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Real Property -- Disposition of Diffused Surface Waters in North Carolina

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the Board by the expulsion of a member expand the jurisdiction and power of the Board and encourage resort to its aid. The extent of jurisdiction, obviously, often controls the scope of the agency's influence, and thus its effectiveness. The broader the Board's jurisdiction, the easier it can effect its policies; the narrower, the more difficult. In *Holder*, the Court upheld the Board's expansion of jurisdiction, thus accomplishing a principal objective of labor policy—prompt access to administrative agencies.[37]

Because of the expected increase in traffic, resulting from the expansion of jurisdiction, the Board may be able to more firmly regulate those practices of the unions tending to repress the individual rights of the members. This decision should promote a modernization of the internal union proceedures, for if the union machinery is cumbersome and slow to react to the needs of the members, they will by-pass the union and seek a remedy with the Board. To off-set this trend, the unions will have to streamline their internal systems so that there will be no need to resort to the Board.

A third effect may be found in the attitudes of the individual union members. Possibly greater democratization of unions themselves might follow, as open disagreement with union officials without fear of expulsion leads to greater member participation in union decisions on all levels. The Court's decision in this case is one step closer to the attainment of union democracy.

ALEXANDER P. SANDS

Real Property—Disposition of Diffused Surface Waters in North Carolina[1]

INTRODUCTION

Water that is derived from falling rain or melting snow or that rises in springs and is diffused over the surface of the ground is denominated

ber to exhaust his internal union remedies before seeking relief in court or before an administrative body.
Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 869 (1960).

[37] Section 10(b) of the NLRA forbids issuance of a complaint based on conduct occurring more than six months earlier. 29 U.S.C. § 160(b) (1959).

[1] The courts have generally referred to this distinct class of water as "surface water." It is more correctly identified as "diffused surface water" since technically all water on the face of the earth is surface water. 1 R. CLARK, WATERS AND WATER RIGHTS § 52.1, at 302 (1967). In keeping with the terminology employed

surface water. It is distinguished from water flowing in a natural watercourse or collected into and forming a definite and identifiable body, such as a lake or a pond.[2] An owner may either use or dispose of the surface water which comes upon his land. These alternatives—use or disposition—pose different problems and, consequently, are governed by different laws.[3] Of the two, the disposition problem has been the more troublesome.[4] The purpose of this note is to examine what a landowner in North Carolina can and cannot do to rid himself of too much surface water.[5]

Three basic doctrines relative to the disposition of surface water have been developed by the courts in the various states: the civil-law rule, the common enemy rule, and the reasonable use rule.[6]

The civil-law rule is usually expressed in specific terms:[7]

> [T]he owner of the upper or dominant estate has a legal and natural easement or servitude in the lower or servient estate for the drainage of surface water, flowing in its natural course and manner; and such natural flow or passage of the waters cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant proprietor, unless the right to do so has been acquired by contract, grant or prescription.[8]

The rule appeals to a sense of natural justice by requiring the continuation of the drainage conditions imposed by nature; it avoids any compe-

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by the North Carolina Supreme Court, the term "surface water" will be used in this note.

[2] 56 AM. JUR. *Waters* § 65 (1947).

[3] The use of surface water is discussed in Aycock, *Introduction to North Carolina Water Use Law*, 46 N.C.L. REV. 1, 20-21 (1967).

[4] J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 304 (1962).

[5] The law of disposition of surface water is almost exclusively the product of judicial decision. One exception of minor importance will be considered later. See p. 211 & note 34 *infra*. In the broader area of water development, there has been considerable legislative activity with concern centered on the problems of groups or communities. N.C. GEN. STAT. §§ 156–54 to –138 (1964), *as amended*, (Supp. 1967) (drainage districts); N.C. GEN. STAT. § 139 (1964), *as amended*, (Supp. 1967) (soil and water conservation districts and flood plain management). Further consideration of these statutes is beyond the scope of this note.

[6] Kenyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 893 (1940) [hereinafter cited as Kenyon & McClure].

