An Agricultural Law Research Article

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Originally published in UNIVERSITY OF ILLINOIS LAW FORUM
1960 U. ILL. L.F. 189 (1960)

HISTORY AND SCOPE OF ILLINOIS DRAINAGE LAW

BY HAROLD W. HANNAH *

PERHAPS THE HISTORY of Illinois drainage law can fairly be said to have commenced when it got to be more economic to drain than to find another piece of land. It is difficult to put it any better than Smurr did when he said: [1]

> "This growing importance of the law of drainage is shown by an examination of the early decisions of our supreme court, in which we find that during the first half century after the organization of the State of Illinois, during that period when government land could be had, or land could be bought from the private owners for a mere nominal consideration, when it was cheaper to buy a new farm than to drain the farm one already owned, the rules of drainage remained unlitigated, and that it was not until the rich prairie lands of this state could no longer be had for the asking . . . that the leading case of *Gilman* [*sic*, *Gillham*] *v. Madison Co. R. R. Co.*,[2] following the rule of the civil law, fixed and determined the rights of drainage in Illinois."

Further appreciation of the physical-economic background which spawned our Illinois drainage laws may be gained from this statement in a study of drainage districts made by the Illinois Tax Commission: [3]

> "The open, rolling prairie lands offered little attraction to early settlers. Although the low, luxuriant growth attested to good soil, for many months of the year these lands were wet and soft. The black, sticky soil could not be turned by the iron and wooden ploughs that had proven effective in the sandy loams from which the emigrants had come.[4] Gnats, flies, snakes, and wild animals infested the tall grasses and the dread black swamp fever was thought to steal out of these places at night to take toll of settlers and their families.
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> "These great open spaces, today among the richest lands in the world, were finally farmed and developed because of two major factors. The tide of settlers continued to sweep into Illinois and in a few short years had claimed all of the timbered lands. Thus necessity forced men to locate on what were considered to be the less desirable homesteads. In 1837, John Deere invented his 'self-polisher steel plow' which made it

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[1] SMURR, FARM DRAINAGE 2 (1909).

[2] 49 Ill. 484 (1869).

[3] ILLINOIS TAX COMM'N, DRAINAGE DISTRICT ORGANIZATION AND FINANCE 1879-1937, at 1-2 (1941).

[4] CONGER, HISTORY OF THE ILLINOIS RIVER VALLEY 442 (1932).

possible to till the black soil of the open lands. It was then that the settlement of Illinois was pushed rapidly northward. New areas were opened by the charter lines of the Illinois Central Railroad in 1851 and by the construction of the Illinois-Michigan Canal during the period 1840 to 1857. In the short space of sixty years (1820-1880) the greatest part of the agriculturally productive lands of Illinois had been tilled. Farmers then turned their attention to the improvement of the natural state of these lands and the increase in agricultural production; not the least of the problems encountered was improving the natural drainage."

Drainage in Illinois municipalities will not be included in the scope of this article, since the drainage function is only one of many with which such municipalities are clothed under the general police power. This applies also to sanitary districts. Of comparatively recent origin, but of limited use thus far, are laws providing for the organization of river conservancy districts and surface water protection districts. These will not be discussed.

THE CIVIL-LAW RULE ADOPTED

Though *Gillham v. Madison Co. R.R.* is credited with bringing the civil-law rule to Illinois, *Gormley v. Sanford*,[5] is more widely quoted. In it is the near-classic statement that:

"As water must flow, and some rule in regard to it must be established where land is held under the artificial titles created by human law, there can clearly be no other rule at once so equitable and so easy of application as that which enforces natural laws. There is no surprise or hardship in this, for each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land." [6]

According to Kinyon and McClure [7] the courts of Louisiana were the first to adopt the civil-law rule in this country, applying it as early as 1812.[8] Pennsylvania was the first common-law state to adopt the rule, applying it in 1848 in the case of *Martin v. Riddle*.[9]

Since *Gormley v. Sanford*, Illinois courts have considered hundreds of drainage disputes, and certain interpretations and modifications of the rule announced in that case have emerged. These are discussed in another part of this symposium.[10]

There are at least two other concepts of drainage law in operation in

[5] 52 Ill. 158 (1869).

