CROSS & VAIL

Attorneys at Law

Memorandum

Re: Spite Dogs

To: Alex Associate

From: Jane Whitefield

John and Carla Clancy bought a home in a suburb of Boise, Idaho. Their neighbors are Farah and Sam Seign. The Seigns' children are grown and no longer live at home. The Clancys have an 8 year old son, Toby.

The Seigns had a dog, a four year old female Doberman Pincher named Eloise. The fence that separates the two properties was a wire fence, about five feet high. Eloise roamed inside the fence. From time to time, Eloise would scare Toby by barking and jumping against the fence when Toby was in his yard.

The Clancys told the Seigns that Eloise was upsetting Toby and that the dog would have to be removed from the property. The Seigns replied that Eloise had never harmed anyone, had never jumped the fence, and that Toby was overly fearful. In response, the Clancys filed a suit in state court to compel the removal of Eloise as a nuisance. The Seigns were forced to hire our firm to defend against the nuisance. We advised them that they would almost certainly win the suit, but it might cost several thousand dollars. At that point, the Seigns' son persuaded his parents to end the case by giving him Eloise, an outcome that pleased both the son and Eloise.

The next month, the Seigns took out the wire fence and put in an "Invisible Fence". They also purchased two Doberman Pinchers. One is a 16 month old male. The other a 4 month old female.

The Clancys have sued again. I don't know what an invisible fence is. Find out what this is all about.

Memorandum

Re: Spite Dogs

To: Alex Associate

From: Perry Paralegal

The fence was part of a larger project done by the Seigns. They took out the wire fence, enclosed the entire property with an invisible fence, enlarged their deck, and dug a pond. They stocked the pond with trout. They hope the trout will survive, as the pond is fed by a creek.

The Seigns tell me that they felt that Eloise was lonesome with there being no children in the house. They hope the two Dobermans will play with one another. The male is somewhat imposing, but is actually quite gentle. It was available for adoption only because its owner was transferred to Hawaii. Dogs can be imported to Hawaii only after a 6-month quarantine.

An invisible fence consists of a wire buried in the ground that sends a signal to a collar worn by a dog. The collar delivers a shock to the dog when it comes too close to the boundary. Most dogs learn after only a couple of shocks not to approach the area of the wire. The wire fence covered only a small percentage of the Seigns' property, but the invisible fence covers all of the property. Sometimes a dog will "take the pain" and go through the invisible fence. The fence's current is then increased. The Seigns' dogs have not gone through the fence.

I am told that Toby has not been in his yard since the electric fence was put in and the two dogs arrived. The Seigns are amused that now that their dogs can roam the entire property, the deer that formerly traveled through their parcel have altered their path and now go through their neighbors' parcel, eating all the Clancy azaleas. They have also been told that the Clancy's well collapsed. This is probably because the pond collects water that would otherwise flow to the Clancy parcel.

SUNDOWNER, INC. v. KING

95 Idaho 367, 509 P.2d 785
Supreme Court of Idaho, 1973

SHEPARD, J.

This is an appeal from a judgment ordering partial abatement of a spite fence erected between two adjoining motels in Caldwell, Idaho. This action is evidently an outgrowth of a continuing dispute between the parties resulting from the 1966 sale of a motel.

In 1966 Robert Bushnell sold a motel to defendants-appellants King. Bushnell then built another motel, the Desert Inn, on property immediately adjoining that sold to the Kings.

The Kings thereafter brought an action against Bushnell (H. J. McNeel, Inc.) based on alleged misrepresentations by Bushnell in the 1966 sale of the motel property. In 1968 the Kings built a large structure, variously described as a fence or sign, some 16 inches from the boundary line between the King and Bushnell properties. The structure is 85 ft. in length and 18 ft. in height. It is raised 2 ft. off the ground and is 2 ft. from the Desert Inn building. It parallels the entire northwest

side of the Desert Inn building, obscures approximately 80% of the Desert Inn building and restricts the passage of light and air to its rooms.

Bushnell brought the instant action seeking damages and injunctive relief compelling the removal of the structure. Following trial to the court, the district court found that the structure was erected out of spite and that it was erected in violation of a municipal ordinance. The trial court ordered the structure reduced to a maximum height of 6 ft.

The Kings appeal from the judgment entered against them and claim that the trial court erred in many of its findings of fact and its applications of law. The Kings assert the trial court erred in finding that the "sign" was in fact a fence; that the structure had little or no value for advertising purposes; that the structure cuts out light and air from the rooms of the Desert Inn Motel; that the structure has caused damage by way of diminution of the value of the Desert Inn Motel property; that the erection of the structure was motivated by ill-feeling and spite; that the structure was erected to establish a dividing line; and that the trial court erred in failing to find the structure was necessary to distinguish between the two adjoining motels.

