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Maryland Surface Waters - a Critical Analysis - Kennedy-Chamberlin Development Co. v. Snure

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Maryland Surface Waters — A Critical Analysis[1]

Kennedy-Chamberlin Development Co. v. Snure[2]

Surface waters from the defendant's land drained naturally into a small stream, flowed southerly through an existing pipe under Goldsboro Road, and emptied into a ditch which wound through the plaintiffs' property. The defendant municipality planned to construct two new roads on its land; and the plaintiffs sought injunctive relief against proposed changes in the drainage system by which the defendant would install storm drains along these new roads emptying into the Goldsboro Road pipe which in turn would be replaced with a larger tile. Despite assertions, through expert witnesses, that the proposed increase in the flow of water onto plaintiffs' lands would cause erosion, flooding, and damage, the plaintiffs were denied relief below. The question on appeal was whether or not the lower court erred in refusing relief when no damage had in fact been proven, even though a prospective increase in the flow of water was conceded. The question was answered in the negative and the decision was, on appeal, affirmed. The Court held that the evidence of alleged future damage was not sufficiently clear and convincing to constitute a basis for equitable relief by injunction.

The decision is noteworthy in that, first, it purports to apply the civil law test[3] in dealing with surface waters and, second, in so doing it raises the question as to what extent dominant or upper landowners may improve or modify their lands in Maryland when the changes may incidentally result in injury to the lower land due to an increase in the flow of water. What has become known as the civil law

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[1] This case note is intended as a supplement to a former Note, *Drainage Of Surface Waters Under The Civil Law Rule As Applied In Maryland*, 11 Md. L. Rev. 58 (1950).

[2] 212 Md. 369, 129 A. 2d 142 (1957).

[3] This rule is expressive of the common law maxim of water-courses: "*Aqua currit et debet currere, ut currere solebat*" — "Water runs, and ought to run, as it has used to run." 11 Md. L. Rev. 58, 61 (1950); Goble v. Louisville & N. R. Co., 187 Ga. 243, 200 S. E. 259, 261 (1938). The supporting theory is that higher ground is preferable, more expensive, and is purchased with an understanding that the water will continue to descend in its natural manner. This rule is not, however, dependent upon the law of easements, but assumes the form of a natural right to the continued flow of surface waters. Since this right is advantageous to agricultural areas, and the United States at its inception and during its formative years was predominantly agricultural, the rule has found widespread acceptance. Shahan v. Brown, 179 Ala. 425, 60 So. 891 (1913); Meixell v. Morgan, 149 Pa. St. 415, 24 A. 216 (1892); Bradbury v. Vandalia Levee & Drainage Dist., 236 Ill. 36, 86 N. E. 163 (1908).

rule,[4] recognizing a natural easement of drainage from higher land onto lower lands, was adopted and explained by the Court of Appeals in 1887 as follows:

> "The prevailing doctrine in this country seems to be that the owner of the upper land has a right to the uninterrupted flowage of the water . . . and that the proprietor of the lower land, . . . , has no right to make embankments whereby the current may be arrested and accumulated on the property of his neighbor. This is the rule of the civil law, . . ."[5]

However, in subsequent cases,[6] the Court altered the effect of this rule by liberalizing its application, particularly where a strict application would result in great hardship to one or both of the parties. This was accomplished by applying a "reasonableness of use" test instead of the aforementioned civil law rule.[7] The Court, however, in *Whitman v. Forney,* was rather reluctant to go as far as to say that they were breaking precedent and adopting the reasonable use rule. To avoid such a result, the Court, in referring to its use of the reasonableness of use rule, stated:

> "It creates no precedent, does not change the adopted rule of law, but provides mitigation for the harsh application of either of the rules, which might be applied in the particular State in which the case arises."[8]

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[4] The other principal rule, in contraposition to the civil law rule, is the so-called common law rule which is also known as the "common enemy" doctrine. Popular in large urban areas, particularly from New Jersey to New England, this rule is based upon the belief that surface waters are a detriment and thus can be warded off with impunity by all landowners. See 11 Md. L. Rev., *ibid,* 61-62; 56 AM. JUR. 552, Water, §69; Chadeayne v. Robinson, 55 Conn. 345, 11 A. 592 (1887); Barkley v. Wilcox, 86 N. Y. 140 (1881); Boyd v. Conklin, 54 Mich. 583, 20 N. W. 595 (1884).

[5] P., W. & B. R.R. Co. v. Davis, 68 Md. 281, 289, 11 A. 822 (1888).

[6] Whitman v. Forney, 181 Md. 652, 31 A. 2d 630 (1943); Battisto v. Perkins, 210 Md. 542, 124 A. 2d 288 (1956). See also: Bishop v. Richard, 193 Md. 6, 65 A. 2d 334 (1949); Biberman v. Funkhouser, 190 Md. 424, 58 A. 2d 668 (1948), both noted 11 Md. L. Rev. 58 (1950).

