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RIGHTS IN SUBTERRANEAN WATERS.

To one, whose taste leads him to consider the law in its historical relations, there is scarce one of the numerous topics embraced in it, which may not afford interesting speculations, as well as valuable suggestions and reflections.

The science of Comparative Jurisprudence has not received the attention it deserves. As a department of ethnology, it has not been assigned the place which its importance would justify. There are few more infallible tests of the condition of a people, their social development and relative advance in refinement and good morals, than the laws, written or unwritten, by which their property is held, their rights determined, or their wrongs redressed. The twelve tables were the brief body of laws of Savage Rome. The Code, Pandects, and Institutes of Justinian, were summaries of the refined and complicated system of legal ethics, which had been developed by the changes through which that people had passed, during the life of a thousand years, as well as of the wants which had had to be supplied during that period by the wisdom and foresight of the lawgiver. Every lawyer of our own day, with the experience and observation of a score of years, cannot fail to have remarked the progress which jurisprudence has been silently

making within a period as brief as that; nor can a man justly lay claim to eminence as a jurist, who has contented himself with studying the dry details of dogmatic rules alone.

These remarks, though general and in some measure commonplace, have been suggested by a recent examination of some of the leading cases in the English and our own books, in which is involved the doctrine of the modern law of easements and servitudes. In no department of the law has progress been more noticeable than in this. Principles now well settled and familiar, were controverted, and, in not a few instances, unheard of within the recollection of many still at the bar. Nor will our space admit of extending the illustration of this, beyond a simple class of these questions.

Though the subject of rights of water found within and beneath one's own soil, and percolating in veins and currents through the body of the earth, was anticipated and provided for to a considerable extent, by a clause in the Digest which Mr. Justice MAULE has translated: "If a man dig a well in his own field and thereby drain his neighbor's, he may do so unless he does it maliciously;" it is not a little remarkable, that the first case in which the point was discussed and settled in England, so far as we have been able to discover, was that of *Acton* vs. *Blundell*, in the Exchequer Chamber in 1843. Nor was it in fact settled, until the case of *Chasemore* vs. *Richards* was decided in the House of Lords in 1859. The first of these (reported in 12 M. & W. 325, 354), presented this state of facts. The plaintiff, and those under whom he claimed, for the purpose of supplying water for working a cotton-mill, dug a large well upon his premises, the benefit of which he and they had enjoyed for many years, when the defendant sunk a coal-pit in land in his possession, at a distance of three-quarters of a mile from the mill, and subsequently, another pit seven hundred and thirty-five yards from the plaintiff's mill. The effect of opening these coal-pits was to draw off the water from this well, so as seriously to impair the value of the mill, the ground between the two being porous and consisting of strata through which the water percolated from the well to the pits. There was no charge that the defendant had done this maliciously, or with an intent to

injure the plaintiff, or without exercising due and reasonable care. Both in the argument and decision of the case, reference is made to the doctrines applicable to surface-currents of water, and liberal citations are made from the civil law writers. TINDAL, C. J., quotes the language of Judge STORY in *Tyler* vs. *Wilkinson*, 4 Mas. 401, and concludes "that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith." The court held, that the plaintiff was without remedy for the injury he had sustained. But it should be remarked, that they carefully avoid determining what would have been the law, if the plaintiff had enjoyed the water of his well, uninterruptedly, for more than twenty years.

The case of *Chasemore* vs. *Richards*, 5 H. & N. 982, was of a somewhat different character, yet involving many of the same principles. The plaintiff owned a mill which was operated by a river, which derived a part of its supply of water from a swampy piece of land bordering upon it, into which the rain from an extensive watershed of country flowed and settled, and percolated through the earth to the stream first mentioned. This state of things had continued for more than sixty years, when the defendants dug a well within this land which belonged to them, and from the water that collected therein, supplied the town of C. by means of pumping the same from this well. The action was for thus diverting the water which would otherwise have found its way, by percolation, through the earth to the stream, and thereby depriving the plaintiff's mill of the benefit thereof. It was first heard, on error from the Court of Exchequer, in the Exchequer Chamber in 1857, and again upon error, in the House of Lords in 1859. The case of *Broadbent* vs. *Ramsbotham*, involving many of the same points, had been decided by the Court of Exchequer in 1856, 11 Exch. 692. Opinions were delivered in the House of Lords by WIGHTMAN, J., Lords CHELMSFORD, CRANWORTH, and WENSLEYDALE, in the latter of which it is remarked, that "their Lordships had now to decide for the *first time* the question as to the rights of underground water." He refers with approbation to

Kent's Commentaries, Angell on Watercourses, and a case from 1 Rawle's Rep. 27, and quotes also from the Civil Law. In showing the difficulty of applying the ordinary rules in respect to running water, to underground currents, one of the judges refers to a fact stated by Lord BROUGHAM, that the French Artesian well at the Abattoir de Grenelle, was said to draw part of its supplies from a distance of forty miles underground, and, as far as is known, from percolating water. The judgment of the House of Lords was adverse to the plaintiff, and the law in England seems now to be settled upon the point.