[6] *Id.* at 162.

[7] Kinyon & McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891, 895 (1940).

[8] Orleans Navigation Co. v. Mayor of New Orleans, 1 La. (2 Martin (O.S.)) 214 (1812).

[9] 26 Pa. 415 (1848).

[10] See Ratcliff, *Private Rights Under Illinois Drainage Law*, *supra* p. 198.

the United States besides the civil-law concept: the "common enemy" rule and the "reasonable use" rule. Theoretically, the common enemy rule gives a landowner an unrestricted right to deal with surface water coming to his land. But actually the courts which follow this concept have developed many limitations on his right to dispose of surface waters. The reasonable use concept gives a landowner the right to deal with surface water, but his right depends on the degree of his need and the damage his neighbor would suffer from his ditching, tiling, or other drainage operations. The courts which follow this rule may arrive at conclusions just as unreasonable as any arrived at by courts which follow either of the other two rules.

It is perhaps accurate to say that the present soundness and usability of the drainage doctrine in Illinois depend at least as much on the insight and wisdom of key personnel on the bench and in the legal profession as on any rule which might have been adopted.

THE CONSTITUTIONAL PROVISION ON DRAINAGE DISTRICTS

By 1870 interest in drainage had gathered enough momentum to get the constitutional convention of 1869-1870 to write the following provision in the constitution of 1870: "The General Assembly may pass laws permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes, across the lands of others." [11]

Subsequent events proved this section to be quite inadequate. Not only did it purport to give rights to "occupants" who might have no tenure but it did not provide for any kind of local organization or for any means of assessment or financing. Furthermore it did not mention levees, and flood protection along the Mississippi was one of the early needs. There were attempts nevertheless to base both drainage and levee organization on the constitutional provision, resulting for the most part in a painful history of frustration and wasted effort.[12] After a series of decisions adverse to attempted district organization, culminating in *Updike v. Wright*,[13] its defects were largely cured in 1878 by amendment—the first to be made to the constitution of 1870. The constitutional provision now reads:

> "The General Assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof, with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this State, by special assessments upon the property benefited thereby."

[11] ILL. CONST. art. IV, § 31.

[12] For a discussion of the tribulations of the SNY Levee District, see ILLINOIS TAX COMM'N, *op. cit. supra* note 3, at 16-20.

[13] 81 Ill. 49 (1876).

As a result of this amendment and subsequent decisions, certain major issues were clarified and principles established, important among which are that:

(1) Only owners are involved—"occupants" have no standing with respect to district organization.

(2) Flood protection and the construction of levees is a proper function of drainage districts.

(3) Districts can be organized to construct drains or levees where needed, and keep them in repair. The power of eminent domain may be exercised in acquiring necessary rights.

(4) Special assessments may be levied—but only on land which is benefited.

(5) Districts are quasi-public corporations.[14]

STATUTORY DEVELOPMENTS

Nineteenth-Century Legislation

After adoption of the constitutional provision the Illinois legislature in 1879 passed two laws, known as the Levee Act[15] and the Farm Drainage Act.[16] The primary purpose of both was to provide landowners with a legal entity or organization which could be used to force unwilling owners into the district and to secure adequate drainage or flood protection for the lands lying within the district.[17]

The Levee Act was entitled "An act to provide for the construction, reparation and protection of drains, ditches, and levees across the lands of others, for agricultural, sanitary, and mining purposes, and to provide for the organization of drainage districts." The Farm Drainage Act was entitled "An act to provide for drainage for agricultural and sanitary purposes. . . ."

Both acts were amended in 1881 and 1883. In 1885 two separate codes were passed, one purporting to be a revision and amendment of the Levee Act, the other an amendatory revision and consolidation of the Farm Drainage Act.[18] The Levee Act was designed primarily for levee, pumping, and flood protection works and envisioned large districts. The Farm Drainage Act was designed to serve mainly those lands needing subsurface tiling, open ditches, and other works to effect the drainage of surplus waters.