[7] This is the third rule in effect in the United States. Under it, surface waters may be interfered with so long as the respective landowners are utilizing their lands reasonably in so doing, as compared to the damage caused by the interference. Minnesota and New Hampshire have adopted this doctrine. See Note, *Rule As To Surface Waters in Minnesota,* 2 Minn. L. Rev. 449 (1918); City of Franklin v. Durgee, 71 N. H. 186, 51 A. 911 (1901).

Flexibility seems to be lacking in the civil law rule. Under a strict application of this rule, the lower owner would suffer a great hardship in that he would be prevented from improving his land or utilizing it in an otherwise reasonable fashion. The desirable answer in each case is that all attendant and extenuating circumstances be considered. "[T]he failure to attain substantial justice by the enforcement in all cases of a rule of law which does not recognize these important differences is not surprising." Franklin v. Durgee, *ibid,* 913.

[8] *Supra,* n. 6, 659.

However, it is rather difficult to conceive how a Court can apply a rule of law without adopting it. Furthermore, in the subsequent case of *Battisto v. Perkins,* the Court in referring to the *Whitman* case, stated:

> "In that case the Court also adopted and applied the rule, known as 'reasonableness of use', involving a balance of benefit and harm."[9]

The result of these cases leaves Maryland in the rather unique position of having adopted both the civil law rule and the rule of reasonableness of use; the latter being applied only in hardship situations. This, of course, introduces some degree of uncertainty as to when the Court will find the circumstances extenuating enough to call for the application of the reasonableness of use rule.

It should be observed, however, that even prior to the *Whitman* case, the Maryland Court has not been so dogmatic as to adhere to a strict application of the civil law rule.[10] The Maryland cases have always recognized two limitations on this right of drainage under the civil law rule. In *Biberman v. Funkhouser,*[11] the Court of Appeals said:

> ". . . the upper owner has no right to increase materially the quantity or volume of water discharged on the lower landowner . . . the upper owner has no right to discharge water into an artificial channel or in a different manner than the usual and ordinary natural course of drainage, or put upon the lower land water which would not have flowed there if the natural drainage conditions had not been disturbed."[12]

For breach of the second limitation, the Court has approved a self-help remedy in *Hancock v. Stull*[13] to the effect that "[i]f water is unlawfully forced on the lower owner, he is entitled to protect his property from the unwarranted flow",[14] and cited its acceptance in other Maryland cases.[15]

In the instant case, the Court was on firm ground, from the standpoint of precedent, in reciting these limitations on the civil law rule. But the holding in this case did not apply

[9] *Supra,* n. 6, 546.

[10] The Whitman case, *supra,* n. 6, was the first case which expressly applied a reasonable use test.

[11] *Supra,* n. 6.

[12] *Ibid,* 429.

[13] 206 Md. 117, 110 A. 2d 522 (1955).

[14] *Ibid,* 119.

[15] *Supra,* n. 6; City Dairy Co. v. Scott, 129 Md. 548, 100 A. 295 (1916) [the protection here was by fill].

such limitations to the defendant's natural right of drainage. The language of the Court was that:

> ". . . at this time there is no specific evidence to establish to what extent, if at all, the appellants' property will be damaged, . . .
>
> "The appellants' evidence . . . assumes conditions which do not exist. Damage does not necessarily result from an increased flow of surface water.
>
> ". . . the evidence . . . (is) not conclusive as to the legal rights of the parties hereto, . . ."[16]

In effect, *damage* and *not* merely an *artificial increase* or *concentration* of the natural flow of surface water, is made the test. Thus, even where the situation calls for the application of the recognized limitations under the civil law rule, the Court will not apply them if it does not deem it *reasonable* to do so. In essence, is this not merely an application of the reasonablness of use critterion? In other words, under some circumstances the Court may deem it *reasonable* to *artificially increase* or *concentrate* the natural flow of surface water while in other situations it may not.

Can the Court's refusal to apply the civil law limitations in the instant case be explained in view of its consistent adherance to it in previous cases? Perhaps its departure from established doctrine in the instant case can be justified or distinguished by the defendant's status, it being that of a municipality. The great majority of previous litigants on this subject have been private landowners,[17] and the limitations have been firmly applied with a rather rigid rein being kept upon the dominant landowner.[18] In the *Kennedy* case, however, the dominant landowner is a municipality; and although the Court warns of the line beyond which even it cannot transgress,[19] it is interesting to note that the Court says:

> "The propriety, extent and character of public improvements which lie within the discretion of municipal authorities are not subject to judicial interference

[16] Kennedy-Chamberlin Development Co. v. Snure, 212 Md. 369, 376-8, 129 A. 2d 142 (1957). Parenthetical material supplied.

