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would have proper notice, and the attorneys' duties would be eased and clarified.

HERBERT T. MITCHELL, JR.

Real Property—Riparian Rights

Because *Y* irrigated his cabbages and collards with the contaminated water of Beaverdam Creek, the North Carolina Commissioner of Agriculture secured an injunction to prohibit the sale or disposition of the crop. *Y* thereupon sued the defendant municipal corporations for negligently permitting sewage to pollute the creek. The North Carolina court reversed the judgment for damages below and said that the motion for nonsuit should have been allowed.[1] In the course of the opinion the court stated that riparian rights were not established in *Y* because he had no allegation in his complaint that he or his lessor was a riparian proprietor, neither allegation nor proof that he or his lessor had acquired a right to use the waters of the creek by prescription or adverse use, nor proof that he or his lessor had authority and license from an alleged riparian owner to use the water. The court then raised two important questions by quaere: (1) What is the physical extent of riparian land?[2] (2) Can a riparian owner transfer his riparian rights to a non-riparian owner for use on non-riparian land? This note is concerned with the problems raised by these questions.[3]

In the common law riparian states[4] that have considered the first question, two theories have developed concerning the physical extent of riparian land. One doctrine is the watershed rule[5] which requires land

[1] Young v. City of Asheville, 241 N. C. 619, 86 S. E. 2d 408 (1955).

[2] Land to be riparian must have the stream flowing over it or along its borders. Stratbucker v. Junge, 153 Neb. 885, 46 N. W. 2d 486 (1951). The land must be in actual contact with the water and mere proximity without contact is insufficient. Kingsley v. Jacobs, 174 Ore. 514, 149 P. 2d 950 (1944).

[3] Any treatment of the prior appropriation theory of water rights or of the attainment of water rights by prescription or adverse use is beyond the scope of this note. The doctine of prior appropriation is that the one who first diverts and applies to a beneficial use the waters of a stream has a prior right thereto, to the extent of his appropriation. 56 AM. JUR., *Waters* § 291 (1947). Prescription or adverse use is the acquiring of ownership of a water right by adverse use. The use must be continuous, uninterrupted, adverse and exclusive under a claim of right for the prescriptive period. 56 AM. JUR., *Waters* § 326 (1947).

[4] There are two separate and distinct systems of water rights in the United States. One is the riparian doctrine which developed under the English common law. The other is the prior appropriation doctrine which developed in the arid western states of the United States. Generally the common law riparian doctrine is that each riparian proprietor is entitled to have the water course flow by or through his land in its natural course and quality, subject only to reasonable use by himself and other riparian proprietors. The prior appropriation doctrine is the doctrine that the first person to apply the water of a stream to a beneficial use is entitled to the full flow of the stream, whether he is a riparian owner or not. Agnor, *Riparian Rights in the South Eastern States*, 5 S. C. L. Q. 141, 143, 147 (1952).

[5] Research indicates that the following states have the watershed theory:

to be within the watershed of a stream in order to enjoy riparian rights.[6] The principal reasons for this rule are that where water is used on such lands it will, after use, return to the stream, and that as the rainfall on such lands feeds the stream, the land is entitled, so to speak, to the use of its water.[7] Land beyond the watershed cannot be regarded as riparian even though it is a part of a single tract abutting the stream.[8] Some states place a further limitation upon the application of the watershed rule in requiring that title to the entire tract must be acquired in one transaction.[9] Under this limitation subsequent acquisitions of land adjacent to the riparian land will not be riparian even if contiguous;[10] and where land once conveyed is thereby cut off from the riparian tract and stream, it can never regain the riparian right although it may thereafter be reconveyed to the person owning the riparian land.[11]

The watershed rule appears to work satisfactorily in a common law riparian state where the test for a permissive use of riparian water is a reasonable use on riparian land, with use on non-riparian land being unlawful. The status of the land, whether riparian or non-riparian, thus becomes an important preliminary question that must be decided before even considering the reasonableness of the use.[12]