We have examined the record at length and conclude that the findings of the trial court are supported by substantial although conflicting evidence. The trial court had before it both still and moving pictures of the various buildings. The record contains testimony that the structure is the largest "sign" then existing in Oregon, Northern Nevada and Idaho. An advertising expert testified that the structure, because of its location and type, had no value for advertising and that its cost, i. e., $6,300, would not be justified for advertising purposes.

The pivotal and dispositive issue in this matter is whether the trial court erred in requiring partial abatement of the structure on the ground that it was a spite fence. Under the so-called English rule, followed by most 19th century American courts, the erection and maintenance of a spite fence was not an actionable wrong. These older cases were founded on the premise that a property owner has an absolute right to use his property in any manner he desires. See: 5 Powell on Real Property, 696, p. 276 (1949 ed. Rev'd 1968); Letts v. Kessler, 54 Ohio St. 73, 42 N.E. 765 (1896).

Under the modern American rule, however, one may not erect a structure for the sole purpose of annoying his neighbor. Many courts hold that a spite fence which serves no useful purpose may give rise to an action for both injunctive relief and damages. See: 5 Powell, supra, 696, p. 277; IA Thompson on Real Property, § 239 (1964 ed.). Many courts following the above rule further characterize a spite fence as a nuisance. See: Hornsby v. Smith, 191 Ga. 491, 13 S.E.2d 20 (1941); Barger v. Barringer, 151 N.C. 433, 66 S.E. 439 (1909); Annotation 133 A.L.R. 691.

One of the first cases rejecting the older English view and announcing the new American rule on spite fences is Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888). Subsequently, many American jurisdictions have adopted and followed *Burke* so that it is clearly the prevailing modern view. See: Powell, supra, 696 at p. 279; Flaherty v. Moran, 81 Mich. 52, 45 N.W. 381 (1890); Barger v. Barringer, supra; Norton v. Randolph, 176 Ala. 381, 58 So. 283 (1912); Bush v. Mockett, 95 Neb. 552, 145 N.W. 1001 (1914); Hibbard v. Halliday, 58 Okla. 244, 158 P. 1158 (1916); Parker v. Harvey, 164 So. 507 (La.App.1935); Hornsby v. Smith, supra; Brittingham v. Robertson, 280 A.2d 741 (Del.Ch.1971). Also see the opinion of Mr. Justice Holmes in Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889).

In *Burke* a property owner built two 11 ft. fences blocking the light and air to his neighbors' windows. The fences served no useful purpose to their owner and were erected solely because of his malice toward his neighbor. Justice Morse applied the maxim *sic utere tuo ut alienum non*

laedas, and concluded:

> But it must be remembered that no man has a legal right to make a malicious use of his property, not for any benefit or advantage to himself, but for the avowed purpose of damaging his neighbor. To hold otherwise would make the law a convenient engine, in cases like the present, to injure and destroy the peace and comfort, and to damage the property, of one's neighbor for no other than a wicked purpose, which in itself is, or ought to be, unlawful. The right to do this cannot, in an enlightened country, exist, either in the use of property, or in any way or manner. There is no doubt in my mind that these uncouth screens or "obscurers" as they are named in the record, are a nuisance, and were erected without right, and for a malicious purpose. What right has the defendant, in the light of the just and beneficent principles of equity, to shut out God's free air and sunlight from the windows of his neighbor, not for any benefit or advantage to himself, or profit to his land, but simply to gratify his own wicked malice against his neighbor? None whatever. The wanton infliction of damage can never be a right. It is a wrong, and a violation of right, and is not without remedy. The right to breath the air, and to enjoy the sunshine, is a natural one, and no man can pollute the atmosphere, or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice towards his neighbor.

We agree both with the philosophy expressed in the *Burke* opinion and with that of other jurisdictions following what we feel is the better-reasoned approach. We hold that no property owner has the right to erect and maintain an otherwise useless structure for the sole purpose of injuring his neighbor. The trial court found on the basis of substantial evidence that the structure served no useful purpose to its owners and was erected because of the Kings' ill will and emnity toward their neighboring competitor. We therefore hold that the trial court did not err in partially abating and enjoining the "sign" structure as a spite fence.

