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Pendergrast v. Aiken: The Resolution of Surface Water Drainage Problems

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INTRODUCTION

In the past, surface water often hindered the development of land. A building could not be built upon a creek bed; a swamp was unfit for farming; and, certain land in a valley was unusable because of the run-off of water from the mountains. Today's technology has enabled us to overcome these excess water problems and make the land productive. However, the land is often made productive at the expense of neighboring lands upon which the excess water is cast. Thus, a drainage problem is created.

A drainage problem occurs whenever water comes upon a person's land and that person, or his agent, acts to alter the natural disposition of the water, thereby causing harm to the property of another. The alteration can be the result of installing pipes,[1] paving land which normally absorbs water,[2] digging ditches,[3] constructing highways,[4] filling low land,[5] changing the grade of land,[6] or building embankments.[7] The harm caused by these alterations may be damage from flooding,[8] erosion,[9] deposits of mud, debris and silt,[10] or the mere presence of water.[11] Even though there is injury, not every drainage problem gives rise to a cause of action. According to *Pendergrast v. Aiken*,[12] liability only occurs when the harmful interference with the flow of surface waters is unreasonable and causes substantial damage.

THE CASE

In *Pendergrast*, the plaintiffs were the owners of a tract of land on U.S. Highway 25 in Buncombe County, North Carolina on which there had been erected a brick and concrete-block building. The building

1. Dize Awning & Tent Co. v. City of Winston-Salem, 29 N.C. App. 297, 224 S.E.2d 257 (1976).
2. Speight v. Griffin, 25 N.C. App. 222, 212 S.E.2d 898 (1975).
3. Jenkins v. Wilmington & Weldon R.R., 110 N.C. 438, 15 S.E. 193 (1892).
4. Youmans v. City of Hendersonville, 175 N.C. 574, 96 S.E. 45 (1918).
5. Bradley v. Texaco, Inc., 7 N.C. App. 300, 172 S.E.2d 87 (1970).
6. Ayers v. Tomrich Corp., 17 N.C. App. 263, 193 S.E.2d 764 (1973).
7. McClees v. Sikes, 46 N.C. (1 Jones) 308 (1854).
8. Braswell v. Highway Commission, 250 N.C. 508, 108 S.E.2d 912 (1959).
9. Sherrill v. Highway Commission, 264 N.C. 643, 142 S.E.2d 653 (1965).
10. Davis v. Atlantic Coast Line R.R., 227 N.C. 561, 42 S.E.2d 905 (1947).
11. Clark v. Norfolk Southern R.R., 168 N.C. 415, 84 S.E. 702 (1915).
12. 293 N.C. 201, 236 S.E.2d 787 (1977).

contained an upper floor and a basement with a dirt floor, and housed three commercial establishments. About 30 feet behind the building, there was a small creek flowing in a southerly direction and containing water throughout the year.

The defendants owned the land immediately to the south of the plaintiffs' property. The land was undeveloped and between four and six feet below the level of the adjacent highway. The creek originating on the plaintiffs' land passed through the defendants' property in a natural drainage ditch before coming to Allen Avenue, which bordered the defendants' southern boundry. There the water flowed beneath the street through two 24-inch culverts.

In 1972, the defendants entered into an agreement with a contractor to have their land filled with dirt. It was decided that the defendants would order 274 feet of 36-inch corrugated pipe to carry the creek which would otherwise be covered with dirt. Both the defendant and the contractor testified that the other of the two had recommended the 36-inch pipes.

In March of 1973, after the pipe had been installed, there was a substantial but normal rainfall. The creek exceeded its banks and flooded the basement of the plaintiffs' building for the first time since they had moved onto their property in 1962. In April and May there was similar flooding. On May 27, the area received four inches of rain in a 12-hour period. After this exceptionally heavy rain, the creek flooded the plaintiffs' basement to a depth of over five feet. The plaintiffs' complaint alleged that there were also two other flooding incidents.

At trial, a civil engineer testified for the plaintiffs that, according to sound engineering practices, the defendants should have installed drainage facilities capable of handling a flow of 800 gallons of water per minute. According to his calculations, the 36-inch pipe actually installed had a maximum capacity of 260 gallons per minute and "was completely inadequate to carry the water."[13]

After all of the evidence had been heard, the trial court judge submitted the following issues to the jury: "(1) Did the defendants Aiken create a nuisance by installing and covering a 36-inch drain across their property? (2) If so, did defendants Aiken thereby cause damage to plaintiffs' property? (3) What amount of damages, if any, are plaintiffs entitled to recover of the defendants Aiken?"[14] The jury responded "Yes" to the first question, "No" to the second question, and did not answer the third. Thereupon, judgment on the verdict was entered for the defendants and the plaintiffs appealed. The Court of Ap-

13. *Id.* at 205, 236 S.E.2d at 789.
14. *Id.* at 206, 236 S.E.2d at 790.

peals affirmed with one judge dissenting and the case was appealed to the North Carolina Supreme Court.

The first step the Court took toward the resolution of this case was to analyze the existing rules for dealing with drainage problems. The Court concluded that the reasonable use rule afforded the soundest approach to surface water drainage problems and therefore formally adopted the rule. Since the trial court's instructions to the jury dealt, in part, with the civil law rule, the Court held that there was error in the charge. In addition, the Court held that it was error to instruct the jury that they might find that the defendants had created a nuisance without finding that there was substantial damage to the plaintiffs. Due to the errors committed, the Court ruled that there must be a new trial.

BACKGROUND

Drainage problems generally concern either diffused surface water, watercourses or flood waters. Diffused surface waters "are those which accumulate from rains, melting snows or springs, diffuse themselves over the surface of the ground and seek a lower level by force of gravity without flowing in a defined channel."[15] A watercourse is a stream of water which flows within well-defined banks and channel.[16] The flow of water need not be continuous,[17] and the size of the stream is not material.[18] In addition a watercourse may be either a natural watercourse, such as rivers, creeks and branches, or it may be an artificial watercourse, such as canals and ditches.[19] Flood waters are waters above the highest line of the ordinary flood of a watercourse, but they become diffused surface waters if they permanently leave the main current of the watercourse.[20]

Most jurisdictions use these classifications when solving drainage problems and some jurisdictions apply slightly different rules to the differing classifications.[21] The North Carolina courts, however, have chosen to combine these classifications into the broader category of surface waters.[22] Thus, diffused surface waters, watercourses and flood waters are controlled by one rule in North Carolina.

There are three basic rules governing the resolution of surface water

15. Midgett v. Highway Commission, 260 N.C. 241, 244, 132 S.E.2d 599, 604 (1963).
16. Levene v. City of Salem, 191 Or. 182, 190, 229 P.2d 255, 259 (1951).
17. ReRuwe v. Morrison, 28 Wash.2d 797, 810, 184 P.2d 273, 280 (1947).
18. Reed v. Jacobson, 160 Neb. 245, 248, 69 N.W.2d 881, 884 (1955).
19. Darr v. Carolina Aluminum Co., 215 N.C. 768, 771, 3 S.E.2d 434, 436 (1939).
20. 260 N.C. at 244, 132 S.E.2d at 604.
21. Weeks v. McKay, 85 Idaho 617, 382 P.2d 788 (1963); Garbarino v. Van Cleave, 214 Or. 554, 330 P.2d 28 (1958).
22. 293 N.C. at 206, 236 S.E.2d at 790.

drainage problems. The first of these is the common enemy rule.[23] Basically, the rule recognizes diffused surface water and flood water as a common enemy from which every person may protect his land. Under the rule, one may make alterations to his land to reject or dispose of those unwanted waters without incurring liability for his acts.[24]

The common enemy rule originated in the courts of Massachusetts around the middle of the ninteenth century.[25] It was based upon the maxim *cujus est solum, ejus usque ad coelum et ad infernos*, and was designed to give each landowner "the free and unfettered control of his own land. . . ."[26] The New Jersey courts first applied the name "common enemy" to the rule in 1875[27] and thereafter, the rule was adopted in other jurisdictions as well.

When applied in its strictest form, the common enemy rule sometimes resulted in harsh decisions. To provide for a more equitable resolution of surface water drainage problems, the rule underwent a gradual modification or abandonment by the courts. Today there are no jurisdictions which follow the common enemy rule in its strictest form.[28]

There is no standard modified common enemy rule and the modifications of the rule differ slightly in various states. The rule has been modified by adding requirements of reasonableness,[29] necessity,[30] or necessity and due care.[31] Thus the modifications take the rule that a landowner may fight off surface water and add the qualification that he "do so without injury to such adjoining proprietor,"[32] or "unless he unnecessarily injures or damages another for his own protection,"[33] or "that he must exercise his rights not wantonly, unnecessarily or carelessly, but in good faith and with such care as not to injure needlessly the property of the adjacent owner."[34]

A second rule governing surface water drainage problems is the civil law rule[35] "which recognizes a natural servitude of natural drainage as

23. Although the common enemy rule is sometimes referred to as "the common law rule," it was not a part of the common law. 3 H. FARNHAM, WATERS AND WATER RIGHTS § 889b (1904).

24. Keys v. Romley, 64 Cal.2d 396, 400, 412 P.2d 529, 531, 50 Cal. Rptr. 273, 276 (1966).

25. Kenyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 902 (1940).

26. Gannon v. Hargadon, 92 Mass. (10 Allen) 106, 109 (1865).

27. Town of Union v. Durkes, 38 N.J.L. 21 (1875).

28. Butler v. Bruno, 115 R.I. 264, 341 A.2d 735 (1975).

29. King v. Cade, 205 Okla. 666, 240 P.2d 88 (1951).

30. Leader v. Matthews, 192 Ark. 1049, 95 S.W.2d 1138 (1936).

31. Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195 (1962).

32. Gulf, C.S. & F. Ry. Co. v. Richardson, 42 Okla. 457, 460, 141 P. 1107, 1109 (1914).

33. 192 Ark. at 1054, 95 S.W.2d at 1140.

34. Mason v. Lamb, 189 Va. 348, 354, 53 S.E.2d 7, 10 (1949).

35. For a complete discussion of the civil law rule in North Carolina prior to the adoption of the reasonable use rule *see* Note, *Disposition of Diffused Surface Waters in North Carolina*, 47 N.C. L. REV. 205 (1968).

between adjoining lands, so that the lower owner must accept the surface water which naturally drains onto his land but, on the other hand, the upper owner cannot change the natural drainage so as to increase the natural burden."[36] The rule, which is sometimes referred to as the natural flow rule, is based upon the maxim *aqua currit et debet currere, ut currere solebat* (water runs and ought to run, as it has used to run), and apparently originated in Roman Law and the Code Napoleon.[37] The first American jurisdiction to apply the rule was Louisiana in 1812.[38]

As the use of the rule grew, its application sometimes resulted in extreme consequences.[39] Like the common enemy rule, the strict civil law has been adandoned or modified in every jurisdiction. Modifications of the rule generally require that the upper owner act reasonably.[40] The most complete modification of the rule was announced in a recent California case:[41]

> It is properly a consideration in land development problems whether the utility of the possessor's use of his land whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters . . . . If the weight is on the side of him who alters the natural watercourse, then he has acted reasonably and without liability; if the harm to the lower landowner is unreasonably severe, then the economic costs incident to the expulsion of surface waters must be borne by the upper owner whose development caused the damage. If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule.[42]

A third rule used in resolving surface water drainage problems is the rule of reasonable use. The rule states that "Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage."[43] The reasonableness of the use is generally considered to be a question of fact which should be submitted to a properly instructed jury.[44]

The reasonable use rule originated in the courts of New Hampshire in 1862[45] and was adopted by the Minnesota courts in 1894.[46] For

36. 260 N.C. at 246, 132 S.E.2d at 603.
37. Keys v. Romley, 64 Cal.2d 396, 402, 412 P.2d 529, 532, 50 Cal. Rptr. 273, 276 (1966).
38. Orleans Navigation Co. v. New Orleans, 2 Mart. 214 (1812).
39. Annot., 59 A.L.R.2d 421 (1958).
40. Whitman v. Forney, 181 Md. 652, 31 A.2d 630 (1943).
41. Keys v. Romley, 64 Cal.2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966).
42. *Id.* at 410, 412 P.2d at 537, 50 Cal. Rptr. at 281.
43. Pendergrast v. Aiken, 293 N.C. at 216, 236 S.E.2d at 796.
44. Butler v. Bruno, 115 R.I. 264, 341 A.2d 735 (1975).
45. Basset v. Company, 43 N.H. 569 (1862).
46. Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462 (1894).

over half a century these two states remained as the only American jurisdictions that followed the rule.[47] Since then, the reasonable use rule has been adopted in full by eight other jurisdictions.[48]

Although there are specialized rules of liability which are used in resolving surface water drainage problems, it is nevertheless necessary to state the precise basis for such liability. The three major causes of action upon which liability is most commonly based are trespass, negligence or nuisance.[49] It is often possible to allege more than one basis for the injury[50], and the basis chosen may sometimes make a difference in the outcome of the case.[51]

Trespass may be used as a basis whenever the unauthorized casting of water upon the land of another interferes with the owner's exclusive possession of his land.[52] The interference need not be the result of an intentional or negligent act, but merely the result of some voluntary act.[53] A trespass may occur when the flow of water is diverted across the land of another[54] or when the flow of a stream is obstructed, thereby causing water to be cast upon the land of another landowner.[55]

Another basis upon which one may be liable for creating a surface water drainage problem is negligence. As in other types of cases, negligence may be used as the basis for a case involving drainage problems when a duty has been breached and that breach proximately caused injury to another.[56] For example, negligence may be asserted against one who allows drainage pipes to become clogged and damaged in breach of his duty to maintain.[57]

The most frequently stated grounds for asserting liability in surface water drainage problems is that the unwanted waters constitute a private nuisance. In order to be able to recover on the basis of nuisance, one must be able to show that there has been an unreasonable interfer-

47. *See* Pendergrast v. Aiken, 293 N.C. at 210, 236 S.E.2d at 793.

48. Weinberg v. Northern Alaska Development Corp., 384 P.2d 450 (Alaska 1963); Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970); Armstrong v. Francis, 20 N.J. 320, 120 A.2d 4 (1956); Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977); Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967); Butler v. Bruno, 115 R.I. 264, 341 A.2d 735 (1975); Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971); State v. Deetz, 66 Wis.2d 1, 224 N.W.2d 407 (1974).

49. Liability may also be based upon the violation of a statute, Smith v. City of Woodstock, 17 Ill. App. 3d 948, 309 N.E.2d 45 (1974), or upon eminent domain, Youmans v. City of Hendersonville, 175 N.C. 574, 96 S.E. 45 (1918).

50. *See, e.g.*, First Kingston Corp. v. Thompson, 223 Ga. 6, 152 S.E.2d 837 (1967).

51. *See, e.g.*, Blocher v. McArthur, 303 S.W.2d 529 (Tex. Civ. App. 1957).

52. W. PROSSER, LAW OF TORTS § 13 (4th ed. 1971).

53. *Id.*

54. Casanover v. Villanova Realty Co., 209 S.W.2d 556 (Mo. App. 1948).

55. Mogwood v. Edwards, 61 N.C. (Phil. Law) 350 (1867).

56. Johnson v. City of Winston-Salem, 239 N.C. 697, 81 S.E.2d 153 (1954).

57. *Id.*

ence with the use and enjoyment of one's land.[58] Although the issue as to what constitutes an unreasonable interference is a question of fact, the *Restatement (Second) of Torts* provides certain guidelines that are helpful in resolving this issue.[59] It indicates that the action should be considered unreasonable if "(a) the gravity of the harm outweighs the utility of the actor's conduct, or (b) the harm caused by the conduct is substantial and the financial burden of compensating for this and other harms does not render infeasible the continuation of the conduct."[60] In addition, the *Restatement* lists the following factors as relevant to a determination of the gravity of the harm:

(a) the extent of harm involved;
(b) the character of the harm involved;
(c) the social value which the law attaches to the type of use or enjoyment invaded;
(d) the suitability of the particular use or enjoyment invaded to the character of the locality;
(e) the burden on the person harmed of avoiding the harm.[61]

Also, several factors are given which may be used to determine the utility of the conduct involved:

(a) the social value which the law attaches to the primary purpose of the conduct;
(b) the suitability of the conduct to the character of the locality;
(c) whether it is impracticable to prevent or avoid the invasion, if the activity is maintained;
(d) whether it is impracticable to maintain the activity if it is required to bear the cost of compensating for the invasion.[62]

Once the proper cause of action has been determined, the aggrieved party must decide on the type of relief he wishes to seek. The two most commonly sought measures of relief in surface water drainage problems are damages and injunctions.

Damages are allowed in order to compensate the landowner for the unreasonable interferences to his land. The method by which the amount of damages are determined depends upon whether or not the nuisance is permanent. If the nuisance is permanent the damages are "the depreciation in the market value of the realty by reason of the nuisance."[63] If the nuisance is abatable, then the measure of damages is "the depreciation in the rental or use value of his property during the period in which the nuisance exists, plus any special damages."[64]

58. Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971).
59. RESTATEMENT (SECOND) OF TORTS § 822-31 (Tent. Draft No. 17, 1971).
60. *Id.* § 826.
61. *Id.* § 827.
62. *Id.* § 828.
63. D. DOBBS, LAW OF REMEDIES § 5.3 (1973).
64. *Id.*

An injunction is sometimes available as a remedy to surface water drainage problems. In determining whether to grant an injunction, a court is guided by traditional rules of equity. Thus, an injunction will be issued under the following circumstances:

