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INTERFERENCES WITH SURFACE WATERS

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ALTHOUGH there are few reported cases on the subject prior to 1850, the draining and disposing of casual surface waters¹ has been a constantly increasing source of litigation between neighboring possessors of land during the last ninety years. Whenever a tract of land is graded, cultivated, or otherwise improved, a swamp drained, a structure erected, or a highway or railroad constructed, the flow of surface waters is likely to be altered, with resulting harm to some possessor of nearby land. In so far as fundamental principles are concerned, there would seem to be little or no difference between such cases and the cases in which harm is caused to a possessor of land through interferences with watercourses, lakes, or subterranean waters or through the media of fumes, noises, or vibrations. In each instance, one possessor of land sustains harm in the use and enjoyment of his land as a result, usually, of another's use and enjoyment of other land. The

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¹By "casual surface waters" is meant those occasional recurrent accumulations of excess water from rains and melting snows which either stand in temporary ponds and puddles or drain off across the countryside until they reach a drainway, stream or lake, or are absorbed in the soil. See Restatement of Torts, Vol. IV, sec. 846. This, of course, is not and does not purport to be a precise legal definition of the lines of demarcation between casual surface waters on the one hand and watercourses, lakes and subterranean waters on the other. It is merely a general description of one form that water may take and in which it may give rise to legal controversies. The typical surface water cases are easily distinguishable from the typical cases involving streams, lakes and underground waters, and it is with such typical situations that this article is concerned. A precise distinction between the various forms of water is necessary only in the borderline cases, and it is at least arguable that such cases are sui generis and should not be decided by a definitive process of forcing them into a class where they do not clearly belong in order to apply to them rules that are not clearly appropriate.

problem is one of reconciling conflicting uses of land, and the important question is whether circumstances exist which will justify a court in shifting the loss, or a part of it, from the person harmed to the person causing it.

Few courts, however, seem to have recognized this fact, and only in New Hampshire and possibly Minnesota have all invasions of a possessor's interests in the use and enjoyment of his land been treated as different phases of a single problem involving the application of the same fundamental principles, irrespective of the medium through which the invasions are caused.² The general practice has been to make different categories according to the medium through which the harm is caused; to regard invasions through interference with the flow of surface waters as quite different from invasions of the same interests through other media, and to adopt somewhat different principles of law in each category. Consequently, in most jurisdictions there is a separate and distinct

²In New Hampshire the reasonable use doctrine is followed and applied as the basic principle of liability in cases in which an invasion of interests in the use and enjoyment of land results from interferences with the flow of surface waters, see *infra*, footnote 88; from interferences with subterranean waters, as in *Bassett v. Salisbury Mfg. Co.*, (1862) 43 N. H. 569, 82 Am. Dec. 170 (where defendant obstructed the drainage of subterranean percolating water from plaintiff's land), and from interferences with watercourses, as in *Hayes v. Waldron*, (1863) 44 N. H. 580, 84 Am. Dec. 105; *Green v. Gilbert*, (1880) 60 N. H. 144 (where sawdust was discharged into a watercourse); *Concord Mfg. Co. v. Robertson*, (1889) 66 N. H. 1, 25 Atl. 718, 18 L. R. A. 679; *Gillis v. Chase*, (1891) 67 N. H. 161, 31 Atl. 18, 68 Am. St. Rep. 645 (diversion of water from watercourse). The doctrine is also applied in other cases of private nuisance, where the invasion of interests in the use and enjoyment of land is caused through other media: *Davis v. Whitney*, (1894) 68 N. H. 66, 44 Atl. 78 (invasion by lint, dust, and smoke); *Ladd v. Granite State Brick Co.*, (1894) 68 N. H. 185, 37 Atl. 1041 (invasion by smoke); *Faucher v. Trudel*, (1902) 71 N. H. 621, 52 Atl. 443 (invasion by noise from blacksmith shop).

In Minnesota, as in New Hampshire, the reasonable use doctrine is applied as the basic principle of liability in cases where an invasion of interests in the use and enjoyment of land results from interferences with the flow of surface waters, see *infra*, footnotes 101-102; from interferences with subterranean waters, *Erickson v. Crookston Waterworks Power & Light Co.*, (1907) 100 Minn. 481, 111 N. W. 391, 9 L. R. A. (N.S.) 1250, 10 Ann. Cas. 843, (1908) 105 Minn. 182, 117 N. W. 435, 17 L. R. A. (N.S.) 650 (appropriation of subterranean water hindered plaintiff's use of artesian wells); and from interferences with watercourses, *Red River Roller Mills v. Wright*, (1883) 30 Minn. 249, 15 N. W. 167, 44 Am. Rep. 194; *Pinney v. Luce*, (1890) 44 Minn. 367, 46 N. W. 561; *Minnesota Loan & Trust Co. v. St. Anthony Falls Water-Power Co.*, (1901) 82 Minn. 505, 85 N. W. 520. Although there is some doubt, it is probable that the reasonable use doctrine is also applied in other cases of private nuisance where the invasion is caused through other media; *Romer v. St. Paul City Ry.*, (1899) 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455 (invasion by noise from operation of street cars); cf. *Brede v. Minnesota Crushed Stone Co.*, (1919) 143 Minn. 374, 173 N. W. 805, 6 A. L. R. 1092 (invasion by dust from operation of quarry and rock crusher).

"law of surface waters" which in many respects differs markedly from the law applicable in the same jurisdictions to watercourses, subterranean waters, and private nuisances in general.³ Even with this segregation and isolation of the law governing interferences with the flow of surface waters, however, there is little uniformity in the principles of law adopted by the several jurisdictions in the United States with respect to such invasions. Three principal and widely divergent views have been developed—the so-called civil law rule, common enemy rule, and reasonable use rule—and it will be the first object of this article to discuss these three rules in some detail, and point out, so far as possible, the actual results produced by each.

I. THE EXISTING LAW ON THE SUBJECT

A. THE CIVIL LAW RULE

In substance, the civil law rule of surface waters is 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.⁴ Each parcel of land

³In New York, for example, the common law or common enemy rule of surface waters is followed. See *infra*, footnote 71. But the reasonable use doctrine is followed in the law of watercourses, *Prentice v. Geiger*, (1878) 74 N. Y. 341; *Strobel v. Kerr Salt Co.*, (1900) 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, 79 Am. St. Rep. 643, re-argument denied, (1900) 165 N. Y. 617, 59 N. E. 1131; but cf. *Whalen v. Union Bag & Paper Co.*, (1913) 208 N. Y. 1, 101 N. E. 805; the law of subterranean waters, *Hathorn v. Natural Carbonic Gas Co.*, (1909) 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N.S.) 436, 128 Am. St. Rep. 555, 16 Ann. Cas. 989; *People v. New York Carbonic Acid Gas Co.*, (1909) 196 N. Y. 421, 90 N. E. 441; but cf. *Dunbar v. Sweeney*, (1921) 230 N. Y. 609, 130 N. E. 913, and the law governing private nuisances in general, *Campbell v. Seaman*, (1876) 63 N. Y. 568, 20 Am. Rep. 567; *Booth v. Rome, W. & O. T. R. R.*, (1893) 140 N. Y. 267, 35 N. E. 592, 24 L. R. A. 105, 37 Am. St. Rep. 552; *McCarty v. Natural Carbonic Gas Co.*, (1907) 189 N. Y. 40, 81 N. E. 549, 13 L. R. A. (N.S.) 465, 12 Ann. Cas. 840; see *Cogswell v. New York, N. H. & H. R. R.*, (1886) 103 N. Y. 10, 13-14, 8 N. E. 537, 57 Am. Rep. 701.

Likewise, in Massachusetts the common law or common enemy rule of surface waters is followed. See *infra*, footnote 64. The reasonable use doctrine, however, is followed in the law of watercourses, see *Stratton v. Mount Hermon Boys' School*, (1913) 216 Mass. 83, 84-89, 103 N. E. 87, 49 L. R. A. (N.S.) 57, Ann. Cas. 1915A 768, and in the law governing private nuisances in general, *Rogers v. Elliott*, (1888) 146 Mass. 349, 15 N. E. 768, 4 Am. St. Rep. 316; *Stevens v. Rockport Granite Co.*, (1914) 216 Mass. 486, 104 N. E. 371, Ann. Cas. 1915B 1054; *Tortorella v. H. Traiser Co.*, (1933) 284 Mass. 497, 188 N. E. 254, 90 A. L. R. 1203. But there seems to be an unlimited privilege to interfere with the flow of subterranean percolating waters. *Greenleaf v. Francis*, (1836) 18 Pick. (Mass.) 117; see *Walker v. Cronin*, (1871) 107 Mass. 555, 564; *Davis v. Spaulding*, (1892) 157 Mass. 431, 434, 32 N. E. 650, 19 L. R. A. 102.

⁴No quotation from text book, law review, or case has been found which expresses the civil law rule in precisely the language used above. Yet, from

is said to be subject to a natural servitude for the natural flow of surface water across it,⁵ and therefore a possessor of lower land is not privileged to obstruct the natural flow of surface water from higher land,⁶ nor is a possessor of higher land privileged to increase the natural flow of surface water upon lower land.⁷

The courts of the jurisdictions in which the civil law rule was originally adopted appear to have derived it directly from the civil codes of foreign nations⁸ and to have justified their adoption of it upon a principle of natural law expressed in the maxim *aqua currit*

an exhaustive study of cases and other materials, it is the opinion of the writers that this statement accurately expresses the fundamental proposition embodied in the rule. Almost universally the rule is stated in more specific terms. For example, in *Martin v. Riddle*, (1848) 26 Pa. St. 415, 416, it was said, "Where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances. Hence the owner of the lower ground has no right to erect embankments whereby the natural flow of water from the upper ground shall be stopped; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is directed from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels, and thus increase the wash upon the lower fields."

⁵"The doctrine of the civil law is, that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature. . . ." *Nininger v. Norwood*, (1882) 72 Ala. 277, 282-283, 47 Am. Rep. 412. A substantially similar statement may be found in innumerable cases; see for example: *Gray v. McWilliams*, (1893) 98 Cal. 157, 161-162, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163, and *Dugan v. Long*, (1930) 234 Ky. 511, 514, 28 S. W. (2d) 765. See also Louisiana Civil Code (1870) Art. 660.

⁶*Gray v. McWilliams*, (1893) 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; *Farkas v. Towns*, (1897) 103 Ga. 150, 29 S. E. 700, 68 Am. St. Rep. 88; *Garland v. Aurin*, (1899) 103 Tenn. 555, 53 S. W. 940, 48 L. R. A. 862, 76 Am. St. Rep. 699; Louisiana Civil Code (1870) Art. 660.

⁷*Heier v. Krull*, (1911) 160 Cal. 441, 117 Pac. 530; *Boynton v. Longley*, (1885) 19 Nev. 69, 6 Pac. 437, 3 Am. St. Rep. 781; Louisiana Civil Code (1870) Art. 660. In most civil law rule jurisdictions this phase of the rule has been modified to a very great extent. See *infra*, footnotes 145-160 and text.

⁸In *Martin v. Riddle*, (1848) 26 Pa. St. 415, 416, it was said of the law of surface waters: "Not readily finding the subject treated of in any of our usual books of reference, I venture to extract the law from books of foreign origin—*Corp. Jur.* 39, 3, 1, and 43, 21; *Code Nap.* sec. 640; *Poth du Voisinage*." The Civil Code of Louisiana, although a composite of French and Spanish law, is based primarily upon the Code Napoleon. Tucker, *Source Books of Louisiana Law* (1935) 1-7, 36-45; Saunders, *Revised Civil Code of Louisiana* (2d ed. 1933) iii-ix, xvii-xxx. The language of the Louisiana Civil Code dealing with surface waters, (1870) Art. 660, is practically identical with the language used in the civil codes of foreign nations. See French Civil Code (1804) Art. 640; Italian Civil Code (1865) Art. 536.

et debet currere.⁹ The real reason for the rule, however, would seem to be found in the idea that the least harmful and therefore the best way to dispose of surface waters is to require the maintenance of natural drainage rather than to permit each possessor to deal with the surface water problem as he pleases and without regard to the welfare of his neighbors.¹⁰

The courts of Louisiana were the first to adopt the civil law rule in this country, applying it as early as 1812.¹¹ The first American jurisdiction outside of Louisiana to adopt the rule was Pennsylvania, applying it in the case of *Martin v. Riddle*.¹² Shortly thereafter it was adopted in other jurisdictions.¹³ In none of these earlier cases, however, was reference made to the common enemy rule, which was being developed by other courts at approximately the same time.¹⁴ In the more recent cases in which the civil law rule has been adopted, however, the courts have expressly recognized the common enemy rule and elected to adopt the civil law rule in preference to it.¹⁵

⁹"Almost the whole law of watercourses is founded on the maxim of the common law, aqua currit et debet currere. Because water is descendible by nature, the owner of a dominant or superior heritage has an easement in the servient or inferior tenement for the discharge of all waters which by nature rise in or flow or fall upon the superior." *Kauffman v. Griesemer*, (1856) 26 Pa. St. 407, 413, 67 Am. Dec. 437.

¹⁰"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." *Gormley v. Sanford*, (1869) 52 Ill. 158, 162.

¹¹*Orleans Navigation Co. v. New Orleans*, (1812) 2 Martin (O.S.) 214. For subsequent cases, see *Lattimore v. Davis*, (1839) 14 La. (O.S.) 31, 63 Am. Dec. 120; *Martin v. Jett*, (1838) 12 La. 501, 32 Am. Dec. 120.

¹²(1848) 26 Pa. St. 415. This case, although decided in 1848, was not reported until 1852.

¹³*Overton v. Sawyer*, (1854) 46 N. C. 308, 62 Am. Dec. 170; *Butler v. Peck*, (1865) 16 Ohio St. 334, 88 Am. Dec. 452. During this period several cases were decided in jurisdictions which subsequently adopted the common enemy rule of surface waters, in which the courts indicated their approval of the civil law rule. See *Bellows v. Sackett*, (1853) 15 Barb. (N.Y.) 96, 101-102; *Laumier v. Francis*, (1856) 23 Mo. 181, 184.

