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## Real Property - Water Rights - Liability for Discharge of Surface Water

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REAL PROPERTY—WATER RIGHTS—LIABILITY FOR DISCHARGE OF SURFACE WATER—In 1950 the corporate defendants purchased a forty acre tract of farm land lying north of plaintiffs' golf course and restaurant. Drainage from this tract had always flowed in a natural course southerly through

plaintiffs' land. The defendant corporations constructed a subdivision of 169 homes on the tract. This change aggravated the discharge of surface water onto the land of the plaintiffs, increasing the run-off some 350 per cent and, in times of heavy rains, producing flood conditions. Plaintiffs were awarded damages and an injunction by the trial court. On appeal, *held*, reversed. In respect to 30 acres of defendants' land,<sup>1</sup> since the increased discharge was the result of improvements to the land and was drained to substantially the same locality as before the improvements were made, although by artificial means and in greater volume and force, plaintiffs were not entitled to relief. *Yonadi v. Homestead Country Homes, Inc.*, 35 N.J. Super. 514, 114 A. (2d) 564 (1955).

Three different rules form the basis for the law of surface waters in the United States.<sup>2</sup> The oldest is the civil law rule. Its fundamental principle is that each landowner has a right to insist upon the natural flow of surface water and a correlative duty to refrain from doing anything to disrupt that natural flow.<sup>3</sup> The second rule is the so-called "common enemy" or common law rule. The gist of this doctrine is that one may do with surface waters as he sees fit, retaining or repelling them at will.<sup>4</sup> The third rule, that of reasonable use, is based on considerably less explicit authority. According to this theory, each landowner may make reasonable use of his land, although in the process the retention or repulsion of surface water may harmfully affect other landowners.<sup>5</sup> The principal case illustrates that, however different these three rules may be in theory, they are not nearly so far apart in practice.<sup>6</sup> For New Jersey is a "common enemy" state, and yet this court reaches a result which is in substantial agreement with that of most courts which have met the problem, whether they follow the civil law, "common enemy," or reasonable use rules.<sup>7</sup> All

<sup>1</sup> The proof was unclear as to whether or not drainage from the remaining ten acres flowed to substantially the same locality as before the improvements were made. These questions were therefore left for determination by the trial court on remand.

<sup>2</sup> See Kinyon and McClure, "Interference With Surface Waters," 24 MINN. L. REV. 891 (1940), for the most comprehensive study of this field to date.

<sup>3</sup> The leading cases are *Orleans Navigation Co. v. Mayor of New Orleans*, 2 Martin (La.) 269 (1811) and *Martin v. Riddle*, 26 Pa. 415 (1856). See 3 FARNHAM, WATERS AND WATER RIGHTS §889a (1904).

<sup>4</sup> See Kinyon and McClure, "Interference With Surface Waters," 24 MINN. L. REV. 891 at 898 (1940). *Gannon v. Hargadon*, 10 Allen (Mass.) 106 (1865) is the leading case.

<sup>5</sup> *Franklin v. Drugee*, 71 N.H. 186, 51 A. 911 (1901), *Kinyon and McClure*, "Interference With Surface Waters," 24 MINN. L. REV. 891 at 904 (1940). To date only two states, New Hampshire and Minnesota, can be said to have accepted this rule unqualifiedly. *Bassett v. Salisburg Mfg. Co.*, 43 N.H. 569 (1862); *Swett v. Cutts*, 50 N.H. 439 (1870); *Sheehan v. Flynn*, 59 Minn. 436, 61 N.W. 462 (1894).

<sup>6</sup> For cases decided under all three rules, yet reaching the same result, see 28 A.L.R. 1262 (1924).