Our decision today is not entirely in harmony with White v. Bernhart, 41 Idaho 665, 241 P. 367 (1925). White held that an owner could not be enjoined from maintaining a dilapidated house as a nuisance, even though the house diminished the value of neighboring property. *White* is clearly distinguishable from the case at bar. Rather than a fence, it involved a dwelling house which was not maliciously erected. The rule announced herein is applicable only to structures which serve no useful purpose and are erected for the sole purpose of injuring adjoining property owners. There is dictum in *White* which suggests that a structure may only be enjoined when it is a nuisance per se. Such language is inconsistent with our decision today and it is hereby disapproved.

ARMSTRONG v. FRANCIS CORP.

20 N.J. 320, 120 A.2d 4
Supreme Court of New Jersey, 1956

BRENNAN, J.

The Chancery Division, after trial, entered a final judgment against the defendant, the Francis Corporation. Francis appealed to the Appellate Division, and we certified the appeal here on our own motion.

A small natural stream rose in Francis' 42-acre tract, which lies immediately south of Lake Avenue in Rahway. The stream flowed in a northerly direction 1200 feet across the Francis lands through a seven-foot box culvert under Lake Avenue and emptied into Milton Lake, 900 feet north

of the avenue. It was the natural drainway for the larger 85-acre area south of Lake Avenue which includes the Francis tract.

Francis stripped its tract and erected 186 small homes thereon in a development known as Duke Estates, Section 2. It also built some 14 houses on an adjacent small tract known as Duke Estates, Section 1, lying in another drainage area. It constructed a drainage system of streets, pavements, gutters, ditches, culverts and catch basins to serve both developments. The system emptied into a corrugated iron pipe laid by Francis below the level of the natural stream bed on its lands. The pipe followed the course of the stream bed to the box culvert under Lake Avenue, although deviating from the course at some places. The pipe was covered with fill on Francis' tract and all evidence of the natural stream there has disappeared.

The drainage of the original 85 acres was thus augmented not only by the drainage of some 2 1/2 acres of the Duke Estates, Section 1, but also by waters percolating into the joints of the pipe where it lay below the level of the water table of the Francis tract. The pipe joints were expressly designed to receive such percolating waters, and, to the extent that the percolation lowered the level of the water table, the result was to provide a drier terrain more suitable to housing development.

Where the stream passes north of Lake Avenue en route to Milton Lake after leaving the box culvert it remains largely in its natural state and forms the boundary line between the residential tracts of the plaintiffs Armstrong and the defendants Klemp. The Klemps were made parties defendant by Francis' cross-claim but prevailed thereon and were allowed the same relief as the Armstrongs. The stream passes through a 36-inch culvert under the Klemp driveway and thence, across lands of the Union County Park Commission, to the Lake.

The Francis improvement resulted in consequences for the Armstrongs and the Klemps fully described by Judge Sullivan in his oral opinion as follows:

> Now the stream as it emerges from the underground pipe goes under Lake Avenue and then flows past and through the Armstrong and Klemp properties is no longer the "babbling brook" that Mr. Klemp described. Now there is a constant and materially increased flow in it. The stream is never dry. The water is now discolored and evil smelling and no longer has any fish in it. A heavy deposit of silt or muck up to eighteen inches in depth now covers the bottom of the stream. After a heavy rainstorm the stream undergoes a remarkable change for several hours. All of the upstream rain water that used to be absorbed or held back is now channeled in undiminished volume and at great speed into this stream. This causes a flash rise or crest in the stream, with a tremendous volume of water rushing through at an accelerated speed. As a result, the stream has flooded on several occasions within the last year, although this was unheard of previously. More distressing, however, is the fact that during these flash situations the body of water moving at the speed it does tears into the banks of the brook particularly where the bed may turn or twist. At a point even with the plaintiff's (Armstrong) house the stream makes a sharp bend. Here the effect of the increased flow of water is most apparent since the bank on plaintiff's side of the stream has been eaten away to the extent of about ten feet. This erosion is now within fifteen feet of the Armstrong septic tank system. It is difficult to say where it will stop, where the erosion will stop. The silting has, of course, raised the bed of the stream up to eighteen inches in places and the raising of the stream results in water action against different areas of the bank so that the erosion problem while unpredictable is ominous. The eating away of the banks in several places has loosened rocks or boulders which have been rolled downstream by the force of the water. Those stones, however, as they rolled through the Klemp culvert cracked and broke the sides and bottom of the culvert and the water is now threatening to undermine the entire masonry. There is no doubt but that the defendant's activities have caused all of the condition just related.

