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The Law of Underground Waters

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THE LAW OF UNDERGROUND WATERS.

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C O R N E L L U N I V E R S I T Y

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CHAPTER I.

CLASSIFICATION OF SUBTERRANEAN WATERS AND GENERAL RULE OF LAW GOVERNING EACH.

The law regulating the relative rights of neighboring land owners with respect to surface waters has been discussed in the courts for many years and has become well settled at the present time. The law of subterranean waters, however, is of much more recent origin. The first case which distinguished the law in regard to underground water from that of surface streams seems to have arisen in Massachusetts in 1836 (Greenleaf vs. Francis, 18 Pickering, 117) though there were some English cases which broached the question earlier but were decided on other grounds. Following this Massachusetts case there was a period of peace in American courts on that question until 1850 when a Connecticut case revived the litigation and from that time we have been acquiring a large amount of judicial authority.

Subterranean waters are divided into two classes; percolating waters and underground streams (Willis vs. City of Perry, 60 N. W., 727). By the term percolating waters is meant not only those waters which in the strict sense of the term, percolate through the soil but also any underground streams flowing in unknown and undefined channels. The class called underground streams, on the

other hand, refers only to such subterranean waters as actually flow in well defined courses and whose courses are either known or easily ascertainable.

The reason for this division is that in the first class, called percolations, the law is directly opposed to that governing underground streams. In underground streams we find the same rules controlling as in surface waters. Adjacent proprietors have relative rights in the water, easements can be created therein by prescription, and so on through the whole law of underground and surface watercourses the rules appear to be identical. The authorities are so numerous and the law so firmly settled on this point that it would be useless to discuss them here. The part which does give difficulty here is in the borderland cases to distinguish whether the water in each particular case is of the one class or the other.

The fact that the water in question flows in a well defined stream cannot be established by mere theory and speculation but such facts must be given in evidence as to prove, by reasonable inference, that such a stream exists. In the case of Taylor vs. Welch, 6 Oregon, 198, the court held that the mere fact, when defendant drained a marsh, a spring on the plaintiff's land, at

a lower level and some 300 feet distant, became dry was not sufficient to prove that the marsh and spring were connected by a well defiend stream. In Chase vs. Silverstone, 62 Maine, 175, defendant in digging a well struck a vein of water which filled his well and overflowed the yard. The plaintiff's well was thereby injured but the court held that there was no direct proof to show an underground stream, and that even if they had proved such a stream it was not known until defendant by excavation had discovered it and hence was not a stream flowing in a well known course.

The question as to what constitutes a well known underground course, so as to bring it within the law of surface waters, seems to give some conflict. It seems to be the better doctrine that such a stream would not be one whose course was unknown until dis covered by excavation, but there are authorities holding the other way. In the case of Haldeman vs. Bruckhardt, 45 Pa. St., 514, the court held that defined watercourses which cannot be diverted are not the hidden streams of which the owner of the soil can have no knowledge until they have been discovered by excavation made in the exercise of the rights of property, but they are known streams, the courses of which are perceptible and require no surface exploration before such courses can be defined. In

Burroughs vs. Saterlee, 67 Iowa, 396, on the other hand, it was held that the fact that the stream was not known until the injury was done was no defence, but that the land owners through whose lands the stream flows have relative rights in the water.

Vice Chancellor Chaterton, in Black vs. Ballymena, L.R. 17 Irish, 459, states very plainly what knowledge is necessary to prove a stream sufficiently well defined to make it subject to the law of surface waters. He says: "In considering this question, the knowledge required cannot be reasonably held to be that derived from a discovery in part by excavation exposing the channel but must be a knowledge, by reasonable inference, from existing and observed facts in the natural, or rather the pre-existing condition of the surface of the ground. The onus of proof lies of course on the plaintiff claiming the right and it lies upon him to show that, without opening the ground by excavation or having recourse to abstruse speculations of scientific persons, men of ordinary powers and attainments would know, or could by reasonable diligence ascertain, that the stream, when it emerges into light, comes from and has flowed through a defined subterranean channel."

In the absence of proof to the contrary, the presumption is that the water in question is percolating Hanson vs. McCue, 42 Cal., 303, Metcalf vs. Nelson, 65 N. W. 911.

CHAPTER II.

RIGHTS IN PERCOLATING WATERS.

Section I.

Rights in general.

Unlike surface waters in which adjoining land owners have relative rights and can exercise only a reasonable use, percolating waters, and under this term is included all underground waters not flowing in well defined courses, are subject to the absolute dominion of the owner of the land in which such waters are found. They are treated as a part of the land itself just as much as the rock, sand or minerals in the earth. As Ames, C. J. says in Buffom vs. Harris, 5 R. I., 243,"but it (percolating water) is in the eye of the law, as well as of common sense, the moisture and a part of the soil with which it intermingles, to be used there by the owner of the soil if to his advantage, or to be got rid of in any mode he pleases if to his detriment." And this is the

well settled view of the matter, the only exception at the present time being two New Hampshire cases which strenously attack this position and maintain that relative rights do exist in regard to percolating waters and that the land owner is entitled to only a reasonable use of such water. These cases are, Bassett vs. Salisbury Manufacturing Co., 43 N. H., 569, and Swett vs. Cutts, 50 N. H., 439.

Perhaps the strongest reason for this distinction between surface and percolating underground waters as to the rights of land owners is that stated by Bennett, J. in Chatfield vs. Wilson, 28 Vt., 49. He says; "The laws of the existence of water underground, and of its progress while there, are not uniform, and cannot be known with any degree of certainty, nor can its progress be regulated. It sometimes rises to a great height, and sometimes moves in collateral directions, by some secret influences beyond our comprehension.

"The secret, changeable, and uncontrolling character of underground water, in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules as is done in the case of surface streams. Their nature is defined, and their progress over the surface may be seen, and known, and is uniform.

"We think the practical uncertainty which must ever attend subterranean waters is reason enough why it should not be admitted to subject them to certain and fixed rules of law, and that it is better to leave them to be enjoyed absolutely by the owner of the land as one of its natural advantages and in the eye of the law a part of it."

Another important reason for not allowing neighboring land owners to possess relative rights in percolating waters is found in the indefinate nature and great extent of the obligation which such a law would impose. A land owner could be restrained from draining his farm or making any excavations if such act was shown to interfere with anothers water supply.

Then there is no uniformity in such a rule for a large mining or quarrying industry could be restrained from carrying on its pursuit merely for the sake of preserving a feeble spring on a neighbors land.

Section II.

Effect of prescription.

In many cases involving a question of rights in underground water the party contending for such a right has based his claim upon the doctrine of prescription, arguing that a right to a continued flow of percolating waters through his neighbors land is an easement capable of being created by grant and equally capable of being created by a conclusive presumption of a grant when enjoyed by the claimant for the period fixed by the local Statute of Limitations for the acquirement of similar easements by prescription. A few of the earlier cases were decided in favor of this view but these decisions were not followed in the later cases and the universal rule now is that no easement can be created in percolating waters by prescription.

There are two principle reasons for not allowing an easement in percolating underground water to be acquired by prescription. In order to acquire an easement by prescription, as in the case of acquiring title by adverse possession, there must be an adverse user. There must be such an assertion of right as to expose the party to an action unless in fact he had a grant, for, as Pearson, J. says in Felton vs. Simpson, 11 Iredell (N. Car.) 84, "it is the fact of his being thus exposed to an action and the neglect of the opposite party to bring suit, that is seized upon

as the ground of presuming a grant, in favor of long possession and enjoyment, upon the idea that this adverse state of things would not have been submitted to, if there had not been a grant." In percolating waters there exist no relative rights between neigh boring land owners but each has an absolute right to all that may be found in his land. Clearly then a person, by using water which oozes into his land from his neighbors lot, is in no wise exceeding his rights nor infringing upon the rights of his neighbor and it would be absurd to decide that a continued exercise of such a right for a long time would raise a presumption that the owner of the servient estate, who had no right to complain of the use of the water, had granted an easement to a continued water supply from his land.

Another necessary element of adverse user is that the user must be open and notorious. The owner of the servient estate must know of the use. But in percolating waters their movements are unknown and uncertain and the person against whom the doctrine of prescription would be applied cannot be expected to know that the waters which his neighbor uses filter from his land. As stated in Frazier vs. Brown, 12 Ohio St., 294, "he could not be reasonably required to enter his caveat against the appropriation of a thing so hidden and obscure as percolating underground water."

Section III.

Effect of grant.

Although no correlative rights can be established in percolating waters by prescription, yet there is no reason why such rights cannot be obtained by a contractual regulation between the land owners. Such a grant may arise either by express agreement of the parties or may be implied. In the case of an express grant of this nature the difficulty exists in the construction of the contract to determine the extent of the rights acquired. The cases of Bliss vs. Greeley, 45 N. Y., 671, and Johnstown Cheese Mfg. Co. vs. Veghte, 69 N. Y., 16 furnish good examples of the general line of distinction which has been followed by the courts in construeing such grants.

In the former case the owner of the farm granted to the plaintiff the right to dig and stone up a certain spring and to conduct the water therefrom through the grantor's land, by a specified pipe, to the grantees house. The grantee completed the waterworks and enjoyed the use of the water until the grantor dug a well near that used by the grantee in consequence of which the water ceased to rise in the first well and the grantee was deprived of his water supply. The grantee brought an action against the

grantor for a breach of the grant, but the court held that there had been no breach. In the opinion Peckham, J. says; "The grant here is limited and specific. This grant did not make a servient estate of the grantors whole farm. It is difficult to see how the plaintiff acquired more thereby than if he had obtained a grant in fee of the land, including the spring and the track of the pipe. Under a grant in fee it is quite clear that he could have no relief against the acts found in this case. This grant prevents the grantor and his assigns from any substantial interference with the spring or the pipe. It does not prevent their improvement or use of the residue of the farm. Had the parties designed to make the whole farm servient to this easement, they should have expressed that purpose."

In the case of Johnstown Cheese Co. vs. Veghte, the defendant granted to the plaintiff the use of the water which was then conducted to the factory from the springs on the defendants land. The court distinguished this covenant from that in Bliss vs. Greely and held that defendant was liable in damages to plaintiff for digging anywhere on his land if such acts materially decreased the flow of water to plaintiffs factory. The intent of the grant was to secure to the plaintiff all the water then conducted from the

spring and not simply to give a right to draw what water might be in the spring.

When the owner of land sells a portion of it he impliedly grants to the transferee of the land conveyed all the apparent and visible easements which are necessary for the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted; but such grantor impliedly reserves such apparent easements for his own use, as against the estate transferred, only when such an easement is absolutely necessary to the enjoyment of the property remaining in the grantor. In other words the law will imply a grant of an easement in favor of the transferree of the land more readily than it will imply a reservation in favor of the transferor. The deed is in the language of the grantor and it is presumed that in drawing such deed he will be less likely to omit any agreed provisions which are beneficial than those prejudicial to his interests. The law therefore construes a deed strictly as against the grantor.

In an implied grant the same distinction is observed as to the extent of the rights granted as in express grants. If the grant implied is that the flow of the water shall continue as

before the grant then the grantors entire estate is servient to such an extent that nothing can be done upon it which will alter the flow of the water. But if the grant only means that the grantee shall have the right to use a certain well, then such grantee acquires no greater servitude over the rest of the estate than of he had bought the land where the well stood and the grantor would not be liable for excavating near the well and diverting the water from it.

Section IV.

Distinction between land owner's rights and rights of one exercising a special right in the land.

It is sometimes stated that the right to intercept percolating underground waters is strictly confined to the owner of the land and that if a person or corporation exercising a special right in the land should, by diverting such water, injure an adjoining land owner's water supply he would be liable in damages at the suit of such injured person. That is too broad a statement of the law and is to a great extent incorrect.

It is universally recognized that the owner of land can grant away his rights in percolating water and clearly a person acquiring such rights by grant could not be under greater liability to an adjoining land owner than the grantor himself would be for similar acts. In the case of a trespasser the question becomes more difficult. Of course a trespasser would be liable to the owner of the land on which he trespassed but would he be liable to an adjoining land owner for injuries caused by diversion of underground water.

It is a fundamental rule of law that a man is bound to forsee the natural and probable consequences of his acts and that any injuries resulting from his acts which an ordinary man would not foresee as the natural and probable consequence is damnum

absque injuria. In applying this test to a trespasser's liability to an adjoining land owner for an injury to his water supply it might seem that the uncertainty as to the existence and movements of underground water would render the injury to an adjoining land owner too remote to be considered the natural and probable consequence of his act. This argument would be defeated, however, by showing that the defendant knew of the movements of the water when he did the wrong.

Since no relative rights exist between adjacent land owners it would seem that a person could not control the flow of underground water except while it is actually in his own land and hence any disturbance of such waters in anothers land could not give a right of action even as against a trespasser. It is, however, a close question and as there are no authorities directly in point it is impossible to determine how the law will be declared when an occasion arises for a decision of this question.

In the case of a public improvement by a municipal corporation where the statute , authorizing such improvements to be made, states, that the corporation shall pay full compensation for all injury to property, the decisions in England and America seem to differ as to the liability of the corporation for an

injury to real property, not crossed by the works of the company but which property is injured by a diversion of under ground percolating water. In England the courts held that the corporation would not be liable for such an injury, arguing that the legislature did not intend to put the corporation under greater liability than they would have been without the statute but simply to confer upon the land owner a right to compensation co-extensive with the rights of action of which the statute had deprived him in authorizing the works, New River Co. vs. Johnson, 2 El. and El., 435. In the American cases of Parker vs. Boston and Maine Ry. Co., 3 Cushing, 107 and Trowbridge vs. Brookline, 144 Mass., 139, the same question arose under similar statutes and the courts held that the statute included any real and actual damage and that an injury to a well by a disturbance of the underground water was such an injury.

Section V.

Effect of malice.

There are numerous cases in which the question of the effect of malice in appropriating or diverting underground percolating water has been presented to the courts. While there are many opinions which touch this point, some of them very extensively, yet in the great majority of the cases the remarks are mere dicta and so of little force as authorities.

In the case of Shesley vs. King, 74 Maine, 164, a very extensive discussion of this question is given by Barrows, J. in which he maintains that willful, malicious injury to another is punishable even though the same act if done from good motives would be damnum absque injuria. He says, " one of the legal rights of every one in a civilized community would seem to be security in the possession of his property and privileges against purely wanton and needless attacks from those whose hostility he may have in some way incurred." There are many dicta which support this view but there seem to be no cases which actually turned on this point that were decided in this way. The greater weight of authority seems to be in accord with the following rule, as laid down by Black, J. in Jenkins vs. Fowler, 24 Pa. St., 308.

"Malicious motives make a bad act worse, but they cannot make that a wrong, which in its own essence is lawful." In the case of Phelps vs. Nowlen, 72 N. Y., 39, the question was squarely before the court and it was decided that malicious motives in the exercise of a legal right would not give rise to a cause of action. In reviewing the previous N. Y. cases Miller, J. says, "These cases tend to establish the doctrine in this State, that if a man has a legal right courts will not inquire into the motive by which he is actuated in enforceing the same. A different rule would lead to the encouragement of litigation and prevent in many instances a complete and full enjoyment of the right of property which inheres to the owner of the soil."

CHAPTER III.

POLLUTION OF UNDERGROUND WATER.

Having now considered some of the different questions which have arisen in regard to rights to appropriate or divert underground water, the subject of contamination or pollution of such waters presents itself. In this branch of the law of underground waters the conflict of the authorities is most noticeable. The practical importance of the questions involved in this branch of the law is perhaps greater than in any other part of the law of subterranean waters and, owing to this importance and to the conflict of authorities upon the subject, the litigation is here observed to be most extensive. Several doctrines have been presented as a solution of the difficulty. Some courts looking at the mere legal right of ownership of the waters in the owner of the land have laid down the rule that such ownership includes the right to use the waters in any way in which the owner desires. Most of the courts, however, adopt a more equitable view and refuse to the land owner the right to pollute the underground water which his neighbor is entitled to receive in its pure state.

The doctrine laid down in Upjohn vs. Richland Township, 46 Mich., 542 is rather an extreme view of the case and is not sanctioned by any large number of cases. In that case Cooley, J.

says "But if withdrawing the water from ones well by an excavation on adjoining lands will give no right of action, it is difficult to understand how corrupting its waters by a proper use of the adjoining premises can be actionable, when there is no actual intent to injure, and no negligence. The one act destroys the well, and the other does no more; the injury is the same in kind and degree in the two cases." This idea rests on the principle that the owner of the land is absolute owner of the water in it and hence can use it as he pleases while it is in his land. That would be a simple rule to lay down and apply but obviously it is far from being a just one. One of the fundamental rules or maxims of our law is, sic utere tuo ut alienum non laedas, and certainly to allow a person to poison the water on his land and then allow it to pass to his neighbor would be a serious infraction of that maxim.

A much more just view is taken by the majority of the courts. It bases its doctrine rather on the law of nuisance than of property rights. Prima facie a land owner is not allowed to cause his own property to become a nuisance to his neighbor and it is immaterial whether such nuisance is the result of putting filth on ones land or on his own land and allowing it to escape to his neighbor's or by poisoning the air which his neighbor

breathes or the water he drinks. The case of Ballard vs. Tomlinson 29 Ch. Div., 125 is a leading case in support of this doctrine. In the opinion Lindley, L. J. says, "So if a man choose to poison his own well, he must take care not to poison the waters which other persons have a right to use as much as himself. To hold the contrary, on the ground that the water is not their property until they get it, is to take an inadequate view of the subject and to overlook the fact that the law of nuisance is not based exclusively on rights of property."

Mr. Edmund Bennett, in an article in 24 Am. Law Reg., 638, gives a very logical doctrine, following the theory generally known as the doctrine of Rylands vs. Fletcher. He says, "The ground of liability in all such cases is obvious and simple, and if the principle be kept steadily in mind it will lead to a satisfactory conclusion in them all. That principle is that every man is bound to keep all his dangerous things on his own premises at his peril; and if he fails to do so, and they escape and injure others, he is liable."