The question had already arisen and been decided in the American courts, and their judgment had anticipated that of the English courts. In Massachusetts it was raised in the case of *Greenleaf* vs. *Francis*, 18 Pick. 117, and decided in 1836. This, we believe, was the earliest American case reported, and grew out of a diversion of the water from the plaintiff's well, which was supplied by a living spring into which it had been excavated, by the defendant's well which he had dug near that of the plaintiff, cutting off thereby the source of the supply of the latter. The court held it was not actionable. This was followed by the case of *Dexter* vs. *Prov. Aq. Co.* in 1840, 1 Story 387, where the plaintiff had enjoyed the waters of a spring in his own land for watering his cattle and irrigation for more than twenty years, and the defendants had deprived him of these by digging a well near by, for the purpose of supplying the city of Providence with water. Upon the strength of the case of *Balston* vs. *Bensted*, 1 Campb. 463, which will be noticed hereafter, the judge held that the plaintiff was entitled to an injunction against this diversion. But he did not consider or settle what the plaintiff's rights would have been, independent of what he was assumed to have gained by prescription.

The Court of Connecticut, in 1850, had occasion to consider the question in the case of *Roath* vs. *Driscol*, 20 Conn. 533, which was in many respects like that of *Greenleaf* vs. *Francis*, and was decided in the same manner, in an able and well considered opinion by ELLSWORTH, J. In Vermont the same conclusion was

reached in the case of *Chatfield* vs. *Wilson*, 28 Verm. 49, and 32 Verm. 361. Although, in that case, the act complained of was not the diversion of water from one's spring or well, by drawing away the same by means of excavations within another's land, but consisted in the defendant's filling in, upon his own land, hard and impervious earth, in order to prevent the water flowing through his land to that of his neighbor, and thereby reaching his spring or well. And this was held not to be actionable, not being done with an intent to deprive another of what the one causing it did not wish to apply to his own use.

In 1855 cases occurred in New York and in Pennsylvania which engaged the attention of their courts. In the first of these, *Ellis* vs. *Duncan*, 21 Barb. 230, the injury complained of was the cutting off the supply of water from a natural spring that rose in the plaintiff's land by the defendant's working a quarry in his own land. In the latter, *Wheatley* vs. *Baugh*, 25 Penn. St. 528, the diversion complained of, was that of the waters of a natural spring which was essential to carry on the plaintiff's business as a tanner. It was occasioned by the defendant commencing to work a valuable copper mine within his own premises, at a point more than five hundred yards from the plaintiff's spring. The question is examined with great ability and thoroughness by LEWIS, C. J., and the judgments in both cases were in favor of the defendants.

It is not proposed to collect here, the various cases in which this and similar questions have been raised; and these which have been mentioned, have been selected partly to show the recency and chronological order of the decisions, and partly to exhibit the various phases in which the leading point in the cases presented itself in applying the principles upon which the decisions rest.

It should be observed, that the question in these cases has not turned upon the simple fact that the water, whose diversion was the subject of complaint, was flowing beneath the surface of the earth. It is now well settled, that where water has formed for itself a known and ascertainable course or channel, in which it flows, it is governed by the same rules as to being obstructed or diverted, whether flowing beneath or upon the surface of the earth:

Dudden vs. *Guardians*, &c., 1 H. & N. 630. So it is well settled, that this diversion of underground supplies of a well or a spring, may not be made by a stranger who is not acting with the right of a landowner, within the limits where the act occasioning the diversion is done: *Parker* vs. *Bos. & M. R. R.*, 3 Cush. 107. And all the cases agree, that even such landowner may not deprive the adjacent owner of the benefit of such underground water, with an intent to work him an injury and not in the *bonâ fide* use of his own premises for some proper purpose.

When we come to analyze the grounds upon which the courts have rested their decisions, in the various cases which have arisen upon this subject, the discussion will be found to have taken a pretty wide range. They have drawn hints and rules from analogy with the law of running streams, and also from the distinction between these, as obvious incidents of property and elements of value, and the secret deposits or currents of water within the earth, whose existence may be unknown or unsuspected till developed by the art and industry of man. It has, moreover, been assumed by some in reaching their conclusion, that the water within the body of earth, over which a man's property extends, is as much a part of what constitutes it, so far as ownership may be predicated of it, as the minerals, marl, or other substances which compose it and give it value.