¹⁴See *infra*, footnotes 52-54. Furthermore, in these early cases the courts were not aware of the reasonable use doctrine, which had not yet been applied to cases involving interference with the flow of surface waters. But in *Butler v. Peck* (1865) 16 Ohio St. 334, 88 Am. Dec. 452, a case in which the court applied the civil law rule to facts involving an alteration in the natural flow of surface water, counsel's brief contained a citation of the case of *Bassett v. Salisbury Manufacturing Co.*, (1862) 43 N. H. 569, 82 Am. Dec. 170, where the reasonable use doctrine was applied to interferences with the flow of subterranean waters. The court in the *Butler Case*, however, apparently did not recognize the possibility of applying the reasonable use doctrine to cases of alterations in the natural flow of surface waters.

¹⁵See *Ogburn v. Connor*, (1873) 46 Cal. 346, 351-352, 13 Am. Rep. 213;

At the present time the courts of the following jurisdictions, with a good many modifications and qualifications which will be discussed below, purport to follow the civil law rule: Alabama,¹⁶ California,¹⁷ Colorado,¹⁸ Georgia,¹⁹ Illinois,²⁰ Iowa,²¹ Kansas,²²

Albany v. Sikes, (1894) 94 Ga. 30, 32-35, 20 S. E. 257, 26 L. R. A. 653, 47 Am. St. Rep. 132; Boyd v. Conklin, (1884) 54 Mich. 583, 587-593, 20 N. W. 595, 52 Am. Rep. 831.

¹⁶Nininger v. Norwood, (1882) 72 Ala. 277, 47 Am. Rep. 412; Crabtree v. Baker, (1883) 75 Ala. 91, 51 Am. Rep. 424; Savannah, A. & M. Ry. v. Buford, (1894) 106 Ala. 303, 17 So. 395; Southern Ry. v. Lewis, (1910) 165 Ala. 555, 51 So. 746; Tennessee, A. & G. Ry. v. Cardon, (1937) 27 Ala. App. 585, 177 So. 171. See generally Cocke, Rights and Liabilities of Coterminal Landowners With Respect to Obstruction and Diversion of Surface Water, (1926) 1 Ala. L. J. 117. See also *infra*, footnotes 147 and 187.

¹⁷Ogburn v. Connor, (1873) 46 Cal. 346, 13 Am. Rep. 213; Gray v. McWilliams, (1893) 98 Cal. 157, 32 Pac. 976, 21 L. R. A. 593, 35 Am. St. Rep. 163; Le Brun v. Richards, (1930) 210 Cal. 308, 291 Pac. 825, 72 A. L. R. 336. See generally Note, (1920) 8 Cal. L. Rev. 197. See also *infra*, footnotes 148 and 188.

¹⁸See City of Boulder v. Boulder & White Rock Ditch & Reservoir Co., (1923) 73 Colo. 426, 428, 216 Pac. 553, 36 A. L. R. 1458; Debevit v. New Brantner Extension Ditch Co., (1925) 78 Colo. 396, 398, 241 Pac. 1111. See also *infra*, footnote 149.

¹⁹Farkas v. Towns, (1897) 103 Ga. 150, 29 S. E. 700, 68 Am. St. Rep. 88; Hendrix v. McEachern, (1927) 164 Ga. 457, 139 S. E. 9; see Albany v. Sikes, (1894) 94 Ga. 30, 32-35, 20 S. E. 257, 26 L. R. A. 653, 47 Am. St. Rep. 132. See also *infra*, footnote 191.

²⁰Dayton v. Drainage Commissioners, (1889) 128 Ill. 271, 21 N. E. 198; Chicago, P. & St. L. Ry. v. Reuter, (1906) 223 Ill. 287, 79 N. E. 166; Beechley v. Harms, (1928) 332 Ill. 185, 163 N. E. 387; see Gormley v. Sanford, (1869) 52 Ill. 158, 162. See generally (1918) 13 Ill. L. Rev. 63; (1920) 15 Ill. L. Rev. 282; (1921) 15 Ill. L. Rev. 462; (1923) 17 Ill. L. Rev. 454. See also *infra*, footnote 150.

²¹In early Iowa cases dealing with surface water, the court rejected both the civil law rule and the common enemy rule. An intermediate rule was adopted which was to the effect that a possessor of land is subject to liability for *unnecessarily* causing harm to others. Livingston v. McDonald, (1866) 21 Iowa 160, 89 Am. Dec. 563; Willits v. Chicago, B. & K. C. Ry., (1893) 88 Iowa 281, 85 N. W. 313, 21 L. R. A. 608. However, in a subsequent case the court misconstrued the Livingston Case and said that the civil law rule had been adopted in that case. Baker v. Akron, (1909) 145 Iowa 485, 487-489, 122 N. W. 926, 30 L. R. A. (N.S.) 619. As a result of this misconstruction, the Iowa Court at the present time follows the civil law rule. Herman v. Drew, (1933) 216 Iowa 315, 249 N. W. 277; see Young v. Scott, (1933) 216 Iowa 1253, 1254, 250 N. W. 484; Clark v. Pierce, (Iowa 1938) 277 N. W. 711. See generally (1929) 14 Iowa L. Rev. 547. See also *infra*, footnotes 113 and 151.

²²In early Kansas cases the court adopted and applied the common enemy rule, Atchison, T. & S. F. R. R. v. Hammer, (1879) 22 Kan. 763, 31 Am. Rep. 216; see Missouri Pacific Ry. v. Keys, (1895) 55 Kan. 205, 217-218, 40 Pac. 275, 49 Am. St. Rep. 249, subject to the exception that a possessor of lower land is subject to liability for harm caused by the obstruction of a natural drainway for the flow of surface water. Palmer v. Waddell, (1879) 22 Kan. 352. This exception to the common enemy rule is discussed below at footnotes 165-177 and text. However, in 1911 a statute was enacted which in effect adopted the civil law rule with respect to agricultural lands and to highways in rural districts. Kansas, Laws 1911, ch. 175, sec. 1. This statute was amended in 1917, Kansas, Laws 1917, ch. 176, sec. 1, and again

Kentucky,²³ Louisiana,²⁴ Maryland,²⁵ Michigan,²⁶ Nevada,²⁷ North Carolina,²⁸ Ohio,²⁹ Pennsylvania,³⁰ South Dakota,³¹ Tennessee,³² and Texas.³³

in 1931. Kansas, Laws 1931, ch. 184, sec. 1. As thus amended the statute may be found in Kansas, General Statutes 1935, ch. 24, sec. 105. Consequently, at the present time the civil law rule is in force in Kansas with respect to agricultural lands. *Martin v. Lown*, (1922) 111 Kans. 752, 208 Pac. 565; *Skinner v. Wolf*, (1928) 126 Kan. 158, 266 Pac. 926; see *Dyer v. Stahlhut*, (1938) 147 Kan. 767, 770, 78 P. (2d) 900. See *infra*, footnotes 152 and 190.

²³*Johnson v. Marcum*, (1913) 152 Ky. 629, 153 S. W. 959; see *Pickerill v. Louisville*, (1907) 125 Ky. 213, 225-226, 30 Ky. L. Rep. 1239, 100 S. W. 873; *Dugan v. Long*, (1930) 234 Ky. 511, 514, 28 S. W. (2d) 765; Board of Trustees of Town of Auburn v. Chyle, (1934) 256 Ky. 283, 286, 75 S. W. (2d) 1039. See *infra*, footnotes 153 and 192.

²⁴*Orleans Navigation Co. v. New Orleans*, (1812) 2 Martin (O.S.) (La.) 214; *Martin v. Jett*, (1838) 12 La. 501, 32 Am. Dec. 120; *Lattimore v. Davis*, (1839) 14 La. 161, 33 Am. Dec. 581; *Delahoussaye v. Judice*, (1858) 13 La. Ann. 587, 71 Am. Dec. 521; *Hooper v. Wilkinson*, (1860) 15 La. Ann. 497, 77 Am. Dec. 194; *Barrow v. Landry*, (1860) 15 La. Ann. 681, 77 Am. Dec. 199; *Bolinger v. Murray*, (1931) 18 La. App. 158, 137 So. 761. See Louisiana Civil Code (1870) Art. 660. See also *infra*, footnote 154.

²⁵*Philadelphia, W. & B. R. R. v. Davis*, (1888) 68 Md. 281, 11 Atl. 822, 6 Am. St. Rep. 440; *Baltimore & S. P. R. R. v. Hackett*, (1898) 87 Md. 224, 39 Atl. 510.

²⁶*Boyd v. Conklin*, (1884) 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831; *Gregory v. Bush*, (1887) 64 Mich. 37, 31 N. W. 90, 8 Am. St. Rep. 797; see *Leidlein v. Meyer*, (1893) 95 Mich. 586, 589-590, 55 N. W. 367; *Crane v. Valley Land Co.*, (1918) 203 Mich. 353, 359, 169 N. W. 18. See also *infra*, footnote 155.

²⁷*Boynton v. Longley*, (1885) 19 Nev. 69, 6 Pac. 437, 3 Am. St. Rep. 781.

²⁸*Overton v. Sawyer*, (1854) 46 N. C. 308, 62 Am. Dec. 170; *Porter v. Durham*, (1876) 74 N. C. 767; *Winchester v. Byers*, (1928) 196 N. C. 383, 145 S. E. 774. See also *infra*, footnote 156.

²⁹*Butler v. Peck*, (1865) 16 Ohio St. 334, 88 Am. Dec. 452; *Blue v. Wentz*, (1896) 54 Ohio St. 247, 43 N. E. 493; *Henicle v. Pennsylvania R. R.*, (1934) 49 Ohio App. 447, 197 N. E. 360. See also *infra*, footnotes 157 and 194.

³⁰In one of the earliest cases dealing with surface waters decided in Pennsylvania the civil law rule was not applied. *Bentz v. Armstrong*, (1844) 8 Watts & S. (Pa.) 40, 42 Am. Dec. 265. This case has since been cited for the proposition that an exception to the civil law rule exists in favor of urban land. *Gould*, Law of Waters (3d ed. 1900) sec. 268, p. 542. That so-called exception to the civil law rule is discussed below at footnotes 187-194 and text. Since that time, however, it has become settled in Pennsylvania that the civil law rule is in force with respect to rural land. *Martin v. Riddle*, (1848) 26 Pa. St. 415; *Kauffman v. Griesemer*, (1856) 26 Pa. St. 407, 67 Am. Dec. 437. See also *infra*, footnotes 158 and 189.

³¹See *Thompson v. Andrews*, (1917) 39 S. D. 477, 485-486, 165 N. W. 9. See also *infra*, footnotes 114, 116-117, and 159.

³²*Garland v. Aurin*, (1899) 103 Tenn. 555, 53 S. W. 940, 48 L. R. A. 862, 76 Am. St. Rep. 699; *Davis v. Louisville & N. R. R.*, (1921) 147 Tenn. 1, 244 S. W. 483. See *infra*, footnote 193.

³³In early cases the Texas court applied the common enemy rule of surface waters. *Barnett v. Matagorda Rice & Irrigation Co.*, (1904) 98 Tex. 355, 83 S. W. 801, 107 Am. St. Rep. 636. However, in 1915 a

B. THE COMMON ENEMY RULE

The "common enemy" or, as it is sometimes called, the "common law" rule of surface waters 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 to others.³⁴

Some courts have justified this rule upon a narrow and one-sided conception of the nature of land ownership.³⁵ Others have predicated their adoption of it upon the ground that it is consistent

statute was enacted which in effect adopted the civil law rule of surface waters. Texas, General Laws, First Called Session, 1915, ch. 7, sec. 1. This statute has been carried over into Vernon's Texas Statutes 1936, Art. 7589a. Consequently, at the present time the civil law rule of surface waters is in force in Texas. *Miller v. Letzerich*, (1932) 121 Tex. 248, 49 S. W. (2d) 404; 85 A. L. R. 451; *Roby v. Hawthorne*, (Tex. Civ. App. 1934) 77 S. W. (2d) 923; *Calhoun v. Baize*, (Tex. Civ. App. 1938) 114 S. W. (2d) 634. See *infra*, footnotes 118 and 160.

³⁴Perhaps the earliest clear expression of the common enemy rule is that in *Gannon v. Hargadon*, (1865) 10 Allen (Mass.) 106, 109-110, 87 Am. Dec. 625, where Chief Justice Bigelow said, "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any part of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities or in other directions than they were accustomed to flow. . . . [W]here there is no watercourse by grant or prescription, and no stipulation exists between coterminous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate or control the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. *Cujus est solum, ejus est usque ad coelum* is a general rule, applicable to the use and enjoyment of real property, and the right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor it is at all material, in the application of this principle of law, whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his land, or by erecting barriers or changing the level of the soil, so as to turn it off in a new course after it has come within his boundaries. The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom against one who does not act inconsistent with the due exercise of dominion over his own soil."

³⁵In *Grant v. Allen*, (1874) 41 Conn. 156, 160, it was said, "The right of the owner of land to determine the manner in which he will use it, or the mode in which he will enjoy it, the same being lawful, is too high in character to be affected by considerations growing out of the retention, diversion, or repulsion of mere surface water. . . ." See also *Goodale v. Tuttle*, (1864) 29 N. Y. 459, 467.

with the public policy favoring land improvement and development.³⁶ Still others have adopted the rule because, in their opinion, it represents the English "common law."³⁷

In recent years, some legal writers have questioned the conclusion that the "common enemy" rule is the rule of the English common law.³⁸ These writers assert that the rule is not supported by English authority,³⁹ and have therefore concluded that calling the "common enemy" rule the "common law" rule is misleading and erroneous. A few of these writers have gone even further and taken the position that the English authorities really support the civil law rule.⁴⁰ Consequently, it seems desirable to advert briefly to the English cases.

