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SURFACE WATER IN SOUTH CAROLINA

I. INTRODUCTION

Surface water,¹ unlike water in a watercourse, is generally deemed a liability rather than an asset.² As a result, three basic rules governing the disposal of unwanted surface water have emerged. There are, of course, modifications of each rule. The three rules are the common enemy or common law rule, the civil law rule, and the reasonable use or modified civil law rule.

Under the common law rule, surface water is regarded as a common enemy, and every landed proprietor has the right to take any measure necessary to the protection of his own property from its ravages, even if in doing so he throws it back upon a coterminous proprietor to his damage³

This rule is apparently derived from the notion that each landowner has the right to unrestrained use of his land.⁴ The civil law rule is "that the landowner has the duty to receive surface flows from above his land, and he has the corresponding right to have the water flow from his land to land below it."⁵ The third rule, and the more desirable rule,⁶ is the reasonable use rule.

The rule is that in effecting a reasonable use of his land for a legitimate purpose a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, . . . if (a) there is a reasonable necessity for such drainage; (b) if reasonable care be taken to avoid unnecessary injury to the land receiving the burden; (c) if the utility or benefit accruing to the land drained reasonable outweighs the gravity of the harm resulting to the land

1. The more specific term "diffused surface water" is often preferred by authorities because all waters on the surface of the earth is technically surface water. See, e.g., 1 WATER AND WATERS COURSES § 52.1(A) (1967); Dolson, *Diffused Surface Water and Riparian Rights: Legal Doctrines in Conflict*, 1966 WISC. L. REV. 58.

2. This is not the invariable rule and problems often arise over the appropriation of surface water. See Dolson *supra* note 1, at 59-92. These problems are beyond the scope of this paper.

3. *Edwards v. Charlotte, C. & A.R.R.*, 39 S.C. 472, 475, 18 S.E. 58 (1893).

4. *Cass v. Dick*, 14 Wash. 75, 44 P. 113 (1896).

5. 1 WATER AND WATER COURSES § 52.1, at 305 (1967).

6. See W. PROSSER, LAW OF TORTS (3d ed. 1964).

receiving the burden; and (d) if, where practicable, it is accomplished by reasonably improving the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drain is used.⁷

Both the common law and civil law rules have been criticized as too harsh,⁸ and courts recognizing, if not articulating, this fact have grafted exceptions on these rules. This paper will examine the South Carolina law of surface water, laying particular emphasis on exceptions to the common enemy doctrine.

II. SOUTH CAROLINA'S COMMON ENEMY RULE

A. Adoption

South Carolina first adopted the common enemy rule in the form stated above in *Edwards v. Charlotte, Columbia & Augusta Railroad*⁹ in 1893. The court, in adopting this rule, rejected the analogy in an earlier case requiring reasonable use of fire on one's own property¹⁰ and another analogy in two earlier cases requiring non-negligent obstruction of a natural watercourse.¹¹ The court felt itself bound to adopt the common enemy rule by a statute which continued the common law of England in full force.¹² The common enemy rule, however, was a doctrine developed in Massachusetts and was never in force in England,¹³ and it has been claimed that the civil law rule was really the English common law.¹⁴ The rule has been reiterated many times since, however, and it is highly unlikely that this mistake will ever be remedied.

B. Definition of Surface Water

The common enemy rule applies only to surface water. The negligent obstruction of a natural water course is actionable if

7. *Enderson v. Kelehan*, 226 Minn. 163, 167-68, 32 N.W.2d 286, 289 (1948).

8. See, e.g., *Kinyon & McClure, Interferences with Surface Water* 24 MINN. L. REV. 891 (1940).

9. 39 S.C. 472, 18 S.E. 58 (1893).

10. *Gregory v. Layton*, 36 S.C. 93, 15 S.E. 352 (1892).

11. *Wallace v. Columbia, C. & A.R.R.*, 34 S.C. 62, 12 S.E. 815 (1891); *Mills v. Greenville & C.R.R.*, 13 S.C. 97 (1880).

12. *Edwards v. Charlotte, C. & A.R.R.*, 39 S.C. 472, 474-75, 18 S.E. 58 (1893).

