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The first issue of THE NORTH CAROLINA LAW REVIEW appeared in June 1922, and it has been published quarterly since that time on a subscription basis. But it was not reaching all the lawyers in this State, as had been expected, and so was not rendering such service as we believe it can. The present plan, as long as it can be maintained, is to place on the subscription list, without charge, every lawyer in North Carolina who is interested enough to request us to send him THE LAW REVIEW. In order to do this, the size of our magazine was reduced, but it is intended to keep up the standard of the material which will appear in our pages.

We hope that THE LAW REVIEW will be the medium through which may be expressed the attitude, the needs and the problems of the lawyers and judges in active practice. Those who are daily carrying on the legal work of the State must have some definite reactions to, and also constructive suggestions for dealing with, the difficulties met in the practical administration of justice through law. Contacts between the lawyer, the judge, the law student and the law teacher are needed in order that there be a basis for the legal profession as a whole to render real public service. Such cooperation we hope to have with THE NORTH CAROLINA LAW REVIEW.

REASONABLE USE OF PERCOLATING WATERS—It is one of the elementary truths, firmly fixed in the Common Law, that the water of a natural watercourse is not the subject of ownership.<sup>1</sup> In this respect, it may be classified with light, air, or *ferae naturae*, which are not private property until appropriated, used, or reduced to control.<sup>2</sup> Thus, while the landowner through, or past, whose premises the watercourse runs may take it from the stream and into his possession by introducing it into a pipe or aqueduct, or by storing it in a reservoir,<sup>3</sup> and thus acquire ownership as of personal property,<sup>4</sup> in its original state in the watercourse he is regarded as merely having the use of, and not an absolute property right in, the water. He is

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<sup>1</sup> *Tracey Development Co. v. People*, (1914) 212 N. Y. 488, 106 N. E. 330. See also article by Samuel C. Wiel in 22 H. L. R. 190.

<sup>2</sup> *Vernon Irrigation Co. v. Los Angeles*, (1895) 106 Cal. 237, 39 Pac. 762. The Institutes of Justinian recognized running water as common property: "Thus, the following things are by natural law common to all—the air, running water, the sea, and consequently the sea shore." Just. lib. II, tit. 1,—translation by J. B. Moyle (5th Ed.) p. 35.

<sup>3</sup> *City of Syracuse v. Stacey*, (1901) 169 N. Y. 231, 62 N. E. 354, *Wallace v. City of Winfield*, (1916) 98 Kansas 651, 159 Pac. 11.

<sup>4</sup> *Hagerman Irrigation Co. v. McMurry*, (1911) 16 N. Mex. 172, 113 Pac. 823.

entitled to demand, as a "natural right," that upper and adjoining landowners allow the stream to flow as it has been accustomed to flow, but, since those owners have the same right, he is under a corresponding duty not to interfere with such flow in a manner which might jeopardize their interests.<sup>5</sup> Such is the doctrine of riparian rights at Common Law in England, and as adopted by the courts of this country.

In the case of percolating water, i.e. water percolating or seeping through the earth under the surface and in no fixed channels, the approach of our courts has been somewhat different. Just how far one landowner may go in preventing the passage of such water to adjoining land has been the subject of much discussion, and has resulted in a wide split of authority in the various American jurisdictions.<sup>6</sup> In general the authorities may be marshalled under two main heads: First, those which give to the landowner the absolute property in percolating water, together with the right to prevent its passage to adjoining land, and, second, those which deny such property right, supplying, in its stead, the doctrine of *reasonable use*. The first of these two positions has been termed the "English View," the leading case in point being *Acton v. Blundell*,<sup>7</sup> which was decided by the Exchequer Chamber in 1843. In that case, the defendant while carrying on mining operations on his own land in the usual manner, sunk certain shafts which drained the percolating water from the land of the plaintiff, resulting in the drying up of the plaintiff's well. The court held that the injury was *damnum absque injuria*, following literally the maxim of *cuius est solum, eius est usque ad caelum et ad inferos*,—the owner of the soil is owner to the sky and the depths,—“whether it (the land below his property) is solid rock, or porous ground, or venous earth, or part soil, part water . . .”<sup>8</sup> By its decision, the English court recognized that, in the case of percolating water, not only the right of user, but the corpus of the water, passed as absolute property with the soil itself.