[7] At least one writer has urged a general definition: "In substance, the civil-law rule of surface waters is that a person who interferes with the natural flow of surface waters so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the other." *Id.*

[8] 56 AM JUR. *Waters* § 68, at 550–51 (1947). In the acquisition of rights to drain surface water across the lands of another by grant, license, easement, or prescription, the general principles of property law apply. For North Carolina cases on the subject see Perry v. White, 185 N.C. 79, 116 S.E. 84 (1923) (attempted easement

tition of "might" in disposing of surface waters, and it makes easy the prediction of rights among landowners. On the other hand, it has a pronounced tendency to inhibit any development or improvement of lands since any alteration of the natural contours is certain to interfere with natural drainage.[9]

Under the common enemy rule[10] a proprietor may lawfully obstruct or hinder the natural flow of surface water. He may turn it back upon upper lands or onto the lands of other proprietors and not be subject to liability for such obstruction or diversion.[11] The effect of the rule is to allow one to use his property in any way he chooses, regardless of the effect on his neighbor. Historically, it has served to encourage the development and improvement of land in unsettled country. At the same time it has often provoked contests of "might" between owners as to which could build the highest and strongest embankment to protect his land.[12]

In their original, pure forms the civil-law rule and the common enemy rule were diametrically opposed. Each was rigid and inflexible, embodying strict property law principles. As it became necessary to apply them to new and varied circumstances, the courts began modifying the basic rules, bringing them into step with the needs and conditions of society. Such modification involved the application of the tort principles of reasonableness and negligence to determine liability.[13]

Four states[14] have carried this trend to its logical conclusion and have adopted a reasonable use rule, which differs markedly from both the civil-law rule and the common enemy rule. It neither allows an owner to deal with surface water as he pleases nor prohibits him absolutely from interfering with the natural flow. Rather, it permits him to make reasonable use of his property even though the natural flow is thereby altered. For an act to give rise to a cause of action, there must be an unreasonable alteration which causes harm to another.[15]

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by prescription); Hair v. Downing, 96 N.C. 172, 2 S.E. 520 (1877) (by grant); Shaw v. Etheridge, 52 N.C. 225 (1859) (easement by implication).

[9] Annot., 59 A.L.R.2d 421 (1958).

[10] It is frequently referred to as the "common law rule." However, several writers maintain that England did not follow this rule. Kenyon & McClure 899. Because it was first adopted in Massachusetts, the rule would be more appropriately referred to as the "common enemy or Massachusetts rule." See Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404 (1932).

[11] 56 AM. JUR. *Waters* § 69, at 553-54 (1947).

[12] Annot., 59 A.L.R.2d 421, 423 (1958).

[13] *Id.*

[14] Alaska, Minnesota, New Hampshire, and New Jersey. The reasonable use rule is also advocated by the RESTATEMENT OF TORTS § 833, comment *b* (1939).

[15] Kenyon & McClure 904. The adoption of the reasonable use rule makes it

THE BASIC CIVIL-LAW RULE

As early as 1854 the North Carolina Supreme Court indicated that it favored the natural flow of surface water,[16] which is the basic ingredient of the civil-law rule. Nevertheless, twenty-two years later in 1876, the court in effect applied the common enemy rule without reference to the earlier case.[17] The contradiction can no doubt be explained by the state of confusion which existed in the courts during the early development of the two rules. More often than not one rule would emerge into general usage in a given jurisdiction without a rejection or even an acknowledgement of the other.[18]

In *Porter v. Durham*,[19] decided later in the 1876 term, the court ended the confusion in North Carolina and adopted the civil-law rule. In this case defendants were enjoined from digging canals which would have diverted water from its natural flow onto plaintiff's lands. In affirming the judgment the court stated:

> It has been held that an owner of lower land is obliged to receive upon it the surface-water which falls on adjoining higher land, and which naturally flows on the lower land. Of course, when the water reaches his land the lower owner can collect it in a ditch and carry it off to a proper outlet so that it will not damage him. He cannot, however, raise any dyke or barrier by which it will be intercepted and thrown back on the land of the higher owner. While the higher owner is entitled to this service, he cannot artificially increase the natural quantity of water or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place or in a different manner from its natural discharge.[20]

In an unusual case in 1963,[21] defendant State Highway Commission argued that *ocean* waters coming over the dune line during a storm were flood waters and as such were not subject to the laws applicable to surface waters. Defendant urged that the court apply the common enemy doctrine to flood waters. Thus the court was presented with the opportunity

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possible for "all invasions of a possessor's interest in the use and enjoyment of his land [to be] treated as different phases of a single problem involving the application of the same fundamental principles, irrespective of the medium through which the invasions are caused. . . ." *Id.* at 892.

