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Rights in Percolating Waters

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RIGHTS IN PERCOLATING WATERS.—Almost without exception the courts approve of *Acton v. Blundell*, 12 M. & W. 324, to the extent of its actual decision,—that where as a result of improvement or enjoyment of one's own land one conducts operations which draw off percolating waters from a neighbor's land, even to the extent of drying up a well or spring, such inconvenience is to be deemed *damnum absque injuria*. The doctrine of the court "that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure," if intended to be taken as broadly as stated and not limited to the facts then before the court, has not received such uniform support.

In *Chasemore v. Richards*, 7 H. L. Cas. 349, that doctrine was applied to a case where percolating waters were drawn off by powerful pumps, the water being conducted some distance away for use. And in *Mayor v. Pickles* [1895], A. C. 587, it was held that even though the abstraction was malicious the result should be the same.

On the other hand in *Meeke v. East Orange*, 77 N. J. L. 623, 74 Atl. 379, 25 L. R. A. (N. S.) 465, 134 Am. St. Rep. 798, it was held that the right of an occupant of land as against neighbors to abstract percolating waters was not absolute, but relative, that the doctrine of "reasonable use" applied. About all there is to be said against *Chasemore v. Richards* was said by Chancellor Pitney in the New Jersey Case. The opinion contains not only a thorough discussion of the problem on principle but also a review of the decided cases.

In *Schenk v. City of Ann Arbor*, 163 N. W. 109 (May 31, 1917), the Michigan court repudiates *Chasemore v. Richards*, the court contenting itself with quoting from and following *Meeke v. East Orange*, *supra*, and *Hathorn v. Natural Carbonic Gas Co.*, 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555. Four justices dissented, but not on the fundamental question.

One feature of *Chasemore v. Richards* perhaps has not been sufficiently emphasized. The plaintiff there was the owner and operator of a mill operated by water power, developed by a stream, a part of the supply of which was the percolating water cut off by the defendant. The water abstracted had not reached the stream nor any tributary thereof—it was not stream water any more than rain water wandering over the surface is stream water. The rights of the plaintiff were those of a riparian proprietor to have a reasonable use of the waters of the stream and the defendant no doubt owed him a duty not to make an unreasonable use of the waters of the stream. In truth, however, the defendant had not done anything with the water of the stream, not any more than had the defendant in *Broadbent v. Ramsbottom*, 11 Ex. 602.

Percolating water is a gift of nature; like air we know not whence it comes nor whither it goes. If the doctrine of reasonable use is properly applied in the case of air, why should it not be good sense and good law in the case of water?

R. W. A.