13. 1A G. THOMPSON, REAL PROPERTY § 266 at 365 (1964); *Kegs v. Romley*, 50 Cal. Repr. 273, 412 P.2d 529 (1966). But see *Cross, Ground Waters in the Southeastern States*, 5 S.C.L.Q. 149 (1953).

14. 1A G. THOMPSON, REAL PROPERTY § 266, at 365 (1964).

it results in damage to an adjoining proprietor.¹⁵ It becomes important then to distinguish between surface water and water in a natural water course. Surface waters have been defined positively as:

waters of a casual and vagrant character, which ooze through the soil, or diffuse or squander themselves over the surface, following no definite course. They are waters which though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused over the surface of the ground, and are derived from rains and melting snows, occasional outburst of water, which at times of freshet or melting of snows descend from the mountain and inundate the country; and the moisture of the wet, spongy or boggy ground.¹⁶

On the other hand the court has said that the "[d]istinguishing features of surface waters are purely negative, and consist in the absence of the distinguishing features which are common to all water courses."¹⁷ A water course, the court continued was:

a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and it naturally discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes.¹⁸

Parties to actions have from time to time seized on certain characteristics which they felt ought to be conclusive on the question of whether the water involved was surface water or a part of a natural watercourse. The presence of a large amount of water is not conclusive that there is a watercourse.¹⁹ Nor

15. *E.g.*, *Johnson v. Williams*, 338 S.C. 623, 121 S.E. 2d 223 (1961); *Touchberry v. Northwestern R.R.*, 83 S.C. 315, 65 S.E. 341 (1909); *Lampley v. Atlantic Coast Line R.R.*, 71 S.C. 156, 50 S.E. 773 (1905); *Jones v. Seaboard Airline Ry.*, 67 S.C. 181, 45 S.E. 188 (1903); *Lawton v. South Bound Ry.*, 61 S.C. 548, 39 S.E. 752 (1901); *Wallace v. Columbia, C. & A.R.R.*, 34 S.C. 62, 12 S.E. 815 (1891).

16. *Brandenberg v. Zeigler*, 62 S.C. 18, 21, 39 S.E. 790 (1901), quoting from 24 ENCY. OF LAW 896. This passage also quoted in *Lawton v. South Bound R.R.*, 61 S.C. 548, 552, 39 S.E. 752 (1901).

17. *Lawton v. South Bound R.R.*, 61 S.C. 548, 552, 39 S.E. 752 (1901).

18. *Id.* at 552-53.

19. *Bradenberg v. Zeigler*, 62 S.C. 18, 39 S.E. 790 (1901).

does the presence of catfish indicate that the water involved is part of a watercourse in view of "the well-established habit of certain species of the family of traveling long distances over dryland."²⁰ The presence of a ditch has been held both conclusive and not conclusive of the presence of surface water. In *Lawton v. South Bound Railroad*²¹ the court stated that "certainly a ditch—a purely artificial channel—cannot with any propriety be regarded as a natural watercourse."²² But in *Johnson v. Williams*²³ the court found that a ditch was carrying water in a natural watercourse. The ditch in this case was cut as a canal between two natural bodies of water.

The characterization of flood water from a stream or other natural body of water can be difficult. South Carolina has drawn the line in this fashion:

[T]he flood water of a river is not usually surface water, although spread out over the adjacent lands "Whether the water from the overflow of streams is to be considered as still a part of the watercourse or to be treated as surface water, is the subject of diverse opinions; but the most satisfactory rule which has been evolved makes its character depend upon the configuration of the country and the relative position of the water after it has gone beyond the usual channel. If the flood water becomes severed from the main current or leaves the same never to return, and spreads out over the lower ground it becomes surface water. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel presently to return, as by recession of the waters, it is to be regarded as still part of the stream."²⁴

C. *The Nuisance Exception*

The court which had laid down the harsh common enemy rule was quick to mount exceptions on it. The first of these exceptions to the

right to deal with [surface water] in any such manner as he may see fit, is that it is subject to the general law in regard to nuisances, if its accumulation has become

20. *Riverbank v. Atlantic Coast Line R.R.*, 124 S.C. 136, 142, 117 S.E. 206 (1923).