[16] Overton v. Sawyer, 46 N.C. 308 (1854). At this time only two other states, Louisiana (1812) and Pennsylvania (1848), had adopted the rule. Kenyon & McClure 895 nn.11 & 12.

[17] Raleigh & A.A.L.R.R. v. Wicker, 74 N.C. 220 (1876).

[18] Kenyon & McClure 895, 902.

[19] 74 N.C. 767 (1876).

[20] *Id.* at 779-80.

[21] Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963), *noted in* 42 N.C.L. REV. 711 (1964).

to limit the application of the civil-law rule.[22] The court, discussing both rules in detail, specifically rejected the common enemy rule and reaffirmed the civil-law rule.[23]

The civil-law rule recognizes the burden that nature has placed on the lower land. Under a strict interpretation of the civil-law rule, anything that renders the natural[24] effect of drainage more burdensome is improper. Any act by an upper owner that causes water from one watershed to flow into another or which alters the direction of the natural flow by artificial means is a diversion[25] and therefore unlawful since it increases the burden. A lower owner can ease the natural burden by collecting water in a ditch and discharging it into a proper outlet. It seems reasonably clear that, historically, "proper outlet" meant a natural watercourse running through the lower owner's land.[26] The right to drain into a natural watercourse passing through one's own land was apparently a part of the basic civil-law rule in North Carolina.[27] If the right was "exercised in good faith, and in a reasonable manner, for the better adaptation of the land to lawful and proper uses, no damage [could] be recovered if the lands of a lower proprietor [were] injured."[28]

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[22] Brief for Defendant at 3-4, Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963).

[23] Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963).

[24] The word *natural* when used in this context

> has reference to that course which would be taken by such waters falling (or, in the case of springs, rising) on the land of the upper proprietor, or carried thereto from still higher land and flowing or running therefrom onto the lands of the lower proprietor undiverted and unaccelerated by any interference therewith by the upper proprietor.

56 AM. JUR. *Waters* § 67, at 550 (1947).

[25] For the various meanings the court has given to the word *diversion*, see pp. 216-17 *infra*.

[26] Jenkins v. Wilmington & W.R.R., 110 N.C. 438, 15 S.E. 193 (1892).

[27] Porter v. Durham, 74 N.C. 767 (1876).

[28] Jenkins v. Wilmington & W.R.R., 110 N.C. 438, 443, 15 S.E. 193, 194 (1892). Ostensibly, a railroad was like any other citizen in its right to drain surface water. Incident to the acquisition of a right of way, a railroad clearly obtained the right to gather surface water which collected thereon and to conduct it to its proper outlet, or to an outlet capable of receiving it. *Id.* at 442-45, 15 S.E. at 194. There is some dispute as to the standard of care required of the railroad. The basic civil-law rule would require that no water be diverted to the injury of the lower owner. There is authority to the effect that the railroad is held only to a standard of reasonableness. Parks v. Southern Ry., 143 N.C. 289, 297, 55 S.E. 701, 704 (1906). There is also some confusion as to whether a railroad has a duty to collect and dispose of surface water which occurs naturally upon its right of way or whether it may, as any private owner, let it pass on to lower land. *Compare* Greenwood v. Southern Ry., 144 N.C. 446, 57 S.E. 157 (1907), *with* Davenport v. Norfolk S.R.R., 148 N.C. 287, 62 S.E. 431 (1908).

MODIFICATION OF THE CIVIL-LAW RULE

A rule that required the preservation of natural drainage may have been adequate, or even beneficial, in a undeveloped frontier environment, but it was not suited to an urban, industrialized society. The North Carolina Supreme Court early recognized that a strict application of the civil-law rule would prohibit any alteration of natural drainage and consequently discourage the improvement and effective use of land.