Arkansas: Harrell v. City of Conway, 271 S. W. 2d 924 (Ark. 1954). *California:* Chauvet v. Hill, 93 Cal. 407, 28 Pac. 1066 (1892); Bathgate v. Irvine, 126 Cal. 135, 58 Pac. 442 (1889); Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907); modified to allow use of surplus water on non-riparian land in Chow v. City of Santa Barbara, 217 Cal. 673, 22 P. 2d 5 (1933); City of Pasadena v. City of Alhambra, 180 P. 2d 699 (Cal. 1947); City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 207 P. 2d 17 (1949). *Kansas:* Clark v. Allaman, 71 Kan. 206, 80 Pac. 571 (1905). Kansas is now practically a prior appropriation state having changed by statute which was upheld in *Ex rel.* Emery v. Knapp, 167 Kan. 546, 207 P. 2d 440 (1949). See Busby, *American Water Rights Law: A Brief Synopsis of Its Origin and Some of Its Broad Trends With Special Reference to the Beneficial Use of Water Resources,* 5 S. C. L. Q. 106, 127 (1952). *Massachusetts:* Sturtevant v. Ford, 280 Mass. 303, 182 N. E. 560 (1932); Stratton v. Mt. Hermon Boys' School, 216 Mass. 83, 103 N. E. 87 (1913). *New Jersey:* McCarter v. Hudson County Water Co., 70 N. J. Eq. 695, 65 Atl. 489 (1906). *South Dakota:* Sayles v. City of Mitchell, 60 S. D. 592, 245 N. W. 390 (1932). *Texas:* Texas Co. v. Burkett, 117 Tex. 16, 296 S. W. 273 (1927); Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733 (1905). *Virginia:* Virginia Hot Springs Co. v. Hoover, 143 Va. 460, 130 S. E. 408 (1925); Town of Gordonsville v. Zinn, 129 Va. 542, 106 S. E. 508 (1921).

[6] A watershed is the boundary line between one drainage area and others. Webster, *International Dictionary,* 2886 (2d Ed. 1940).

[7] Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907).

[8] Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907); Sayles v. City of Mitchell, 60 S. D. 592, 245 N. W. 390 (1932).

[9] Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733 (1905); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781 (1903); Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P. 2d 533 (1938).

[10] Boehmer v. Big Rock Creek Irr. Dist., 117 Cal. 26, 48 Pac. 908 (1897).

[11] Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P. 2d 533 (1938); Yearsley v. Cater, 149 Wash. 285, 270 Pac. 804 (1928).

[12] Town of Gordonsville v. Zinn, 129 Va. 542, 106 S. E. 509 (1921).

The main advantage of the watershed rule seems to be that it allows a riparian owner to use riparian water on his land to the maximum extent possible while at the same time protecting the lower riparian owners, since the water after use will drain back into the stream from which it was extracted.

The second doctrine defining the extent of riparian land developed in Oregon.[13] This theory is that the limit to riparian land is common ownership and contiguity to the stream. The Oregon court said in *Jones v. Conn:*[14] "It is plainly not possible to define the distance to which the riparian proprietor's right to use the water for irrigation or other purposes extends, but this will depend upon the circumstances of each case. The only general rule that can be laid down is that the distance and use should be reasonable. . . . It would seem therefore that any person owning land which abuts upon or through which a natural stream of water flows is a riparian proprietor, entitled to the rights of such, without regard to the extent of his land, or from whom or when he acquired titles."

This rules appears to have the practical advantage of extending the riparian right to the greatest acreage under one ownership while still protecting other riparian owners by requiring reasonable use.[15] But as Oregon now has virtually adopted the prior appropriation doctrine, this rule doesn't seem to be of practical importance.[16]

North Carolina has said that a riparian owner is one who owns the land which the water covers or which forms its banks.[17] In *Young v. City of Asheville*[18] it was stated that land to be riparian must be in actual contact with the stream, and that mere proximity without contact is insufficient. Thus, although it seems clear that riparian land in North Carolina is land touching or in actual contract with the stream itself, whether it is merely one tract or extends to subsequent acquisitions or is limited by the watershed is yet to be decided.

If in a future case the North Carolina court finds it necessary to define the exact physicial extent of riparian land, it is hoped that the policy adopted will be one of protecting the lower riparian owner while still allowing maximum usage of the riparian water consistent

[13] Apparently Oregon has been the only state to follow this doctrine. Jones v. Conn., 39 Ore. 30, 64 Pac. 855 (1901), *rehearing denied* 39 Ore. 46, 65 Pac. 1068 (1901).

[14] *Id.* at 39, 64 Pac. at 858.

[15] Note, 27 MICH. L. REV. 479 (1929).

[16] See Busby, *American Water Rights Law: A Brief Synopsis of Its Origin and Some of Its Broad Trends With Special Reference to the Beneficial Use of Water Resources,* 5 S. C. L. Q. 106, 127 (1952); Maloney, *The Balance of Convenience Doctrine in the South Eastern States, Particularly as Applied to Water* (Addendum), 5 S. C. L. Q. 159, 180 (1952).

[17] City of Durham v. Cotton Mills, 141 N. C. 615, 54 S. E. 453 (1906); Pugh v. Wheeler, 19 N. C. 50 (1832).

[18] 241 N. C. 618, 86 S. E. 2d 408 (1955).

with this protection. The rule allowing a riparian owner to use water on his land within the watershed seems to achieve this result.

May a riparian owner transfer his riparian right to a non-riparian owner to use on non-riparian land?[19] The majority of the common law riparian states that have considered this problem say that no legal right exists in a riparian owner for the use of the riparian water beyond his riparian land.[20] Any such use is an infringement upon the rights of the lower riparian owners;[21] and since a riparian owner cannot exercise any right of use on non-riparian land, he cannot, as against a lower riparian owner, confer it upon another.[22] However, as between himself and his grantee, the riparian owner is estopped to prevent the non-riparian use.[23] The lower riparian owner is allowed to enjoin any diversion of water to non-riparian land in order to prevent the diversion from growing into a prescriptive right.[24] Some states qualify this rule by requiring the lower riparian owner to show actual injury before he can prevent the diversion.[25]

[19] A riparian owner does not own the water of a stream but he owns a usufructuary right which is the right of reasonable use of the water. Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P. 2d 533 (1938).

[20] *California:* Gould v. Stafford, 77 Cal. 66, 18 Pac. 879 (1888); Miller & Lux v. Madera Canal & Irrigation Co., 155 Cal. 59, 99 Pac. 502 (1909); modified to allow use of surplus water on non-riparian lands in Chow v. City of Santa Barbara, 217 Cal. 673, 22 P. 2d 5 (1933); City of Pasadena v. City of Alhambra, 180 P. 2d 699 (Cal. 1947); City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 207 P. 2d 17 (1949). *Connecticut:* Harvey Realty Co. v. Borough of Wallingford, 111 Conn. 352, 150 Atl. 60 (1930); Williams v. Wadsworth, 51 Conn. 277 (1884). *Georgia:* Hendrix v. Robert Marble Co., 175 Ga. 389, 165 S. E. 223 (1932); Stoner v. Patten, 132 Ga. 178, 63 S. E. 897 (1909). *Massachusetts:* Stratton v. Mt. Hermon Boys' School, 216 Mass. 83, 103 N. E. 87 (1913). Massachuetts allows diversion to non-riparian land if there is no actual injury to lower riparian owners for any present or future use. *New Jersey:* McCord v. Big Brothers Movement, 185 Atl. 480 (N. J. 1936). *Pennsylvania:* Lackawanna Mills v. Scranton Gas & Water Co., 300 Pa. 303, 150 Atl. 633 (1930); Scranton Gas & Water Co. v. Delaware L. & W. R. Co., 240 Pa. 604, 88 Atl. 24 (1913). *South Dakota:* Sayles v. City of Mitchell, 60 S. D. 592, 245 N. W. 390 (1932). *Texas:* Woody v. Durham, 267 S. W. 2d 219 (Texas 1954); Texas Co. v. Burkett, 117 Tex. 16, 296 S. W. 273 (1927); Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733 (1905). Texas allows use of surplus water on non-riparian land. *Virginia:* Town of Purcellville v. Potts, 179 Va. 514, 19 S. E. 2d 700 (1942); Town of Gordonsville v. Zinn, 129 Va. 542, 106 S. E. 508 (1921). *West Virginia:* Roberts v. Martin, 72 W. Va. 92, 77 S. E. 535 (1913). *Washington:* Hunter Land Co. v. Laigenour, 140 Wash. 558, 250 Pac. 41 (1926); Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923); Mally v. Weidensteiner, 88 Wash. 398, 153 Pac. 342 (1915); Town of Kirkland v. Cochrane, 87 Wash. 528, 151 Pac. 1082 (1915). Washington allows use of surplus water on non-riparian lands.

[21] Roberts v. Martin, 72 W. Va. 92, 77 S. E. 535 (1913); Town of Purcellville v. Potts, 179 Va. 514, 19 S. E. 2d 700 (1942).

[22] Gould v. Eaton, 117 Cal. 539, 49 Pac. 577 (1897); Kennebunk v. Maine Turnpike Authority, 147 Me. 149, 84 A. 2d 433 (1951).

[23] Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 110 Pac. 927 (1910): Texas Co. v. Burkett, 117 Tex. 16, 296 S. W. 273 (1927).

[24] Pabst v. Finmand, 190 Cal. 1124, 211 Pac. 11 (1922); Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 Pac. 978 (1907).

[25] "The question in such a case is not whether the diversion, being for a legitimate use, is in quantity such as is reasonable having regard to all the circumstances

This rule confines the use of riparian water strictly to riparian land and prohibits its use on non-riparian land either by a riparian owner or his grantees as against a lower riparian owner. Although this rule protects the lower riparian owner, it doesn't seem to answer the policy question of why a non-riparian owner who needs water should not be allowed to use it, where there is a surplus in the stream that would run unused into the sea.

Apparently to prevent this waste of water and to promote maximum usage, a group of states, who once followed the doctrine above, have modified it either by constitutional amendment or by statutory change so as to allow appropriation of surplus water for beneficial use on non-riparian land.[26] Therefore, in *Texas Co. v. Burkett,*[27] it was held that the riparian owner has the right to divert water to non-riparian land where water is abundant and no possible injury could result to lower riparian owners. But in *Smith v. Wheeler,*[28] in an action for injunction against diversion of water from riparian land to non-riparian land, it was said that the burden was on the defendant to prove the existence of surplus water.

This group of states seems to have achieved a desirable balance between protecting the riparian owner while still promoting maximum usage of water so as to prevent waste. If a state having a history of common law decisions holding that riparian water cannot be used on non-riparian land is to adopt the modified doctrine of the above states, it should probably do so by statute or constitutional amendment.

A minority group of states allows riparian water to be used on non-riparian land.[29] This is done by treating the fact of use on non-riparian land as merely another circumstance to consider in deciding the reasonableness of the use. As was said in *Gillis v. Chase,*[30] it is simply a question of fact whether the use of water by a riparian owner either

. . . but only whether it causes actual damage to the person complaining." Stratton v. Mt. Hermon Boys' School, 216 Mass. 83, 103 N. E. 87 (1913); "The riparian owner has the right to divert riparian water to non-riparian land, where water is abundant and no possible injury could result to lower riparian owners." Texas Co. v. Burkett, 117 Tex. 16, 296 S. W. 273 (1927).

[26] *California:* City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 207 P. 2d 17 (1949); City of Pasadena v. City of Alhambra, 180 P. 2d 699 (Cal. 1947); Chow v. City of Santa Barbara, 217 Cal. 673, 22 P. 2d 5 (1933). *Nebraska:* Crawford Co. v. Hathaway, 67 Neb. 325, 93 N. W. 781 (1903). *Texas:* Woody v. Durham, 267 S. W. 2d 219 (Tex. 1954); Texas Co. v. Burkett, 117 Tex. 16, 296 S. W. 273 (1927); Watkins Land Co. v. Clements, 98 Tex. 578, 86 S. W. 733 (1905). *Washington:* Hunter Land Co. v. Laigenour, 140 Wash. 558, 250 Pac. 41 (1926); Brown v. Chase, 125 Wash. 542, 217 Pac. 23 (1923).

[27] 117 Tex. 16, 296 S. W. 273 (1927).

[28] 107 Cal. App. 2d 451, 237 P. 2d 325 (1951).

[29] *New Hampshire:* Poire v. Serra, 106 A. 2d 39 (N. H. 1954); Gillis v. Chase, 67 N. H. 161, 31 Atl. 18 (1891). *Oklahoma:* Smith v. Stanolina Oil & Gas Co., 197 Okla. 499, 172 P. 2d 1002 (1946). *Vermont:* Kasuba v. Graves, 109 Vt. 191, 194 Atl. 455 (1937); Lawrie v. Silsby, 82 Vt. 505, 74 Atl 94 (1909).

[30] 67 N. H. 161, 31 Atl. 18 (1891).

for his own purposes or for sale to others, is under all the circumstances a reasonable one. The mere fact his grantees are taking water to their non-riparian land does not per se make their use unreasonable but that fact together with the size and character of the stream, the quantity appropriated, and all the circumstances may make the use unreasonable.[31]

Before following the above rule it should be considered that of the three states presently adhering thereto, two states, New Hampshire and Vermont, regard their non-navigable streams as practically *publici juris*[32] while the third state, Oklahoma,[33] follows the theory with the aid of a statute.

In *Pugh v. Wheeler*,[34] North Carolina recognized the reasonable use doctrine.[35] The North Carolina Supreme Court stated in *Harris v. Norfolk & Western Ry. Co.*[36] that a riparian owner may use water for any purpose to which it can be beneficially applied, provided he does not inflict substantial injury on those below him. Then in *Dunlap v. Carolina Power & Light Co.*[37] the court further stated that a riparian owner has a right to make all the use he can of the stream as long as he does not pollute it or divert it from its natural channel and abstract so much of the water as to prevent others from having equal enjoyment with himself or does not use the same in such an unreasonable manner as to materially damage or destroy rights of other riparian owners. Does the court mean that the reasonable use doctrine applies only to use on riparian land and that any use on non-riparian land that substantially injures lower riparian owners is unlawful? Or does it mean that the reasonable use doctrine applies to use on both riparian and non-riparian land and that such use on non-riparian land is just another factor in deciding the reasonableness?

It would seem that since North Carolina does not have a statute defining the rights of riparian owners, and that since our non-navigable streams are not *publici juris*,[38] that our court should not follow the lead of those states allowing use of riparian water on non-riparian land under the theory that such use is just another factor in deciding the

[31] 82 Vt. 505, 74 Atl. 94 (1909).
[32] Annot. 14 A. L. R. 330 (1921).
[33] Smith v. Stanolina Oil & Gas Co., 197 Okla. 499, 172 P. 2d 1002 (1946).
[34] 19 N. C. 50 (1832).
[35] "What constitutes a reasonable use is a question of fact having regard to the subject matter and the use; the occasion and manner of its application; its object and extent and necessity; the nature and size of the stream; the kind of business to which it is subservient; the importance and necessity of the use claimed by one party, and the extent of the injury caused by it to the other." Dunlap v. Carolina Power & Light Co., 212 N. C. 814, 820, 195 S. E. 43, 47 (1938).
[36] 153 N. C. 542, 69 S. E. 623 (1910).
[37] 212 N. C. 814, 195 S. E. 43 (1938).
[38] State v. Glenn, 52 N. C. 321 (1859); Pugh v. Wheeler, 19 N. C. 50 (1832).

reasonableness. If such a result is desired, it should be left to the legislature.

If North Carolina does not allow a riparian owner to use riparian water on non-riparian land, then it probably will not allow the riparian owner to convey such a right that he does not have.

JAMES A. ALSPAUGH.

Torts—Breach of Contractual Duty as Negligence

The North Carolina Supreme Court has recently affirmed a ruling of the superior court striking portions of a complaint relating to a contract between the defendants and a third party as irrelevant to the issue of actionable negligence.[1] The complaint charged the defendants with negligence in performance of their plumbing contract with the Board of Education of Mecklenburg County, with which the plaintiff had a contract for the general construction work in the erection of a new school building, the same building for which the defendants were to do the plumbing. The plaintiff's cause of action was that defendants performed their contract negligently, resulting in broken water lines which flooded the foundations of the building, causing large sections of the walls and underpinning erected by the plaintiff to cave in and break off, and thereby necessitating their repair by the plaintiff.

Upon motion by defendants, allegations in the complaint referring to many sections of the plumbing contract were striken by the trial court. The plaintiff's appeal challenged the striking of these allegations. In affirming this ruling, the Court recognized that in an action for negligence it is competent to allege and prove the existence of a contract for the purpose of showing the relationship of the parties out of which arises the common law duty to use ordinary care, but held that it is not competent to allege specific terms of the contract as a standard for measuring the defendant's conduct.[2]

There is a liberal doctrine in North Carolina whereby an injured plaintiff may sue in tort for damages caused by the defendant's breach of a contract, even though the plaintiff is not a party thereto.[3] The plaintiff was allowed to sue for breach of contract as a third party beneficiary in the case of *Gorrell v. Water Supply Co.*,[4] where the complaint alleged a contract between the defendant, the Greensboro Water Supply Co., and the City of Greensboro for furnishing the city with water for

[1] Pinnix v. Toomey, 242 N. C. 358, 87 S. E. 2d 893 (1955).

[2] *Id.* at 363, 87 S. E. 2d at 898.

[3] Solomon v. Bates, 118 N. C. 311, 24 S. E. 478 (1896); Bond & Willis v. Hilton, 44 N. C. 308 (1853); Robinson v. Threadgill, 35 N. C. 39 (1851).

[4] 124 N. C. 328, 32 S. E. 720 (1899). See German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220 (1912); Guardian Trust Co. v. Fisher, 200 U. S. 57 (1905).