21. 61 S.C. 548, 39 S.E. 752 (1901).

22. *Id.* at 555.

23. 238 S.C. 623, 121 S.E. 2d 223 (1961).

24. *Jones v. Seaboard Air Line Ry.*, 67 S.C. 181, 198, 45 S.E. 188 (1903).

a nuisance per se, as for example, whenever it has become dangerous at all times and under all circumstances to life or property.²⁵

The case which laid down this exception, *Baltzeger v. Carolina Midland Railway*,²⁶ set almost impossible standards for its use. The plaintiff in the case has alleged that the railroad in building its line had built up a high embankment which stopped the flow of surface water. This surface water had gathered on the railroad's land, stagnated, and allegedly emitted gasses which poisoned and polluted air, eventually causing the death of the plaintiff's daughter. The court found the allegations insufficient to show a nuisance per se.²⁷ This required a finding that the stagnant water was not "dangerous at all times and under all circumstance to life, health and property."²⁸ The court then indicated that, even though the stagnant water was not a nuisance per se, recovery might be had if it were shown that the nuisance was a private as opposed to a public one. This in turn would have required a showing of special damage to the plaintiff. The fact that the plaintiff's daughter had died was not different "in kind, as well as degree, from those injuries which [might] be reasonably expected, [would] be sustained by the public generally."²⁹ Thus the plaintiff's allegation was insufficient as a nuisance per se because the pond was not dangerous to everyone and was insufficient as a private nuisance because it was as dangerous to everyone as it was his daughter. This case formed a formidable precedent against recovery on the nuisance theory. It was soon joined by another³⁰ in which the plaintiff alleged a railroad had obstructed his drainage. The plaintiff tried to show special damages, apparently to come under the nuisance exception.³¹ The court held that any elements of special damage would have been considered in the highway condemnation award. The next two cases³² involved the obstruction of the drainage of surface water. In neither case was the flooding of the plaintiff's land sufficient allega-

25. *Baltzeger v. Carolina Midland Ry.*, 54 S.C. 242, 247, 32 S.E. 348 (1899).

26. 54 S.C. 242, 32 S.E. 358 (1899).

27. *Id.* at 247.

28. *Id.*

29. *Id.* at 250.

30. *Johnson v. Southern Ry.*, 71 S.C. 241, 50 S.E. 775 (1905).

31. See the cases cited for the respondent in the South Carolina Reports at 71 S.C. 241, 241-42.

32. *Banks v. Southern Ry.*, 126 S.C. 241, 118 S.E. 923 (1923); *Riverbank v. Atlantic Coast Line R.R.*, 124 S.C. 136, 117 S.E. 206 (1923).

tion of a nuisance per se. In the later case³³ a public nuisance with special damage to the plaintiff was not made out by an allegation that the public road was flooded, because there was no showing that the overflowing of the highway contributed to the plaintiff's damage.

It would have seemed unlikely from a review of these cases that a proprietor whose land was flooded would be allowed to recover under the nuisance exception. In *Deason v. Southern Railway*,³⁴ however the court upheld a judgment for the plaintiff on the nuisance theory. The plaintiff was the upper riparian and complained of the defendant's obstruction of a drainage ditch. The trial judge had charged that "you can back the water and protect yourself; and you cannot back it on another person's land, on another's land, and in such a way as to create a nuisance and destroy his property."³⁵ The court said that "[i]t would be hard to find a clearer or fairer statement of the law . . ."³⁶ In deciding whether the charge was applicable to the facts the court quoted from *Wood on Nuisance* to the effect that "[e]very citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property."³⁷ This portion of the opinion standing alone would have put South Carolina in the group of states having the reasonable use rule. The court, however, went on to hold that the plaintiff had a prescriptive easement to maintain the ditch. It is unclear whether the easement in addition to the nuisance was a requisite to recovery.³⁸ Although subsequent cases mention the nuisance exception,³⁹ plaintiffs apparently have not relied on *Deason*, preferring to rely on the "casting in concentrated form" exception.⁴⁰

There is authority that stagnant surface water constitutes a nuisance. The court in *Bowlin v. George*⁴¹ held that an allegation that stagnant water was accumulating in a junk yard stated a cause of action on a private nuisance. The court said that "we fail to see how the law relating to the handling of

33. *Banks v. Southern Ry.*, 126 S.C. 241, 118 S.E. 923 (1923).