The court expressed its awareness of the dangers of an inflexible rule and demonstrated its intention to deal with the problem in *Mizzell v. McGowan*,[29] a case which was to come before the court three times in four years. Defendant had dug ditches and canals upon his land in order to drain water from a swamp into a natural watercourse. Plaintiff alleged that the drainage had increased and accelerated the watercourse to the point that it had overflowed and flooded his lands. The court said:

> The upper owner can not divert and throw water on his neighbor, nor the latter back water on the other with impunity. *Sic utere tuo, ut alieum non laedas.* This rule, however, can not be enforced in its strict letter, without impeding rightful progress and without hindering industrial enterprise. Minor individual interest must sometimes yield to the paramount good. Otherwise the benefits of discovery and progress in all enterprises of life would be withheld from activity in life's affairs. 'The rough outline of natural right or liberty must submit to the chisel of the mason that it may enter symmetrically into the social structure.' *Under this principle the defendants are permitted not to divert, but to drain their lands, having due regard for their neighbor, provided they do not more than concentrate the water and cause it to flow more rapidly and in greater volume down the natural streams through or by the lands of plaintiff.* This license must be conceded with caution and prudence.
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> . . . Porter v. Durham . . . was a case solely for diverting water from its natural course and throwing it on the plaintiff. That question was reserved by the court and is not before us. . . .[30]

Mizzell's second appearance before the court[31] was inconclusive. On the third appeal,[32] however, the *Mizzell* rule was further defined and explained. The right to accelerate and increase was not limited to the size or capacity of the watercourse. The water to be drained, however, must come from within the natural boundaries of the watershed.[33] Finally, the court reaffirmed the narrow scope of the rule:

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[29] 120 N.C. 134, 26 S.E. 783 (1897).
[30] *Id.* at 138, 26 S.E. at 784 (emphasis added).
[31] Mizzell v. McGowan, 125 N.C. 439, 34 S.E. 538 (1899).
[32] Mizzell v. McGowan, 129 N.C. 93, 39 S.E. 729 (1901).
[33] *Id.* at 95, 39 S.E. at 729.

> A man can dig ditches wherever he pleases upon his own land, provided he runs them into a *natural watercourse* before leaving his land, subject only to the limitation against diversion. But if he cannot reach a natural watercourse without going into the lands of another, he must proceed under . . . the Code.[34]

Beyond the obvious facilitation of the drainage and reclamation of swamp lands, the significance of the *Mizzell* rule—that one may increase and accelerate but not divert—is two-fold. First, though it modified the substantive civil-law rule very little (one could already drain into a natural watercourse), it gave rise to the phrase "increase and accelerate but not divert," which the court was later to make the touchstone of the law of surface water. Second, it demonstrated the court's commitment to a flexible application of the civil-law rule.

Mizzell deals with the right to increase and accelerate the flow *in a natural watercourse* as a by-product of drainage. The rule is not so broad as to encompass the increase and acceleration of the natural flow of surface water *onto lower lands* incident to grading, paving, or building upon the upper land. Initially, this distinction was recognized,[35] but it soon became blurred[36] and was subsequently mentioned in some cases[37] and ignored in others.[38] Ultimately, the court explicitly stated that the *Mizzell* rule—that one may increase and accelerate but not divert—governed the drainage of surface water onto the lands of another.

The first application of this modified civil-law rule is found in *Parker v. Norfolk & Carolina Railroad*,[39] decided between the first and second *Mizzell* cases. In *Parker*, defendant had allegedly diverted water from its natural flow onto plaintiff's lands. In upholding the finding of diversion the court said:

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[34] *Id.* at 96, 39 S.E. at 730 (emphasis added). The statute to which the court refers was originally enacted in 1795 and is still in effect today. N.C. GEN. STAT. §§ 156-1 to -36 (1964). If a landowner has swamp lands which have no natural outlet and which cannot be drained into a natural watercourse, the statute enables him to drain through the lands of a lower proprietor. References to this procedure by the court in the late nineteenth century indicate that it may have had some vitality at that time. There is no indication that it is used today.

[35] Mizzell v. McGowan, 120 N.C. 134, 26 S.E. 783 (1897).

[36] Parker v. Norfolk & C.R.R., 123 N.C. 71, 31 S.E. 381 (1898).

[37] Barcliff v. Norfolk S.R.R., 168 N.C. 268, 269-70, 84 S.E. 290, 291 (1915); Briscoe v. Parker, 145 N.C. 14, 17, 58 S.E. 443, 444 (1907); Rice v. Norfolk & S.R.R., 130 N.C. 375, 378, 41 S.E. 1031, 1032 (1902); Mizzell v. McGowan, 129 N.C. 93, 96, 39 S.E. 729, 730 (1901).

[38] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947); Roberts v. Baldwin, 151 N.C. 407, 66 S.E. 346 (1909); Parker v. Norfolk & C.R.R., 123 N.C. 71, 31 S.E. 381 (1898).

[39] 123 N.C. 71, 31 S.E. 381 (1898).