[17] *Supra*, ns. 5, 6, 15; Neubauer v. Overlea Realty Company, 142 Md. 87, 120 A. 69 (1923); Superior Construction Co. v. Elmo, 204 Md. 1, 102 A. 2d 739, 104 A. 2d 581 (1954).

[18] See in particular Neubauer v. Overlea Realty Co., *ibid*, and Battisto v. Perkins, 210 Md. 542, 124 A. 2d 288 (1956).

[19] *Supra*, n. 16, 376:

> "If, however, the municipality collects surface waters into a single channel and . . . causes the stream to overflow on his (the lower owner's) lands, the owner has a cause of action."
>
> (Parenthetical material supplied.)

> unless exercised arbitrarily, oppressively or fraudulently, and they result in invasion of property rights."[20]

Similar language is to be found in the cases cited by the Court in support of this position to the effect that the dominant municipality will be liable only for *unreasonable* methods of drainage, there being certainly no *greater* duty of protection of the lower land imposed upon the municipality than that required of a private owner.[21] The reverse implication, in fact, seems more tenable, that perhaps a lesser duty and standard of conduct is required of the municipality.

While the upper landowner is certainly not precluded from improving his property, the Court of Appeals has made it emphatic that there are prescribed boundaries of standards within which he must operate. Dominant owners of unimproved and wooded tracts can improve the land for building, although they are under a legal obligation to use precautions to prevent inundations of silt, mud, and debris upon the servient land from the denuded slopes.[22] However, no new artificial collection devices, channeling and increasing the flow beyond the capacity of *existing* natural and artificial channels, are permissible.[23] In regrading,[24] the upper owner, on the authority of the *Biberman*[25] case, is given considerable latitude. Reasonable upgrading and terracing is sanctioned in spite of slight increases both in flow and direction of the surface waters with a balancing of the cost to the lower owner to accommodate the increases against the cost and damages to the upper owner of restoring the premises to their original condition.[26] However these judicial holdings are not rules of proscription from which a definite course of action may be outlined for the home improver. Each case turns upon its own fact situation. In one case the character of the soil may account for a marked erosion from an increased flow while in another case the increase in flow may raise the water level substantially without any visible erosion. However, the Court intimates that "standing on one's rights" and acting "with im-

[20] *Ibid*, 378.

[21] See in particular Cech v. City of Cedar Rapids, 147 Iowa 247, 126 N. W. 166, 167 (1910).

[22] Battisto v. Perkins, *supra*, n. 18, and Superior Construction Co. v. Elmo, *supra*, n. 17.

[23] Baltimore County v. Hunter, 207 Md. 171, 113 A. 2d 910 (1955); Neubauer v. Overlea Realty Co., *supra*, n. 17.

[24] Regrading by either party does not change dominant to servient, nor servient to dominant. The original, natural flowage of the surface water determines this classification which remains unalterable by artificial means.

[25] Biberman v. Funkhouser, 190 Md. 424, 58 A. 2d 668 (1948).

[26] *Ibid*, 430.

punity" are not compatible legal bedfellows, and that a litigant claiming both will not be regarded in a favorable light. The dominant owner who insists on increasing the flow in furtherance of his improvement rights while flatly refusing to reconsider any moderation of his plans can expect a strict application of the limitations on his right of drainage similar to those applied in the *Battisto*[27] case.

The dominant owner may increase the flow, incident to an improvement, until property rights of the servient owner are infringed. The upper owner assumes the risk of judicial wrath whenever he acts, but only in court can he determine whether his actions rendered him liable. Predictability in judicial decisions has an uncertain rating in surface water cases. However, the civil law rule with its limitations and the reasonable use rule, both of which Maryland has adopted, are each in themselves, free from any ambiguity. The lack of predictability here stems from the uncertainty of not knowing in advance which rule the Court will apply. This lack of certainty, however, may not necessarily be undesirable. In fact, it may be asserted that unpredictability is even good in that it tends to engender a greater degree of equitable conduct on the part of the parties. If the instant case is really a departure from the usual limitations under the civil law rule as based upon the reasons outlined therein, still the application was made in a case where a *municipality* was the dominant landowner, and the broad configurations of the civil law rule's limitations in use in Maryland will probably remain unchanged for *private* dominant landowners in surface water cases.

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[27] *Supra*, n. 18. In that case, plaintiff sued for damages caused by precipitations of mud and debris through increased flow of rain water from defendants' higher land as an alleged result of regrading and building activities. Defendants refused to afford the plaintiffs more than token protection from such inundations. The Court awarded the plaintiffs damages equal to the cost of restoration of the premises.