<sup>5</sup> Goddard, *Easements*, (8th. Ed.) p. 84. See also Leake, *Uses and Profits of Land*, p. 148. The obligation to allow the water to flow in its natural state became a part of the Common Law under the maxim, *Aqua currit et debet currere ut currere solebat*.

<sup>6</sup> For discussion and citation of cases in the various jurisdictions, see Tiffany, *Real Property*, (2nd. Ed.) p. 1175 *et seq.* Also 27 R. C. L. ("Waters") par. 91.

<sup>7</sup> 12 Meeson & Welsby 324. See *Chasemore v. Richards*, 7 H of L Cas. 349, 1 Eng. Rul. Cas. 729, and note.

<sup>8</sup> *Acton v. Blundell*, *supra*, p. 353.

Numerically, perhaps over one-half of the decisions on the question in the United States have followed the lead of *Acton v. Blundell* in declaring that the landowner has an absolute property in the water under his land, and may use it as he sees fit, irrespective of the hardship to adjoining landowners.<sup>9</sup> The courts supporting this view have taken the position that the percolating water is a part of the corpus of the soil itself, and not a separate substance subject to riparian rights, or to the rules of use applied in the case of water in watercourses on the surface of the land. Opposed to the line of authorities supporting the English view is an ever-growing group of decisions in favor of the "American Doctrine"<sup>10</sup> of *reasonable use*. A definition of *reasonable use* was made by one court as follows: "While the owner of land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby become a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with a beneficial use of the land, especially if such use in excess of the reasonable and beneficial use is injurious to others who have substantial rights to the water."<sup>11</sup> A great majority of the later American cases are in accord,<sup>12</sup> although the Supreme Court of Virginia, as late as 1921, followed the English View.<sup>13</sup>

In the recent case of *Rouse v. City of Kinston*,<sup>14</sup> the facts were these: The plaintiff, a resident of Kinston, purchased two tracts of land known as the "Caswell Lodge Plantation" and the "Ginhouse" tract. On both of these properties the water was bad, being both

<sup>9</sup> *Hanson v. McCue*, (1871) 42 Cal. 303, 10 Am. Rep. 299; *Houston & T. C. R. Co. v. East*, (1904) 98 Tex. 146, 81 S. W. 279; *Roath v. Driscoll*, (1850) 20 Conn. 533, 52 Am. Dec. 352 and note; *Elster v. City of Springfield*, (1892) 49 Ohio St. 82, 30 N. E. 274; *Hunte v. Laramie*, (1919) 26 Wyo. 160, 181 Pac. 137; *Huber v. Merkel*, (1903) 117 Wis. 355, 94 N. W. 354; *Chase v. Silverstone*, (1873) 62 Me. 175, 16 Am. Rep. 419; *Stoner v. Patten*, (1909) 132 Ga. 178, 63 S. E. 897; *Lybe's Appeal*, (1884) 106 Pa. St. 627, 51 Am. Rep. 542; *McCarter v. Hudson County Water Co.*, (1906) 70 N. J. Eq. 695, 65 Atl. 489.

<sup>10</sup> So called, perhaps, because the English Common Law Doctrine remains substantially unchanged. See *English v. Metropolitan Water Board*, (1907) 1 K. B. 588.

<sup>11</sup> *Midway Irrigation Co. v. Snake Creek Mining & Tel. Co.*, (1921) 271 Fed. 157, 162. (CCA. 8th. Circuit).

<sup>12</sup> *Smith v. Brooklyn*, (1899) 160 N. Y. 357, 54 N. E. 787; *Horne v. Utah Oil Refining Co.*, (1921) 59 Utah 279, 202 Pac. 815; *Katz v. Walkinshaw*, (1902) 141 Cal. 116, 70 Pac. 663,—rehearing affirming same (1903) 141 Cal. 128, 74 Pac. 766. Wiel on *Water Rights in Western States*, section 1066 and cases cited.

<sup>13</sup> *Heninger v. McGinnis*, (1921) 131 Va. 70, 108 S. E. 671. Also in accord is *Miller v. Black Rock Springs Imp. Co.*, (1901) 99 Va. 747, 40 S. E. 27.

<sup>14</sup> *Rouse v. City of Kinston*, (1924) 188 N. C. 1, 123 S. E. 482.

unhealthy and not drinkable. After purchasing the land, which comprised almost six hundred acres, the plaintiff, at the expense of from \$15,000 to \$20,000, sank wells and procured deep artesian water on the premises. The City of Kinston purchased a half acre of land adjoining the large tracts of the plaintiff, and soon after began sinking deep wells thereon, and expressed its purpose to conduct water therefrom by a ten-inch main to the City. Contemporaneously with the sinking of the City's wells, two of the plaintiff's wells ceased to flow, and the flow of a third well was decreased from approximately 100 gallons per minute to only 8 gallons per minute. The City had also laid mains over the land of the plaintiff without purchase of an easement or condemnation of the property. The plaintiff was awarded \$8,000 damages for the injury to his wells and \$1,000 for the trespass caused by the laying of the mains. The defendant City assigned error, and appealed to the Supreme Court of North Carolina. The court found no error, and affirmed the judgment below. The opinion of the court was given by Clarkson, J., who, after an exhaustive review of the authorities, rejected the English View, and upheld the American doctrine of reasonable use of percolating water. Said the court, "We think there is no error in the charge of the court below as follows: 'This rule (that of *reasonable use*) does not prevent the private use by any landowner of percolating waters subjacent to his soil in manufacturing, agriculture, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining, or the like, although by such use the underground percolating waters of his neighbor may be thus interfered with or diverted; but it does prevent the withdrawal of underground waters for sale or distribution, for uses not connected with any beneficial ownership or enjoyment of the land from which they are taken, if it thereby follows that the owner of adjacent lands is interfered with in his right to the reasonable use of subsurface water upon his own land or if his wells, springs or streams are thereby materially diminished in flow, or his land rendered less valuable for agriculture, pasturage, or for legitimate uses. . . .'" The court expressed the opinion that the English Rule, dependent upon ownership to the sky and depths, must fall before the maxim of *sic utere tuo ut alienum non laedas*.<sup>15</sup>

<sup>15</sup> The same result, on substantially the same facts, was reached in the case of *Meecker v. City of East Orange*, (1909) 77 N. J. Law 623, 74 Atl. 379. There it was held that a city which, for purpose of supplying its inhabitants with drinking water, sank on its land artesian wells, through which it drew out percolating water, was liable in damages for injuries caused thereby to the adjoining owner.

As suggested in the quotation from the charge in the lower court in the *Kinston case*, the application of the doctrine of *reasonable use* is tempered by a close analysis of the facts to determine whether or not the adjoining landowner is actually suffering an injury. This is well brought out by two recent cases of *Horne v. Utah Oil Refining Company*<sup>16</sup> and *Glover v. Utah Oil Refining Company*.<sup>17</sup> In the first case, over a hundred lots were irrigated by underground waters raised from an artesian basin. An oil company purchased a small lot in the vicinity and sunk wells whose operation seriously diminished the supply of the adjacent lot owners. The water so taken was to be put through a refinery in the district. The surrounding lot owners asked for an injunction, which was granted. The court, in its opinion, rested the result solely on the ground that there had been an unreasonable use of the percolating water on the part of the Company. The Company then purchased the water rights of over a hundred of the adjoining owners, and went ahead with its original plan. Then, in the *Glover case* which followed, one small lot owner, who had not sold out to the Company, asked for an injunction. She alleged that, when all of the original lot owners had used, on their lots in the district, their correlative portion of the percolating waters, she was entitled to 6.58 minute gallons for her lot; that, if the water intended to be drawn from the land by the Company which had purchased the rights of her neighbors were distributed rateably among all of the lots in the district, the plaintiff would be entitled to 15 minute gallons, and that she needed the increase over her original 6.58 minute gallons, which she admits the defendant's action would not impair. The plaintiff sought to enjoin the drawing of the water from the district on theory that it was not to be beneficially used for the tract on which the artesian basin was located. The Utah court held that, in such a case, as long as plaintiff's relative portion of 6.58 minute gallons was not interfered with, she had no cause for complaint merely on the basis of the use which the Company was to have for the water. The two cases taken together form an excellent basis for the suggestion contained in the charge to the jury in the case of *Rouse v. City of Kinston*, that perhaps the doctrine of *reasonable use* has no application unless, by a use unconnected with the land from which the water is taken, the adjoining landowner is interfered with in the *then* beneficial use of

<sup>16</sup> (1921) 59 Utah 279, 202 Pac. 815.

<sup>17</sup> (1923) 62 Utah 174, 218 Pac. 955. Thurman, J., delivered the opinion of the court in both this case and the *Horner Case*, *supra*.

his premises. If such a conclusion is not sound, then it would appear that the position taken by the Utah court in the *Glover* case is untenable, since in the *Horne* case, the court rejected the idea of absolute property in the percolating water, resting its decision solely on the ground of unreasonable use, and then, in the sequel case, denied the plaintiff's right to a recovery, not on the ground that the use of the water by the Company was reasonable, but on the ground that the plaintiff's original share of the water was not diminished.

The two Utah cases raise an interesting question with regard to the future development of the doctrine of *reasonable use*: When the activity of the defendant fails to impair the *present* flow of the percolating water through the land of the plaintiff, but will result in cutting off the possibility of *future* improvements, will the courts extend the doctrine of *reasonable use* so as to protect such future development? Three separate situations are possible when the defendant is taking percolating water,—First, he may be taking it for use on his own land for purpose of immediate enjoyment of the land; second, he may be taking it for use in expansion or development of the resources of the land; and third, he may be taking the water for use at a distant place, or for a use totally unconnected with his own land from which it is drawn. It is quite obvious from a portion of the charge to the jury in the *Kinston* case, approved by the Supreme Court, that our court is unwilling to apply the *reasonable use* doctrine so as to interfere in the first of these situations. The present right to beneficial use of the water on the land of the person drawing the same appears to be paramount to the right of his neighbor to future increase in his supply.<sup>18</sup> The inference of the charge in that same case is that the doctrine of *reasonable use* will also permit the unrestricted use of the water in the second situation, i.e. for future development of the defendant's land.<sup>19</sup> But the court was of the opinion that the application of the doctrine would restrain the unrestricted use of the water by the defendant in the third of these situations,—for use unconnected with the beneficial use of the adjoining land from which it was drawn. The California court has

<sup>18</sup> See previously quoted portion of the charge: "This rule does not prevent the private use by any landowner of percolating waters subjacent to his soil in manufacturing, agriculture, irrigation, or otherwise . . ."

<sup>19</sup> *Ibid.*: "Nor does it prevent any reasonable *development* of his land by mining, or the like, although by such use the underground percolating waters of his neighbor may be thus interfered with or diverted; . . ."

likewise taken this position,<sup>20</sup>—one which would have been fatal to the contention of the defendant company in the *Glover case* had the Utah court seen fit to adopt it.

Although the decision in the *Kinston case* did not render their consideration necessary, in future applications of the doctrine of *reasonable use* there are two possibilities. Either our courts will apply the doctrine narrowly, and thus tend to swing back to the English Rule of *ownership* of the percolating water, at least for all purposes connected with the land of the person drawing the same,<sup>21</sup> or they will apply the doctrine broadly and limit it, roughly, to the same considerations which now apply to riparian rights on surface streams. The scarcity of ground water for purposes of irrigation and the supplying of drinking water alike, make the latter course by far the more desirable. Its adoption would mean a recognition of the right of each adjoining landowner to have percolating water flow as it has been *accustomed* to flow, free from unreasonable interference by the neighboring owners for *any* purpose. While the rules of riparian rights do not, because of the difference in subject matter, of necessity control underground waters, still it would undoubtedly clarify the doctrine of *reasonable use* to attach it to such a well-grounded and stable body of law as has arisen in connection with water rights on the surface.

F. S. R.

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<sup>20</sup> *Burr v. Maclay Rancho Water Co.*, (1908) 154 Cal. 428, 98 Pac. 260. The court held that the right of a landowner to a quantity of percolating water necessary for *further* use on his own tract is paramount to that of the adjoining owner to take the water to distant land.

<sup>21</sup> The language of the Federal Court in *Midway Irrigation Co. v. Snake Creek Mining, etc. Co.*, *supra*, tends to support this possibility even though the decision, perhaps, does not. See p. 162 of that opinion: "Subterranean and other waters on his land, *which thereby become a part of the realty* . . ."

In South Dakota it is expressly provided by statute (Comp. Laws, Section 2771) that subterranean water, not flowing in a definite channel, but percolating and seeping through the earth, is a part of the realty. The owner of land upon which a percolating spring appears, being entitled to the waters thereof, may recover damages from a person carrying them away. See *Metcalf v. Nelson* (1895) 8 S. D. 87, 65 N. W. 911.