> It was held in [*Mizzell*] that the dominant tenant had the right to carry off his surface water by cutting ditches, by which the flow of water, naturally flowing therein, is increased and accelerated, and *discharged on the land of the servient tenant.* . . . It has been previously held that neither a railroad nor an individual could divert water from its natural course and throw it upon abutting lands and cause damage. . . . It may now be stated that the upper holder may increase and accelerate the flow of the water in its natural course, but cannot divert other waters to the damage of the lower lands.[40]

Nowhere in *Mizzell* does there appear language that would allow such a discharge. In fact, there is clear language to the contrary.[41] The second and third *Mizzell* cases came after *Parker* and would apparently overrule it, yet the court continued to quote the rule in cases involving drainage of surface water onto lower lands.[42] It is perhaps significant that the issue in each of these later cases[43] was diversion, and not increase and acceleration. Since diversion resulting in injury to the lower proprietor is not permitted under the basic civil-law rule, it would have been sufficient for the court to state only that principle. However, the *Mizzell* rule offered a convenient phraseology which embodied the basic principle prohibiting diversion, so the court seized upon it and used it. In doing so, by association, it applied the remainder of the rule (permitting increase and acceleration) to drainage onto the lands of another. Thus the court significantly liberalized the civil-law rule in North Carolina.

Application of the Civil-Law Rule

A mere statement of the liberalized civil-law rule offers broad guidelines to landowners, but it does little to tell them specifically what they may and may not do. An examination of the cases demonstrates the application of the broad principles. For convenience, the rights and duties of upper and lower owners are discussed separately. Practically speaking, nearly all tracts are both dominant and servient—dominant over those below and servient to those above. In some instances, as where a railroad or highway right of way passes through a tract of land, the owner of the land assumes the rights and obligations of upper and lower owner in relation to the holder of the right of way.[44]

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[40] *Id.* at 73, 31 S.E. at 381-82 (emphasis added).

[41] See p. 210 & note 30 *supra.*

[42] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947); Sykes v. Sykes, 197 N.C. 37, 147 S.E. 621 (1929); Barcliff v. Norfolk S.R.R., 168 N.C. 268, 84 S.E. 290 (1915); Roberts v. Baldwin, 151 N.C. 407, 66 S.E. 346 (1909); Briscoe v. Parker, 145 N.C. 14, 58 S.E. 443 (1907).

[43] Cases cited note 42 *supra.*

[44] Greenwood v. Southern Ry., 144 N.C. 446, 57 S.E. 157 (1907).

The Upper Owner

The upper owner is possessor of an easement or servitude in the lower land. This easement is imposed by nature and recognized by law. The easement, according to North Carolina law, includes the right to accelerate and increase the natural flow, but does not include the right to divert. In at least two cases, the issue of *acceleration and increase* was squarely presented to the court. In one of these the court held that defendant could fill in a roadside ditch, thereby increasing and accelerating the flow of surface water onto the lower land, as long as the ditch was on his property. If the road in question was public, and the ditch on the right of way, then defendant had no such right.[45]

The other, *Davis v. Atlantic Coast Line Railroad*,[46] presented the court with an unusual opportunity to examine, in a single case, nearly every situation in which an upper owner could be held liable for interference with natural flow. Plaintiff's lower parking lot was periodically flooded after upper defendant shipbuilding company had leveled and paved its parking lot. Defendant railroad, whose tracks ran between the two pieces of property, provided three culverts under its road to pass water from the upper lot to the lower. On the general nature of surface water, the trial judge correctly stated the rule of law:

> [U]nder the law when one owns or occupies lower lands, he must receive waters from higher lands when they flow naturally therefrom. There is a principle of law to the effect that where two tracts of land join each other, one being lower than the other, that the lower tract is burdened with an easement to receive waters from the upper tract, which naturally flow therefrom.
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> I charge you further that the owner or one in charge of the higher lands or premises, may increase the natural flow of water, and may accelerate it, but cannot divert the water and cause it to flow upon the lands of the lower proprietor in a different manner, or in a different place from which it would naturally go. . . .[47]

In applying the foregoing rule the judge, in substance, charged: if the shipbuilding company did no more than increase and accelerate the natural

[45] Sykes v. Sykes, 197 N.C. 37, 147 S.E. 621 (1929).

[46] 227 N.C. 561, 42 S.E.2d 905 (1947).