> A matter of some concern is that defendant's housing development occupies only about one-half of the area which drains into this brook. At the present time there is a forty acre undeveloped section to the south of the defendant and it is reasonable to assume that it, too, will be improved and built upon at some future time. Defendant's underground trunk sewer was built to accommodate any possible runoff from this tract. If and when that section is developed, Armstrong and Klemp will have that much more erosion, silting and flooding to deal with.

Judge Sullivan concluded that the Armstrongs and the Klemps were plainly entitled to relief in these circumstances and "that the only sensible and permanent solution to the problem is to pipe the rest of the brook," that is, from the culvert outlet at Lake Avenue the entire distance to Milton Lake. A plan for that purpose had been prepared by Francis' engineer and approved by the Armstrongs and the Klemps at a time when efforts were being made to compromise the dispute before the trial. The final judgment orders Francis, at its expense, forthwith to proceed with and complete within 60 days the work detailed on that plan. The Union County Park Commission has given its formal consent to the doing of the work called for by the plan on its lands.

The important legal question raised by the appeal is whether the damage suffered by the Armstrongs and the Klemps is *damnum absque injuria*, namely, merely the non-actionable consequences of the privileged expulsion by Francis of waters from its tract as an incident to the improvement thereof. Francis argues, however, that, even if the injuries caused are actionable, Judge Sullivan's findings are against the weight of the evidence, that there was prejudicial error in the admission of evidence dealing with the offer of compromise, and that the relief granted was excessive, improper and unwarranted. We find no merit in any of these contentions.

The findings are fully and amply supported by competent evidence. The controverted questions lie principally in the opposing interpretations of the facts by the expert witnesses, and we are not persuaded that Judge Sullivan should have accepted the opinion of the Francis experts in preference to the opinion of the expert who testified for the Armstrongs and the Klemps. And there is nothing in the record as we read it to suggest that Judge Sullivan weighed the evidence of the offer of compromise in reaching his conclusions. His finding that the completion of the piping to Milton Lake was the sensible thing to do in no wise refers to the compromise offer, and in the context of his oral opinion that finding seems plainly to be predicated upon his view of what was needful to save the Armstrongs and the Klemps from further harm. The prescription in the judgment that the piping plan developed by Francis' own engineer be completed does not point to a contrary conclusion. Having decreed that piping was necessary to afford adequate relief, ordering its accomplishment according to the plan which reflected Francis' own concept of that need was wholly logical. Like considerations also answer Francis' other point that the relief allowed was excessive,—or, at least, point up the absence of any basis for the intrusion of appellate judgment into the question of its reasonableness.

Turning, then, to the basic question for decision, appellant grounds its argument upon the following statement of the Appellate Division in Yonadi v. Homestead Country Homes, 35 N.J.Super. 514, 521, 114 A.2d 564, 567 (1955);

> While the New Jersey cases do not deal with the matter explicitly, we conclude that where surface water is concentrated through a drain or other artificial means and is conducted to some place substantially where it otherwise would have flowed, the defendant will not be liable even though by reason of improvements he has made in the land, the water is brought there in larger quantities and with greater force than would have occurred prior to the improvements. The policies underlying the general rule come to bear here. What reasonably could the upland proprietor or occupant do in the present case with this excess water? Rather than require him to dispose of it—and so perhaps

> require him to secure the cooperation of a number of lowland properties through which the water must eventually be brought—the burden is cast on each lowland proprietor to protect his own land.

We might summarily dispose of this point against the appellant upon the ground that more than the surface water drained from the 85-acre tract is involved here. Appellant has augmented the volume of water passing through the Lake Avenue culvert with water from another drainage area and with water percolating into its pipe where the level of the natural water table on its tract is higher,—and so the cited proposition would not in any event apply. See Town of Union v. Durkes, 38 N.J.L. 21 (Sup.Ct.1875). But, because we do not agree that the quoted proposition, in the form stated, which makes no allowance for differences in factual situations, is or should be the law governing the liability of the landowner who alters the flow of surface waters with resulting material harm to other landowners, we shall treat the case as if only the disposal of surface water from the 85-acre tract was involved and determine appellant's point upon that premise.

In their article "Interferences with Surface Waters", 24 Minn.L.Rev. 891, 899, (1940), Professor Kinyon and Mr. McClure have convincingly demonstrated that there was no true common law of surface waters and that the law in that respect has been largely developed since 1850, both in England and in the United States.

