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Ground Waters in the Southeastern States

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GROUND WATERS IN THE SOUTHEASTERN STATES

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The body of law relating to this subject has generally recognized two major classifications of underground or subterranean waters: (1) underground streams which flow in definite or ascertainable channels; and (2) waters which percolate, ooze or seep through the earth without any definite channels, being commonly identified as "percolating waters".

In general, the rules of law regarding surface streams are applied to definite underground streams.[1] Since other participants in this panel will deal with the law as applied to surface streams, this paper does not purport to discuss, generally, the rights and liabilities in regard to definite streams other than to make the following general comments. Unless subterranean waters are known to flow in a definite channel it is usually presumed that they are percolating waters and the existence of an underground stream must be proven by the party alleging it. A flow of underground water through a seam or fissure in the subsurface does not constitute a stream. It would seem that one must establish the existence of a definite channel or current under the surface. Size of the definite flow may also be a factor.[2] If water comes to the surface as a "spring" by natural forces and in sufficient volume to provide a permanent watercourse across adjoining land, the owner of the land on which it surfaces as well as the owners of adjoining lands over which it flows in a watercourse will have the rights and liabilities of riparian owners.[3]

In considering the doctrine applicable to percolating waters, one must differentiate between the "English" rule and the "American" rule or rules. The English rule rests upon the fundamental concept that the owner of the soil owns to the sky and to the centre of the earth (*i. e. "cujus est solum, ejus est usque ad coelum et ad inferos"*). Hence, an owner of land has the absolute right to withdraw from percolating waters on his land and use it as he pleases, without regard to the effect on lower or adjoining owners. The full application of that

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1. 56 AM. JUR., "Waters," § 109 and cases there cited.
2. Clinchfield Coal Corp. v. Compton, 148 Va. 437, 139 S. E. 308 (1927); Wheelock v. Jacobs, 70 Vt. 162, 40 Atl. 41 (1897).
3. 56 AM. JUR., "Waters," § 133.

view is well illustrated by *Mayor of Bradford v. Pickles.*[4] There the municipality owned a tract from which was obtained its water supply. The respondent, Pickles, owned a parcel which was somewhat higher than appellant's tract. The geological formation of the subsurface of his parcel was such that percolating waters were forced by nature to flow to appellant's tract. After appellant had been taking water from its tract for several decades, respondent sank a well on his land with the result that appellant's supply diminished. Appellant sought to enjoin respondent's withdrawing of water on his land in diminution of its supply, contending that respondent's real motive was to injure appellant and compel it to buy respondent's land. In holding that appellant was not entitled to an injunction, the House of Lords stated:

> "The only remaining point . . . is that the acts done by the defendant are done, not with any view which deals with the use on his own land or the percolating water through it, but is done in the language of the pleader, 'maliciously' . . .
>
> "This is not a case in which the state of mind of the person doing the act can effect the right to do it. If it was a lawful act, however ill the motive might be, he has a right to do it . . . Motives and intentions in such a question . . . seem to me to be absolutely irrelevant."

Earlier American cases, including some in our own southeastern region, recognized the English rule.[5] These cases indicated, at least, that the English rule would not be unqualifiedly applied for the benefit of the interfering owner when he was activated by malice or other improper motive.

As might be expected the English concept of absolute ownership has been questioned, and even repudiated, by numerous American jurisdictions. In consequence, there has been developed in this country the doctrines of "reasonable use" and "correlative rights". Under the first of these, a proprietor has a *right* to a *reasonable and beneficial* use of percolating waters under his land in connection with his utilization and development of that land. He may make such use of percolating waters in mining, manufacturing, agriculture, and otherwise on the land where it is withdrawn, even though his use interferes

4. 1895 A. C. 587. See also, Bleacher's Association, Ltd. v. Rural Dist. Council, (1933) 1 ch. 356.

5. Shahan v. Brown, 179 Ala. 425, 60 So. 891 (1913); Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896); Saddler v. Lee, 66 Ga. 45 (1879); Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S. W. 937 (1890); Miller v. Black Rock Springs Improvement Co., 99 Va. 747, 40 S. E. 27 (1901).

with, diminishes, or completely cuts off his neighbor's present or prospective use of such waters on the neighbor's land. The neighbor has the same rights to use percolating waters which he brings to the surface on his land. The courts which apply this doctrine usually hold that negligent or wasteful disposition of such waters is not reasonable, to the extent that it interrupts or depletes a neighbor's use. A number of jurisdictions apply the rule of reasonable use to prevent the extraction and transfer of water from the land on which it is lifted when such operations are detrimental to a neighbor's extraction and use on his own premises. An apparent example would be the case of a water company which draws water by wells on a tract owned by it and then pipes it to a community several miles away.