[47] *Id.* at 564, 42 S.E.2d at 908. The last sentence of the quotation contains an interesting paradox. If an acceleration and increase of the natural flow would not "cause it to flow upon the lands of the lower proprietor in a different manner," then it is not clear what would constitute a "different manner." This seemingly conflicting language appears in other cases: Barcliff v. Norfolk S.R.R., 168 N.C. 268, 84 S.E. 290 (1915); Brown v. Southern Ry., 165 N.C. 392, 81 S.E. 450 (1914).

flow of water, it would not be liable; if it diverted water which would otherwise not have flowed upon plaintiff's land and caused it to flow thereon it would be liable; if there were no natural flow from the higher premises onto plaintiff's land prior to the grading and paving, and if a flow was created by such grading and paving, then the flow is artificial and defendant shipbuilding company would be liable, but if a natural flow existed prior to the paving and grading and the construction only accelerated and increased that water, the company is not liable.[48] As to defendant railroad: if the water came down in its natural state and the railroad did nothing to accelerate the flow under its track, then the railroad would not be liable;[49] if it was not a natural flow which came down, but an artificial one created by the diversion of the shipbuilding company, and the railroad gathered up the wrongfully diverted flow in pipes and discharged it upon plaintiff's property in a manner different than it would have naturally gone and in a way so as to damage plaintiff's property, then the railroad would be liable; but if the flow were diverted from above and the railroad put it into pipes to enable it to pass under its tracks instead of over them and plaintiff was not damaged to any greater extent than if the water had flowed over the tracks, then the railroad is not liable.[50]

The court, in approving the charge of the trial judge, stated that not to allow an upper owner to increase and accelerate the flow of water in improving his land would have the effect of depriving him of the use of his property.

The two most recent surface water cases,[51] involving the reciprocal rights of upper and lower owners, give rather complete statements of the civil-law rule in North Carolina, but no mention is made of the right to increase and accelerate. In one of these, *Phillips v. Chesson*,[52] the issue was the diversion of the natural flow of surface water by an upper owner as a result of construction of a rock wall and a dirt embankment. After

[48] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 564-65, 42 S.E.2d 905, 908 (1947).

[49] *Id.* at 565, 42 S.E.2d at 908. This is a curious statement. If, as the court has stated many times, a railroad has the same rights as any other proprietor to drain surface water, why should it not be able to increase the flow under its tracks? The instruction is probably incorrect, but it was not challenged on appeal since defendants won at the trial court level.

[50] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 565, 42 S.E.2d 905, 908-09 (1947).

[51] Midgett v. Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963); Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950).

[52] 231 N.C. 566, 58 S.E.2d 343 (1950).

holding that the upper owner could not divert, nor alter the natural flow with artificial devices, the court stated:

> The question whether more water or less water is caused to flow onto the lower land—which may be a factor bearing on liability—is often by no means the most important. The manner of its collection and release, the intermittent increase in volume and destructive force, its direction to a more vulnerable point of invasion, may often become important.[53]

This dictum might indicate that even the right to increase and accelerate is subject to limitation. Apparently some standard of reasonableness may be applied in future cases involving increase and acceleration.

Several jurisdictions that follow the civil-law rule have modified it to make it more workable in an urban environment.[54] North Carolina has not yet made such a general modification. It has, however, by special application of the increase and accelerate principle, carved out an exception to the civil-law rule which has facilitated the grading and paving of streets by governmental agencies.

In *Yowmans v. City of Hendersonville*,[55] the court recognized that in most circumstances defendant would be liable if he diverted water onto plaintiff's land, but stated:

> [I]n regard to the flow and disposal of surface water incident to the grading and pavement of streets, a different rule is recognized, and a municipality, acting pursuant to legislative authority, is not ordinarily responsible for the increase in the flow of water upon abutting owners unless there has been negligence on their part causing the damage complained of. . . . It is held in this jurisdiction, however, that the right referred to is not absolute, but is on condition that the same is exercised with proper skill and caution, and if, in a given case, or as it may affect the property of some abutting owner, there is a breach of duty in this respect, causing damage, the municipality may be held responsible.[56]

Apparently a city is not required as a matter of law to curb and gutter its streets, but it is subject to the duty to exercise reasonable care in deciding whether or not to construct such drainage facilities.[57] Further, having decided to construct artificial drains, the city is required to exer-