The casting of surface waters from one's own land upon the land of another, in circumstances where the resultant material harm to the other was foreseen or foreseeable, would appear on the face of it to be tortious conduct, as actionable where the consequences of an unreasonable use of the possessor's land, as in the case of the abstraction or diversion of water from a stream which unreasonably interferes with the use of the stream below, Prosser, Torts (1951), p. 586, and as in the case of the unreasonable use of percolating or subterranean waters, Meeker v. City of East Orange, 77 N.J.L. 623, 74 A. 379, 25 L.R.A.,N.S., 465 (E. & A.1909), and as in the case of artificial construction on one's land which unreasonably speeds the waters of a stream past one's property onto that of an owner below, causing harm, Kidde Manufacturing Co. v. Bloomfield, 20 N.J. 52, 118 A.2d 535 (1955); Hughes v. Knight, 33 N.J.Super. 519, 111 A.2d 69 (App.Div.1955). Yet only the courts of the states of New Hampshire and Minnesota have expressly classified the possessor's liability, where imposed, for harm by the expulsion of surface waters to be a tort liability. Those courts have evolved the "reasonable use" rule laying down the test that each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable. Franklin v. Durgee, 71 N.H. 186, 51 A. 911, 58 L.R.A. 112 (Sup.Ct.1901); Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462, 26 L.R.A. 632 (Sup.Ct.1894); 24 Minn.L.Rev., supra, 909.

All other states have treated the legal relations of the parties as a branch of property law—that is, have done so, if we emphasize only the language of the decisions and ignore the actual results reached. Two rules have been evolved which, in their statement, are directly oppossed, for under one the possessor would not be liable in any case and under the other he would be liable in every case. But an analysis of the results reached under both rules shows that neither is anywhere strictly applied. The first rule, purportedly applicable in our own State, stems from the view that surface waters are the common enemy. The "common enemy" rule emphasizes the possessor's privilege to rid his lands of surface waters as he will. That rule "is, in substance, that a possessor of land has an unlimited and unrestricted legal privilege to deal with the surface water on his land as he pleases, regardless of the harm which he may thereby cause others." 24 Minn.L.Rev., *supra*, 898. For New Jersey decisions see Earl v. DeHart, 12 N.J.Eq. 280 (E. & A.1856), Fitz-Patrick v. Gourley, 104 N.J.Eq. 281, 145 A. 337 (Ch.1929), Nathanson v. Wagner, 118 N.J.Eq. 390, 179 A. 466 (Ch.1935), and other cases collected in Yonadi v. Homestead Country Homes, supra. The other

rule, borrowed from the civil law of foreign nations and called the "civil law" rule, emphasizes not the privileges of the possessor but the duties of the possessor to other landowners who are affected by his expulsion of surface waters from his lands. That rule is to the effect that "a person who interferes with the *natural* flow of surface waters so as to cause an invasion of another's interests in the use and enjoyment of his land is subject to liability to the other." 24 Minn.L.Rev., *supra*, 893.

The quoted statement from the *Yonadi* opinion implies that what Francis did here was absolutely privileged, which is the clear import of the common enemy rule. But our decisions have invariably refused to apply the rule according to its letter where it works injustice. Typical departures are found in Field v. Inhabitants of West Orange, 36 N.J.Eq. 118 (Ch.1882), affirmed 37 N.J.Eq. 434, 600 (E. & A.1883), Weisberger v. Maurer, 153 A. 626, 9 N.J.Misc. 117 (Cir.Ct.1930), affirmed 109 N.J.L. 273, 160 A. 634 (E. & A.1932), Davison v. Hutchinson, 44 N.J.Eq. 474, 15 A. 257 (Ch.1888), Smith v. Orben, 119 N.J.Eq. 291, 182 A. 153 (Ch.1935); see also Schnitzius v. Bailey, 48 N.J.Eq. 409, 22 A. 732 (Ch.1891). Nor have states which are said to follow the civil law rule held that the possessor may not under any circumstances rid his lands of surface water without incurring liability if harm is caused to another. In sum, the courts here and elsewhere, in terms of results, have actually come out at the "reasonable use" doctrine, Prosser, supra. Professor Kinyon and Mr. McClure have summarized the course of the decisions as follows (24 Minn.L.Rev. supra, pp. 916, 920, and 913):