34. 142 S.C. 328, 140 S.E. (575 (1927).

35. *Id.* at 334.

36. *Id.*

37. *Id.* at 335.

38. Justice Cothran in dissent showed a better command of precedent, if not a feel for the more desirable rule.

39. *See, e.g., Fairley v. Southern Ry.*, 162 S.C. 129, 160 S.E. 274 (1931)

Garmany v. Southern Ry., 152 S.C. 205, 149 S.E. 765 (1929).

40. *See infra* § D.

41. 239 S.C. 429, 123 S.E.2d 528 (1962).

surface water has any application."⁴² The *Baltzeger* case was distinguished on the basis that the surface water was collected within the city limits and was thus a public nuisance. Other than this questionable distinction, the case is salutary as it views surface water from the nuisance (tort) aspect rather than clothing it with immutable property characteristics.

D. *The Casting in Concentrated Form Exception*

The second exception which grew up to the common enemy rule was that, "whatever else may be done with surface water, the proprietor whose land it has reached cannot divert it from its natural course and cast it in a body on an adjoining proprietor."⁴³ The rule has come to be stated in this form: "[I]t is actionable injury, for a person to collect surface water, into an artificial channel, and cast it on another's land, in concentrated form."⁴⁴ The exception seems clearly aimed at upper proprietors, and indeed the court in enunciating the rule quoted a New York case which stated that "[t]here is a distinction between casting water upon another's land and preventing the flow of surface water upon your own."⁴⁵ The exception rests on the notion that surface water becomes the property of the owner and that he cannot dispose of his property to the injury of his neighbor.⁴⁶ There is no suggestion why water in a concentrated form is any more the property of a proprietor than other surface water. The exception is theoretically opposed, therefore, to the common enemy rule which views the surface water as an intruder.

The exception as applied to the upper riparian reached its broadest acceptance in *Garmany v. Southern Railway*.⁴⁷ The railroad had removed some dirt from its right-of-way so that land which formerly drained another way went over the plaintiff's land. The court said that the "artificial channel need not necessarily extend to the line or edge of the injured person's lands, . . . but must extend to such a point that the surface water conveyed therein or thereby results in injury to such person's land or health."⁴⁸ As the dissent pointed out, this de-

42. *Id.* at 433.

43. *Brandenberg v. Zeigler*, 62 S.C. 18, 23, 39 S.E. 790 (1901).

44. *Riverbank v. Atlantic Coast Line R.R.*, 124 S.C. 136, 141, 117 S.E. 206 (1923).

45. *Brandenberg v. Zeigler*, 62 S.C. 18, 22, 39 S.E. 790 (1901).

46. *Id.* at 23-24.

47. 152 S.C. 205, 149 S.E. 765 (1929).

48. *Id.* at 208.

cision comes close to reversing the principle that the upper proprietor can fight off surface water. One caveat for lower riparians exists. In *Kirland Distributing Co. v. Seaboard Air-line Railway*,⁴⁹ the plaintiff was unable to invoke the exception to the common enemy rule because he had contracted with the defendant to build the spur which caused the damage.

Lower proprietors are within the reach of this rule, also.⁵⁰ The situation which arises most often is the obstruction of a ditch by the lower riparian. The problem is that it is the upper riparian who collects the surface water. The volume of the water backed up depends on the amount of water sent on to the lower riparian's land. And the lower riparian could avoid any liability⁵¹ by placing the obstruction at the beginning of his property. If he did that, no court could say he had collected surface water and cast it in concentrated form on the upper proprietor.

E. Negligence and Reasonable Use

In two cases the South Carolina court has come close to using tort concepts to govern surface water cases. The first was the *Deason* case mentioned above⁵² which laid down a test for reasonable use. As discussed, the case's authority is doubtful. In *Touchberry v. Northwestern Railroad*⁵³ the court allowed punitive damages when the railroad knew it was injuring the plaintiff by casting surface water on his land. This was "a conscious disregard of the plaintiff's rights."⁵⁴

In the overwhelming majority of cases, however, negligence and reasonable use concepts have been rejected. In *Cannon v. Atlantic Coast Line Railroad*⁵⁵ the court stated that "the principle is the same whether the roadbed was negligently constructed or not."⁵⁶ At an earlier time the court had said that "a person dealing with surface water on his own land is not bound to exercise reasonable care, with regard to the rights of other

49. 109 S.C. 331, 96 S.E. 122 (1918).

50. *E.g.*, *Slater v. Price*, 96 S.C. 245, 80 S.E. 372 (1913). *Cf.* *Fairey v. Southern Ry.*, 162 S.C. 129, 160 S.E. 274 (1931). *But see* *Garmany v. Southern Ry.*, 152 S. C. 205, 149 S.E. 765 (1929) (dissenting opinion).

51. Absent, of course, a prescriptive easement. This easement can be obtained in the same manner as any other easement. The discussion of this easement is beyond the scope of this paper.

52. See text at note 33 *supra*.

53. 88 S.C. 47, 70 S.E. 424 (1911).

54. *Id.* at 54.

55. 97 S.C. 233, 81 S.E. 476 (1913).

56. *Id.* at 237. *Accord* *Garmany v. Southern Ry.*, 152 S.C. 205, 149 S.E. 765 (1929).

landowners."⁵⁷ The rejection of negligence and reasonable use is consistent with the common enemy doctrine but makes increasingly poorer sense as South Carolina becomes less agrarian.⁵⁸

III. LIABILITY OF THE STATE FOR "TAKING"

One further aspect of surface water law should be examined. The state is cloaked in its garb of sovereign immunity. With respect to damage caused by surface water, this immunity has been a liability rather than an asset. The South Carolina court, in combatting the injustices of sovereign immunity, laid out liberal rules in construing article I, section 17 of the South Carolina Constitution which reads: "Private property shall not be taken . . . for public use without just compensation being first made therefor." This provision has been construed to include damage caused by the state with surface water.

The earliest cases against the sovereign for surface water damages were brought under the "defect in the streets" provision.⁵⁹ *Mayrant v. City of Columbia*⁶⁰ allowed recovery under this provision using language which spoke of a division of governmental and administrative functions. This case was later "distinguished, modified or overruled,"⁶¹ and put on the possible basis of "taking". The case which did so apparently laid to rest the "defect in the street" approach by requiring that the injury be incurred in the use of the street for street purposes.⁶² Nevertheless, plaintiffs continued to allege that their damage from surface water was due to a defect in the streets.⁶³ It would seem that the allegations under a "defect" statute would have to constitute a tort if performed by a private person. It will be seen that no such limitations attach to allegations of a "taking" for public use, and no off-setting disadvantages to the latter action can be conjured up by the author.

57. *Touchberry v. Northwestern R.R.*, 87 S.C. 415, 424, 69 S.E. 877 (1911). *Accord* *Riverbank v. Atlantic Coast Line R.R.*, 124 S.C. 136, 117 S.E. 206 (1923); *Lawton v. South Bound R.R.*, 61 S.C. 548, 39 S.E. 752 (1901).

58. Some states have adopted different rules for rural and urban areas. See 1 WATER AND WATER RIGHTS § 52.1 (1967).

59. Now S.C. CODE ANN. § 47-70 (1962).

60. 77 S.C. 281, 57 S.E. 857 (1907). See also *McNinch v. City of Columbia*, 128 S.C. 54, 122 S.E. 403 (1924) (grounds for recovery not stated).

61. *Triplett v. City of Columbia*, 111 S.C. 7, 18, 96 S.E. 675 (1918).