[53] *Id.* at 569, 58 S.E.2d at 346.
[54] Annot., 59 A.L.R.2d 421, 433 (1958).
[55] 175 N.C. 574, 96 S.E. 45 (1918).
[56] *Id.* at 577, 96 S.E. at 46. This distinction was first recognized in Brinkley & Lassiter v. Norfolk S.R.R., 168 N.C. 428, 84 S.E. 700 (1915).
[57] Eller v. City of Greensboro, 190 N.C. 715, 130 S.E. 851 (1925).

cise ordinary skill and caution in that construction.[58] Generally, this is taken to mean that the artificial drains must be adequate to receive the amount of surface water which will flow into them under ordinary conditions and in the light of ordinary experience.[59] An increase in the level of water in a city's artificial drain, even to the point of its being completely filled, does not constitute negligence either in paving the streets which caused the increase or in failing to widen and deepen the drain.[60]

The paving and grading exception to the civil-law rule is subject to two limitations: first, a city may not collect and concentrate surface water into artificial drains and discharge it onto plaintiff's property without adequately providing for its proper outflow unless compensation is paid;[61] second, it apparently applies only to the grading and paving of existing streets and not to the construction of new ones.[62]

The court has given the word *diversion* several meanings. First, to cause water which would naturally have flowed in one watershed to flow into another is a diversion.[63] Second, to collect surface water in an artificial ditch or canal and discharge it upon the lower land at a different place[64] or in a different manner[65] than usual is a diversion.[66] Third, to erect artificial barriers that, without collecting the flow, alter the direction

[58] Gore v. City of Wilmington, 194 N.C. 450, 140 S.E. 71 (1927).

[59] *Id.*

[60] Roberson v. City of Kinston, 261 N.C. 135, 134 S.E.2d 193 (1964).

[61] Yowmans v. City of Hendersonville, 175 N.C. 574, 577, 96 S.E. 45, 47 (1918).

[62] Braswell v. Highway Comm'n, 250 N.C. 508, 108 S.E.2d 912 (1959) (dictum). The court gives no explanation for this distinction, nor is there any indication what rule would apply to new streets.

[63] Clark v. Norfolk S.R.R., 168 N.C. 415, 84 S.E. 702 (1915); Hooker v. Norfolk S.R.R., 156 N.C. 155, 72 S.E. 210 (1911); Hocutt v. Wilmington & W.R.R., 124 N.C. 214, 32 S.E. 681 (1899).

[64] Chappel v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963); Darr v. Carolina Alum. Co., 215 N.C. 768, 3 S.E.2d 434 (1939) (no right to drain into artificial channel); Cardwell v. Norfolk & W.R.R., 171 N.C. 365, 88 S.E. 495 (1916); Mullen v. Lake Drummond Canal & Water Co., 130 N.C. 496, 41 S.E. 1027 (1902) (water in canal brought on premises by artificial means and thus product of diversion); Porter v. Durham, 74 N.C. 767 (1876).

[65] Sherill v. Highway Comm'n, 264 N.C. 643, 142 S.E.2d 653 (1965). A culvert placed under the highway was not properly aligned with the axis of the ditch; the increased flow of water from above caused acceleration and a whirlpool, which washed away the land. The culvert was said to be an artificial device that diverted the flow.

[66] Brown v. Southern Ry., 165 N.C. 392, 81 S.E. 450 (1914). Some authorities say any water brought on premises by artificial means cannot be abandoned and treated as surface water. 3 H. FARNUM, LAW OF WATERS AND WATER RIGHTS § 881 at 2569 (1904). For implication that overflow from ice box and water barrel is surface water, *see* Holton v. Northwestern Oil Co., 201 N.C. 744, 161 S.E. 391 (1931). *But cf.* Mullen v. Lake Drummond Canal & Water Co., 130 N.C. 496, 41 S.E. 1027 (1902).

and cause the water to flow upon the lower land at a different place than usual is a diversion.[67] Fourth, to create an artificial flow where previously no natural flow existed and to direct the artificial flow onto lower land is a diversion.[68] If some natural flow did exist, even though small, the upper owner might increase and accelerate the natural flow and this would not constitute a diversion.[69]

Whether or not water has been diverted is an issue of fact for the jury, while the effect of such diversion is a question of law for the court.[70] Negligence need not be alleged to state a cause of action for diversion,[71] but there must be an allegation of injury. Diversion is evidently not unlawful *per se;* there must be actual damage before the statute of limitations begins to run.[72] Flooding by unlawful diversion is not a continuing trespass, and therefore all damages incurred within the three years preceding the bringing of the action may be recovered.[73]

The Lower Owner

The lower owner as proprietor of the servient estate must receive the natural flow of surface water upon his land. He may not throw up barriers, dikes, or embankments[74] or in any way obstruct the natural flow from above.[75] As previously discussed,[76] he may collect the natural flow into artificial channels and ditches once it reaches his land and discharge it into its natural outlet or into a proper outlet adequate to receive it. Should a lower owner, or an upper owner for that matter, choose to replace a natural drainway with an artificial conduit, he then becomes liable to exercise ordinary care to maintain the conduit so that the natural flow

[67] Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950) (stone wall); Winchester v. Byers, 196 N.C. 383, 145 S.E. 774 (1928) (pile of dirt).

[68] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947) (artificial flow may not be created by leveling and paving); Rice v. Norfolk & S.R.R., 130 N.C. 375, 41 S.E. 1031 (1902) (artificial flow may not be created by draining a natural basin or swamp which had no natural outlet). Such swamps or basins may be drained into natural watercourses. See pp. 210-11 *supra.*

[69] Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947).

[70] Rice v. Norfolk & S.R.R., 130 N.C. 375, 376, 41 S.E. 1031, 1032 (1902).

[71] Braswell v. Highway Comm'n, 250 N.C. 508, 511, 108 S.E.2d 912, 914 (1959); Yowmans v. City of Hendersonville, 175 N.C. 574, 578, 96 S.E. 45, 47 (1918).

[72] Barcliff v. Norfolk S.R.R., 168 N.C. 268, 270, 84 S.E. 290, 291 (1915).

[73] Roberts v. Baldwin, 151 N.C. 407, 66 S.E. 346 (1909).

[74] Porter v. Durham, 74 N.C. 767 (1876) (dictum).

[75] Evidently this burden has been well accepted in North Carolina. No case has been located in which an upper owner has sued a lower for obstructing the natural flow of surface water. There are cases in which an adjacent owner has sued another for diversion caused by failure to keep drainage ditches open. *See, e.g.,* Price v. Norfolk S.R.R., 179 N.C. 279, 102 S.E. 308 (1920).

[76] See pp. 210-11 *supra.*

will not become obstructed.[77] Finally, there is one circumstance in which the lower owner might obstruct the flow coming onto his land. If the flow from above is not natural, but the result of diversion by the upper, then the lower owner may block it and pond it upon the upper land without incurring liability, so long as he does not also obstruct the passage of water that would naturally flow onto his land.[78]

CONCLUSION

Recently, in comparing the civil-law and common enemy rules, the North Carolina Supreme Court noted that many jurisdictions have so modified the basic rules that there remained only a very fine line of distinction between them.[79] Apparently the court was referring to developments in other jurisdictions, for it appears that North Carolina has not substantially deviated from its original version of the civil-law rule. This is not to say that the North Carolina version is antiquated. Indeed, an examination of the surface water litigation in the state shows that since 1930 only thirty-eight cases have come before the supreme court, an average of one case a year. Only three of the recent cases have involved disputes between private individuals.[80]

At the same time, it would be unwise to assume that the law in its present state is sufficient to deal with all future problems. The current trend toward industrialization and urbanization will no doubt severely test the existing law. The court has indicated that it will make modifications when they become necessary. In making these changes it will be acting in accordance with the philosophy it expressed in the first *Mizzell* case: "The rough outline of natural right or liberty must submit to the chisel of the mason that it may enter symmetrically into the social structure."[81]

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[77] Johnson v. City of Winston-Salem, 239 N.C. 697, 81 S.E.2d 153 (1954).

[78] 56 AM. JUR. *Waters* § 119 (1947). *See* Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 565, 42 S.E.2d 905, 908-09 (1947).

[79] Midgett v. Highway Comm'n, 260 N.C. 241, 244, 132 S.E.2d 599, 604 (1963).

[80] Most of the litigation in North Carolina has arisen from the activities of municipalities and railroads and other quasi-public corporations. Less than half of the total number of surface water cases have involved disputes between private landowners.

[81] Mizzell v. McGowan, 120 N.C. 134, 138, 26 S.E. 783, 784 (1897).