Prior to 1850 the English reports are rather barren of intelligible cases dealing with the law of surface waters.⁴¹ This may be due to the early establishment of administrative procedures which probably absorbed most of the controversies over land drainage.⁴²

³⁶"Society has an interest in the cultivation and improvement of lands, and in the reclamation of waste lands. It is also for the public interest that improvements shall be made, and that towns and cities shall be built. To adopt the principle that the law of nature must be observed in respect to surface drainage, would, we think, place undue restriction upon industry, and enterprise, and the control by an owner of his property." Andrews, J. in *Barkley v. Wilcox*, (1887) 86 N. Y. 140, 148, 40 Am. Rep. 519.

Similar language was used by Chief Justice Beasley in *Bowlsby v. Speer*, (1865) 31 N. J. L. 351, 352-353, 86 Am. Dec. 216.

³⁷*Edwards v. Charlotte, C. & A. R. R.*, (1893) 39 S. C. 472, 474-475, 18 S. E. 58, 22 L. R. A. 246, 39 Am. St. Rep. 746; *Abbott v. Kansas City, St. J. & C. B. Ry.*, (1884) 83 Mo. 271, 53 Am. Rep. 581.

³⁸3 Farnham, *Law of Waters and Water Rights* (1904) sec. 889b, pp. 2587-2591; Thomson, *Surface Waters*, (1889) 23 Am. L. Rev. 372, 387-391; Rood, *Surface Water in Cities*, (1908) 6 Mich. L. Rev. 448, 451-453; Note, (1935) 15 Bos. U. L. Rev. 892, 895-896.

³⁹See in addition to the material in footnote 38: Note, (1920) 8 Cal. L. Rev. 197, 198; Note, (1918) 3 Corn. L. Q. 313, 315; Note, (1929) 15 Va. L. Rev. 288, 290; Note (1929) 5 Wis. L. Rev. 239, 240.

⁴⁰3 Farnham, *Law of Waters and Water Rights* (1904) sec. 889b, pp. 2587-2589; Rood, *Surface Water in Cities*, (1908) 6 Mich. L. Rev. 448, 451-453. The cases upon which these writers mainly rely are cited *infra*, footnote 41.

⁴¹The following early English cases are the only ones which have been found dealing with the law of surface waters: *Anonymous*, (1344) Y. B. 18 Edw. III., p. 22, pl. 1; *Anonymous*, (1468) Y. B. 8 Edw. IV., p. 5, pl. 14; *Harcourt v. Spicer*, (1521) Y. B. 12 Hen. VIII., p. 2, pl. 2; *Ward v. Metcalfe*, (1641) Clayton 96. They are the cases principally relied upon by Farnham and Rood (footnote 40, *supra*) in support of their conclusion that the English law of surface waters really is in accord with the civil law rule. Their significance, however, is doubtful at the most.

⁴²For early English statutes establishing administrative procedures with respect to the drainage and reclamation of lands and the protection of them against the ravages of the sea and floods, see: (1427) 6 Hen. VI., ch. 5; (1429) 8 Hen. VI., ch. 3; (1439) 18 Hen. VI., ch. 10; (1444) 23 Hen. VI., ch. 8; (1472) 12 Edw. IV., ch. 6; (1487) 4 Hen. VII., ch. 1; (1531) 23

Whatever the explanation, there is so little authority that no really definitive statement can be made as to what the English common law of surface waters was prior to that time.⁴³ The cases decided since 1850 are no more satisfactory. In 1853, and again in 1855 and 1856 the Court of Exchequer decided that a possessor of lower land had no action against a possessor of higher land for withholding the natural flow of surface water from the lower land.⁴⁴ In the last two cases the court even made statements to the effect that an owner of land may use or dispose of surface water at his pleasure.⁴⁵ This attitude, quite at odds with the theory of the civil law rule, is in accord with the English view, established in *Acton v. Blundell*⁴⁶ and *Chasemore v. Richards*,⁴⁷ that the flow of *subterranean percolating waters* may be interrupted without liability; and it would seem to indicate that the English courts of that day regarded all water not forming part of a watercourse, whether surface or subsurface, as something which each possessor of land was privileged to use or fight for his own benefit regardless of the harm thereby caused to others. However, in other cases the English courts apparently gave indirect approval to the civil law rule.⁴⁸

Hen. VIII., ch. 5; (1533) 25 Hen. VIII., ch. 10. The draining and reclaiming of land was apparently regarded as a matter of great importance and a project to be encouraged enthusiastically: 24 Dasent, Acts of the Privy Council of England—1598-1599 (1905) 323, 329-330, 395-396.

⁴³Several courts in the British empire have questioned the conclusion (arrived at by the writers mentioned above, Notes 38-40) that the early English cases (Note 41) adopt the civil law rule of surface waters. See *Vinnicombe v. MacGregor*, (1903) 29 Vict. L. Rep. 32, 49-51; *Makowecki v. Yachimyc*. (Alberta 1917) 34 Dom. L. Rep. 130, 142-146; *Edwards v. Scott Rural Municipality*. (Sask. 1933) [1934] 1 W. W. Rep. 33, 40-44, aff'd, *Rural Municipality of Scott v. Edwards*, [1934] S. C. Rep. 332.

⁴⁴*Greatrex v. Hayward*, (1853) 8 Exch. 291, 22 L. J. Ex. 137; *Rawstrom v. Taylor*, (1855) 11 Exch. 369, 25 L. J. Ex. 33; *Broadbent v. Ramsbotham*, (1856) 11 Exch. 602, 25 L. J. Ex. 115, 4 W. R. 290.

⁴⁵"This is the case of common surface water rising out of springy or boggy ground, and flowing in no definite channel, although contributing to the supply of the plaintiff's mill. This water having no defined course, and its supply being merely casual, the defendant is entitled to get rid of it in any way he pleases." *Rawstrom v. Taylor*, (1855) 11 Exch. 369, 382, 25 L. J. Ex. 33.

"No doubt, all the water falling from heaven and shed upon the surface of a hill, at the foot of which a brook runs, must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which this water falls from dealing with it as he may please and appropriating it." *Broadbent v. Ramsbotham*, (1856) 11 Exch. 602, 615, 25 L. J. Ex. 115, 4 W. R. 290.

⁴⁶(1843) 12 M. & W. 324, 13 L. J. Ex. 289.

⁴⁷(1859) 7 H. L. Cas. 349, 29 L. J. Ex. 81, 5 Jur. (N.S.) 873, 7 W. R. 685.

⁴⁸In *Smith v. Kenrick*, (1849) 7 C. B. 515, 566, 18 L. J. C. P. 172, 13 Jur. 362, it was said in dicta, "And this is in accordance with the civil law, by which it was considered that land on a lower level, owed a natural

Furthermore, the courts of the British Empire, outside of England, do not follow a uniform view. Some of them have adopted the civil law rule,⁴⁹ and others the common enemy rule.⁵⁰ Consequently, it seems impossible to determine precisely what is or has been the British common law of surface waters; and it would therefore seem preferable to use the term "common enemy"⁵¹

servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down to it." And in *Scots Mines Co. v. Leadhill Mines Co.*, (1859) 34 L. T. (O.S.) 34, H. L., it was said, "It must be recollected that, without any convention, the occupier of a lower field holds it under the servitude of receiving the natural drainage from an adjoining field on a higher level. . . ." But in the latter case the statement quoted may have referred to the law of Scotland, which follows the civil law rule. See footnote 49. In *Whalley v. Lancashire & Yorkshire Ry.*, (1884) L. R. 13 Q. B. 131, 136, 53 L. J. Q. B. 285, 50 L. T. 472, it was said, "Then we come to the case of having property which is subject to this defect, that unless you can prevent the injury which the ordinary course of nature will bring upon it by transferring that injury to your neighbour's property, your property must suffer as a natural consequence of its position. . . . If the owner of such property, in order to cure that defect, were to do something to his land which . . . would throw that defect on his neighbour's land, he would, I think, according to ordinary principles of law, become liable to pay the damages this would occasion. . . ."

⁴⁹The civil law rule appears to have been adopted in the Australian state of Victoria, see *Vinnicombe v. MacGregor*, (1902) 29 Vict. L. Rep. 32, 33-45; also in India, *Sheik Hussain Sahib v. Subbayya*, (1925) I. L. R. Madras 441, Scotland, see *Campbell v. Bryson*, (1864) 3 Sess. Cas. (MacPh.) 254, 259-260, 263, and in the Isle of Guernsey, *Gibbons v. Lenfesty*, (1915) 84 L. J. P. C. 158. Prior to the adoption of the common enemy rule for all Canadian provinces (see footnote 50), the civil law rule was in force in Alberta. *Makowecki v. Yachimyc*, (1917) 34 Dom. L. Rep. 130; *Farnell v. Parks*, (1917) 38 Dom. L. Rep. 17.

⁵⁰The common enemy rule appears to have been adopted in New Zealand. *Black & White Cabs, Ltd. v. Tonks*, [1928] N. Z. L. Rep. 590. In the case of *Rural Municipality of Scott v. Edwards*, [1934] S. C. Rep. 332, the Supreme Court of Canada adopted the common enemy rule, thus making it the governing law of surface waters for all Canadian provinces except, possibly, Quebec. Prior to that time the courts of Manitoba, *Wilton v. Murray*, (1897) 12 Man. Rep. 35; *Meier v. Franklin*, [1927] 2 Dom. L. Rep. 294, Nova Scotia, *Harrison v. Harrison*, (1883) 16 N. S. Rep. 338, Ontario, *Williams v. Richards*, (1893) 23 Ont. Rep. 651, and Saskatchewan, *Edwards v. Scott Rural Municipality*, (1933) [1934] 1 W. W. Rep. 33, aff'd [1934] S. C. Rep. 332, had adopted the common enemy rule.

⁵¹It has been said that the term "common enemy" was first used to describe this rule as to surface waters in *Town of Union v. Durkes*, (1875) 38 N. J. L. 21, 22, where Chief Justice Beasley said, "Lord Tenderden forcibly expressed the legal idea that the surface water was a common enemy, which every proprietor may fight and get rid of as best he may." The reference to Lord Tenderden was said to have been to his opinion in the case of *King v. Commissioners of Sewers for Pagham, Sussex*, (1828) 8 Barn. & C. 355, 361, which dealt with the waters of the sea and not with surface waters. For that reason use of the term "common enemy" to describe the law of surface waters was characterized as misleading. See 3 *Farnham, Law of Waters and Water Rights* (1904) sec. 889c, pp. 2595-2596. However, in spite of the fact that the term was taken from a case dealing with the waters of the sea, it is submitted that it describes with substantial correctness the fundamental idea upon which the common enemy rule has been based. See footnote 34 and text.

rather than the misleading "common law" in referring to this rule.

In the United States, the development of the common enemy rule was approximately contemporaneous with the development of the civil law rule, except for the early cases in Louisiana, discussed above. The first case to adopt the common enemy rule seems to have been the Massachusetts case of *Luther v. Winnisimmet Co.*,⁵² decided in 1851. Within a short time thereafter the rule was either applied or approved in additional cases,⁵³ and in 1865 the Massachusetts court decided the case of *Gannon v. Hargadon*,⁵⁴ which has since become known as the leading case representing the common enemy rule. It is significant that, in all of these earlier cases, the courts did not refer to the civil law rule which was then being adopted by the courts of other jurisdictions.⁵⁵ However, in more recent cases in which the common enemy rule has been applied, the courts have recognized the existence of the civil law rule, and have elected expressly to follow the common enemy rule in preference to it.⁵⁶

At the present time the courts of the following jurisdictions, with numerous qualifications and modifications discussed below, purport to follow the common enemy rule: Arizona,⁵⁷ Arkansas,⁵⁸

⁵²(1851) 9 Cush. (Mass.) 171.

⁵³*Flagg v. City of Worcester*, (1859) 13 Gray (Mass.) 601; *Dickinson v. City of Worcester*, (1863) 7 Allen (Mass.) 19; *Bangor v. Lansil*, (1863) 51 Me. 521; *Barry v. City of Lowell*, (1864) 8 Allen (Mass.) 127, 85 Am. Dec. 690; see *Parks v. City of Newburyport*, (1857) 10 Gray (Mass.) 28, 29; *Goodale v. Tuttle*, (1864) 29 N. Y. 459, 467. In jurisdictions which later adopted the common enemy rule, several cases were decided at this period of time which do not seem to support either the civil law rule or the common enemy rule. *Earl v. De Hart*, (1856) 12 N. J. Eq. 280, 72 Am. Dec. 395; *Amick v. Tharp*, (1856) 13 Grat. (Va.) 564, 67 Am. Dec. 787; *Thomas v. Kenyon*, (1861) 1 Daly (N.Y.) 132.

⁵⁴(1865) 10 Allen (Mass.) 106, 87 Am. Dec. 625. Other cases decided during this year which followed and applied the common enemy rule are *Greeley v. Maine Central R. R.*, (1865) 53 Me. 200, and *Bowlsby v. Speer*, (1865) 31 N. J. L. 351, 86 Am. Dec. 216.

⁵⁵Nor were the courts, in cases decided during or before 1865, aware of the applicability of the reasonable use doctrine to alterations in the flow of surface waters, although that doctrine had been applied to interferences with subterranean percolating waters as early as 1862 in the case of *Bassett v. Salisbury Manufacturing Co.*, (1862) 43 N. H. 569, 82 Am. Dec. 170, discussed below at footnotes 79, 85-86 and text.

⁵⁶See, for examples, *Le Munyon v. Gallatin Valley Ry.*, (1921) 60 Mont. 517, 199 Pac. 915; *Barkley v. Wilcox*, (1881) 86 N. Y. 140, 40 Am. Rep. 519; *Baltzeger v. Carolina Midland Ry.*, (1899) 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789; *Jordan v. City of Benwood*, (1896) 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859.