> When the threatened injury cannot be adequately compensated in damages at law, or where, under the circumstances of the case, the injured party has no adequate remedy at law. The foundation for the jurisdiction in such cases is, in general, the irreparable nature of the injury, the inadequacy of pecuniary compensation, the destruction of the estate in the character in which it has been enjoyed, or the prevention of a multiplicity of suits.[65]

ANALYSIS

By eliminating the subclassifications of surface waters, the North Carolina courts have helped to simplify a needlessly complex area of the law. In most jurisdictions which do recognize the distinctions among the classifications, the distinctions seem to make very little difference, with one exception. Regardless of the surface water drainage rule that a state applies, most states accept the "well-established principle of law that waters flowing in a stream in a natural watercourse through or adjoining a person's lands could not be diverted by upper landowners to the damage of lower riparian landowners."[66] Since the Court has eliminated subclassifications of surface waters, it would appear that in North Carolina watercourses, as well as other surface waters, can be diverted if the diversion is reasonable. This interpretation would provide equitable results and also provide for the full use and development of land.

The surface water drainage rules which were discussed by the Court in *Pendergrast* each have certain advantages and disadvantages. Under the strict common enemy rule, every landowner would know with reasonable certainty what he could do to rid himself of unwanted surface water without incurring liability. However, he could never be certain that water would not be cast upon his property by another landowner who was fighting off surface waters. Also, the rule encourages landowners "to engage in contests of hydraulic engineering in which might makes right, and breach of the peace is often inevitable."[67] Court adopted modifications improve the rule since they often prohibit unnecessary, negligent or unreasonable conduct, but the modifications do little to discourage hydrologic contests.

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65. Brown v. Solary, 37 Fla. 102, 110, 19 So. 161, 163 (1896).

66. Werk v. Los Angeles County Flood Control Dist., 104 Cal. App. 2d 599, 609, 232 P.2d 293, 298 (1951).

67. Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NAT. RES. J. 72, 78 (1968).

The civil law furnishes predictable results in that every landowner knows that if he interferes with the natural flow of water he will be liable for any resulting damage. Just as predictably, a landowner knows that if he improves his property, it will almost always alter the natural flow of surface water. Because of this, the development of land will be needlessly stifled under the strict rule.

The reasonable use modification of the civil law rule helps to correct this situation. It allows a reasonable interference with the natural flow, but generally does not lead to drainage contests familiar to the common enemy rule. Modifications of the rule, however, have developed on a case by case basis and sometimes apply only to certain situations.[68] Because of this, the virtue of predictability has been lost and the law unnecessarily complicated.

The reasonable use rule greatly simplifies the law regarding surface water drainage problems. Since the rule is based upon tort rather than property law, many property concepts are no longer involved. Also, subclassifications of surface waters are no longer essential because all surface waters are subjected to the single rule of reasonable use. These simplifications will make drainage cases easier to resolve, and they will be resolved with greater consistency.

Another advantage of the rule is that it is flexible. Unlike the common enemy rule. Modifications of the rule, however, have develstay abrest of changing times, the reasonable use rule should require no modifications. As society develops, certain conduct in regard to surface water may increase or decrease in utility and therefore change the result in a case, but the rule need not be altered to reflect that change in utility.

One possible disadvantage of the reasonable use rule is lack of predictability. However, the rule is no less predictable than the modified common enemy rule, or the modified civil law rule. Also, the *Restatement of Torts* enhances predictability since it lists certain factors to be considered in determining reasonability.[69]

Under the reasonable use rule, a cause of action for interfering with surface water drainage will be based upon the law of private nuisance when the interference is substantial. Since most cases that are resolved by litigation involve substantial damages, the law of private nuisance should govern the resolution of most surface water drainage problems. If there are no substantial damages, then there can be no nuisance,[70] and recovery must be sought on other grounds.

68. Pendergrast v. Aiken, 293 N.C. at 215, 236 S.E.2d at 796.
69. RESTATEMENT (SECOND) OF TORTS, *supra* note 59.
70. Watts v. Pama Mfg. Co., 256 N.C. 611, 124 S.E.2d 809 (1962).

CONCLUSION

The Court in *Pendergrast* said, "We adopt the reasonable use rule as an act of clarification—not innovation."[71] Their adoption of the rule was indeed an act of clarification. Surface water drainage problems may now be resolved under a rule which simply allows one to make a reasonable use of his land, but which prohibits him from causing an unreasonable interference with the land of another. This concept is embodied in the ancient legal maxim *sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another); so the idea can hardly be called an innovation. But the adoption of a rule which clarifies and simplifies a needlessly complex area of law is an innovation which should be highly regarded.

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71. 293 N.C. at 218, 236 S.E.2d at 798.