62. *Id.*

63. See, e.g., *Kline v. City of Columbia*, 155 S.E.2d 597 (1967) (involving gas rather than water damage).

*Faust v. Richland County*⁶⁴ was a case in which the highway department allegedly negligently obstructed a drain and caused great quantities of water to flood the plaintiff's yard. The court sat en banc, and the report is as confusing as it is long. The majority implied that, for the plaintiff to recover, it would be necessary for the government to commit an act for which it would be liable if it were a private individual. The majority felt that the complaint stated a cause of action under the casting in concentrated form exception. The dissent thought that since the action of the state was "the exercise of a legal right, and not the commission of a wrong, . . . it [was] impossible to make out of it a taking or damage without compensation . . ." ⁶⁵ The dissent differed from the majority only as to whether the complaint would have made out a cause of action against an individual. Both prior⁶⁶ and subsequent ⁶⁷ cases allowed damages for "taking" when the injury was inflicted by the obstruction of a navigable stream. Until *Milhous v. State Highway Department*,⁶⁸ the question of whether the government had to commit an act for which a private individual would be liable prior to liability for a taking had never been decided. In that case the government had obstructed surface drainage in such a way that an individual, acting similarly, would not have been liable. The court held the "[the constitutional provision] creates a right in the citizen to compensation for property taken for public use unfettered by limitations of the rules of the common law applicable under similar circumstances to the liability of an individual."⁶⁹

The right having been established, all that remained was to define the limits of the doctrine. The state or other sovereigns have sought to avoid liability for a taking because (1) the taking was not for public purposes, (2) there was no permanency of damage, (3) there was no positive or aggressive act of the state, or (4) the activity of the state did not contribute to the damage. Of these, only the fourth is a viable alternative for the state presently. In discussing these four defenses, some cases not involving surface water will be used. This will be a

64. 117 S.C. 251, 109 S.E. 151 (1921).

65. *Id.* at 283.

66. *Hopkins v. Clemson Agricultural College*, 221 U.S. 636 (1911).

67. *Chick Springs Water Co. v. State Highway Dep't.*, 159 S.C. 481, 157 S.E.2d 842 (1931).

68. 194 S.C. 33, 8 S.E.2d 852 (1940).

69. *Id.* at 43.

distinction of no consequence as the fact that surface water is involved is immaterial in "taking" cases.

In cases involving the flooding of private land, the public generally has no interest in seeing that land inundated. It would seem, then, that no taking for public use would have occurred. This objection was raised and rejected in *Lindsey v. City of Greenville*.⁷⁰ The court said that

[t]he taking or damaging of property to the extent that is reasonably necessary to the maintenance and operation of other property devoted to a public use is, likewise, a taking or damaging for a public use.⁷¹

The second and third defense relied on by the state were set out in *Collins v. City of Greenville*.⁷² That case involved damage to a home when the city sewerage system backed up. The court denied recovery under the "taking" theory stating that "there was no taking for a public use which is permanent . . . and growing out of [a] positive act of the [defendant]."⁷³ The positive act requirement is easily met in the normal surface water case as the building or maintenance of a road is such a positive act.⁷⁴

Naturally, if a person's land is flooded by causes not attributable to the state, the state is not liable for a taking. The burden on the complaining party is to show that the action by the state is "the real factor, or at least a participating one."⁷⁵ This standard makes it relatively easy for the plaintiff to get to the jury, but the state has been successful in obtaining a directed verdict.⁷⁶

IV. CONCLUSION

Surface water law in South Carolina is in a confused state. For almost any given factual situation involving damage by the surface water, a carefully drawn complaint will be sufficient under at least one or more decisions. Unfortunately, the complaint is just as likely to be unsound under other decisions.

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70. 247 S.C. 232, 146 S.E.2d 232 (1966).

71. *Id.* at 239.

72. 233 S.C. 506, 105 S.E. 2d 704 (1958).

73. *Id.* at 509, quoting from *Gasque v. Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940).

74. See, e.g., *Kline v. City of Columbia*, 155 S.E.2d 597 (1967).

75. *Baynham v. State Highway Dep't*, 181 S.C. 435, 187 S.E. 528 (1936).

76. See, e.g., *Lail v. South Carolina State Highway Dep't*, 244 S.C. 237, 136 S.E.2d 306 (1964).