⁵⁷*Gibson v. Duncan*, (1915) 17 Ariz. 329, 152 Pac. 856; see *Tucson v. Dunseath*, (1914) 15 Ariz. 355, 359, 139 Pac. 177; *Roosevelt Irr. Dist. v. Beardsley Land & Investment Co.*, (1929) 36 Ariz. 65, 70, 282 Pac. 937. See infra, footnotes 124, 171, and 183.

⁵⁸See *Little Rock & Ft. S. Ry. v. Chapman*, (1882) 39 Ark. 463, 473-

Connecticut,⁵⁹ District of Columbia,⁶⁰ Indiana,⁶¹ Maine,⁶² Massachusetts,⁶³ Mississippi,⁶⁴ Missouri,⁶⁵ Montana,⁶⁶ Nebraska,⁶⁷ New Jersey,⁶⁸ New Mexico,⁶⁹ New York,⁷⁰ North Dakota,⁷¹ Okla-

474, 43 Am. Rep. 280; cf. *Baker v. Allen*, (1899) 66 Ark. 271, 275, 50 S. W. 511, 74 Am. St. Rep. 93. See *infra*, footnotes 125 and 179.

⁵⁹*Chadeayne v. Robinson*, (1887) 55 Conn. 345, 11 Atl. 592, 3 Am. St. Rep. 55; *Byrne v. Farmington*, (1894) 64 Conn. 367, 30 Atl. 138; *Rutkoski v. Zalaski*, (1916) 90 Conn. 108, 96 Atl. 365; *Tide Water Oil Sales Corp. v. Shimelman*, (1932) 114 Conn. 182, 158 Atl. 229, 81 A. L. R. 256; see *Grant v. Allen*, (1874) 41 Conn. 156, 160. See *infra*, footnote 126.

⁶⁰*Baltimore & O. R. R. v. Thomas*, (1911) 37 App. D. C. 255; *Pearce v. Scott*, (1928) 58 App. D. C. 257, 29 F. (2d) 630. See *infra*, footnote 127.

⁶¹*Taylor v. Fickas*, (1878) 64 Ind. 167, 31 Am. Rep. 114; *Cairo & V. R. R. v. Stevens*, (1881) 73 Ind. 278, 38 Am. Rep. 139; *Clay v. Pittsburgh C. C. & St. L. Ry.*, (1905) 164 Ind. 439, 73 N. E. 904; *Ramsey v. Ketcham*, (1920) 73 Ind. App. 200, 127 N. E. 204. See *infra*, footnote 128.

⁶²*Bangor v. Lansil*, (1863) 51 Me. 521; *Greeley v. Maine Central R. R.*, (1865) 53 Me. 200; *Morrison v. Bucksport & B. R. R.*, (1877) 67 Me. 353; *Murphy v. Kelly*, (1878) 68 Me. 521. See *infra*, footnotes 121 and 165.

⁶³*Luther v. Winnisimmet Co.*, (1851) 9 Cush. (Mass.) 171; *Flagg v. City of Worcester*, (1863) 13 Gray (Mass.) 601; *Dickinson v. City of Worcester*, (1863) 7 Allen (Mass.) 19; *Gannon v. Hargadon*, (1865) 10 Allen (Mass.) 106, 87 Am. Dec. 625; *Franklin v. Fisk*, (1866) 13 Allen (Mass.) 211, 90 Am. Dec. 194; *Bates v. Smith*, (1868) 100 Mass. 181; *Maddock v. City of Springfield*, (1932) 281 Mass. 103, 183 N. E. 148. See *infra*, footnotes 129 and 166, and also *Abbott, Ways and Waters in Massachusetts*, (1915) 28 Harv. L. Rev. 478.

⁶⁴*Sinai v. Louisville, N. O. & T. Ry.*, (1893) 71 Miss. 547, 14 So. 87; *Columbus & G. Ry. v. Taylor*, (1928) 149 Miss. 269, 115 So. 200. See *infra*, footnotes 130 and 180.

⁶⁵Several early cases in Missouri appear to have adopted the civil law rule. *Shane v. Kansas City, St. J. & C. B. R. R.*, (1879) 71 Mo. 237, 36 Am. Rep. 480; see *Laumier v. Francis*, (1856) 23 Mo. 181, 184; *McCormick v. Kansas City, St. J. & C. B. R. R.*, (1879) 70 Mo. 359, 360-361, 35 Am. Rep. 431. However, since the case of *Abbott v. Kansas City, St. J. & C. B. R. R.*, (1884) 83 Mo. 271, 53 Am. Rep. 581, it has been definitely established that the common enemy rule, subject to certain qualifications, is in force in Missouri. *Adair Drainage District v. Quincy, O. & K. C. R. R.*, (1919) 280 Mo. 244, 217 S. W. 70; see *Place v. Union Township*, (Mo. App. 1934) 66 S. W. (2d) 584, 586; *Tackett v. Linnenbrook*, (Mo. App. 1938) 112 S. W. (2d) 160, 163-164. See generally English, *The Law of Surface Water as Applicable to Missouri and States Bounded by Large Rivers*, (1900) 51 Cent. L. J. 360. See also *infra*, footnote 131.

⁶⁶*Le Munyon v. Gallatin Valley Ry.*, (1921) 60 Mont. 517, 199 Pac. 915. See *infra*, footnote 167.

⁶⁷*Morrissey v. Chicago, B. & K. C. R. R.*, (1893) 38 Neb. 406, 56 N. W. 946; *Muhleisen v. Krueger*, (1930) 120 Neb. 380, 232 N. W. 735; see *Annheuser-Busch Brewing Ass'n v. Peterson*, (1894) 41 Neb. 897, 904, 60 N. W. 373; *Aldritt v. Fleischauer*, (1905) 74 Neb. 66, 69-70, 103 N. W. 1084. See also *infra*, footnotes 132, 172, and 181.

⁶⁸*Bowlsby v. Speer*, (1865) 31 N. J. L. 351, 86 Am. Dec. 216; *Fitzpatrick v. Gourley*, (1929) 104 N. J. Eq. 281, 145 Atl. 337; *Nathanson v. Wagner*, (1935) 118 N. J. Eq. 390, 179 Atl. 466. See *infra*, footnotes 133 and 177.

⁶⁹*Walker v. New Mexico & S. P. R. R.*, (1897) 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837. See *infra*, footnotes 134 and 168.

⁷⁰*Barkley v. Wilcox*, (1881) 86 N. Y. 140, 40 Am. Rep. 519; *Bennett v. Cupina*, (1930) 253 N. Y. 436, 171 N. E. 698; *Manley v. New York C. R. R.*, (1929) 227 App. Div. 206, 237 N. Y. S. 273; *Bull v. State of New*

homa,⁷² Rhode Island,⁷³ South Carolina,⁷⁴ Virginia,⁷⁵ Washington,⁷⁶ West Virginia,⁷⁷ and Wisconsin.⁷⁸

C. THE REASONABLE USE RULE

The reasonable use rule differs markedly from the civil law and common enemy rules. Under it a possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor is he absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. 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. He incurs liability only when his harmful interference with the flow of surface water is unreasonable.⁷⁹ The

York, (1931) 231 App. Div. 313, 247 N. Y. S. 183; Carrabis v. Brooklyn Ash Removal Co., (1936) 249 App. Div. 746, 291 N. Y. S. 840. See *infra*, footnote 135.

⁷¹See Henderson v. Hines, (1921) 48 N. D. 152, 159-161, 183 N. W. 531. See (1929) 2 Dakota L. Rev. 365. See also *infra*, footnotes 136 and 173.

⁷²Taylor v. Shriver, (1921) 82 Okla. 11, 198 Pac. 329; see Chicago, R. I. & P. Ry. v. Groves, (1908) 20 Okla. 101, 111, 93 Pac. 755, 22 L. R. A. (N.S.) 802; Castle v. Reeburgh, (1919) 75 Okla. 22, 23, 181 Pac. 297. See *infra*, footnotes 137, 174, and 195-197.

⁷³See Johnson v. White, (1904) 26 R. I. 207, 208-209, 58 Atl. 658, 65 L. R. A. 250. See also *infra*, footnotes 112, 117, 138.

⁷⁴Baltzeger v. Carolina Midland Ry., (1899) 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789; Lawton v. South Bound R. R., (1901) 61 S. C. 548, 39 S. E. 752; Cannon v. Atlantic C. L. Ry., (1914) 97 S. C. 233, 81 S. E. 476; Rivenbark v. Atlantic C. L. Ry., (1923) 124 S. C. 136, 117 S. E. 206; Fairey v. Southern Ry., (1931) 162 S. C. 129, 160 S. E. 274. See *infra*, footnotes 139, 169, and 198-200.

⁷⁵See Norfolk & W. R. R. v. Carter, (1895) 91 Va. 587, 592, 22 S. E. 517; McGehee v. Tidewater Ry., (1908) 108 Va. 508, 510, 62 S. E. 356. See generally (1924) 11 Va. L. Rev. 159; (1928) 15 Va. L. Rev. 177; (1929) 15 Va. L. Rev. 288. See also *infra*, footnotes 140, 175, and 182.

⁷⁶Wood v. Tacoma, (1911) 66 Wash. 266, 119 Pac. 859; Morton v. Hines, (1920) 112 Wash. 612, 192 Pac. 1016; see Cass v. Dicks, (1896) 14 Wash. 75, 78-79, 44 Pac. 113, 53 Am. St. Rep. 859; Miller v. Eastern Railway & Lumber Co., (1915) 84 Wash. 31, 34, 146 Pac. 171. See *infra*, footnote 141.

⁷⁷Jordan v. City of Benwood, (1896) 42 W. Va. 312, 26 S. E. 266, 36 L. R. A. 519, 57 Am. St. Rep. 859. See *infra*, footnotes 142 and 176.

⁷⁸Hoyt v. Hudson, (1871) 27 Wis. 656, 9 Am. Rep. 473; O'Connor v. Fond du Lac, A. & P. Ry., (1881) 52 Wis. 526, 9 N. W. 287, 38 Am. Rep. 753; Johnson v. Chicago, St. P., M. & O. Ry., (1891) 80 Wis. 641, N. W. 771, 14 L. R. A. 495, 27 Am. St. Rep. 76; Champion v. Crandon, (1893) 84 Wis. 405, 54 N. W. 775, 19 L. R. A. 856; Harvie v. Caledonia, (1915) 161 Wis. 314, 154 N. W. 383. See generally (1929) 5 Wis. L. Rev. 239. See also *infra*, footnotes 143 and 170.

⁷⁹The reasonable use rule was first applied in a case involving interferences with the flow of *subterranean percolating waters*, Bassett v. Salisbury Mfg. Co., (1862) 43 N. H. 569, 577, 82 Am. Dec. 170. The rule was stated in the following language: ". . . a man may exercise his own right on his own land as he pleases, provided he does not interfere with the rights of others. The rights are correlative, and, from the necessity of the

issue of reasonableness or unreasonableness is 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 on the part of the possessor making the alteration in the flow, the purpose or motive with which he acted, and others.⁸⁰

This rule of reasonable use differs from the other two rules in that it does not purport to lay down any specific rights or privileges with respect to surface waters, but leaves the whole matter to be determined upon the facts of each case in accordance with general principles of fairness and common sense. Its proponents advance convincing arguments in its favor by comparison with the other two rules. The best of these is found in the New Hampshire case of *Franklin v. Durgee*,⁸¹ and since it would be gilding the lily to attempt an improvement on the masterful argument of Justice Walker in that case, the writers take the privilege of quoting at length from his opinion:⁸²

"If the owner of land has absolute and unlimited domain thereof, wholly independent and irrespective of his neighbors'

case, the right of each is only to a reasonable user or management; and whatever exercise of one's right or use of one's privilege, in such case is, under all the circumstances, and in view of the rights of others, such a reasonable user or management is not an infringement of the rights of others; but any interference by one land-owner with the natural drainage, injurious to the land of another, and not reasonable, is unjustifiable. Every interference by one land-owner with the natural drainage, actually injurious to the land of another, would be unreasonable, if not made by the former in the reasonable use of his own property."

Subsequently, the reasonable use rule was applied to a case involving an interference with the flow of surface waters: *Swett v. Cutts*, (1870) 50 N. H. 439, 446, 9 Am. Rep. 276, where it was said, "The doctrine which we maintain adapts itself to the ever varying circumstances of each particular case,—from that which makes a near approach to a natural water-course, down by imperceptible gradations to the case of mere percolation, giving to each land owner, while in the reasonable use and improvement of his land, the right to make reasonable modifications of the flow of such water in and upon his land." See also *Flanders v. Franklin*, (1899) 70 N. H. 168, 169, 47 Atl. 88; *Bush v. City of Rochester*, (1934) 191 Minn. 591, 593-594, 255 N. W. 256.

⁸⁰In *Swett v. Cutts*, (1870) 50 N. H. 439, 446, 9 Am. Rep. 276, it was said, "In determining this question all the circumstances of the case would of course be considered; and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other land owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen." See also *Rindge v. Sargent*, (1886) 64 N. H. 294, 294-295, 9 Atl. 723. *Priest v. Boston & M. R. R.*, (1901) 71 N. H. 114, 51 Atl. 667; *Bush v. City of Rochester*, (1934) 191 Minn. 591, 594, 255 N. W. 256.

⁸¹(1901) 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112.

⁸²The quotation is taken from 71 N. H. 187-191.

enjoyment of their contiguous lands, he may with impunity wholly prevent the natural flow of surface water upon his land, and cause it to flow back upon the adjacent owner's land by means of an embankment or other obstruction erected upon the division line; and he would be entitled to thus inflict immense damage upon others' property, not because he might derive some advantage from the operation or because it is a reasonably necessary method of developing and improving his land, but merely because the land is his. . . . In other words, it is held in numerous cases that the landowner, by virtue of his proprietorship alone, has the unqualified right at common law to divert or obstruct the natural flow of surface water coming upon his land. . . .

"Other courts reach an opposite result by adopting the rule of the civil law with reference to surface waters. . . .

