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PERCOLATING WATERS: THE RULE OF REASONABLE USER

PERCOLATING WATERS: THE RULE OF REASONABLE USER.

Is the right to capture and detain percolating waters upon one's own land an absolute or a qualified right? If it is an absolute right one need give no excuse or justification for cutting off, even intentionally or maliciously, another's water supply from subterranean undefined sources. If it is a qualified right one must show some reasonable end to be served by the exercise of it in order to justify the damage its exercise inflicts upon a neighbor. To put the concrete case, may one landowner intentionally (that is, with foreknowledge of results,) cut off a neighboring landowner's water supply by thus intercepting, collecting or monopolizing the percolating waters that feed the neighbor's well or spring?

The answer given to this question in the leading American case[1] is that he may do so if he collects the water for his own use, but not if he collects it for the sole purpose of injuring the neighbor. If he collects it for his own use it is immaterial that he also entertains hostility toward the neighbor. The right should not, however, be exercised from mere malice. Later American cases transfer the emphasis from the showing of "malice" to a showing of "unreasonable user" which may or may not be accompanied by malice.

The answer given to this question in the leading English case[2] is that he may do so absolutely, since he owns the soil absolutely, and all that lies therein, whether solid rock, or porous ground, or venous earth, or part soil, part water, and may dig therein and apply all that is there found to his own purposes. In a later case[3] one judge expressed grave doubts whether this should be extended to the collecting of water for extensive sale through a large district, but his doubts were brushed aside. In a quite recent case[4] it was

[1] *Greenleaf v. Francis* (1836), 18 Pick. 117. See also *Roath v. Driscoll*, (1850), 20 Conn. 533; *Wheatley v. Baugh* (1855), 25 Pa. St. 528; *Trustees v. Youmans* (1867), 50 Barb. 316; *Chesley v. King* (1882), 74 Me. 164.

[2] *Acton v. Blundell* (1843), 12 Mees. & W. 324. See also *Chasemore v. Richards* (1859), 7 H. L. Cas. 349.

[3] *Chasemore v. Richards, supra.*

[4] *Mayor of Bradford v. Pickles* (1895), A. C. 587.

held that one owner might lawfully cut off a supply used by a whole town, with the sole purpose of producing that precise injury, and with no purpose of benefiting himself or his own lands, or society in general.

The English law is therefore clear. The landowner who by operations on his own land cuts off the percolating waters that would otherwise feed his neighbor's well or spring need make no defence, need show no justifiable purpose or occasion. His sufficient answer is that he has an absolute right to all the percolating waters brought or held within his own lands, and can not be called upon to explain to any one why he has chosen to collect them, or after collecting them to waste them. Some American cases are to the same effect.[5]

It is believed, however, that the prevailing American view is that, in order to justify the cutting off of another's water supply derived from percolating waters, it is necessary that this should be the result of a reasonable user of defendant's rights in his own lands. To cut off a water supply from mere malice is to cut it off without reasonable excuse or justification. "The right (to percolating waters) should not be exercised from mere malice."[6] "Neither the civil law nor the common law permits a man to be deprived of a well or spring or stream of water for the mere gratification of malice."[7] "This plaintiff had rights in that spring, which, while they were completely subject to the defendant's right to consult his own convenience and advantage in the digging of a well in his own land for the better supply of his own premises with water, should not be ignored if it were true that defendant did it 'for the mere, sole and malicious purpose' of cutting off the sources of the spring and injuring the plaintiff, and not for the improvement of his own estate."[8] "An exception exists in case of an injury done by cutting off such waters with malice. No person can wantonly and maliciously cut off on his own land the underground supply of a neighbor's spring or well without any purpose of usefulness to himself."[9] This is the language of the

[5] *Chatfield v. Wilson*, 28 Vt. 49; *Wheelock v. Jacobs*, 70 Vt. 162; *Huber v. Merkel* (Wis., 1903), 94 N. W. Rep. 354.

[6] *Greenleaf v. Francis*, 18 Pick. 117.

[7] *Wheatley v. Baugh*, 25 Pa. St. 528. See also *Brown v. Kistler* (1899), 190 Pa. St. 499.

[8] *Chesley v. King*, 74 Me. 164.

[9] *Trustees v. Youmans*, 50 Barb. (N. Y.) 316.

leading American cases, and, although *obiter* in the cases above cited, has been adopted in other cases where the very question was necessarily decided. There is now a considerable array of authorities holding that the use of percolating waters resulting in harm to another must be reasonable in order to be justifiable.[10]

In the leading New Hampshire case[11] it was held that where defendant's dam set back water so as to intercept the natural drainage (including percolations) from plaintiff's land (although his land was not situated directly upon the water course), defendant was liable to plaintiff unless such obstruction was caused by defendant in the reasonable use of his own land or privilege. While the question arises in a different form, it was thought by the court to involve the same principles as the cases dealing with the diversion of percolating waters. Rights in percolating waters are held to be not absolute, but correlative, and, "from the necessity of the case, the right of each is only to a reasonable user or management." In the second New Hampshire case[12] the same doctrine was applied to surface water. It is therefore the doctrine in that State that no difference in theory is to be observed between water in streams, and percolating or drainage waters. In any case the test is the reasonableness of the interference with the natural flow or percolation. Malicious interference without benefit to the one interfering can never be regarded as reasonable.

In the first New York case cited[13] the action was to recover damages occasioned by extended operations by wells, acqueducts and pumps which resulted in drying up plaintiff's brook and pond. The water so gathered by defendant was conveyed to the city and then distributed. The court held that the city was making an unreasonable use of the water. "It may be stated, with some degree of confidence, that no case will be found in this State, and our research has not enabled us to find one in any other State of this country, where the right has been upheld in the owner of land to

[10] *Bassett v. Salisbury Mfg. Co.* (1862), 43 N. H. 569; *Swett v. Cutts* (1870), 50 N. H. 439; *Smith v. City of Brooklyn* (1897), 18 N. Y. App. Div. 340, aff'd 160 N. Y. 357; *Forbell v. City of New York* (1900), 164 N. Y. 522; *Katz v. Walkinshaw* (Cal., 1902), 70 Pac. Rep. 663, on rehearing 74 Pac. Rep. 766; *Stillwater Water Co. v. Farmer* (Minn., 1903), 93 N. W. Rep. 907; *Barclay v. Abraham* (Iowa, 1903), 96 N. W. Rep. 1080.

[11] *Bassett v. Salisbury, supra.*

[12] *Swett v. Cutts, supra.*

[13] *Smith v. City of Brooklyn, supra.* Affirmed, 160 N. Y. 357.

destroy a stream, a spring or well upon his neighbor's land, by cutting off the source of its supply, except it was done in the exercise of a legal right to improve the land or make some use of the same in connection with the enjoyment of the land itself, for purposes of domestic use, agriculture or mining, or by structures for business carried on upon the premises." This then is the doctrine that a non-natural user is an unreasonable user.

The second New York case cited[14] was one in which the city water-works operations by collecting all the percolating waters in the neighborhood dried up plaintiff's land so that it became unfit for cultivation. It was held that the means (powerful suction pumps) and the use to which the water was put (conveying it away for sale) rendered the defendant's acts unreasonable as to plaintiff. It is true the court called it trespass, but this does not impair the value of the reasoning by which it was shown that non-natural means and non-natural user may render the acts of the defendant in collecting percolating water unreasonable.[15]

The California case[16] involved a somewhat similar set of facts. An artesian belt contained several square miles of territory. Plaintiff had an artesian well in the belt and used the water for domestic purposes and for irrigating his lands. Defendant had wells in the same belt, and was conveying away and selling the water to be used on lands of others distant from the saturated belt. There was no evidence of an underground stream; the water was therefore regarded as percolating water. The operation of defendant's wells diverted the water to the damage of plaintiff. The court contends earnestly for the doctrine of reasonable use of percolating waters, and holds the merchandising of the water by defendant to be unreasonable as to plaintiff.

The Minnesota case[17] was one in which plaintiff was using the water to sell to consumers, and defendant diverted a large quantity of the percolating water, a small part of which he used, but the greater part of which he turned into the city sewer and wasted. An injunction was granted against such waste. "Except for the

[14] *Forbell v. City of New York, supra.*

[15] Where plaintiff was also collecting water for a non-natural use and defendant interfered while collecting water for a like non-natural use, it was held plaintiff had no remedy. *Merrick Water Co. v. Brooklyn,* 32 N. Y. App. Div. 454.

[16] *Katz v. Walkinshaw, supra.*

[17] *Stillwater Water Co. v. Farmer, supra.*

benefit and improvement of his own premises, or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect or divert such waters for the sole purpose of wasting them." It will be observed that in this case the plaintiff was making a non-natural use of the water, but defendant was making no reasonable use whatever.

The Iowa case[18] was also a case of unreasonable waste. Plaintiff had an artesian well in a saturated belt. Defendant put down a well and turned the flow into a stream where it was wasted. This resulted in stopping the flow from plaintiff's well. "The record indicates strongly that the defendant's object was to maliciously cut off the water supply of a well-owner other than plaintiff. * * * A decided tendency to depart from the strict rules of the common law with respect to percolating waters in the adjustment of modern conditions is manifest in recent decisions. * * * A landowner may not collect, drain or divert waters percolating through the earth merely to carry from his own land for no useful purpose, when such action on his part will have the effect of materially injuring or destroying the well or spring of another, the waters of which are devoted to some beneficial use connected with the land where found. This applies in principle the doctrine of correlative rights to the control of subsurface waters whenever the appropriation proposed is unconnected with the use, enjoyment, or improvement of the land from which taken."

These cases establish for the jurisdictions concerned the doctrine of reasonable user of percolating waters, or of the lands in which the percolating waters may be collected or diverted. Whether they place the law of percolating waters upon substantially the same basis as the law of water courses, as is held in the New Hampshire cases,[19] matters little in the final result. They do recognize that no one has an absolute right in such waters; that the right is qualified by the use to which he puts the waters or the use to which he puts the land in which the waters are; that non-natural user or mere waste may be an unreasonable use as against one whose beneficial and reasonable use is thus interfered with.

[18] *Barclay v. Abrahams, supra.*

[19] *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569; *Swett v. Curtis*, 50 N. H. 439.

Assuming the plaintiff is putting the waters to a natural use, that is one beneficial to the lands or the enjoyment of the lands where the waters are collected, the defendant may to the damage of the plaintiff: (1) also put the waters to a like natural and beneficial use, or, in putting the land itself to a resaonable use, or in reasonably improving it, incidentally interfere with the percolating waters; (2) put the waters to a non-natural use, that is a use not beneficial to the land or its reasonable enjoyment, as where he pipes the collected water away and sells it; (3) put the water to no use at all, that is collect the water and merely waste it. In the first case defendant is not liable to plaintiff for the damage.[20] In the second case defendant has been held to be liable.[21] *A fortiori* the defendant is liable in the third case.[22]

Assuming the plaintiff is putting the water to a non-natural use, that is, piping it away and selling it, the defendant may to the damage of plaintiff: (1) put the water to a natural use beneficial to the land where collected; (2) put the water to a like non-natural use by also piping it away and selling it; (3) put the water to no use whatever, but merely waste it. It would seem clear that defendant would not be liable in the first case, since it has been held that he would not in the second case.[23] In the third case he has been held to be liable, because, although plaintiff is putting the water to a use not beneficial to the lands, it is a use beneficial to society, while defendant is merely wasting it, that is, putting it to no beneficial use whatever.[24]

With the increase in artesian well supplies and the development of irrigation in arid regions, these questions are likely to become of even greater importance than they have been in the past. The American law has now been given a trend that is likely to break down the old notion that there is an absolute right in percolating waters and to establish the doctrine of reasonable user, which is, after all, merely a doctrine of social utility.

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[20] *Tampa Waterworks Co. v. Cline*, 37 Fla. 586; *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747; *Herriman Irrigation Co. v. Kell*, 25 Utah 96; *Clark County v. Lumber Co.*, 80 Miss. 535.

[21] *Forbell v. City of New York*, 164 N. Y. 522; *Katz v. Walkinshaw* Cal.), 70 Pac. 663; 74 Pac. Rep. 766.

[22] *Barclay v. Abraham* (Iowa), 96 N. W. 1080.

[23] *Merrick Water Co. v. Brooklyn*, 32 N. Y. App. Div. 454.

[24] *Stillwater Water Co. v. Farmer* (Minn.) 93 N. W. 907.