As eventually amended, eight kinds of districts were possible under these two acts—drainage and levee, mutual, and outlet districts under the

[14] Smith v. People *ex rel.* Detrick, 140 Ill. 355, 29 N.E. 676 (1892).

[15] Ill. Laws 1879, at 120; ILL. REV. STAT. c. 42, §§ 1-75 (1953).

[16] Ill. Laws 1879, at 142.

[17] These early Illinois laws were the basis for drainage legislation in many other states, according to 1 KERR, MINING AND WATER CASES ANNOTATED vii (1912).

[18] Ill. Laws 1885, at 77; ILL. REV. STAT. c. 42, §§ 82-166 (1953).

Levee Act; and one-township, union (in two townships), special (in three or more townships), user, and river districts under the Farm Drainage Act. Under the Farm Drainage Act mutual agreement could be used in place of petition in organizing these various types of districts. All districts provided by the Levee Act were organized before the county court (the circuit courts and Superior Court of Cook County had concurrent jurisdiction). One-township and union districts formed under the Farm Drainage Act were organized under the highway commissioners: This created one of the many problems arising from this multiplicity of procedures—that of lost or nonexistent records in many of the one-township and union districts.

Prior to the adoption of either of these laws and commencing as early as 1861 with a law giving the Board of Supervisors of Tazewell County authority to levy a tax to drain certain lands in Malone Township,[19] a series of public and private laws were passed in aid of drainage and swamp-land reclamation.[20]

Constitutionality of the Levee Act was tested and upheld in an 1884 decision [21] which is also credited with settling several other points regarding preliminary organization, notice, objections, and collection of assessments. Also questions soon arose regarding the "separability" of the two laws. These were disposed of in *Gauen v. Moredock & Ivy Landing Drainage Dist.*,[22] where the court said:

> "[T]he General Assembly has undertaken to enact two entirely separate and independent codes of law applicable to the subject of drainage and the organization and government of drainage districts. While ordinarily acts passed by the General Assembly at the same session and relating to the same subject will be construed together as forming one body of law, yet this is so only by virtue of a rule of construction which must yield to the legislative will when properly expressed. It does not admit

[19] Ill. Laws 1861, at 209. For a survey of even earlier laws and of drainage in the early settlements of Illinois, see ILLINOIS TAX COMM'N, *op. cit. supra* note 3, at 39-51.

[20] "In 1850 an act of Congress (43 U.S.C.A. 982) provided for the granting of swamp and overflowed lands to various states. The land so granted to Illinois was turned over to the counties in 1852 to be reclaimed by drainage and used for county purposes. Such lands were to be under the care and superintendence of the county court which was to appoint a 'drainage commissioner' to conduct the sales of such lands. The county surveyor was to prepare plats of the swamp lands and return such plats to the clerk of the county court, whereupon the court fixed the valuation upon each tract. The purchasers of these tracts were given a certificate by the drainage commissioner, and a deed was later executed by the county court. The court was to sell only enough swamp lands to insure reclamation of all such land, any balance to be granted to the several townships to be used for educational purposes. At the discretion of the county, such balance could also be used for the construction of roads or bridges, or for other public works." DIVISION OF PROFESSIONAL AND SERVICE PROJECTS, WORKS PROGRESS ADMINISTRATION, INVENTORY OF THE COUNTY ARCHIVES OF ILLINOIS No. 83 (Sangamon County (Springfield)) 28-29 (Historical Records Survey, April 1939).

[21] Blake v. People, 109 Ill. 504 (1884).

[22] 131 Ill. 446, 23 N.E. 633 (1890).

of doubt, we think, that it was the intention of the Legislature to keep these two codes of law entirely distinct, so as to subject drainage districts organized under one act only to the rules provided by that act, the provisions of the other independent act having in such case no application. This it was clearly competent for the Legislature to do, and we think their intention to produce that result is too clearly expressed to admit of any possible question." [23]

The distinction between the two acts was preserved until a new drainage code became effective in 1956.[24] The effect of this "dual" set of laws is very well expressed in the following excerpt from the Tax Commission Report:

"The confusion in legal provisions resulting from this original division of drainage law into two major and several minor sets of procedure has grown with each passing year. In spite of the original difference in the type of drainage intended to be provided by the districts organized under each act there is little or no legal distinction in purpose. Districts without levees or pumping plants but providing a combined system of drainage ditches may be organized and proceed under either the Farm Drainage Act or the Drainage and Levee Act, although several provisions of the Drainage and Levee Act are applicable only to those districts constructing or maintaining levees or pumping plants. Districts providing pumping plants may be organized and proceed under the Drainage and Levee Act or as special drainage districts under the Farm Drainage Act. Districts constructing or maintaining levees can be organized and proceed under the Levee Act or as special drainage districts under the Farm Drainage Act, and probably also as a one- or two-township district under the Farm Drainage Act.

"Amendments to the statutes have been numerous and complicated, sometimes involving enactment, repeal, and re-enactment in addition to various changes. Much of the legislation and many of the amendments were passed for a particular drainage district which desired to perform a certain act or had already performed it and needed validating

[23] *Id.* at 461-62, 23 N.E. at 638.

[24] This table from ILLINOIS TAX COMM'N, *op. cit. supra* note 3, gives a picture of activity under these acts from 1879 to 1937:

Drainage Costs of Different Types of Districts, and Proportion of Assessments Levied as Annual Benefits, 1879-1937

Types of districts	Number of districts	Number of acres	Construction levies	Annual benefit levies	Total levies	Cost per acre	Percent total annual benefit levies are of total levies
		Multiply dollars and acres by 1,000					
Levee and outlet	526	2,714	$45,521	$10,602	$56,123	$20.68	18.9
Special drainage	78	637	7,231	1,751	8,982	14.10	19.5
Union	327	815	2,798	171	2,969	3.64	5.8
Township and user	515	1,082	4,001	205	4,206	3.89	4.9
Mutual	95	206	448	32	480	2.33	6.7
State (all districts)	1,541	5,454	59,999	12,761	72,760	13.34	17.5

legislation. Because of the court decisions declaring drainage districts unconstitutional prior to the amendment of 1878 and several subsequent decisions interpreting the law and invalidating prior assessments and operations, the statutes are cluttered with validating clauses of no present significance.

"Much of the drainage legal code is now found in court cases rather than in the statutory provisions themselves. In interpreting this court law continual reference must be made to the statute, since subsequent amendments may have rendered particular court decisions meaningless. Moreover, because of the numerous procedures depending upon the type of organization of the district involved in a given case, it is not always clear to which type or types of districts a particular interpretation applies. The ruling of the court in one case might not hold for other types of districts.

"Because of this legal confusion, drainage district procedure is unnecessarily complicated and expensive. This has hampered the real function of the laws, which is to make possible the drainage and flood protection of farm lands by cooperative effort. Codification and clarification are imperative." [25]

The 1956 Drainage Code

The conclusions of the tax commission were shared by almost everybody who had any contact with Illinois drainage law. In 1950, the Illinois State Bar Association and the College of Agriculture of the University of Illinois sponsored a conference of interested organizations and agencies to consider possible methods of accomplishing the revision and codification of these laws. On two occasions, bills establishing legislative committees to undertake this work had failed to be called for final reading prior to adjournment of the General Assembly, so it was believed that the initiative must come from individuals rather than from the legislature. The conference appointed a drafting committee composed of Donald V. Dobbins, Chairman; Robert F. White, Vice Chairman; Robert F. Goodyear; Kenneth H. Lemmer; D. E. Martensen; Glenn Ratcliff; and Harold W. Hannah. The Illinois Drainage Code which became effective in 1956 was the product of this drafting committee.[26]

The Code embodies the following ideas and concepts:

(1) There should be but one comprehensive statute under which all drainage districts are organized and operate.

(2) All districts should be organized in and operate under the county

[25] *Id.* at 57.

[26] For a good commentary on the purpose and effect of the Code, and on the legislative and judicial background leading up to it, see commentary by Dobbins, *Illinois Drainage Law*, ILL. ANN. STAT. cc. 39-42, at XIX-XXXV (Smith Hurd 1956).

courts instead of being strewn among the county courts, the circuit courts, the Superior Court of Cook County, highway commissioners, and justices of the peace.

(3) All drainage commissioners should be appointed by the county judge, with allowance for districts previously organized which choose to continue the election method.

(4) The county treasurers should serve as district treasurers, the county clerks as district clerks, and the county collectors as district collectors—with but minor exceptions—in order that all the records of each district might be found in the courthouse.

(5) Special assessment procedure should be simplified, particularly for maintenance and repair work.

(6) Provisions should be made for the organization of districts by referendum as well as by the present petition process.

(7) Provisions for the formation of mutual, outlet, and user districts should be retained in substance.

(8) Provisions for the organization of subdistricts and minor subdistricts should be retained in substance.

(9) Provisions on consolidation, annexation, detachment, and dissolution should be retained in substance.

(10) All connections to a district drainage system should be approved by the commissioners of the district both as to design and manner of construction.

(11) The law should be logically divided into appropriate articles and sections having, for example, all of the provisions on the organization of districts in one article, all provisions on the powers and duties of commissioners and other officers in another article, and all provisions on the levy and collection of assessments in another article.

(12) The provisions of the Civil Practice Act should apply to proceedings under the Drainage Code, except in those instances in which special procedure is provided in the Code.

(13) There was much sound law in the former statutes and in court decisions, and this should be preserved.

Included as a part of the Code is the substance of two early laws which enlarged an owner's right to improve his drainage beyond the point permitted by the court's interpretation of the civil-law rule.[27] The first, a part of the Agricultural Drainage Act (1885), consisted of seven sections under the general heading "Rights of Drainage." It provides a means through which an owner may acquire the right to extend a covered drain across the land of another to a proper outlet. The second (1889) concerned drains constructed by mutual license or agreement. Both laws are important be-

[27] ILL. REV. STAT. c. 42, § 2—2 to —7 (1959).

cause they offer a means, apart from district organization, whereby a landowner can, to a limited extent, improve or maintain his drainage across the lands of others.

It is worthy of note that drainage districts in Illinois have operated completely "on their own." They have no legal obligation to cooperate with other public agencies,[28] and no state agency has any general supervisory or regulatory power over them. Perhaps the strict delineation of function, the limitation on use of funds raised by special assessment, and the lack of financial inducement to commissioners have all played a part in keeping drainage districts free of all relationships except those which have to do with the solution of the drainage or flood protection problem of the district.

Significant increased interest on the part of the state in drainage activity is indicated by a 1959 law which provides that "the Department of Public Works and Buildings shall make a survey and prepare a master plan for the drainage of and flood control of all watershed areas of this State. . . ." [29] Such plans are to be "made available to private interests and to each public agency in this State having drainage powers in the development of drainage projects."

Though this legislation does not affect the legal role of Illinois drainage districts, it could in time have a significant effect on their number, size, location, and relationship one to the other. In time also there could conceivably be legislation designed to give impetus to total watershed development—including among other things some redefinition and possibly amalgamation of the functions of local agencies such as drainage, sanitary, soil conservation, and river conservancy districts.

[28] The Code does require drainage commissioners to cooperate with other districts and certain public agencies in the exchange of drainage information. ILL. REV. STAT. c. 42, § 12—19 (1959). Also, a 1959 amendment gives the commissioners authority to cooperate in the use of the district's structures for game or fish preserves or in furthering the "purposes of the 'Fish Code of Illinois' or the 'Game Code of Illinois.'" *Id.* § 4—14(g).

[29] ILL. REV. STAT. c. 42, § 472 (1959).