It will, probably, be found to rest upon a few simple principles of legal right. The first of these is the dominion, which every man has in and over his own lands, limited only by the restriction "ut alienum non lædas." Whatever use he can apply it to, or whatever use he can make of its materials, he may exercise, if he do not thereby deprive some other person of a paramount right. If, for instance, he wishes to work a steam-engine, he may dig a well to supply the necessary water, or may draw it from a spring in his own land, and so long as he can derive the necessary supply from these sources he may lawfully use them. But it is to be remembered, that his neighbor, in this respect, has as good rights as he, and in the language of LEWIS, C. J., "the law has never gone so far as to recognise in one man a right to convert another's farm to his own use for the purposes of a filter."

Besides, there is a policy which enters into the determination of this question, which must have operated largely in producing so uniform a course of decisions. If the right to enjoy a well, for instance, or a spring, is absolute because once rightfully obtained, and another may not interfere therewith, even in working his own premises, without being subjected to an action, the owner of a well for a cottage or a farm-yard, may forever prevent his neighbor from excavating within his own soil for coal or minerals, though of vastly more value to the owner and importance to the public than the well, which is thereby disturbed, can be to the owner.

By adopting, moreover, a different rule from that which is now become settled law, inasmuch as no one can ordinarily know beforehand the course or direction of the vein of water that may be struck by excavations beneath the surface, if a mere prior occupation of an underground current or vein of water, by means of a well, is to give one an exclusive right to enjoy it, the owner of such a well might be able to deter all other persons for a greater or less distance from digging a well or a drain, or working a mine or a quarry, for fear of infringing upon his rights at the peril of a lawsuit.

There is an apparent hardship, in some cases, it must be admitted, growing out of this rule of law. In some parts of the country a spring of water upon one's premises is of immense value, often one of the important sources of value to the premises themselves. It may be appropriated to purposes of art as well as of domestic use and comfort. So a man may have obtained for the convenience of his homestead a valuable well of water at a large expense, and it must often work a great and sometimes an irreparable mischief to the owner of such spring or well, if a neighbor, for his own convenience, may cut off its supply and deprive the owner of its use. And this consideration has, at times, led judges to inquire whether and how far priority of occupation and enjoyment of sources of an underground supply of water come within the rule of law as to watercourses flowing upon its surface. (See *Roath* vs. *Driscoll.*) In respect to the latter the law is uniform and simple. I cannot turn a stream away from my neighbor's

mill or meadow, although I may put it to far more profitable uses than he has hitherto done.

But the question about which there has been the most discussion, and which can hardly be considered as settled yet, is how far one may gain a prescriptive right by long enjoyment to the use of underground water.

The earliest and most leading case in favor of the affirmative, is that of *Balston* vs. *Bensted*, 1 Campb. 467, which has already been mentioned. In that Lord ELLENBOROUGH assumed that there could be no doubt, that after enjoying a spring in one's land for twenty years, any one who should by digging in his own land, draw down the head of the spring, so as not to be of use to the owner, would be liable therefor. Such "exclusive enjoyment of water in any particular manner, affords a conclusive presumption of right in the party so enjoying it."

Judge STORY, in the case already cited, adopted and acted upon this as a settled principle of law. The court of Massachusetts in *Greenleaf* vs. *Francis*, enter somewhat into the discussion of this question. But it was not called for, as the well in that case, had been in existence only for twelve or fourteen years.

The doctrine of *Balston* vs. *Bensted*, was directly impugned by CRESSWELL, J., in *Chasemore* vs. *Richards*, who also refers to *Dickenson* vs. *Grand J. Canal Co.*, 7 Exch. 282, as sustaining the same view as his own. And WIGHTMAN, J., in the case of *Chasemore* vs. *Richards*, above cited, says that the opinion of Lord ELLENBOROUGH "amounted only to the dictum of an eminent judge, followed by no decision of the case, and is directly at variance with the judgment of the Court of Exchequer in the case of *Dickenson* vs. *Grand J. Canal Co.*"

Though the point is purposely waived in some of the American cases, and that of *Smith* vs. *Adams*, 6 Paige 435, may seem to favor the views of Lord ELLENBOROUGH in *Roath* vs. *Driscoll*, above cited, the court of Connecticut affirm, that "nothing is gained by a mere continued preoccupancy of water under the surface." The court of Pennsylvania is equally positive in the case of *Wheatley* vs. *Baugh*;—"No man by the mere prior enjoyment of the

advantages of his own land, can establish a servitude upon the land of another;" and they deny that any length of enjoyment of a natural spring of water upon one's land, gives the owner any prescriptive right to continue it against a disturbance by another adjoining owner, in the proper prosecution of his business upon his own premises.