The doctrine of "correlative rights" is frequently treated as being identical with "reasonable use". It would appear to be more accurate to consider "correlative rights" as an extension or refinement of "reasonable use", rather than as a distinct or separate rule. Under the latter doctrine, the courts do not indicate that there is any limitation upon the quantity of water to be taken so long as the use is *reasonable* as regards purpose and disposition as previously pointed out. In some instances the doctrine of "correlative rights" limits a taker to his proportionate share, according to his surface area as compared with the whole area overlying the water supply. In other cases, it is applied to predicate taking upon the greatest utilization.[6] This doctrine appears to have had its widest acceptance in those western states where there has been a chronic shortage of water.

Another proposition of particular application in some western states is the "priority of appropriation rule". Under this rule, the first to take and apply to a beneficial use has a prior vested right to continue to take to the extent of such use, to the end that a subsequent use may not diminish the first taker's amount of water. One authority has set forth the rule as: "Beneficial use shall be the basis, the measure, and the limit of the right to the use of water".[6(a)] It would appear fair to observe that "priority of appropriation" is hardly an independent or separate rule but rather an adaptation of the rule of "reasonable use".

With one possible exception, the courts in our region seem to have been concerned with the application of the "English" rule or the "reasonable use" rule, without embracing "correlative rights" or

6. See, MCHENDRIE, THE LAW OF UNDERGROUND WATER, 13 Rocky Mountain L. R. I.
6(a). *Id.*

"priority of appropriation". The cases hereafter referred to will be used to illustrate the trends of our courts.

(1) In *Nourse v. Andrews, Mayor of Russellville,*[7] the plaintiff owned land along a river which he claimed was fed by percolation of water from an adjoining tract which the City had bought to obtain a water supply from the underlying waters. Plaintiff claimed that such diversion by the city would cut off his water supply and deprive him of a property right in percolating waters. In rejecting his prayer for an injunction, the Court stated:

> "Percolating waters are part of the earth itself, as much as the soil and stones with the same absolute right of use . . . by the owner of the land . . . " . . . The owner of the soil is entitled to the waters percolating through it, and such water is *not subject to appropriation . . .*"

(2) In *Sycamore Coal Co. v. Stanley,*[8] plaintiff had a well on his farm. Defendant coal company drilled a four inch core on its adjoining land to determine a coal seam, and when the core reached sixty feet plaintiff's well was rendered useless. The Court rejected his claim for damages and, after setting forth its statement of the English rule, went on to explain:

> ". . . but in most jurisdictions in this country the rule sometimes referred to as the American or reasonable use rule, . . . has been adopted. According to this rule, the right of a landowner to subterranean percolating waters is limited to a reasonable and beneficial use of the waters under his land and he has no right to waste them, whether through malice or indifference, if, by such waste, he injures a neighboring landowner. Here, the appellant was using its land in a legitimate manner, and it drilled the hole for a necessary and useful purpose."

(3) In *Sloss-Sheffield Steel & Iron Co. v. Wilkes,*[9] a mine roof on defendant company's adjoining land fell and percolating waters no longer came to plaintiff's well and springs. In regard to plaintiff's right to damages, the Court stated:

> "If the defendant is conducting any sort of operations to which its land is adapted in any ordinary and careful manner, and as a consequence percolating water is drained, affecting the surface owner's water supply, either of that or adjoining land, no lia-

7. 200 Ky. 467, 255 S. W. 84 (1923).
8. 292 Ky. 168, 166 S. W. 2d 293 (1942).
9. 231 Ala. 511, 165 So. 764 (1936).

bility for his damage exists. But, if the waters are drained without a reasonable need to do so, or are wilfully or negligently wasted in such operation in a way and manner that it should have anticipated to occur, and as a proximate result the damage accrued to the surface owners so affected, including adjoining landowners, there is an actionable claim . . ."

(4) In *Cason v. Florida Power Co.*,[10] defendant company erected a dam on its lower land. Subterranean drainage of percolating waters from plaintiff's upper land was interrupted so that his water-table was raised, to the damage of his land, improvements and crops. The Court stated that the issue was whether defendant's use of its land was reasonable and that the question should have been submitted to the jury. In the course of its opinion, the Court explained:

"The property rights relative to the passage of waters that naturally percolate through the land of one owner to and through the land of another are correlative; and each land owner is restricted to a reasonable use of his property as it affects subsurface waters passing to or from the land of another."

While the Court used the word "correlative," it is apparent that the term was used as being interchangeable with "reasonable use". In the later case of *Labruzzo v. Atlantic Dredging Co.*,[11] the same Court had to consider a plaintiff's right to recover for interference with his water supply in consequence of defendant's excavations on its adjoining land. Relying upon a Pennsylvania decision, the Florida Court declared that there was no liability for loss of percolating waters if occasioned by an adjoining *owner's lawful use of his land, without malice or negligence,* but if injury to a neighbor's water supply can be plainly anticipated and can be avoided by reasonable care and at reasonable expense, the owner causing the damage is not exempt from all obligations. The case was *sent back to have the jury* decide whether defendant's conduct was "unreasonable under all the circumstances".

