LIABILITY FOR DIVERSION OF SURFACE WATER

Johnson v. Goodview Homes-1, Inc.

82 Ohio L. Abs. 526, 167 N.E.2d 132 (C.P. 1960)

In 1957, the corporate defendant purchased land in the city of Akron which it improved by the construction of twelve houses. While grading, defendant filled a gully, terraced the land and installed drainage pipes to carry surface water from the front of its property to the rear. As a result, the flow of surface water was increased and accelerated onto the land of plaintiff, an adjoining lower owner, causing damage to his basement and house foundation. The court ruled that defendant's actions constituted a trespass, enjoined defendant from piping water toward plaintiff's property, and awarded damages.

American jurisdictions have followed three different rules concerning diffused surface water.[1] Almost half follow the common enemy doctrine which developed from the concept that water is an enemy common to all and may be avoided by each land owner as he sees fit without liability for damage to other landowners.[2] The second rule is the civil rule which holds that the burden of receiving diffused surface water should be on the land where the water naturally flows and not where it can be made to flow.[3] The upper land owner is considered to have an easement across the lower adjoining estate to the extent of the natural flow of the diffused surface water. The third rule is the reasonable use rule which allows an owner to divert or retain surface water without liability for damage to others if the act is reasonable in consideration of all the circumstances.[4] Although adopted by the least number of jurisdictions, the reasonable use rule has been advocated by most legal writers.[5]

The law of diffused surface water in Ohio has meandered as freely as the subject matter it has sought to regulate. Ohio has generally followed the civil rule (natural flow) since the *Butler v. Peck* decision of 1865.[6] Six years later in *Tootle v. Clifton*,[7] the Ohio Supreme Court ruled that a lower owner

---

[1] For a general discussion of these rules, see Kinyon and McClure, "Interferences With Surface Waters," 24 Minn. L. Rev. 891 (1940); Annot., 59 A.L.R.2d 421 (1956); also see 24 Mo. L. Rev. 137 (1959).

[2] The leading case on the common enemy rule is Gannon v. Hargadon, 92 Mass. (10 Allen) 106 (1865).

[3] The leading case on the civil rule is Martin v. Riddle, 26 Pa. 415 (1856). See 3 Farnham, Water And Water Rights § 889a (1904).

[4] "The question of the reasonableness of the use in a given case must be determined as a question of fact under all the attendant circumstances." Franklin v. Durgee, 71 N.H. 186, 51 Atl. 911 (1901); see also Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462 (1894); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

[5] Restatement, Torts § 833 (1939); 6 W. Res. L. Rev. 290 (1955); *supra* note 1.

[6] To increase or accelerate the flow of surface water "would sanction the creation, by artificial means of a servitude which nature has denied." Butler v. Peck, 16 Ohio St. 334, 344 (1865).

[7] Tootle v. Clifton, 22 Ohio St. 247 (1871).

could not block the natural flow of surface water coming onto his land. Since the espousal of these landmark cases, Ohio courts have tried to avoid the harshness that strict enforcement of the civil rule would have in "hard cases."

The weight of authority in Ohio indicates that a different rule is being applied to land within municipalities,[8] although there are cases to the contrary.[9] The noted case acknowledges a recent appellate decision, *Lunsford v. Stewart,*[10] in which it was decided that the lower landowner in urban areas can divert surface water and prevent it from coming onto his land if he does so in a reasonable manner. In finding liability for the upper owner's diversion of surface water in the principal case, however, the court states that:

> The court believes the general present, modern rule, urban or otherwise, to be that the *upper* owner commits a trespass if he diverts the flow of the surface water from his upper land, and greatly increases, or accelerates, the flow of the surface water from his upper land in other than a natural waterway or channel, and casts the same upon the lower land, *even though the manner in which he acts is reasonable.*[11] (Emphasis added.)

This decision breaks with the rationale of recent decisions and seems to return to the civil rule for municipal; ties. If the lower owner is to be judged by the reasonableness of his action, as the court in the noted case concedes, then consistency would demand that the upper owner be judged similarly. "It is clear that the questions, on the one hand, of liability of the owner of the lower land for obstructing the flow of surface water and, on the other of liability of the upper owner for increasing or otherwise changing such flow, are reciprocal."[12] The instant case applies the civil rule (natural flow) against the upper urban landowner while recognizing that the reasonable use rule applies when the lower urban owner diverts surface water from his land.[13] In a state already burdened by the application of different rules for urban and rural areas, further distinction between upper and lower landowners in urban areas does not serve any useful purpose. The *Johnson*

8 Mason v. Comm'rs of Fulton County, 80 Ohio St. 151, 88 N.E. 401 (1909), (different rule in urban areas); Springfield v. Spence, 39 Ohio St. 665 (1883) (water said to be a common enemy in the city); Keiser v. Mann, 102 Ohio App. 324, 140 N.E.2d 146 (1956), *appeal dismissed,* 166 Ohio St. 190, 140 N.E.2d 565 (reasonable use); Lunsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953) (reasonable use); Strohm v. Molter, 30 Ohio L. Abs. 330 (Ct. App. 1939) (that there is respectable authority applying the rule of reasonable use to urban lots).

9 McKiernann v. Grimm, 31 Ohio App. 213, 165 N.E. 310 (1928). See also Rueckert v. Sicking, 20 Ohio App. 162, 153 N.E. 129 (1923).

10 *Supra* note 8.

11 Johnson v. Goodview Homes-1, Inc., 82 Ohio L. Abs. 526, 531, 167 N.E.2d 132, 136 (C.P. 1960).

12 State of Ohio, Dep't of Natural Resources, Division of Water, "Principles of Water Rights Law in Ohio" § 45, at 17 (1957).

13 The court assumes that plaintiff (lower owner) could have prevented the surface water from coming onto his land if done in a reasonable manner.

decision should have been based on the reasonableness of the use that the upper owner made of his land with regard to attendant circumstances.[14] Here the social utility in improvement of land is overweighed by the unnecessary harm to plaintiff caused by defendant's failure to install drainage pipes.

Although courts manage to reach similar decisions under all three rules,[15] acceptance of the reasonable use rule as followed in *Lunsford*[16] and *Keiser v. Mann*[17] is preferable. Application of the rule would balance the competing interests[18] and would avoid the plethora of rules adopted by the Ohio courts to meet the individual facts of each case. The Supreme Court of New Jersey recently adopted the reasonable use rule to give the law of surface water consistency and to "thus accord our expressions . . . to the actual practice of our courts."[19] The "cabin on the bank"[20] aspect of Ohio laws dealing with water problems will probably continue until the Ohio Supreme Court decides a surface water rights case.

---

14 It has been suggested that "reasonable interference" is a more appropriate designation. 6 American Law of Property § 28, 63 at 190 n.7 (1954).

15 Cases decided under the three different rules reach the same result in hard cases. Annot., 28 A.L.R. 1262 (1924).

16 The *Lunsford* decision, *supra* note 8, seems to emphasize the reasonableness of the use that the owner makes of his land rather than the correlative rights of the other parties concerned.

17 The urban rule allows the lower owner to block surface water unless done unreasonably, Keiser v. Mann, *supra* note 8.

18 Under the reasonable use rule the plaintiff has the burden of proof to show damages and the unreasonableness of defendant's action, Keiser v. Mann, *supra* note 8.

19 Armstrong v. Francis Corp., *supra* note 4, at 329, 120 A.2d at 10.

20 Remark taken from speech of Attorney General C. William O'Neill, at the Ohio Water Clinic Conference, Feb. 11, 1954, referring to the age of leading water law cases in Ohio and the need for modern Supreme Court decisions.