In *Chasemore* vs. *Richards*, COLERIDGE, J., in a dissenting opinion, was inclined to the notion that a mill-owner might, by long enjoyment of water percolating through the earth, acquire a prescriptive right thereto, while GOULD, J., in *Ingraham* vs. *Hutchinson*, 2 Conn. 597, impugns the doctrine of *Balston* vs. *Bensted*, as not being well founded or tenable.

In this state of the law, it may not be impertinent to examine briefly the principles upon which prescriptions rest, so far as they apply to cases like that under consideration. We are encouraged to do this, from a conviction that such an examination will lead to the same conclusion to which the later cases in England and our own courts obviously tend.

Regarded as a right, *jure naturæ*, as incident to the ownership of the property, this does not depend upon length of enjoyment. My right to the unobstructed, undiverted flow of water in a natural stream running through my land, is as complete the first hour of my ownership, as it will be after fifty years' enjoyment, because it is an incident, *jure naturæ*, to the property in the land.

Prescription, therefore, is something other than and distinct from what is naturally and necessarily an incident of property in lands. As applied to easements and servitudes, it implies something accessary or added to the natural rights of such property. And this can only be acquired by grant, wherein one gains something with which another parts. Prescription always implies a grant; and long enjoyment of what is claimed, if had under certain circumstances consistent with such a prescription, is deemed by law, to be evidence of such a grant having been made. Under the ancient notion of prescription, this enjoyment must have been continued so long that no one could negative its having originated in right. In modern times, the courts have adopted

the analogy of limitation of titles to land, and hold an enjoyment under the circumstances alluded to, continued for the length of time prescribed by local statute as the period of limitation, to be presumptive evidence of a grant having been made, and they do not require the party relying upon it to produce his deed, assuming as a presumption of law, if it is not produced, that it has been lost.

One of the circumstances requisite to raise a presumption of such a grant from mere enjoyment of what is thus claimed, is that it should be adverse to and so exercised, as to be known by the party against whom it is to prevail. "*Nec clam nec precario*," as well as that the acts done should be with an intent thereby to claim a right, are admitted by all writers to be among the requisites of establishing a prescription.

These principles are too elementary to justify the citation of authorities to sustain them. And yet it seems only necessary to apply some of the most familiar of them, in guiding us to a satisfactory solution of the question how far one can acquire a prescriptive right to the enjoyment of underground waters, against the acts of an adjacent landowner done within the limits of his own estate.

In the first place, in digging a well or drawing water from a spring within one's own land, he does no more than exercise a clear legal right. If his is the only spring or well in the neighborhood, he enjoys it to the injury or disturbance of no other person's right. Nor can this be in any sense, adverse to the right of any one. Ordinarily, it would be difficult or impossible to know from what direction the water is passing to reach his spring or his well, so that, if there be several adjoining owners, he cannot know against which of these he is acquiring an adverse right by enjoyment. And if it can be supposed that he knows, and intends to draw the water from the land of an adjacent owner, how far can he extend this? If the supply is derived from a quarter or half a mile, or as in the case mentioned, of the Artesian well, can it be supposed that he intends to claim a right as against landowners so remote?

Again, can an adjacent landowner in such a case, be presumed to know that the owner of the well or spring, is deriving the supply for this from his land, and in that way be held to acquiesce in the exercise of a right adverse to himself?

In the next place, as every prescription implies a grant where there is a grantor who parts with something intentionally and understandingly, and a grantee who, with a like intention and understanding, accepts what is granted, it is certainly a most forced presumption of a grant where neither party would have known, during the period of the pretended acquisition of the right, that the one was deriving what he was enjoying from the other.

The first moment that the one party can know that he is using what he derives from the other, is when the latter, in the exercise of an unquestioned right of property, excavates within his own premises for a well, or for minerals, or a quarry, and detects the source of supply which his neighbor, more or less remote, has been enjoying. And with what propriety can it then be said, that the latter has acquired a prescriptive right to the enjoyment, by its having been continued twenty years adversely to the other landowner, and with his knowledge and acquiescence?

The nearest analogy, perhaps, to an easement of this kind, would be that of light, under the English Common Law, and that of the lateral support of the land of one by that of another. In respect to the latter, it is rather a simple incident of property than an easement, and if it is claimed also for the support of a house on the land, because it was an ancient one, the fact that the house was there and was acquiring an easement of support, would be obvious to the adjacent landowner, as would be the case in respect to a house in whose favor a prescription of light and air should be claimed.

Without pursuing the inquiry any further, the conclusion seems to be clear, upon general principles, that the doctrine of prescriptive rights cannot properly be applied to the enjoyment of water percolating through the earth. And it may be remarked, that even in the matter of light and air, there are so many objections