> From the rationale of the common enemy rule, it would seem that a possessor of land has an unlimited privilege to rid his land of the surface water upon it or to alter its course by whatever means he wishes, irrespective of the manner of doing it or the harm thereby caused to others. However, in substantially all of the jurisdictions purportedly committed to that rule, the courts have refused to go that far. Most of these courts have developed a qualifying rule which is, in substance, that a possessor of land is not privileged to discharge upon adjoining land, by artificial means, large quantities of surface water in a concentrated flow otherwise than through natural drainways, regardless of the means by which the surface water is collected and discharged. The scope of this qualifying rule varies from jurisdiction to jurisdiction, but it has been adopted in one form or another . . . .
>
> In jurisdictions purportedly committed to the civil law rule, one would expect from the rationale of that rule to find that a possessor has no privilege, under any circumstances, to interfere with the surface water on his land so as to cause it to flow upon adjoining land in a manner or quantity substantially different from its natural flow. An examination of the cases in these jurisdictions, however, reveals that the courts have refused to follow the rationale of the rule to that extent. In most of these jurisdictions the courts have recognized that a possessor must have a privilege, under certain circumstances, to make minor alterations in the natural flow of surface water where necessary to the normal use and improvement of his land, even though such alterations cause the surface water to flow upon adjoining land in a somewhat unnatural manner. This is especially true where the possessor disposes of the surface water by depositing it in existing natural drainways. Consequently, the courts . . ., with variations from state to state, have held that a possessor has a limited privilege to discharge surface water on other lands, by artificial means in a non-natural manner . . . .

The authors conclude:

> . . . (Thus) even though the broad principle of reasonable use has not made much headway as an articulate basis of decision, substantially all of the jurisdictions which purport to follow the civil law or common enemy rules have engrafted upon them numerous qualifications and exceptions which, in actual result, produce decisions which are not as conflicting as would be expected, and which would generally be reached under the reasonable use rule.

We therefore think it appropriate that this court declare, as we now do, our adherence in terms to the reasonable use rule and thus accord our expressions in cases of this character to the actual practice of our courts. Indeed, Judge Sullivan did so in his oral opinion below when he pronounced his judgment as based upon his finding that what Francis did was not "done in the reasonable use of his (its) land," relying for authority upon the decision of the former Court of Chancery in Smith v. Orben, supra. And it is significant of the true state of the law that the Restatement on Torts, sec. 833, has adopted the reasonable use test as the rule actually prevailing.

The rule of reasonableness has the particular virtue of flexibility. The issue of reasonableness or unreasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter. 93 C.J.S., Waters, § 116; Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (Sup.Ct.1948). It is, of course, true that society has a great interest that land shall be developed for the greater good. It is therefore properly a consideration in these cases 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. Sheehan v. Flynn, supra. But while today's mass home building projects, of which the Francis development is typical, are assuredly in the social good, no reason suggests itself why, in justice, the economic costs incident to the expulsion of surface waters in the transformation of the rural or semi-rural areas of our State into urban or suburban communities should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit. Social progress and the common wellbeing are in actuality better served by a just and right balancing of the competing interests according to the general principles of fairness and common sense which attend the application of the rule of reason.

FRIENDSWOOD DEVELOPMENT CO. v. SMITH-SOUTHWEST INDUSTRIES, INC.

576 S.W.2d 21
Supreme Court of Texas, 1978

DANIEL, J.

The question in this case is whether landowners who withdrew percolating ground waters from wells located on their own land are liable for subsidence which resulted on lands of others in the same general area.

The trial court had before it depositions, interrogatories, affidavits and exhibits which showed rather clearly that Friendswood [Development Company] had pumped large amounts of subsurface waters from its own property for sale primarily to industrial users in the Bayport industrial area developed by Friendswood and Exxon. These wells were drilled from 1964 through 1971, even though previous engineering reports to defendants showed that production therefrom would result in a certain amount of land subsidence in the area. Plaintiffs alleged that the wells were negligently spaced too close together, too near the common boundary of lands owned by plaintiffs and defendants, and that excessive quantities were produced with knowledge that this would cause subsidence and flooding of plaintiffs' lands. Plaintiffs alleged that this extensive withdrawal of ground water proximately caused the sinking and loss of elevation above mean sea level of their property and the property of others similarly situated along the shores of Galveston Bay and Clear Lake, resulting in the erosion and flooding of their lands and damage to their residences,

businesses and improvements. Plaintiffs further allege that the manner in which Friendswood Development Company continues to use its property for the withdrawal and sale of large amounts of fresh water to commercial users on other lands constitutes a continuing nuisance and permanent loss and damage to their property. The defendants, Friendswood Development Company and its parent company, Exxon, are sought to be held jointly liable for the damages alleged in this case on the theory that they jointly planned and pursued the operations complained of. . . .