(5) In *Rouse v. Kinston*,[12] defendant City of Kinston bought a half acre of land adjoining plaintiff, and sank three deep wells from which it piped water to its corporate limits for sale. Plaintiff's farm was diminished in value because two of his wells went completely dry and a third dropped considerably as soon as the defendant drilled its wells. Plaintiff sued for damages. On appeal, the charge of the

10. 74 Fla. 1, 76 So. 535 (1917).
11. 54 So. 2d 673 (Fla. 1951).
12. 188 N. C. 1, 123 S. E. 482 (1924).

lower court was affirmed. That charge set forth, in part, that:

> "This rule (reasonable use) does not prevent the private use of any landowner of percolating waters subjacent to his soil in manufacturing, agriculture, irrigation, or otherwise; nor does it prevent any reasonable development of his land by mining, or the like, although by such use the underground percolating waters of his neighbors may be thus interfered with or diverted; but it does prevent the withdrawal of underground waters for distribution or sale, for uses *not connected with any beneficial* ownership or enjoyment of the land from which they are taken, if it thereby follows that the owner of adjacent lands is interfered with in his right to the reasonable use of subsurface water upon his own land . . . whatever is reasonable for the owner to do with his subsurface water, he may do. He may make the most of it that he reasonably can. It is not unreasonable for him to dig wells and take therefrom all of the waters that he needs in order to get the fullest enjoyment and usefulness from his land, for the purposes of abode, productiveness of the soil, or manufacture or whatever else the land is capable of."

(6) In *N. C. & St. L. Ry. v. Rickert*,[13] the defendant conveyed to the plaintiff railroad, about 30 years before, one acre of land on which was a spring from which it supplied its trains at the rate of 50,000 gallons daily. Defendant sank a well on his land to supply a swimming pool thereon and to sell any surplus of water from his well to a neighboring town. Pumping from defendant's well caused plaintiff's spring to go dry, but flow of the spring returned upon cessation of defendant's pumping. In affirming the lower court's injunction against the defendant, the Tennessee Court of Appeals set forth its views as to percolating waters in the following language:

> "The better rule is that the rights of each owner being similar, and their enjoyment dependant on the action of other landowners, their right must be *correlative* and subject to the maxim that one must so use his own as not to injure another, so that each landowner is restricted to a reasonable exercise of his own rights and a reasonable use of his own property, in view of similar rights of others.
>
> "The defendant can pump a considerable quantity of water from his well without materially reducing the flow of water from complainant's spring, and this he has a lawful right to do.

13. 19 Tenn. App. 446, 89 S. W. 2d 889 (1935).

The injunction goes no further than to enjoin and inhibit him from pumping water . . . on his property, in such quantities and to such an extent as will interfere with or impair complainant's right to supply its trains and tanks from complainant's spring."[14]

While the Court refers to the rights as "correlative," it made no attempt to indicate the extent of defendant's right other than to limit his use to taking to such an extent, only, as would not impair the railroad's right to supply its trains and tanks . . . without limitation as to the railroad.

In *Board of Supervisors v. Mississippi Lumber Co.*,[15] the plaintiffs had an artesian well in the courthouse from which was supplied an adequate quantity of water for a public drinking fountain. Defendant bored four wells on its property, forced the water to the surface by pressure, and used it in preserving and floating logs in connection with its business on the same property. Defendant's taking of water greatly reduced the flow at plaintiff's well, but defendant was acting in good faith. In affirming the dismissal of plaintiff's bill of complaint, the Court held:

> "Such waters (percolating) belong to the realty, to be used at will by its owner for any purpose of his own . . . on his own land. The right to bore for water to be used on the land for the business uses of the owner of the land is fully recognized . . . The mere boring of a single well might destroy the well of a neighbor on a lower level, but this would furnish no cause of action."

In *Clinchfield Coal Corp. v. Compton*,[16] a spring went dry on plaintiff's land when surface cracks developed on defendant corporation's adjoining land in consequence of its coal mining operations thereon. The court of last resort in Virginia, in holding that the plaintiff had suffered no actionable injury, discussed the English rule and "reasonable use". But since defendant's use of its land was legitimate, the Court stated that its conclusion would be the same under either rule, "but if the question should again come before this Court, we shall feel free to consider it *de novo*".