"By the rule of unlimited ownership of land, the defendants in this case could captiously maintain the embankment complained of, while by the rule of the civil law the plaintiff could with equal disregard of the defendants' property insist upon their removing the obstruction and allowing the water to flow naturally from one estate upon the other. The frequent hardship and practical injustice of applying one of these formulas strictly and exclusively has in some cases apparently resulted in the application of the other, and two opposing rules have thus been evolved in different jurisdictions from the inherent injustice of both. Because under some circumstances the upper proprietor would suffer great damage if the lower proprietor, with little or no advantage to himself, were allowed to interrupt the natural flow of surface water, it has been determined that the former has an absolute right, in all cases, to have the water flow upon the land of the latter; and because, under other circumstances, similar damage would result to the lower proprietor if he were not allowed to divert the water, it has been determined that he may do so in all cases without regard to the damage thus caused to the upper proprietor. It has seemed to some courts that an inflexible rule must be applied in such cases, though its practical effect is oftener attended with great hardship than with substantial justice.⁸³ But when the hardship becomes sufficiently excessive, means have been devised in some cases to avoid it, in jurisdictions where one rule or the other is generally recognized, and some approach to the doctrine of reasonableness

⁸³Substantially the same point was considered in *Swett v. Cutts*, (1870) 50 N. H. 439, 446, 9 Am. Rep. 276, where it was said, "To give the land owner the absolute and unqualified right of disposing of such water would, in many instances, be productive of great mischief to his neighbors, and lead to interminable struggles between them; for the same power to deal with such water would exist in each land owner when it was on his land.

"In many instances the water would assume so much of the character of a natural water-course as to make the application of such a doctrine odious and unjust, while, at the same time, a total want of power to modify such flow to meet the necessities of the land owner would often stand in the way of valuable improvements which might be made without serious detriment to any one."

has been made. In *Vanderweile v. Taylor*, 65 N. Y. 341, the fact is recognized 'that the rule which would be applicable to surface water in agricultural districts must be somewhat modified in its application to city lots.' But to relax the rule for that reason is in effect the adoption of the rule of reasonable user. If ownership alone is the test, the location of the land, whether in the city or in the country, becomes immaterial. It is only important in its bearing upon the legal rights of the parties when those rights are ascertained, in part at least, by a reasonable regard for the proper enjoyment by each of his adjacent land.

"In *Livingston v. McDonald*, 21 Ia. 160, 164, Judge Dillon says: 'We recognize the fact (to use Lord *Tenterden's* expression) that surface water or slough water is a common enemy which each landowner may reasonably get rid of in the best manner possible; but in relieving himself he must respect the rights of his neighbor, and cannot be justified by an act having the direct tendency and effect to make that enemy less dangerous to himself and more dangerous to his neighbor. He cannot make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable.' Many other cases recognize the importance, in the proper administration of justice in such cases, of limiting the rights of both to the reasonably beneficial enjoyment by both of their contiguous lands. . . .⁸⁴

"The common-law right of the ownership of land, in its relation to the control of surface water, as understood by the courts of this state for many years, does not sanction or authorize practical injustice to one landowner by the arbitrary and unreasonable exercise of the right of dominion by another, based on a narrow view of the effect of land titles. Rightly understood and judiciously applied, the law in this respect protects every one in the reasonable enjoyment of his property, and imposes upon none burdensome servitudes for the benefit of others by the strict enforcement of a technical rule of ownership briefly expressed in an ancient maxim. Reasonableness is the vital principle of the common law. . . .

"If the correlative rights of adjoining owners in the control of surface water . . . is peculiar to the jurisprudence of this state, . . . the principle involved is based upon a broader ground of justice than attends the practical operation of either of the extreme views above noted, and is recognized as an essential element in many cases in other jurisdictions, as has been already shown. The question presented in such cases is not so much one of law as of fact. It would doubtless be convenient if it could always be answered by citing a stereotyped definition of legal right. But as the situation of all adjoining owners of land is not the same, and as the circumstances attending the use of land in view of the flow of surface water are infinitely various, the failure to attain substantial justice

⁸⁴A number of jurisdictions purporting to follow the common enemy rule have modified and qualified that rule in line with the point here made by Justice Walker. See *infra*, footnotes 179-185 and text.

by the enforcement in all cases of a rule of law which does not recognize these important differences is not surprising. The result is that the question of the reasonableness of the use in a given case must be determined as a question of fact under all the attendant circumstances."

At the present time only two jurisdictions can be fairly said to have adopted the full reasonable use rule—New Hampshire and Minnesota. In New Hampshire the principle of reasonable use, now applied to all cases involving conflicting uses of neighboring land,⁸⁵ was originally developed and applied in the case of *Bassett v. Salisbury Manufacturing Co.*,⁸⁶ decided in 1862 and involving an obstruction of subterranean percolation. In *Swett v. Cutts*,⁸⁷ decided in 1870, the principle was applied where a harmful alteration in the flow of surface water was involved, and it has consistently been followed and applied in New Hampshire since that time to cases involving interferences with the flow of surface waters.⁸⁸

In Minnesota the development of the reasonable use rule followed a different course. The earliest Minnesota cases purported to adopt the common enemy rule,⁸⁹ but with several important qualifications. These qualifications were that a possessor of land was subject to liability for harm caused by an alteration in the flow of surface water which resulted from an extraordinary use of his land,⁹⁰ for harm caused unnecessarily,⁹¹ for harm caused by collecting surface water in an artificial channel and discharging it upon other land,⁹² and for harm caused by negligently ob-

⁸⁵See footnote 2.

⁸⁶(1862) 43 N. H. 569, 82 Am. Dec. 170.

⁸⁷(1870) 50 N. H. 439, 9 Am. Rep. 276.

⁸⁸*Rindge v. Sargent*, (1886) 64 N. H. 294, 9 Atl. 723; *Priest v. Boston & M. R. R.*, (1901) 71 N. H. 114, 51 Atl. 667; *Franklin v. Durgee*, (1901) 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112; see *Flanders v. Franklin*, (1899) 70 N. H. 168, 169, 47 Atl. 88.

⁸⁹*Rowe v. St. Paul, M. & M. Ry.*, (1889) 41 Minn. 384, 43 N. W. 76, 16 Am. St. Rep. 706; *Jordan v. St. Paul, M. & M. Ry.*, (1889) 42 Minn. 172, 43 N. W. 849, 6 L. R. A. 573; see *O'Brien v. St. Paul*, (1878) 25 Minn. 331, 334-336, 33 Am. Rep. 470; *Hogenson v. St. Paul, M. & M. Ry.*, (1883) 31 Minn. 224, 226, 17 N. W. 374; *Pye v. Mankato*, (1887) 36 Minn. 373, 374-375, 31 N. W. 863, 1 Am. St. Rep. 671; *Beach v. Gaylord*, (1890) 43 Minn. 476, 479, 45 N. W. 1095.

⁹⁰*O'Brien v. St. Paul*, (1878) 25 Minn. 331, 335, 33 Am. Rep. 470. See also *Jordan v. St. Paul, M. & M. Ry.*, (1889) 42 Minn. 172, 175, 43 N. W. 849, 6 L. R. A. 573.

⁹¹*Pye v. Mankato*, (1887) 36 Minn. 373, 374-375, 31 N. W. 863, 1 Am. St. Rep. 671. See also *Beach v. Gaylord*, (1890) 43 Minn. 476, 479, 45 N. W. 1095.

⁹²*Hogenson v. St. Paul, M. & M. Ry.*, (1883) 31 Minn. 224, 17 N. W. 374; *Blakely v. Devine*, (1886) 36 Minn. 53, 29 N. W. 342; *Pye v. Mankato*, (1887) 36 Minn. 373, 31 N. W. 863, 1 Am. St. Rep. 671; *Beach v.*

structing the flow of surface water through deep natural ravines and gullies.⁹³ These various qualifications were modified and generalized to some extent in the later case of *Sheehan v. Flynn*,⁹⁴ especially with respect to the rule that a possessor of land was subject to liability for harm caused by collecting surface water in artificial channels and discharging it upon other land. In that case the court enunciated a general rule to the effect that a possessor of land was privileged to alter the flow of surface water so long as he used reasonable care⁹⁵ and did not cause unnecessary or unreasonable harm to others.⁹⁶ The court also said that, in determining reasonableness in a given case, all of the relevant circumstances should be considered,⁹⁷ including the amount of benefit to

Gaylord, (1890) 43 Minn. 476, 45 N. W. 1095; *Follman v. Mankato*, (1891) 45 Minn. 457, 48 N. W. 192. However, a dictum in a case decided during this time indicates that this qualification of the general rule was perhaps not as broad as stated in the text. In *Jordan v. St. Paul, M. & M. Ry.*, (1889) 42 Minn. 172, 175-176, 43 N. W. 849, 6 L. R. A. 573, it was said, "The right to use and improve one's own land does not, however, include the right to do so merely by transferring from its surface waters naturally resting upon it to the land of another. *It is only where such shifting of the burden follows as an incident to using or improving his land as such land is ordinarily used or improved, that it can be justified.*" (Italics added.)

This dictum was subsequently expanded and applied in *Brown v. Winona & Southwestern Ry.*, (1893) 53 Minn. 259, 55 N. W. 123, 39 Am. St. Rep. 603.

⁹³*McClure v. Red Wing*, (1881) 28 Minn. 186, 9 N. W. 767; see *Rowe v. St. Paul, M. & M. Ry.*, (1889) 41 Minn. 384, 387, 43 N. W. 76, 16 Am. St. Rep. 706. In the *McClure* case Justice Mitchell stated on pages 192-193 the basis of this qualification as follows: ". . . the general common-law doctrine that neither the retention nor repulsion of surface water is an actionable injury must necessarily be materially modified. . . . In a broken and bluff region of the country . . . intersected by long, deep coulees or ravines, surrounded by high, steep hills or bluffs, down which large quantities of water from rain or melting snow rush with the rapidity of a torrent, often attaining the volume of a small river, and usually following a well-defined channel, it would be manifestly inappropriate and unjust to apply the rules of the common law applicable to ordinary surface water. In many respects such streams partake more of the nature of natural streams than of ordinary surface water, and must, at least to a certain extent, be governed by the same rules."

⁹⁴(1894) 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632.

⁹⁵On page 442 it was said, "This is a reasonable doctrine, that takes into consideration all the circumstances of each case. It gives to each man the common-law right to improve and enjoy his own property to its fullest extent, but limited by the requirement that he use reasonable care in disposing of surface water, which the common law did not always require him to do. When he has used such reasonable care, he can generally stand on his common-law rights. . . ."

⁹⁶"The common-law rule as to liability for the diversion of surface water has been modified in this and other states by the rule that a person must so use his own as not unnecessarily or unreasonably to injure his neighbor." *Ibid* p. 441.

⁹⁷"This is a reasonable doctrine, that takes into consideration all the circumstances of each case." *Ibid*, p. 442.

the possessor making the alteration as compared to the harm caused to others,⁹⁸ and the topography of the land in the vicinity.⁹⁹ Applying these principles, the court decided that the defendant, a possessor of land, was privileged in draining onto the plaintiff's land, by artificial means, surface water which had accumulated upon his own land in a natural depression.¹⁰⁰ The extent to which this case departed from the narrower rules and exceptions developed in earlier Minnesota cases is to be noted, as is the evolution made in the case toward recognition and adoption of the broad principle of reasonable use. In the cases decided since *Sheehan v. Flynn*, the court, for the most part, has continued to apply the general principles as there developed, but many of these cases reveal a distinct tendency toward a complete recognition and adop-

⁹⁸"A circumstance to be considered in determining what is a reasonable use of one's own land is the amount of benefit to the estate drained or improved, as compared with the amount of injury to the estate on which the burden of the surface water is cast." *Ibid*, p. 441.

⁹⁹"We hold that one has a right to drain his land for any legitimate use, whether for a railroad track, a wheat field, or a pasture, and whether the improvement is directly and wholly for the purpose of drainage, or whether it is for some other purpose, and such drainage is a mere incidental result. But, if he collect and convey the surface water off his own land, he shall do what is reasonable under all the circumstances, to turn it into some natural drain, or into some course in which it will do the least injury to his neighbor,—and, if he would prevent it from coming upon his land, he must not do so by obstructing some natural drain, and thereby hold back the water and flood the land of his neighbor, at least if such natural drain is an important one." *Ibid*. p. 449.