Plaintiffs have alleged an action in tort based upon the general rule that a landowner has a duty not to use his property so as to injure others *sic utere tuo ut alienum non laedas*. Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615 (1950); Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936); Gulf, C. & S.F. Ry. Co. v. Oakes, 94 Tex. 155, 58 S.W. 999 (1900). The Court of Civil Appeals cited the above cases and this general rule of tort law in holding that plaintiffs were entitled to a trial on the allegations of nuisance and negligence. The problem is that those cases, none of which related to ground water withdrawals, involved liability for the *unreasonable* use of correlative property rights or the balancing of legal and equitable rights between property owners. This is a concept which was deliberately rejected with respect to withdrawals of underground water when this Court adopted the common law rule that such rights are not correlative, but are absolute, and thus are not subject to the conflicting "reasonable use" rule. Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279 (1904).

Plaintiffs insist that this is not a case involving conflicting claims to the ownership or nontortuous use of water and that, therefore, the "archaic and awkward" common law rule adopted in *East* as to "absolute" ownership should not insulate the defendants from damages due to nuisance in fact or negligence in the manner by which they made use of their property. This is, in effect, a contention that the "reasonable use" doctrine should apply to ground water the same as it does to other real property.

The plaintiff in *East* argued for the "reasonable use" rule in that case, and it was adopted by the Court of Civil Appeals. In that case the railroad company, with full knowledge of the long existence of Mr. East's small shallow well on his homestead, dug a well twenty feet in diameter and 66 feet deep on its own adjacent property, from which it pumped 25,000 gallons of water per day. This resulted in lowering the water level on plaintiff's land and drying up his well. The trial court found that the railroad's well was not a reasonable use of its property, and that plaintiff *and* his land had sustained damage in the sum of $206.00. Nevertheless, the trial court granted judgment for the railroad. The Court of Civil Appeals reversed and rendered judgment in favor of East. It followed what has since become known as the "reasonable use" or "American rule" as set forth in Bassett v. Salisbury Mfg. Co., 43 N.H. 569, 82 Am.Dec. 179 (1862), which held that the right of a landowner to draw underground water from his land was not absolute, but limited to the amount necessary for the reasonable use of his land, and that the rights of adjoining landowners are correlative and limited to reasonable use. The court also noted the contrary English doctrine laid down in Acton v. Blundell, 12 M. & W. 324, 152 E.R. 1223 (Ex. 1843), that, "if a man digs a well on his own field and thereby drains his neighbor's, he may do so unless he does it maliciously." The court said that "to apply that rule under the facts shown here would shock our sense of justice."

Adoption of the Common Law Rule of Absolute Ownership

Thus, on the appeal of the *East* case to this Court, the conflicting aspects of the "reasonable use" rule and the common law rule, later referred to as the "English rule" or "absolute ownership rule," were clearly presented. This Court discussed both rules and made a deliberate choice of the common law rule as announced in Acton v. Blundell, supra, reciting that it had been followed

since 1843 in the courts of England "and probably by all the courts of last resort in this country before which the (subject) has come, except the Supreme Court of New Hampshire." Houston & T. C. Ry. Co. v. East, 98 Tex. 146, 81 S.W. 279, 280 (1904). In reversing the Court of Civil Appeals and rejecting the "reasonable use" rule, this Court adopted the absolute ownership doctrine of underground percolating waters. It cited approvingly the language of the Supreme Court of Ohio in Frazier v. Brown, 12 Ohio St. 294 (1861): "In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground water percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy . . . ."[9]

In holding that the owner may withdraw water from beneath his land without liability for lowering the water table and thus damaging his neighbor's well and land, the Court mentioned only waste and malice as possible limitations to the rule. Absent these, the Court clearly embraced the doctrine stated in Acton v. Blundell, supra, that this type of damage "falls within the description *damnum absque injuria*, which cannot become the ground of action." This legal maxim denotes a loss without injury in the legal sense, that is, without the invasion of a legal right or the violation of a legal duty. Langbrook Properties, Ltd. v. Surrey County Council, 3 ALL E.R. 1424 (Ch.1969). In *Langbrook*, which was an action for subsidence caused by withdrawal of ground water, the court held that the law of negligence and nuisance did not apply under the English rule because pumping of the water was lawful and there was no duty to protect against the injury. We have been cited no case from a jurisdiction which adheres to the English rule in which actions in tort for subsidence have been recognized.

[The opinion then reviews numerous Texas precedents.]