<sup>7</sup> The court in the principal case (at 519) begins with the basic "common enemy" premise, modified by an interesting exception. "Under this exception, a defendant

these courts have discovered that, although a simple maxim possesses the undeniable virtue of certainty, it is unworkable when applied to the complex realities of infinitely varied fact situations. Those states which have adopted a reasonable use approach have met the problem by adopting a rule as fluid as the subject matter it governs. The majority of states have achieved the same results, while nominally adhering to "common enemy" or civil law theories, by adopting exceptions to these basic theories and phrasing the exceptions in reasonable use terminology.<sup>8</sup> The principal case rejected the application of any such exceptions in the particular situation with which it was concerned. However, in light of the history of the "common enemy" rule in New Jersey and other jurisdictions, it is very doubtful if this or any court would apply the rule to its logical conclusion in the face of material or substantial damage due to unreasonable use of the defendant's land. Despite the concern of courts for legal certainty, the facts have usually controlled the law, as in the principal case, and most courts have tacitly rejected the inflexible approach, some apparently without realizing it. Consequently, vacillation between one doctrine and another has created confusion as to just what the rule really is.<sup>9</sup> Obviously, the law would be put on a much more stable basis by an outright adoption of a reasonable use theory, in name as well as in form. In view of the spreading acceptance of such a theory by legal authors<sup>10</sup> and the *Restate-*

renders himself *absolutely liable* if by means of such an artificial device he causes surface water to be carried in a body large enough to do *substantial injury . . . and thereby casts it on plaintiff's lands away from where it otherwise would have flowed.*" (Emphasis added.) The court speaks of absolutes, yet leaves itself a safety valve for hard cases in the word "substantial." It is evident that strict adherence to these absolutes would produce ridiculous results. In such extremes the court might find escape in other New Jersey cases. At least two have been decided specifically on the reasonable use theory. *Smith v. Orben*, 119 N.J. Eq. 291, 182 A. 153 (1935); *Brownsey v. General Printing Ink Corp.*, 118 N.J.L. 505, 193 A. 824 (1937). Others have been decided through a determination that the damage was substantial or material, or that the injury arose from the "legitimate beneficial use" of the property. *Hughes v. Knight*, 33 N.J. Super. 519, 111 A. (2d) 69 (1955); *Jessup v. Bamford Bros. Silk Mfg. Co.*, 66 N.J.L. 641, 51 A. 147 (1901).

<sup>8</sup> E.g.: the original civil law jurisdiction of Louisiana used a "necessary and useful" test in *Martin v. Jett*, 12 La. 501 (1836); Pennsylvania, a leading "common enemy" state, has decided cases on a determination of what is necessary, material, or "not unreasonable" from at least 1892 up to 1955. *Meixell v. Morgan*, 149 Pa. 415, 24 A. 216 (1892); *Leiper v. Heywood-Hall Construction Co.*, 381 Pa. 317, 113 A. (2d) 148 (1955). See also Kinyon and McClure, "Interference With Surface Waters," 24 MINN. L. REV. 891 at 916 (1940).

<sup>9</sup> The civil law jurisdiction of Maryland swung quite close to the adoption of a reasonable use theory in *Whitman v. Forney*, 181 Md. 652, 31 A. (2d) 630 (1943), then swung back again in *Biberman v. Funkhouser*, 190 Md. 424, 58 A. (2d) 668 (1948), even citing the *Whitman* case as civil law authority. If there is any distinction to be made between these cases, it seems to be only in the degree of injury, which is itself a determination on a reasonableness basis.

<sup>10</sup> Kinyon and McClure, "Interference With Surface Waters," 24 MINN. L. REV. 891 (1940); Brown, "The Golden Rule as a Maxim of the Modern Law of Water Rights,"

*ment of Torts*,<sup>11</sup> the dilution of the "common enemy" and civil law principles by the courts is evidence of a gradual shift of judicial approval to such an approach.

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56 AM. L. REV. 401 (1922); 15 BOST. UNIV. L. REV. 892 (1935); Worthington, "Waters: Surface Water Drainage," 2 UNIV. FLA. L. REV. 392 (1949).

<sup>11</sup> 4 TORTS RESTATEMENT §833 (1939).