¹⁰⁰The facts of the Sheehan Case are interesting. Defendant and plaintiff each owned a parcel of land, the defendant's being situated on a level some forty feet higher than plaintiff's. The two parcels did not adjoin, but were separated by a third parcel of land. On defendant's land was situated a depression which, in times of rain and melting snow, became filled with surface water to a depth of as much as four feet, and which covered an area of about twenty acres of high grade agricultural land. Defendant commenced digging a ditch from the depression to the head of a small ravine on his land. If the ditch were completed, the ravine would carry the water across the intervening parcel of land, across plaintiff's land, and into a small lake partially situated upon plaintiff's land. The result would be to raise the level of the water in the lake so as to submerge from one to two acres of plaintiff's land during a short period of time each spring season. It was found that defendant's proposed ditch was necessary to drain the surface water from the depression, and that it was the only reasonable method by which the surface water could be drained from the depression. In holding that the defendant was privileged to drain the surface water in this manner, the court said, on page 449, "Applying these principles to the present case, we are of the opinion that these limitations on the common-law right of the owner to improve his land so as to rid it of surface water do not prohibit this defendant from draining this depression in the manner proposed. As before stated, it fairly appears that this is the only way he could reasonably drain this depression, and that this ravine is the only natural drain reasonably accessible; and the consequent injury to others is not so great, as compared to the benefit to be derived from the improvement, as to make it unreasonable on that account."

tion of the full reasonable use rule.¹⁰¹ In the most recent case, *Bush v. City of Rochester*,¹⁰² the Minnesota court seems to adopt that rule in its fullest extent, but there is still some carry-over of the earlier concepts.¹⁰³

¹⁰¹Shortly after the decision in the Sheehan Case, the court apparently adopted the full, reasonable use rule. In *Gilfillan v. Schmidt*, (1896) 64 Minn. 29, 36, 66 N. W. 126, 31 L. R. A. 547, 58 Am. St. Rep. 515, Mr. Justice Mitchell said, "No person has the absolute and unqualified legal right to the use of his own property unaffected by the reasonable use by his neighbor of his property. The use by my neighbor of his property in a particular way may discommode and injuriously affect me in the enjoyment of my property; but, if his use is a reasonable one, I must submit to any resulting inconvenience. The question, after all, is really one of reasonable use. . . ." In some subsequent cases, however, the court seems to have departed somewhat from this broad approach. See for example: *Jungblum v. Minneapolis*, N. U. & S. W. R. R., (1897) 70 Minn. 153, 72 N. W. 971; *Robbins v. Willmar*, (1898) 71 Minn. 403, 73 N. W. 1097; *Oftelie v. Hammond*, (1899) 78 Minn. 275, 80 N. W. 1123; *Gunnerus v. Spring Prairie*, (1904) 91 Minn. 473, 98 N. W. 340; *Werner v. Popp*, (1905) 94 Minn. 118, 102 N. W. 366, aff'd on rehearing, 94 Minn. 521, 103 N. W. 164; *Ginter v. St. Mark's Church*, (1905) 95 Minn. 14, 103 N. W. 738, 69 L. R. A. 621, 111 Am. St. Rep. 438; *Nye v. Kahlow*, (1906) 98 Minn. 81, 107 N. W. 733; *O'Neill v. St. Paul*, (1908) 104 Minn. 491, 116 N. W. 114; *Peterson v. Lundquist*, (1908) 106 Minn. 339, 119 N. W. 50; *Lieberknecht v. Great Northern Ry.*, (1911) 114 Minn. 55, 129 N. W. 1047; *Howard v. Illinois Central Ry.*, (1911) 114 Minn. 189, 130 N. W. 946; *Praught v. Bukosky*, (1911) 116 Minn. 206, 133 N. W. 564; *Watre v. Great Northern Ry.*, (1914) 127 Minn. 118, 149 N. W. 18; *Skinner v. Great Northern Ry.*, (1915) 129 Minn. 113, 151 N. W. 968; *Peterson v. Northern Pacific Ry.*, (1916) 132 Minn. 265, 156 N. W. 121; *Kiefer v. County of Ramsey*, (1918) 140 Minn. 143, 167 N. W. 362; *Hartle v. Neighbauer*, (1919) 142 Minn. 438, 172 N. W. 498; *Town of King v. Brekke*, (1922) 151 Minn. 474, 187 N. W. 515; *Sandmeier v. St. James*, (1925) 165 Minn. 34, 205 N. W. 634; *Simonson v. Township of Alden*, (1930) 181 Minn. 200, 231 N. W. 921.

Although the language used in these cases does not consistently reveal the same broad understanding of the reasonable use principle found in the New Hampshire cases, an examination of the facts of each case and the result arrived at demonstrates that the court in each case achieved a result entirely consistent with that principle. Furthermore, the court's language occasionally indicates a full understanding of it. In *Rieck v. Schamanski*, (1912) 117 Minn. 25, 32, 134 N. W. 228, for example, it was said, "The rule of reasonable use has been recognized. . . ." And in *Hopkins v. Taylor*, (1915) 128 Minn. 511, 512, 151 N. W. 194, it was said, "Whether the course pursued follows the natural course of drainage is an important factor in determining the question of reasonable use, but it is not controlling." Compare *Philips v. Taylor*, (1904) 93 Minn. 28, 29-30, 100 N. W. 649; *Block v. Great Northern Ry.*, (1907) 101 Minn. 183, 185, 112 N. W. 66; *Erhard v. Wagner*, (1908) 104 Minn. 258, 261-262, 116 N. W. 577. See Note, (1918) 2 MINNESOTA LAW REVIEW 449, for a discussion of the Minnesota law of surface waters in force during this period of time. Compare the cases from other jurisdictions following a similar rule. See *infra*, footnotes 179-185.

¹⁰²(1934) 191 Minn. 591, 255 N. W. 256.

¹⁰³"By the rule of the common law, adhered to by this court, a landowner may within reason appropriate to his own use or expel from his land all mere surface water. *Surface water is regarded as a common enemy which each proprietor may fight or rid himself of as he chooses. . . .* [Italics added]. . . . The spread and diffusion of water over adjacent land is recognized as a necessary consequence of improvement. What is [a]

In view of the demonstrable soundness and desirability of the reasonable use rule, it seems a little strange that only two jurisdictions in this country have fully adopted it as the basic measure of the rights and liabilities arising out of interferences with the flow of surface waters. It has been in existence almost as long as the civil law and common enemy rules, and most of the writers on water law have recognized it as a distinct rule for some time.¹⁰⁴ Perhaps the courts of New Hampshire and Minnesota are not highly regarded in other jurisdictions, but their decisions are cited frequently and discussed with approval in cases from other states. Probably the best explanation is that these other courts have not fully understood the reasonable use principle.¹⁰⁵ For example, some courts have cited reasonable use cases as supporting the common enemy rule.¹⁰⁶ Others have discussed them at length and then misinterpreted or misapplied their language.¹⁰⁷ Still others, and probably the majority, simply assume that there are only two rules governing surface waters—the civil law and common enemy rules—and have completely ignored or overlooked the reasonable use idea as a fundamental principle.¹⁰⁸ It is significant, however, that

reasonable use is subject to question and in many cases must be determined by the jury upon the facts and circumstances of the particular case. In our cases the terms negligence . . . , trespass . . . , and nuisance . . . are sometimes loosely applied to the improper diversion of surface waters. Even in *Sheehan v. Flynn* . . . the phrase 'reasonable care' is sometimes used where obviously 'reasonable use' is intended. *The common law doctrine as there modified* is still in force in this state. [Italics added.] The disposition of surface water must be 'reasonable under all the circumstances,' and the consequent injury to others must not be so great, as compared to the benefit derived, as to make it unreasonable on that account."

¹⁰⁴See Gould, *Law of Waters* (3d ed. 1900) sec. 265, p. 539; Farnham, *Law of Waters and Water Rights* (1904) sec. 889c, p. 2597; Thornton, *Surface Water on Agricultural Lands*, (1883) 17 Cent. L. J. 62, 67; Rood, *Surface Water in Cities*, (1908) 6 Mich. L. Rev. 448, 460.

¹⁰⁵One of the very rare instances in which the judge of a court of some jurisdiction other than Minnesota or New Hampshire has displayed an understanding of the fundamental principle of reasonable use is the dissenting opinion of Justice Stuart in the Canadian case of *Makowecki v. Yachimyc*, (Alberta 1917) 34 Dom. L. Rep. 130, 146.

¹⁰⁶In *Barkley v. Wilcox*, (1881) 86 N. Y. 140, 145, 40 Am. Rep. 519, the case of *Swett v. Cutts*, (1870) 50 N. H. 439, 9 Am. Rep. 276, discussed at footnote 87 and text, was cited as supporting the common enemy rule.

¹⁰⁷In *Little Rock & Ft. S. Ry. v. Chapman*, (1882) 39 Ark. 463, 478, 43 Am. Rep. 280, the court cited and discussed with apparent approval the cases of *Bassett v. Salisbury Mfg. Co.*, (1862) 43 N. H. 569, 82 Am. Dec. 170, and *Swett v. Cutts*, (1870) 50 N. H. 439, 9 Am. Rep. 276, which are considered supra, at footnotes 86-87 and text. Yet the Arkansas Court developed principles in that case which approached the reasonable use doctrine no more closely than the principles developed in the case of *Sheehan v. Flynn*, (1894) 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632, considered supra, at footnotes 94-100 and text.

¹⁰⁸See supra footnotes 14 and 55.

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. It therefore seems desirable, in view of the apparent incompatibility of the various rules, to indicate the nature and scope of these modifications and qualifications.

D. MODIFICATIONS OF THE CIVIL LAW AND COMMON ENEMY RULES

Most of the courts committed to the civil law or common enemy rules have recognized that a strict application of the letter of these rules works injustice in some cases, and that there is thus a need for some of the flexibility inherent in the reasonable use doctrine.¹⁰⁹ Frequently, however, in attempting to avoid the undesirable results incident to a strict application of the two rules in particular situations, these courts have developed specific qualifications to the rules which are as arbitrary and inflexible as the general rules themselves.

Perhaps the best illustration of what has been done in this respect can be achieved by grouping the most common types of situations into separate categories and indicating the specific rules applied to each category.

1. APPROPRIATION OF SURFACE WATER. In this type of situation it is uniformly said to be the rule that the possessor of higher land has an unqualified privilege to appropriate surface water thereon, and thus prevent it from flowing to adjacent lower land; and that the possessor of the lower land has no right to the continued flow of the surface water to his land.¹¹⁰ This rule, in accord

¹⁰⁹In *Martin v. Jett*, (1838) 12 La. 501, 505, 32 Am. Dec. 120, the court, in considering the phase of the civil law rule which prohibits the upper possessor from discharging surface water upon lower land, said, "We are by no means disposed to give to the code such an interpretation as would, in effect, condemn to sterility the superior estate. That every man has a right to clear and cultivate his land, cannot be doubted. The clearing of land, and fitting it for agricultural purposes, is not calculated to render this kind of servitude more onerous." Accord, *Kauffman v. Griesemer*, (1856) 26 Pa. St. 407, 414, 67 Am. Dec. 437. See also the cases cited *infra*, in footnotes 179-185, which apply a qualified common enemy rule which is flexible.

¹¹⁰To this effect are: Gould, *Law of Waters* (3d ed. 1900) sec. 279, p. 555; 3 Farnham, *Law of Waters and Water Rights* (1904) sec. 883,

with the common enemy principle,¹¹¹ and followed in common enemy jurisdictions,¹¹² is based upon a narrow conception of the effect of land ownership.¹¹³ Nevertheless, it has been adopted in jurisdictions committed to the civil law rule,¹¹⁴ as well as in some of the few jurisdictions in which the courts have not yet clearly accepted any one of the three major views of the law of surface waters.¹¹⁵

Although this rule that a possessor of land has an unlimited and unqualified privilege of appropriation is generally stated in very broad terms,¹¹⁶ an examination of the cases in which a possessor was actually held to be privileged to appropriate surface water reveals that in each case the appropriator did so for the

p. 2572; *Greatrex v. Hayward*, (1853) 8 Exch. 291, 22 L. J. Ex. 137; *Rawstron v. Taylor*, (1855) 11 Exch. 369, 25 L. J. Ex. 33; *Broadbent v. Ramsbotham*, (1856) 11 Exch. 602, 25 L. J. Ex. 115, 4 W. R. 290; *Thomson, Surface Waters*, (1889) 23 Am. L. Rev. 372, 380-382; *Dillon, Law of Surface Waters*, (1867) 1 Western Jurist 12, 14-15; (1905) 18 Harv. L. Rev. 626.

¹¹¹See *supra*, footnote 34 and text.

¹¹²*Buffum v. Harris*, (1858) 5 R. I. 243; see *Town v. Missouri Pac. Ry.*, (1895) 50 Neb. 768, 774, 70 N. W. 402.

¹¹³In *Livingston v. McDonald*, (1866) 21 Iowa 160, 167, 89 Am. Dec. 563, it was said, "This right of the higher owner thus to retain, and if he sees fit, to appropriate *all* of his surface waters to his own use, is based upon his dominion over the soil which extends indefinitely upwards and downwards, and is adopted as favoring the reclamation and improvement of wet and miry lands." And in *Thomson, Surface Waters*, (1889) 23 Am. L. Rev. 372, 380, it was said, "Surface and percolating waters are deemed by the law to belong absolutely to the owner of the land upon which they are found. . . . The upper proprietor may drain it away or retain it upon his premises in reservoirs at his pleasure. . . ." See also *Note*, (1929) 15 Va. L. Rev. 288, 289.

¹¹⁴*Benson v. Cook*, (1924) 47 S. D. 611, 201 N. W. 526; *Terry v. Heppner*, (1931) 59 S. D. 317, 239 N. W. 759; see *Gibbs v. Williams*, (1881) 25 Kan. 214, 217, 37 Am. Rep. 241; *Livingston v. McDonald*, (1866) 21 Iowa 160, 166-167, 89 Am. Dec. 563. At the time the last two cases cited were decided, the courts of those jurisdictions had not yet clearly adopted the civil law rule. See *supra*, footnotes 21-22. It has been said that under the civil law the upper possessor was not privileged to appropriate surface water so as to prevent it from flowing to lower lands. 1 *Domat, The Civil Law* (Cush. ed. 1850) Art. 1583, p. 616; *Note*, (1935) 15 Bos. U. L. Rev. 892, 896-897; *Note*, (1929) 15 Va. L. Rev. 288, 289. Cf. *Swiss Civil Code* (1907) Art. 689, which is to the effect that the upper possessor is privileged to appropriate surface water only so far as it is indispensable to the upper land.

¹¹⁵*Garns v. Rollins*, (1912) 41 Utah 260, 125 Pac. 867, Ann. Cas. 1915C 1159, commented on in (1912) 26 Harv. L. Rev. 186; *Boynton & Moseley v. Gilman*, (1880) 53 Vt. 17; *State v. Hiber*, (1935) 48 Wyo. 172, 44 P. (2d) 1005. See also the English cases cited *supra*, in footnote 110.

