Bishop* case[18] the Court quoted from the Maryland case of *Whitman v. Forney*[19] that: "The adoption of a hard and fast rule under the strict common law theory would permit the lower landowner to shut off the natural flow of water on his land, and cause great hardship to the owner of the upper land, and possibility to the owners of contiguous lands on whom the overflow would

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[14] Upon this theory it has been held that the landowner "may make erections or excavations thereon to any extent whatever. Within his own limits, he can control not only the face of the earth, but everything under it and over it . . . He may erect structures upon his land as high as he pleases without regard to its effect upon surface water, no matter how much others are disturbed by it". Morrison v. Bucksport & Bangor Railroad Co., 67 Me. 353, 355 (1877).

[15] Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519 (1881); Chadeayne v. Robinson, 55 Conn. 345, 11 A. 592 (1887); Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216 (1865); Gannon v. Hargadon, 10 Allen 109, 87 Am. Dec. 625 (Mass. 1865); Boyd v. Conklin, 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831 (1884).

[16] 71 N. H. 186, 51 A. 911, 58 L. R. A. 112 (1901).

[17] Minnesota is the only other jurisdiction using this doctrine of reasonable use, see Note, 2 Minn. L. Rev. 449 RULE AS TO SURFACE WATERS IN MINNESOTA, (1918).

[18] Supra, n. 1, 337.

[19] 181 Md. 652, 659, 31 A. 2d 630, 633 (1943).

spread. This court has not adopted the common law rule. As we have shown we have held with the civil law rule states that the upper landowner has a right to have his surface water flow in its natural course over the lands of the lower owner. Yet a strict application of this rule also might result in very great hardship on the lower landowner, who would thereby be prevented from improving his land or using it as he would otherwise have a right to use it. In cases where such hardship would necessarily ensue to one or the other of the owners, courts have sometimes adopted what may be called a 'reasonableness of use' rule. That rule is based upon the facts in a particular case and is peculiarly appropriate for an equity court to follow." The *Whitman*[20] case cites the New Hampshire case of *Franklin v. Durgee*[21] in support of this view, but it carefully points out in the opinion that it does not change the adopted rule, the civil law rule, creates no precedent, but merely provides mitigation for the harsh application of the rule being applied.[22] Thus Maryland cannot be said to have adopted the reasonable use rule, but has merely employed the doctrine of reasonability where the Court has felt that the relative hardships on the landowners would be excessive under the strict application of the civil law rule. It is therefore used in Maryland not as a doctrine of law, but merely as a qualification of the existing civil law rule which has been adopted and, with certain qualifications, adhered to in this State.

The civil law rule is subject to the qualification that the dominant owner has no right to increase materially the quantity or volume of water that is discharged on the

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[20] *Supra*, n. 19.

[21] *Supra*, n. 16.

[22] The Whitman case also quotes at 181 Md. 652, 660, 31 A. 2d 630, 633 from Franklin v. Durgee, 71 N. H. 186, 51 A. 911, 913, (1901), that: "The result is that the question of reasonableness of the use in a given case must be determined as a question of fact under all the attendant circumstances. The failure to attain substantial justice by the enforcement in all cases of a rule of law which does not recognize these important differences is not surprising". And the Whitman case, on the same page, also cites Noel, *Nuisances From Land in its Natural Condition*, 56 Harv. L. Rev. 772 (1943), which at 782-784 states: "Where, however, there has been an act of man which has altered or accelerated the flow of natural surface water to the plaintiff's land, there has been a tendency to make the question of liability depend on the doctrine of reasonable user . . . In the closely related matter of the right to obstruct the discharge of surface water, there is a definite tendency at present to depart from the rigid rules and to adopt the more flexible doctrine that the lower landowner may prevent the flow of the surface water if this is done in the ordinary and reasonable use of his own land . . . A flexible rule would seem similarly desirable for cases concerned with the upper owner's duty to check the spread of surface waters.

servient landowner.[23] It is to be noted that in both the *Biberman* case[24] and the *Bishop* case[25] the court was careful to point out that the amount of water being cast into the lands, after the regrading was done or the tiles were placed in the drains, was comparatively slight. The *Biberman* case also stated that another qualification on the rule is that the upper owner cannot discharge water into an artificial channel or in a different manner than the usual and natural course of drainage,[26] or put on the lower land water which would not have flowed there if the natural drainage conditions had not been disturbed.[27] Therefore it has been held in Maryland that the upper owner can accelerate the flow, but he must be careful not to materially increase the amount or volume by the use of drains and pipes.[28]