In *Stoner v. Patten*,[17] the plaintiff claimed that a water supply emerging on his land flowed in a definite channel partly on the sur-

14. Italics supplied.
15. 80 Miss. 535, 31 So. 905 (1902).
16. 148 Va. 437, 139 S. E. 308 (1927). See, also Couch v. Clinchfield Coal Corp., 148 Va. 455, 139 S. E. 314 (1927).
17. 124 Ga. 754, 52 S. E. 894 (1906); 132 Ga. 178, 63 S. E. 897 (1909).

face and partly underground, from higher land owned by a woman who had given the defendant the right to divert water from the surface channel on her land to the defendant's property. The plaintiff prevailed in his contention that the defendant, as a non-riparian owner, could not divert water from the stream to the plaintiff's detriment. However, the Court made the following observations:

> "The books abound with reported cases from Courts of last resort, wherein it is held that if the owner of the land, in the absence of malice, make an excavation on his own premises, thereby draining the well of another, the draining being caused by cutting off the underground springs or fountains which supply the well, *no action will lie* . . . The ownership of land extends indefinitely within the bowels of the earth and the owner has the same exclusive proprietorship in the water which seeps through his soil and collects in the substrata as to that water which falls from the clouds upon the roof of his house and is collected in a cistern until the percolating water becomes a part of *a well-defined stream.*"

Due to the rainfall and the number of surface streams or bodies of fresh water, the matter of adequate water supply has not become a general or widespread serious problem for the southeastern part of this country. However, the problem may be closer at hand than we realize. Population has increased, particularly in our cities. There has been a tremendous industrial growth. Irrigation has been considered and resorted to in some instances. Uses of water have multiplied. As one remarkable illustration, a recent article in a current periodical contained the statement that "in Washington, D. C., air-conditioning plants are estimated to account for 15 to 20 per cent of the water now used".[18] In one instance a large corporate user of subterranean waters in the processing of *wood fibres* is located in a growing community in which the water table is reputed to have dropped some 10 to 20 feet. Your speaker is advised that the corporation has obtained a distant tract of land to assure, among other things, an adequate water supply. As we all know, it is becoming a common occurrence for growing cities which are not near usable surface waters to go well outside their corporate limits to acquire lands from which to obtain subterranean waters for city uses. Our State Geologists and the U. S. Geological Survey are alert to the prospective problem, from a scientific point of view. However, re-

18. Nichols and Colton, "Water for the World's Growing Needs," THE NATIONAL GEOGRAPHIC MAGAZINE, August 1952, p. 269.

search and inquiry indicate that apart from statutes on pollution, none of the southeastern States has any broad comprehensive legislation relating to the use and disposition of ground waters. Probably the lack of such legislation may be explained by one Attorney General's assumption "that the problem has not arisen here sufficiently to require legislative action". From 1929 through 1951, the legislature of Florida has enacted several statutes to "protect and control the artesian waters" in particular counties.[19] Your speaker has examined only the 3 statutes enacted in 1951 but has been advised by Florida's Attorney General that the earlier statutes are "similar".

By each of Florida's 1951 acts, the owner, person in control, or occupant is prohibited from permitting unnecessary flow or waste from an artesian well. An artesian well is defined as an artificial hole in which ground waters rise to an elevation above the top of the water bearing "bed". The acts permit flow or use for irrigation, mining, industrial purposes and domestic use. To prevent prohibited flow, the well must be equipped with valves capable of controlling the discharge of water.

In Mississippi, House Bill No. 329 was introduced during the 1952 session of the legislature, but died in committee. This bill, which is much longer than the Florida acts, contemplated statewide application. It embraced the general objectives of the Florida enactments and in addition required written permit from the State Oil and Gas Commission for drilling of any additional wells by anyone.

Of course, the type of legislation which we have just mentioned hardly scratches the surface of the big problem; namely, the enactment of long range legislation which may chart the course for intelligent development of our resource in percolating waters. The Florida laws and the Mississippi bill purport to do no more than minimize waste in one aspect. There is still the problem of determining whether the full utilization of ground waters is to be developed upon the "English" rule, "reasonable use", "correlative rights", "prior appropriation" or some other principle. Any attempt to obtain enactment of a policy statute or code, so-called, for the development and utilization of ground waters would involve the codification, modification, or even the abrogation of some very, very fundamental propositions in property law. In our region, the urgency of such legislation might well appear to be too far away to arouse much immediate concern, especially among legislators. It would not seem to be presumptive to say

19. LAWS OF FLORIDA, ch. 14, 581, Acts 1929; 16785, Acts 1935; 16786, Acts 1935; 16787, Acts 1935; 19895, Acts 1939; 22935, Acts 1945; 23204, Acts 1945; 26994, 26995 and 26996, Acts 1951.

that the accomplishment of such legislation will only result from an effective and protracted period of education for our citizens and public officials. For this task, the talents and learning of both geologists and lawyers have to be carefully integrated. At the same time, the acts and the proposition already discussed constitute a step forward, small though it be. While the resulting conservation from such legislation may be minuscule, the very need to comply with its provisions might make the public aware, at least, that a problem exists.