¹¹⁶In *Benson v. Cook*, (1924) 47 S. D. 611, 617, 201 N. W. 526, the rule was stated as follows: ". . . it is the settled rule, and a rule from which we believe there is no dissenting voice, that the owner of land has the absolute right to the surface water found thereon, and that he may retain such water for his own use and prevent it from flowing upon the land of another."

purpose of conferring upon himself materially valuable benefits.¹¹⁷ This being so, it would seem that the usual statement is much too broad, and that the rule should be stated in terms which more closely correspond to the actual decisions.¹¹⁸ Moreover, the fact that in each of these cases the upper possessor appropriated the surface water only for some beneficial purpose lends at least inferential support to the view that the reasonable use doctrine is applicable to this situation as well as to situations involving alterations in the flow of surface water.¹¹⁹

¹¹⁷In *Greatrex v. Hayward*, (1853) 8 Exch. 291, 22 L. J. Ex. 137; *Broadbent v. Ramsbotham*, (1856) 11 Exch. 602, 25 L. J. Ex. 115, 4 W. R. 290; and *Buffum v. Harris*, (1858) 5 R. I. 243, the upper possessor prevented the surface water from flowing to the lower possessor's land by laying drains for the purpose of more effectively draining the higher land. In *Rawstron v. Taylor*, (1855) 11 Exch. 369, 25 L. J. Ex. 33, the purpose was to drain the upper possessor's land and to supply his tenants with water for domestic uses. In *Benson v. Cook*, (1924) 47 S. D. 611, 201 N. W. 526; *Terry v. Heppner*, (1931) 59 S. D. 317, 239 N. W. 759; and *Garns v. Rollins*, (1912) 41 Utah 260, 125 Pac. 867, Ann. Cas. 1915C 1159, the surface water was appropriated for irrigation purposes. In *Boynton & Moseley v. Gilman*, (1880) 53 Vt. 17, the possessor of the land granted to defendant a license to lay an aqueduct upon the land and to appropriate the surface water upon it, presumably for commercial uses. And in *State v. Hiber*, (1935) 48 Wyo. 172, 44 P. (2d) 1005, the surface water was appropriated for the purpose of supplying livestock with water.

¹¹⁸In support of this conclusion is the fact that some courts, apparently for the purpose of avoiding the rule, have extended the definition of a watercourse so as to include sizeable, periodic streams of surface water, thus denying the upper possessor an unqualified privilege of appropriation. See, for example, *Hoefs v. Short*, (1925) 114 Tex. 501, 273 S. W. 785, 40 A. L. R. 833.

¹¹⁹In the comment on *Garns v. Rollins*, (1912) 41 Utah 260, 125 Pac. 867, Ann. Cas. 1915C 1159, in (1912) 26 Harv. L. Rev. 186, it was said, "It is submitted that the argument of social utility, which was mainly responsible for the introduction of the reasonable use doctrine as to percolating waters, is equally applicable to surface waters." Cf. (1905) 18 Harv. L. Rev. 626.

Legal writers have sometimes stated that in New Hampshire the reasonable use doctrine governs cases of appropriation. See 3 Farnham, *Law of Waters and Water Rights* (1904), sec. 883, p. 2572; Thomson, *Surface Waters* (1889) 23 Am. L. Rev. 372, 381. Although no New Hampshire case has been found in which the court so decided, it would seem that, in view of the extensive application of that doctrine to other situations, (see footnote 1), this conclusion is correct. Dicta can sometimes be found to the effect that the reasonable use doctrine applies to the appropriation of surface water by an upper possessor. See, for example, *Bush v. City of Rochester*, (1934) 191 Minn. 591, 592, 255 N. W. 256, where it was said, ". . . a landowner may *within reason* appropriate to his own use . . . all mere surface water." [Italics added.]

See also *Thompson v. New Haven Water Co.*, (1913) 86 Conn. 597, 86 Atl. 585, 45 L. R. A. (N.S.) 457. In that case flood water which escaped from a watercourse flowed in a diffused state across plaintiff's nearby meadow and deposited thereon a valuable fertilizer. Between the meadow and the watercourse defendant laid a conduit, and in constructing the conduit defendant excavated earth and threw it up so as to form a continuous embankment across the place where the flood water flowed to plaintiff's meadow.

2. DISCHARGE OF SURFACE WATER BY ARTIFICIAL MEANS.

Surface water may, by artificial means, be caused to flow upon adjoining land in increased volume, or with greater velocity, or in a course different from that which the water naturally followed. Artificial channels may be made which concentrate surface water previously flowing upon the land in a diffused state or which drain previously stagnant surface water collected in natural or artificial depressions. Embankments may be constructed which have the effect of gathering diffused surface water and diverting it upon adjoining land in a volume. Depressions and sag holes may be filled, the level of land raised, or its surface graded so as to discharge surface water upon adjoining land which did not previously receive it. The ways and combinations of ways in which surface water may, by human activity, be made to flow upon adjoining land in a non-natural way seem to be infinitely varied. The specific rules applied to these variations, however, are more or less uniform, and therefore it seems expedient, though at the expense of complete accuracy, to make this general category for the purpose of showing how the civil law and common enemy rules have been modified in these situations.

From the rationale of the common enemy rule,¹²⁰ 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.¹²¹ Most of these courts have developed

As a result the flood water was prevented from flowing across plaintiff's meadow and depositing the valuable fertilizer thereon. Plaintiff brought an action to recover damages for the resulting reduction in value of his hay crops. In affirming a judgment for the plaintiff, the court said on pages 607-608, "The evidence discloses that the defendant, the upper proprietor, has not attempted to appropriate the flood water reaching his land in the improvement or enjoyment of such land, or to interfere with or affect the flow of the water for any purpose connected with that land. The embankment, in so far as appears, or can be imagined, neither serves, nor was intended to serve, an useful purpose. . . . We thus have a situation in which the plaintiff was damaged in his property by an act of the defendant in interfering with the natural flow of flood water, which had no justification in the improvement, use, enjoyment, or protection of its land. Damage done under such circumstance cannot, with due regard for property rights, be regarded as *absque injuria*."

¹²⁰See *supra*, footnote 34 and text.

¹²¹In only one jurisdiction do the courts seem to take the position that a possessor is unqualifiedly privileged to discharge surface water upon adjoining land in a volume and by artificial means. In *Greeley v. Maine Central R. R.*, (1865) 53 Me. 200, defendant's railway embankment obstructed

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,¹²² regardless of the means by which the surface water is collected and discharged.¹²³ The scope of this qualifying rule varies from jurisdiction to jurisdiction, but it has been adopted in one form or another by the courts of the following common enemy jurisdictions: Arizona,¹²⁴ Arkansas,¹²⁵ Connecticut,¹²⁶ District of Columbia,¹²⁷ Indiana,¹²⁸ Massachu-

the flow of surface water. To dispose of the surface water so obstructed, defendant dug a ditch which carried the water alongside the embankment to a point where the water was discharged through a pass made in the embankment directly upon plaintiff's land. Defendant was held not liable for the substantial harm thereby caused to plaintiff. But cf. *Smith v. Preston*, (1908) 104 Me. 156, 71 Atl. 653. See *supra*, footnote 62.

¹²²This particular rule has been stated by various courts in different terms. The following are samples of the language used. In *Hannah v. St. Paul, M. & M. R. R.*, (1887) 5 Dak. 1, 14, 37 N. W. 717, it was said, "The defendant could not, by the rule of either the civil or common law, collect large bodies of surface water upon its own premises by artificial means, and eject the same by unnatural streams, and in unusual quantities, upon the land of another. . . ." In *Linwood v. Board of Education*, (1922) 92 W. Va. 387, 390, 114 S. E. 800, it was said, "One cannot collect surface water into an artificial channel and pour it upon the lands of another to his damage." See Note, (1902) 85 Am. St. Rep. 707, 730-733. This particular rule, however, does not go to the extent of prohibiting a possessor from discharging surface water into natural drainways. See *infra*, footnotes 132 and 141.

¹²³Since the object of this qualifying rule is to prevent the discharge of large quantities of surface water in a concentrated flow by artificial means, liability is imposed in such cases irrespective of whether that result is caused by the collection and discharge of surface water in artificial channels, by the obstruction and diversion of surface water by embankments, or by other means. The particular means by which the prohibited result was caused in the cases cited in footnotes 124-143 is indicated wherever expedient.

¹²⁴*Tucson v. Dunseath*, (1904) 15 Ariz. 355, 139 Pac. 177 (diversion by embankment); *Roosevelt Irr. Dist. v. Beardsley Land & Investment Co.*, (1929) 36 Ariz. 65, 282 Pac. 937 (collection and discharge by canals); *Maricopa County Municipal Water Conservation Dist. No. 1 v. Roosevelt Irr. Dist.*, (1932) 39 Ariz. 357, 6 P. (2d) 898 (diversion by embankment). For the general rule in Arizona, see *supra*, footnotes 57 and 183.

¹²⁵*Jackson v. Keller*, (1910) 95 Ark. 242, 129 S. W. 296 (water in depression drained by ditch); *Morrow v. Merrick*, (1923) 157 Ark. 618, 249 S. W. 369 (diversion and discharge by levee and ditch). For the general rules in Arkansas see *supra*, footnotes 58 and 179.

¹²⁶In Connecticut less in the way of concentration in the flow of surface water is required to impose liability than in any other common enemy jurisdiction. *Adams v. Walker*, (1867) 34 Conn. 466, 91 Am. Dec. 742 (land graded so as to cause water to flow upon adjoining land); *Tidewater Oil Sales Corporation v. Shimelman*, (1932) 114 Conn. 182, 158 Atl. 229, 81 A. L. R. 256 (land graded so as to cause water to flow upon adjoining land). In other cases the more usual statement of this rule may be found. See *Goldman v. New York, N. H. & H. R. R.*, (1910) 83 Conn. 59, 63, 75 Atl. 148.

¹²⁷*Frisbie v. Cowen*, (1901) 18 App. D. C. 381 (discharge by ditch).

¹²⁸*Templeton v. Voshloe*, (1880) 72 Ind. 134, 37 Am. Rep. 150 (ditches

setts,¹²⁹ Mississippi,¹³⁰ Missouri,¹³¹ Nebraska,¹³² New Jersey,¹³³ New Mexico,¹³⁴ New York,¹³⁵ North Dakota,¹³⁶ Oklahoma,¹³⁷

cut through watershed); *Hunter v. Cleveland, C. C. & St. L. Ry.*, (1931) 93 Ind. App. 140, 176 N. E. 710 (discharge by ditches). In the *Templeton Case* it was said on pages 136-137, ". . . the owner of the upper field may not construct drains or excavations so as to form new channels on to the lower field, nor can he collect the water of several channels and discharge it on the lower field so as to increase the *wash* upon the same. The right of the owner of the upper field to make drains on his own land is restricted to such as are required by good husbandry and the proper improvement of the surface of the ground, and as may be discharged into natural channels, without inflicting palpable and unnecessary injury on the lower field."

¹²⁹*White v. Chapin*, (1866) 12 Allen (Mass.) 516 (discharge by ditch); *Curtis v. Eastern R. R.*, (1868) 98 Mass. 428 (water seeped through walls of channel and so flowed upon adjoining land); *Rathke v. Gardner*, (1883) 134 Mass. 14 (discharge by ditch); *Manning v. Woodlawn Cemetery Corp.*, (1923) 245 Mass. 250, 139 N. E. 830 (discharge by ditch); *Birch v. Boston & M. R. R.*, (1927) 259 Mass. 528, 156 N. E. 859 (overflow from ditch flowed upon adjoining land).

¹³⁰*Harvey v. Illinois C. R. R.*, (1916) 111 Miss. 835, 72 So. 273 (discharge of surface water ponded back of railway embankment by ditches); *Cresson v. Louisville & N. R. R.*, (1933) 166 Miss. 352, 146 So. 462 (overflow from a ditch which drained surface water collected in an excavation); see *Illinois Central R. R. v. Miller*, (1891) 68 Miss. 760, 764, 10 So. 61. For the general rule in Mississippi see footnotes 64 and 180.

¹³¹*Tucker v. Hagan*, (Mo. App. 1927) 300 S. W. 301 (discharge through ditch of surface water ponded back of railway embankment); *Kiger v. Sanko*, (Mo. App. 1927) 1 S. W. (2d) 218 (discharge by ditch); *Funke v. St. Louis-San Francisco Ry.*, (1931) 225 Mo. App. 347, 35 S. W. (2d) 977 (discharge by ditch).

¹³²*Davis v. Londgreen*, (1878) 8 Neb. 43 (ditch drained surface water collected in a depression and discharged it upon adjoining land); *Lincoln Street Ry. v. Adams*, (1894) 41 Neb. 737, 60 N. W. 83 (discharge by ditches); *Warner v. Berggren*, (1931) 122 Neb. 86, 239 N. W. 473 (ditch drained surface water collected in a depression and discharged it upon adjoining land); see *Fremont, E. & M. R. R. v. Marley*, (1888) 25 Neb. 138, 146-147, 40 N. W. 948, 13 Am. St. Rep. 482. However, by statute in Nebraska a possessor is privileged to discharge the surface water on his land by artificial means where he drains such water "into any natural depression or draw, whereby such water may be carried into some natural watercourse." Nebraska, Compiled Statutes, 1929, ch. 31, art. 3, sec. 301. In the following cases it was held that, where a possessor of land drains surface water accumulated in a natural depression on his land by means of ditches, and discharges such water into a natural drainway, acting with reasonable care in so doing, he is not subject to liability for the harm thereby caused to possessors of adjoining land, *Todd v. York County*, (1904) 72 Neb. 207, 100 N. W. 299; *Aldritt v. Fleischauer*, (1905) 74 Neb. 66, 103 N. W. 1084; *Bures v. Stephens*, (1932) 122 Neb. 751, 241 N. W. 542. For the general rules in Nebraska see footnotes 67 and 181.

¹³³*Field v. West Orange*, (1882) 36 N. J. Eq. 118, aff'd, (1883) 37 N. J. Eq. 600, 45 Am. Rep. 670 (discharge apparently by gutters in streets); *Weisberger v. Maurer*, (1930) 9 N. J. Misc. 117, 153 Atl. 626, aff'd, (1932) 109 N. J. L. 273, 160 Atl. 634 (discharge presumably by pipe or culvert); see *Kelly v. Dunning*, (1885) 39 N. J. Eq. 482, 483, 484-485; *Nathanson v. Wagner*, (1935) 118 N. J. Eq. 390, 393, 179 Atl. 466.