The rights and liabilities of the upper and lower landowners under the civil law rule, in its modified form as it exists in Maryland, are clearly set forth in several leading Maryland cases on the problem of the drainage of surface waters. In the case of *Philadelphia, Wilmington & Baltimore Railroad Co. v. Davis*[29] the lower owner created an embankment for the purpose of constructing a railroad, and in so doing it had closed a gutter, and substituted an iron pipe. These acts had lessened the capacity of the outlet for the surface water and as a result the higher landowner's cellar was flooded. The Court declared that when it becomes necessary to create an embankment for any purpose, it is the duty of the lower proprietor to provide an outlet of ample capacity to carry off the flow of the water, for no one can legally assume to alter the condition of things so as to injuriously affect the pre-existing rights of his neighbor. It is therefore incumbent on the lower owner to see that the outlet be skillfully and carefully constructed, so that no damage will result to the adjoining landowner; and if done carelessly and negligently, an action

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[23] *Supra*, n. 2, 671.

[24] *Ibid.*

[25] *Supra*, n. 1.

[26] Johnson v. White, 26 R. I. 207, 58 A. 658, 65 L. R. A. 250 (1904) holds that this is true even though no more is collected than would have naturally flowed upon the property in a diffused condition.

[27] Neubauer v. Overlea Realty Co., 142 Md. 87, 120 A. 69 (1923); III TIFFANY, REAL PROPERTY, (3rd Ed. 1939), Sec. 742; and in Dayton v. Rutherford, 128 Ill. 271, 21 N. E. 198 (1889), it was stated that the higher landowner had no right to remove or open natural barriers, and let onto the lower lands such waters as would not have otherwise naturally flowed in that direction.

[28] Neubauer v. Overlea Realty Co., 142 Md. 87, 120 A. 69 (1923).

[29] 68 Md. 281, 11 A. 822, 6 Am. St. Rep. 440 (1888).

for damages may be maintained.[30] In effect the Court is allowing the servient owner to create barriers to the natural flow of the surface water, in the course of the necessary use of his land, but he has the burden of also creating a proper outlet for such waters in order to prevent the upper landowner from being damaged by the lower owner's use of his land. In the *Biberman*[31] case this problem arose and the Court followed this rule by requiring the lower landowner to construct a drain on his land providing an outlet for the surface waters, even though at the time they were not flowing back onto the upper proprietor's land.

The case of *City Dairy Co. v. Scott*[32] clearly points out that under the civil law rule the lower owner cannot interrupt the natural flow of the surface water, by filling his lot or diverting the flow of the drainage, to the detriment of the higher landowner unless the right to do so has been acquired by prescription, grant or contract.[33] And that case further asserts that the servient landowner has the right to fill his property, if necessary, to protect it from any unlawful flow of drainage forced upon such lower owner. Therefore, it is evident that the civil law rule as applied in the State of Maryland is not strictly a rule for the protection and benefit of the dominant landowner, but that it provides rights and liabilities for both the higher and lower landowners, and neither should violate the rights that the law thus gives to owners of contiguous estates.

The general principle that the higher landowner cannot collect surface water and discharge it in a concentrated volume on the lower land does not apply in the situation where the water drains through natural depressions or drains. The weight of authority, on the contrary, holds that such water may be hastened and incidentally increased by artificial means so long as its natural flow is not diverted from these depressions or drainways.[34] In fact it has been declared that the great weight of authority, under both the civil law and common law doctrines, is to the effect that a lower owner cannot obstruct the surface water, as against the rights of the upper owner, from running in such a natural drainage channel or depression, but such natural drain-

[30] Approved in Baltimore & S. P. R. Co. v. Hackett, 87 Md. 224, 39 A. 510 (1898); City Dairy Co. v. Scott, 129 Md. 548, 100 A. 295 (1916); and Eisenstein v. Annapolis, 177 Md. 222, 9 A. 2d 224 (1939).

[31] *Supra*, 2.

[32] 129 Md. 548, 100 A. 295 (1916).

[33] See also, 56 Am. Jur., Waters, Sec. 68.