The facts and legal issues in Langbrook [Properties, Ltd. v. Surrey County Council, (1969) 3 ALL E.R. 1424 (Ch. 1969)], were most similar to those in the instant case. In *Langbrook*, the plaintiffs alleged nuisance and negligence in an action for damages to their property due to subsidence alleged to have been caused by defendants in the manner by which they withdrew underground water from their own nearby property. The only question before the court was whether plaintiffs' suit, cast in nuisance and negligence, stated a cause of action. The court, after an exhaustive review of the English cases, held that the law of nuisance and negligence was not applicable in the case by reason of the acts complained of because there was no duty to take care against the resulting damage and no unlawful act of interference with lawful rights of the plaintiffs. The court said:

> The authorities cited on behalf of the defendants in my judgment establish that a man may abstract the water under his land which percolates in undefined channels to whatever extent he pleases, notwithstanding that this may result in the abstraction of water percolating under the land of his neighbour and, thereby, cause him injury. In such circumstances the principle of *sic utere tuo ut alienum non laedas* (use your property so as not to injure the property of another) does not operate and the damage is *damnum sine injuria* (damages suffered without the invasion of a legal right or the violation of a legal duty).

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[9] The public policy considerations were said to be (1) "because the existence, origin, movement and course of such waters, . . . are so secret, occult and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible"; and (2) "because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, . . ." etc. 81 S.W. 279 at p. 281.

> Is there then any room for the law of nuisance or negligence to operate? In my judgment there is not . . . if there were, it seems to me highly probable that the courts would already have said so, and yet I have not been referred to any case in which that was done.

The above holding is in accord with Texas rules of tort law that (1) in order to create liability for the maintenance of a nuisance, the act complained of must in some way constitute an unlawful invasion of the right of another, and (2) for redress in negligence actions there must be a violation of a legal right and the breach of a legal duty.

Stare Decisis

We agree that some aspects of the English or common law rule as to underground waters are harsh and outmoded, and the rule has been severely criticized since its reaffirmation by this Court in 1955. Most of the critics, however, recognize that it has become an established rule of property law in this State, under which many citizens own land and water rights. The rule has been relied upon by thousands of farmers, industries, and municipalities in purchasing and developing vast tracts of land overlying aquifers of underground water. Approximately 50,000 wells are used to irrigate 2,800,000 acres in the thirteen county High Plains area of West Texas. As shown in the official reports cited earlier in this opinion, over 2,600 water wells have been drilled in Harris County alone while this rule of immunity from liability was in effect. The very wells which brought about this action were drilled after the English rule had been reaffirmed by this Court in 1955.

On this subject, we are not writing on a clean slate. Even though good reasons may exist for lifting the immunity from tort actions in cases of this nature, it would be unjust to do so retroactively. The doctrine of *stare decisis* has been and should be strictly followed by this Court in cases involving established rules of property rights. It is for this reason that, as to past actions complained of in this case, we follow the English rule and Restatement of Torts § 818 (1939) in holding that defendants are not liable on plaintiff's allegations of nuisance and negligence. The same reasoning applies to plaintiffs' other allegations in tort (wrongful diversion of surface waters onto and across plaintiffs' lands and wrongful taking and conversion of plaintiffs' property), which the Court of Civil Appeals did not reach. We have considered all of plaintiffs' points of error in the Court of Civil Appeals complaining of the trial court's judgment and find them to be without merit.

As To Future Wells and Subsidence

. . . As far as we can determine, there is no other use of private real property which enjoys such an immunity from liability under the law of negligence. This ownership of underground water comes with ownership of the surface; it is part of the soil. Yet, the use of one's ground-level surface and other elements of the soil is without such insulation from tort liability. Our consideration of this case convinces us that there is no valid reason to continue this special immunity insofar as it relates to future subsidence proximately caused by negligence in the manner which wells are drilled or produced in the future. It appears that the ownership and rights of all landowners will be better protected against subsidence if each has the duty to produce water from his land in a manner that will not negligently damage or destroy the lands of others.

Therefore, if the landowner's manner of withdrawing ground water from his land is negligent, willfully wasteful, or for the purpose of malicious injury, and such conduct is a proximate cause of the subsidence of the land of others, he will be liable for the consequences of his conduct. The addition of negligence as a ground of recovery shall apply only to future subsidence proximately caused by future withdrawals of ground water from wells which are either produced or drilled in a

negligent manner after the date this opinion becomes final.

While this addition of negligence as a ground of recovery in subsidence cases applies to future negligence in producing water from existing wells and those drilled or produced in a negligent manner in the future, it has been suggested that this new ground of recovery should be applied in the present cause of action. This is often done when a court writes or adds a new rule applicable to personal injury cases, but seldom when rules of property law are involved. This is because precedent is necessarily a highly important factor when problems regarding land or contracts are concerned. In deeds, property transactions, and land developments, the parties should be able to rely on the law which existed at the time of their actions.

Accordingly, the judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed.