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Water and Water Courses - Surface Waters - Rights of a Landowner to Drain

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RECENT CASES

WATER AND WATER COURSES—SURFACE WATERS—RIGHTS OF A LANDOWNER TO DRAIN—Plaintiff brought an action against a neighboring property owner for damages caused by drainage of surface waters onto his property. The defendant then instituted third-party proceedings against the architect-engineer who planned and supervised construction of the works and who expressly agreed to assume responsibility for all acts of negligence and damage growing out of and from this construction which changed the direction of the surface waters. The Supreme Court of North Dakota *held* that the plaintiff could recover damages based on its finding that the plaintiff's property was flooded as a result of the construction, and the architect-engineer did nothing to prevent the flooding after being warned of the dangers by the plaintiff. The Court states that it now adopts the reasonable use rule in regard to the drainage of surface waters. *Jones v. Boeing Company*, 153 N.W.2d 897 (N.D. 1967).

As North Dakota is an agriculturally oriented state the problem of rights and liabilities of landowners in regard to surface water drainage is an often occurring one. It is the purpose of this casenote to discuss the various rules concerning surface water drainage and specifically the rule adopted by North Dakota.

The term surface water was been defined by many courts and the definitions are far from uniform. A simple definition is water collected on the surface of the ground,[1] but a more comprehensive definition, often used, is water from rains, springs, or melting snow which lie or flow on the surface of the earth but which do not form a part of a well-defined body of water or natural watercourse.[2] Water which is considered surface water continues to be such until it reaches a channel or watercourse[3] or percolates through the ground.[4] Interference with surface water has been the subject of

1. Ramsey v. Ketcham, 73 Ind.App. 200, 127 N.E. 204, 205 (1920).
2. *E.g.*, Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83, 87 (1958); Sun Underwriters Ins. Co. of New York v. Bunkley, 233 S.W.2d 153, 155 (Tex. Civil App. 1950); Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024, 1036 (1917); RESTATEMENT OF TORTS § 846 (1939).
3. *E.g.*, County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N.W.2d 507, 511 (1955); Schomberg v. Kuther, 153 Neb. 413, 45 N.W.2d 129, 137 (1950).
4. *E.g.*, Everett v. Davis, 18 Cal.2d 389, 115 P.2d 821, 823 (1941).

many lawsuits and the courts have promulgated three widely divergent views as to the effect or liability resulting from such interference. Each of these views will be discussed in some detail in the material that follows.

The common law or "common enemy view" sets forth the proposition that surface water will be regarded as a common enemy and each landowner may take any measures deemed necessary to protect his land from damage.[5] Under this rule a landowner has the right to lawfully obstruct or hinder the natural flow of surface water and he may turn water off his land onto or over his neighbor's property without being held liable for so doing.[6] An obvious problem with the adoption of a rule such as this is that it could promote embankment building or drainage contests between neighbors which would be detrimental to the organized development of proper drainage and land use. A Texas court has aptly described the common enemy rule as one having no support of law or reason as it is a rule of force rather than common justice.[7]

The civil law theory promulgates the view that the control of surface water is governed by the law of nature and therefore the lower landowner is bound to receive the surface water which naturally flows from the land above.[8] This view seems to allow the upper landowner an easement over the property of the lower landowner and the jurisdictions following this view justify it by stating that one who purchases or otherwise acquires land should expect and be required to accept it subject to the burdens of natural drainage.[9] The civil law view has some rather serious pitfalls if it is strictly interpreted. This is pointed out by the fact that strict adherence to the principle upon which it is founded, namely, " . . . water flows, and as it flows, so it ought to flow,"[10] would seem to prohibit any drainage improvements on one's land. This would be a logical extension because any drainage improvements would necessarily affect the natural water flow, thus violating the civil law theory.

The third and, in this writer's opinion, best theory is that of reasonable use. The sum and substance of the rule is set forth in a New Jersey case as follows:

> . . . [E]ach possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to

5. *E.g.*, Soules v. Northern Pac. Ry. 34 N.D. 7, 157 N.W. 823, 826 (1916).
6. Walker v. New Mexico & Southern Pac. R.R. 165 U.S. 593, 604 (1877).
7. Miller v. Letzerich, 121 Tex. 248, 49 S.W.2d 404, 411 (1932).
8. Soules v. Northern Pac. Ry. *supra* note 5, at 826.
9. La Fleur v. Kolda, 71 S.D. 162, 22 N.W.2d 741, 744 (1946).
10. Vinson v. Turner, 252 Ala. 271, 40 So.2d 863, 864 (1949).

> others, but [the landowner] incurs liability when his harmful interference with the flow of surface waters is unreasonable.[11]

The point of contention in jurisdictions following this view revolves around what is, or is not, a reasonable use and this must be determined on the facts of each case.[12]

In the instant case the Supreme Court absolutely adopts the reasonable use view for North Dakota after having been classified as adhering to the common enemy doctrine since *Henderson v. Hines*[13] was decided in 1921. In the instant case the Court states:

> We believe the reasonable use rule . . . has been well stated and that it represents not so much a change in policy by this court as a clarification of the rationale followed in prior decisions and that the result reached is a similar one.[14]

An analysis of the North Dakota cases concerning surface waters indicates that the above statement is a most accurate appraisal of the situation. An early North Dakota case, prior to *Henderson*, held that, as pertains to surface waters, ". . . one shall not so use his own property as to injure another . . ."[15]

An analysis of *Henderson* will certainly not uphold the idea that North Dakota had adopted the strict common enemy rule. The fact is that the court stated: ". . . [H]e [the landowner] has the right to possess, use, and enjoy his land subject to the principle, 'sic utere tuo ut alienum non laedas.' "[16] which, as mentioned earlier, means one should use his property so as not to harm others. It would seem that, in effect, the North Dakota Court adopted either the reasonable use view or a very modified concept of the common enemy theory in *Henderson*. The reasoning behind this conclusion is that if one must use his property so as not to harm others it necessarily follows that he may not dam up or drain away surface waters as he wishes because his actions may harm a neighboring parcel of land. This, therefore, differs from the strict common enemy theory which gives every landowner the right to dam up and drain away surface waters as he wishes without liability.

Because of the restriction attached to the common enemy theory, by the Court in the *Henderson* case, it appears that North Dakota

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11. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 8 (1956).
12. *E.g.*, Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286, 289 (1948).
13. 48 N.D. 152, 183 N.W. 531 (1921).
14. Jones v. Boeing Co., 153 N.W.2d 897, 904 (1967).
15. Carrol v. Rye Tp., 13 N.D. 458, 101 N.W. 894, 897 (1904), the phrase is derived from the Latin Maxim *"Sic Utere Tuo ut Alienum Non Laedas."* *See also* Lemer v. Koble, 86 N.W.2d 44, 46 (N.D. 1957).
16. Henderson v. Hines *supra* note 13, at 535.

has, in effect, followed the reasonable use view rather than the strict common enemy rule. It can logically be said that North Dakota has followed the reasonable use theory since the "sic utere" principle was set forth in the *Rye* case in 1904. The language of the reasonable use doctrine is present in several other North Dakota surface water cases prior to the instant case. In *Rynestad v. Clemetson*[17] the court stated:

> Subject to certain restrictions, and provided *he acts reasonably and with prudent regard for the interests of adjacent owners* so as not to increase the burden on the lower owner or injure his property, the upper owner may artificially drain his land.[18] (emphasis added)

In a 1967 case the court stated:

> We see no reason why the general rule which fixes the mutual and reciprocal rights and liabilities of adjoining landowners under the maxim sic utere . . ., *requiring that each use and maintain his own land in a reasonable manner* . . ., should not apply . . . [to the facts in this case.][19] (emphasis added)

Even though this writer feels North Dakota has, in effect, followed the reasonable use theory for many years the fact remains that the court has removed all doubt by specifically adopting it in the instant case and it would be useful to investigate what concepts will be important for litigants under this theory. As has been stated earlier, the determination of whether or not the action of the landowner is reasonable or not will depend on the facts and circumstances of each case. Thus it would behoove every landowner to thoroughly scrutinize the facts and attempt to determine the reasonability of the action of the various participants before starting a drainage project.

Minnesota has also adopted the reasonable use theory and the Minnesota Supreme Court has set forth a test which, if followed by the landowner, will allow the landowner the right to drain his land of surface waters even if it creates a burden on the land of the lower owner. The Minnesota test allows drainage of surface waters if the following factors are present:

a) There is a reasonable necessity for such drainage;
b) If reasonable care be taken to avoid unnecessary injury to the land receiving the burden;

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17. 133 N.W.2d 559 (N.D. 1965).
18. *Id.* at 563. The Court was using 93 C.J.S. *Waters* § 116 as authority for this statement.
19. Roder v. Krom, 150 N.W.2d 708, 710 (N.D. 1967).

c) If the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and

d) If, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted.[20]

The above reasonability test set down in Minnesota would at least give a North Dakota landowner some idea of what drainage measures he may take, under the reasonable use theory, without incurring liability.

Even though North Dakota has the reasonable use doctrine as to surface waters, the landowner must know the distinction between surface waters and waters of a natural watercourse and the distinction is often not easily discernable.[21] The distinction is important because a natural watercourse cannot be interfered with under any of the mentioned doctrines.[22] The problems entailed in determining what is a natural watercourse is beyond the scope of this casenote, however, a starting point for one who wishes to pursue the makeup of a watercourse is the definition in the NORTH DAKOTA CENTURY CODE which is as follows:

> A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of permanent character.[23]

In conclusion it should be pointed out that it would seem to be very difficult to promulgate one specific rule concerning drainage of surface water in North Dakota because of the varied topography of the state which includes the rolling hills of the west and the very level Red River Valley in the east. It is, however, extremely important that landowners know what rights they have in regard to drainage of surface waters as well planned drainage is essential

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20. Enderson v. Kelehan *supra* note 12, at 289.

21. The court stated that a natural drainway was involved and it was settled law that drainways must be kept open and furthermore they were in no particular hurry to choose a surface water rule because of the peculiar topography and climatic conditions of the state. Soules v. Northern Pacific Ry. Co., 34 N.D. 7, 157 N.W. 823 (1916). *See also* Reichert v. Northern Pacific Ry. 39 N.D. 114, 167 N.W. 127, 136 (1918).

22. *E.g.*, Lemer, *supra* note 15, at 46; Soules, *supra* note 5; Aldritt v. Fleischauer, 74 Neb. 66, 103 N.W. 1084, 1086 (1905).

23. N.D. CENT. CODE § 61-01-06 (1960).

to good husbandry in an agricultural state and much land can be made more productive as a result of proper drainage.

Because the application of the reasonable use doctrine depends on the facts of each case that comes before the court it can be effectively used in all parts of the state, thus the North Dakota Supreme Court has followed the best suited doctrine for North Dakota.

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DAMAGES—GROWING CROPS—MEASURE OF DAMAGES FOR INJURY TO GROWING CROPS—The appellant appealed a judgment in favor of the respondent based on claims for damages for the county's negligent spraying of weed killer onto their tomato crops. The appellant contends that the trial court did not use the proper measure of damages in measuring the respondent's loss, claiming that the proper measure of damages for partial destruction of growing crops is "the difference between the market value of the crop destroyed and the cost of producing the crop." The California court *held,* in rejecting this measure and based upon the rule in *Rystrom v. Sutter Butte Canal Co.*,[1] that the estimated costs of production must first be deducted from expected gross receipts to arrive at the expected net profit. Next, actual costs of production must be deducted from actual receipts to arrive at actual net profit. Finally, deducting actual net profit from expected net profit fixes the actual damage.[2] *Solis v. County of Contra Costa,* 60 Cal. Rptr. 99 (Ct. App. 1967).

The *Rystrom* case,[3] an action for damages in contract, relies on *Treller v. Bay River Dredging Co.*,[4] where the court approved a measure similar to that in *Rystrom.*

The court stated:

> In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on land not destroyed, and on similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops at the time of injury or destruction, the expenses

1. 72 Cal.App. 518, 249 P. 53 (1925). Action by plaintiff to recover damages for loss of crops due to the alleged failure of defendant to furnish water for irrigation purposes during the years 1921 and 1922 as provided by contract.
2. *Id.* at 55.
3. *Supra* note 1.
4. Teller v. Bay & River Dredging Co., 151 Cal.App. 209, 90 P. 942 (1907).