[34] Manteufel v. Wetzel, 133 Wis. 619, 114 N. W. 91, 19 L. R. A. (N. S.) 167 (1907). See, 56 Am. Jur., Waters, Sec. 73, accord.

way must be kept open to carry the water into the streams.[35] Under the civil law rule it has been held that the upper owner's right of servitude cannot be disturbed by damming up the natural outlet for the surface waters, even though no injury might result to the dominant owner;[36] and it has even been held that the mere act of flooding the upper lands is wrongful *per se*.[37] However, the servient landowner may use artificial drainage methods so long as it does not interfere with the rights of the upper proprietor as originating from the natural condition of the land.[38]

A question arising under the civil law doctrine is whether the servient owner, if he so desires, can treat surface water as an asset and claim thereby a right to its continued flow. This question has been answered[39] that, "As a corollary of this civil code, the upper tenant or owner, in turn, has no right to restrain the surface water from flowing along their natural way, and hence, any obstruction of the drainage by the superior heritage is an actionable injury with respect to the servient estate. This is the strict rule of the civil law, but it has been abrogated if not completely nullified by repealing decisions in the same courts holding the doctrine". Surface water is not regarded by the courts as an asset, but it is looked upon as a detriment. The servient proprietor, therefore, has no right to look upon it as an asset, and he has no vested right in it such as will enable him to demand that its continued flow be maintained.

In answering the question as to who is to be regarded as the upper or dominant owner where the level of the properties have been reversed, the Court in its opinion in the *Biberman*[40] case declared that the property from which the water flowed before grading was done on either tract, as between the adjoining owners of the property, remains the dominant or upper estate, although the level of the two properties has subsequently been reversed by the grading. Thus, the defendant Biberman remained the upper landowner, even after the lower owner had regraded his lot so that it was the higher land; and under the civil law rule as it exists in Maryland the upper owner could regrade his

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[35] Am. Jur., Waters, Sec. 75. And in Beechley v. Harms, 332 Ill. 185, 163 N. E. 387 (1928), it was stated that the fact that there is no natural outlet from the servient land does not relieve it from the servitude placed upon it.

[36] Hooper v. Wolkinson, 15 La. Ann. 497, 77 Am. Dec. 194 (1860).

[37] Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732 (1871).

[38] *Supra*, n. 36.

[39] Note, *Waters and Watercourses—Diversion and Obstruction of Surface Waters*, 15 B. U. L. Rev. 892, 896 (1935).

[40] *Supra*, n. 2.

property to prevent the water from flowing from the original lower land onto it so as to protect his natural right of servitude. But in regrading his land the upper owner had increased the flow of surface water with resulting greater concentration than existed under natural conditions, and the Court was correct in requiring him to diminish the flow as much as possible and to close ditches through which it flowed. The Court required the plaintiff Funkhouser to construct a drain on his property, as the amount of increase in flow was comparatively slight and could be remedied by the construction of such a drain, rather than compel the upper owner to remove an expensive hedge. The Court was justified in this holding by the fact that it was wrongful for the lower proprietor to interfere with the dominant owner's natural right of flow over the servient estate, and because of the relative hardship on the upper owner if he were required to remove an expensive hedge, when the lower proprietor could remedy his originally wrongful act by constructing this drain. The Court in the *Bishop* case[41] had no difficulty in granting the relief prayed for by the dominant owner, *viz.*, that he be allowed to go onto the lower land for the purpose of cleaning out the drainage ditches, once the Court had decided from the facts that the placing of the tiles in the ditches on the dominant land did not materially increase the flow of the surface water. The Court in its opinion cited and relied on the case of *Whitman v. Forney*[42] where it was held that the owners of the lower lands should allow the dominant proprietors to go onto the servient property for the purpose of repairing and keeping in repair the drainage pipe and ditch. Therefore the Court in the *Bishop* case[43] had a similar case directly in point upon which to base its decision. It is to be noted that in its decree the Court declared:[44] "The established ditches should be cleaned out in a reasonable and proper manner in order to facilitate not only the drainage of appellee's (the upper owner) land but also of appellant's (the lower or servient owner) land. All debris taken from the ditches should be removed in such a manner as not to interfere with the proper cultivation of appellant's land". This decree by its direct wording and direction to the upper owner clearly shows that the civil law rule is not merely for the protection of the upper proprietor or for his benefit

[41] *Supra*, n. 1.
[42] 181 Md. 652, 31 A. 2d 630 (1943).
[43] *Supra*, n. 1.
[44] *Supra*, n. 1, 337.

alone, but that it is for the benefit and protection of both the dominant landowner and the servient landowner. By its application both are assured that the rights that have been given them in regard to the drainage of surface waters will be protected, and under this civil law rule the adjoining landowners may determine with reasonable certainty exactly what rights they do possess in reference to the drainage of their respective estates.

Under both the civil law and the common law rules, it is to be noted that there is no liability where water from natural sources, and without the interference of the hand of man, accumulates on land and causes harm by spreading to other land.[45] There is only one case that holds that a landowner is liable for the spread of waters naturally from his land.[46] Hence the problem of surface waters and the application of the civil law rule does not arise unless there is an interference with the natural drainage conditions by either the dominant or servient owner, or the existing drainage system becomes obstructed so that the upper owner is deprived of his right of drainage over the servient estate.

Two broad questions in all these cases involving surface waters are: (1) What is the general definition of "surface waters"; and (2) under the civil law rule is the upper proprietor's right of drainage over the lower lands dependent upon the law of easements.

Surface waters are such as diffuse themselves over the surface of the land and follow no defined course or channel. The distinguishing feature of surface waters, from stream waters, lakes, and ponds, is their diffused state.[47] Generally they are derived from falling rain or melting snow,[48] or arise in springs which diffuse themselves over the surface of the ground, "and not gathering into or forming any more definite body of water than a mere bog or marsh, and are lost by being diffused over the ground through percolation, evaporation, or natural drainage".[49] Thus waters following a well defined channel and having a permanent existence have been held to be a stream, even though dry at times, and not surface waters which flow intermittingly and

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[45] Noel, *Nuisances From Land in its Natural Condition*, 56 Harvard L. Rev. 772, 782.

[46] Clayton v. Sale Urban Dist. Council, 1 K. B. 415 (1926).

[47] 56 Am. Jur., Waters, Sec. 65.

[48] Philadelphia, Wilmington & Baltimore Railroad Co. v. Davis, 68 Md. 281, 11 A. 822, 6 Am. St. Rep. 440 (1888). However there is no Maryland case defining what are considered to be surface waters.

[49] Skinner v. Silver, 158 Ore. 81, 75 P. 2d 21, 28 (1938).

follow no well defined channel.[50] Flood water that leaves a stream and flows away from the stream was treated as surface water against which the landower could not defend himself by obstructing its natural flow in an Alabama case,[51] but was treated otherwise in California.[52] Whether water dripping from the eaves of a roof is surface water is a point upon which the cases are also in conflict. A Connecticut case[53] holds that it is not surface water; whereas, a Delaware case[54] finds that it is surface water whether falling on ground or roofs. The Maryland case of *Harms v. Kuchta*[55] appears to hold with Connecticut, as the Court decided that water dripping from a roof to the damage of an adjoining landowner constitutes a nuisance, and did not discuss the right of drainage of surface waters in the opinion. With this conflict between the various jurisdictions, no one definition prevails as to what constitutes surface waters, each jurisdiction having evolved a working definition as the need has arisen, with some definitions which seem to be conflicting possibly being attributable to the particular facts from which they arose.

As to the second question, it has been expressly held in *Whitman v. Forney*[56] that under the civil law rule the upper proprietor's right of drainage over the lower or servient lands is not dependent upon the law of easements, but that the right of drainage of surface waters is a natural right. In that case, the Court held that the plaintiff had a right to have water from its roadbed run according to its natural flow across the servient lands of the defendant, and in the opinion stated: "This is without regard to the question of a prescriptive right in an easement across the plaintiff's property."[57] The fact that the right of drainage of surface waters is dependent upon a natural right, as distinguished from an easement created by prescription, grant, or necessary implication, is borne out by the *Bishop*[58] case, where the ditches had remained for over fifty years and

[50] International-Great Northern R. Co. v. Regan, 121 Tex. 233, 49 S. W. 2d 414 (1932).
[51] Nininger v. Norwood, 72 Ala. 277, 47 Am. Rep. 412 (1882).
[52] Horton v. Goodenough, 184 Cal. 451, 194 P. 34 (1920) saying "Any property owner may protect himself against flood waters running over the land as they are not surface waters in the technical sense". The different facts in this case and the Alabama case should be weighed before the cases, as distinguished from the definitions, are said to be *contra*.
[53] Shea v. Gavitt, 89 Conn. 359, 94 A. 360 (1915).
[54] Bringhurst v. O'Donnell, 14 Del. Ch. 225, 124 A. 795 (1924).
[55] 141 Md. 610, 119 A. 454 (1922).
[56] 181 Md. 652, 31 A. 2d 630 (1943).
[57] *Ibid.* at 658.
[58] *Supra*, 1.

yet the Court made no reference to the law of easements. Thus it is sometimes stated that the right of drainage of surface waters is based on the law of natural easements, but the term "natural right" is apt to create less confusion in its usage than the term "natural easement".