¹³⁴*Rix v. Town of Alamogordo*, (1938) 42 N. M. 325, 77 P. (2d) 765 (overflow from ditch flowed upon adjoining land).

¹³⁵See *Barkley v. Wilcox*, (1881) 86 N. Y. 147-148, 40 Am. Rep. 519.

¹³⁶See *Hannaher v. St. Paul, M. & M. R. R.*, (1887) 5 Dak. 1, 14, 37 N. W. 717. For the general rules in North Dakota see *supra*, footnotes 71 and 184.

Rhode Island,¹³⁸ South Carolina,¹³⁹ Virginia,¹⁴⁰ Washington,¹⁴¹ West Virginia,¹⁴² and Wisconsin.¹⁴³

¹³⁷Chicago, R. I. & P. Ry. v. Johnson, (1910) 25 Okla. 760, 107 Pac. 662, 27 L. R. A. (N.S.) 879 (discharge by ditch); see Chicago, R. I. & P. Ry. v. Groves, (1908) 20 Okla. 101, 113-114, 93 Pac. 755, 22 L. R. A. (N.S.) 802; Garrett v. Haworth, (1938) 183 Okla. 569, 572, 83 P. (2d) 822. For the general rules in Oklahoma see supra, footnotes 72, 185, and 195-197.

¹³⁸Johnson v. White, (1904) 26 R. I. 207, 58 Atl. 658, 65 L. R. A. 250 (discharge by culvert); see Wakefield v. Newell, (1878) 12 R. I. 75, 77, 34 Am. Rep. 598.

¹³⁹Brandenberg v. Zeigler, (1901) 62 S. C. 18, 39 S. E. 790, 55 L. R. A. 414, 89 Am. St. Rep. 887 (ditch drained surface water collected in a depression and discharged it upon adjoining land); Garmany v. Southern Ry., (1929) 152 S. C. 205, 149 S. E. 765 (ditch drained surface water collected in a depression and discharged it upon adjoining land). For the general rules in South Carolina see supra, footnotes 74 and 198-200.

¹⁴⁰See Norfolk & W. R. R. v. Carter, (1895) 91 Va. 587, 593, 22 S. E. 517. For the general rules in Virginia see supra, footnotes 75 and 182.

¹⁴¹Noyes v. Cosselman, (1902) 29 Wash. 635, 70 Pac. 61, 92 Am. St. Rep. 937 (ditch drained surface water collected in a depression and discharged it upon adjoining land); Sullivan v. Johnson, (1902) 30 Wash. 72, 70 Pac. 246 (ditch drained surface water collected in a depression and discharged it into ditches leading through adjoining land); Whiteside v. Benton County, (1921) 114 Wash. 463, 195 Pac. 519 (discharge by ditch); Ulery v. Kitsap County, (1936) 188 Wash. 519, 63 P. (2d) 352 (discharge by ditches); Tope v. King County, (1937) 189 Wash. 462, 65 P. (2d) 1283 (discharge by ditches and culverts). However, it has been held that a possessor of land is privileged to accelerate the flow of surface water through *natural* drainways by *artificial means* so long as the total quantity of surface water discharged upon the adjoining land is not thereby increased. Trigg v. Timmerman, (1916) 90 Wash. 768, 156 Pac. 846, L. R. A. 1916F 424.

See Morton v. Hines, (1920) 112 Wash. 612, 618-619, 192 Pac. 1016, where the court made an interesting distinction between discharging accumulated surface water and fencing out encroaching waters from other land.

¹⁴²Knight v. Brown, (1885) 25 W. Va. 808 (discharge by ditch); Lindamood v. Board of Education, (1922) 92 W. Va. 387, 114 S. E. 800 (discharge by artificial channel); see Gillison v. Charleston, (1880) 16 W. Va. 282, 304, 37 Am. Rep. 763; Clay v. St. Albans, (1897) 43 W. Va. 539, 544-546, 27 S. E. 368, 64 Am. St. Rep. 883.

¹⁴³In several early Wisconsin cases the rule was developed that a possessor of land is not privileged, by artificial means, to drain a pond or reservoir of surface water collected upon his land and to discharge such water upon adjoining land. Pettigrew v. Evansville, (1870) 25 Wis. 223, 3 Am. Rep. 50 (ditch discharged the water directly upon adjoining land); Wendlandt v. Cavanaugh, (1893) 85 Wis. 256, 55 N. W. 408 (ditch discharged the water directly upon adjoining land); Schuster v. Albrecht, (1898) 98 Wis. 241, 73 N. W. 990 (ditch discharged the water a short distance from the adjoining land so that it flowed in a concentrated volume upon that land); Nicolai v. Wilkins, (1899) 104 Wis. 580, 80 N. W. 939 (tile drains discharged the water in close proximity to the adjoining land). Subsequent cases, however, have tended to limit the rule previously developed. In Johnson v. Chicago, St. P., M. & O. Ry., (1891) 80 Wis. 641, 50 N. W. 771, 14 L. R. A. 495, 27 Am. St. Rep. 76, for example, a railway company was held not liable for harm caused by alterations made in the flow of surface water where a ditch collected surface water ponded back of its railway embankment and carried it to a culvert through which the water was discharged directly upon plaintiff's land, where such water was discharged upon plaintiff's land at the point at which the water would have flowed naturally, and where but very little more water was discharged upon

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.¹⁴⁴ 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.¹⁴⁵ This is especially true where the possessor disposes of the surface water by depositing it in existing natural drainways.¹⁴⁶ Consequently, the courts in the following civil law jurisdictions, with variations from state to state, have held that a possessor has a limited privilege to discharge surface water on other

plaintiff's land than would have flowed upon it naturally. See also *Clauson v. Chicago & N. W. Ry.*, (1900) 106 Wis. 308, 82 N. W. 146; *Shaw v. Ward*, (1907) 131 Wis. 646, 111 N. W. 671, 11 Ann. Cas. 1139; *Manteufel v. Wetzell*, (1907) 133 Wis. 619, 114 N. W. 91, 19 L. R. A. (N.S.) 167; *Vick v. Strehmel*, (1928) 197 Wis. 366, 222 N. W. 307.

For a general discussion of the Wisconsin law on this point see (1929) 5 Wis. L. Rev. 239.

¹⁴⁴This would seem to follow from the rationale of the civil law rule considered *supra*, footnotes 4-7 and text.

¹⁴⁵The scope of the possessor's privilege, in civil law states, to rid his land of surface water or alter its natural flow upon adjoining land, by artificial means, varies somewhat from state to state—the language of the courts not being uniform. Compare *Hughes v. Anderson*, (1880) 68 Ala. 280, 286, 44 Am. Rep. 147; *Dayton v. Drainage Commissioners*, (1889) 128 Ill. 271, 276-277, 21 N. E. 198; *Board of Trustees of Town of Auburn v. Chyle*, (1934) 256 Ky. 283, 286, 75 S. W. (2d) 1039. See also the cases cited in footnote 109, *supra*.

Of course, the privilege recognized in the civil law states is not so broad as to permit a possessor to do what he is not privileged to do in most common enemy jurisdictions, namely, discharge surface water, by artificial means, upon adjoining land in large quantities and in a concentrated flow outside of natural drainways.

¹⁴⁶Many of the cases from civil law jurisdictions dealing with the possessor's privilege to cause, by artificial means, the surface water upon his land to flow in a non-natural manner or quantity upon adjoining land are cases in which the possessor either discharged the surface water into natural drainways or improved the natural drainways so as to facilitate the flow of surface water through them. It is in these situations that the scope of the possessor's privilege appears to be broadest. For a general discussion, see 3 Farnham, *Law of Waters and Water Rights* (1904) sec. 893, pp. 2620-2623.

The scope of the privilege in particular jurisdictions and the situations in which the privilege was validly exercised in individual cases are indicated in footnotes 147-159 wherever it is helpful to do so.

lands, by artificial means in a non-natural manner: Alabama,¹⁴⁷ California,¹⁴⁸ Colorado,¹⁴⁹ Illinois,¹⁵⁰ Iowa,¹⁵¹ Kansas,¹⁵² Ken-

¹⁴⁷*Dicta in Hughes v. Anderson*, (1880) 68 Ala. 280, 286, 44 Am. Rep. 147, quoted in footnote 145, first defined the nature and scope of the possessor's privilege to discharge surface water upon adjoining land in a non-natural manner and by artificial means. Since that case was decided, the problem has been frequently reconsidered, but no substantial changes in the principles there laid down appear to have been made. See *Nininger v. Norwood*, (1882) 72 Ala. 277, 282, 47 Am. Rep. 412; *Walshe v. Dwight Mfg. Co.*, (1912) 178 Ala. 310, 318-320, 59 So. 630; *King Land & Improvement Co.*, (1913) 7 Ala. App. 462, 474-478, 61 So. 22. Of course, the privilege is quite limited. In *Crabtree v. Baker*, (1883) 75 Ala. 91, 51 Am. Rep. 424; *Walshe v. Dwight Mfg. Co.*, (1912) 178 Ala. 310, 59 So. 630; and *City of Mobile v. Lartigue*, (1930) 23 Ala. App. 479, 127 So. 257, it was held that a possessor of land is not privileged to collect surface water in artificial channels and thereby discharge it upon adjoining land. See also *Perry v. McCraw*, (1933) 226 Ala. 400, 147 So. 178, where it was held that a possessor of land is not privileged to cut through a watershed by means of a ditch and thus discharge upon other land surface water which would not have naturally flowed there.

¹⁴⁸The California courts have been quite hesitant in granting any extensive privilege. In *Heier v. Krull*, (1911) 160 Cal. 441, 444, 117 Pac. 530, it was said, "Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions. From these rights and burdens, the principle follows that he has a lawful right to complain of others, who, by interfering with natural conditions, cause such surface water to be discharged in greater quantity or in a different manner upon his land, than would occur under natural conditions." For similar statements, see *Galbreath v. Hopkins*, (1911) 159 Cal. 297, 113 Pac. 174; *Board of Trustees of Leland Stanford Junior University v. Rodley*, (1918) 38 Cal. App. 563, 177 Pac. 175; *Robinson v. San Diego County*, (1931) 115 Cal. App. 153, 300 Pac. 971.

Although some of the cases just cited may fall within the scope of the qualifying rule which has been adopted in most common enemy rule jurisdictions, see *supra*, footnotes 121-143, California seems to have been unusually strict in denying to a possessor the privilege of ridding his land of surface water by causing it to flow upon adjoining land by artificial means. Such a privilege has been granted to a possessor of land in only a few situations—namely, where he plows his land in furrows which have the effect of diverting the natural flow of surface water and of causing it to flow upon other land where it otherwise would not have flowed, *Coombs v. Reynolds*, (1919) 43 Cal. App. 656, 185 Pac. 877, and where he fills in natural depressions on his land so as to cause the surface water which would have naturally collected in them to flow upon adjoining land. *Switzer v. Yunt*, (1935) 5 Cal. App. (2d) 71, 41 P. (2d) 974.

¹⁴⁹See *Boulder v. Boulder & White Rock Ditch & Reservoir Co.*, (1923) 73 Colo. 426, 430-431, 216 Pac. 553, 36 A. L. R. 1458, where it was said that a possessor of land is privileged, by artificial means, to deposit in natural drainways surface water which would have ultimately flowed into them without the aid of artificial channels. But the privilege does not extend so far as to permit a possessor of land "to collect in an artificial channel, or reservoir, or pond, surface water and discharge it upon his neighbor's lands to his injury, in a different manner from that in which it would naturally flow if not interfered with. . . ." See also *Canon City & Cripple Creek R. R. v. Oxtoby*, (1909) 45 Colo. 214, 218, 100 Pac. 1127.

¹⁵⁰The Illinois law on this point has been well stated in *Dayton v. Drainage Commissioners*, (1889) 128 Ill. 271, 276-277, 21 N. E. 198, quoted

tucky,¹⁵³ Louisiana,¹⁵⁴ Michigan,¹⁵⁵ North Carolina,¹⁵⁶ Ohio,¹⁵⁷ Pennsylvania,¹⁵⁸ South Dakota,¹⁵⁹ and Texas.¹⁶⁰

in footnote 145. Thus, in *Peck v. Herrington*, (1894) 109 Ill. 611, 50 Am. Rep. 627, and *Lambert v. Alcorn*, (1893) 144 Ill. 313, 33 N. E. 53, 21 L. R. A. 611, it was held that a possessor of land is privileged to drain surface water collected in depressions upon his land and, by means of ditches, to deposit such water into natural drainways even though the quantity of surface water flowing through them upon adjoining land is thereby increased. But the privilege does not extend so far as to permit a possessor of land, by means of ditches, to drain surface water collected in natural depressions upon his land and to discharge such water upon adjoining land otherwise than through natural drainways. *Anderson v. Henderson*, (1888) 124 Ill. 164, 16 N. E. 232; *Graham v. Keene*, (1892) 143 Ill. 425, 32 N. E. 180.

¹⁵¹In *Miller v. Hester*, (1914) 167 Iowa 180, 184-185, 149 N. W. 93, it was said, "The general rule is that the owner of the dominant estate may not, by artificial means, concentrate at one point surface water diffused over the surface of his land, and discharge it in a mass upon the lower land; but this rule does not apply to natural depressions or drainways through which the surface water on the higher land drains onto the lower land. The great weight of authority seems to be that the flow of surface water along such depressions or drains may be hastened and increased by artificial means, so long as it is not diverted from the natural course of drainage." Thus, a possessor of land in Iowa is privileged to deposit in natural drainways, by artificial means, the surface water upon his land which would have flowed naturally in that direction without artificial alterations. *Les-senger v. Harlan*, (1918) 184 Iowa 172, 168 N. W. 803, 5 A. L. R. 1523; *Schwartz v. Wapello County*, (1929) 208 Iowa 1229, 227 N. W. 91; *Herman v. Drew*, (1933) 216 Iowa 315, 249 N. W. 277; *Johannsen v. Otto*, (Iowa 1938) 282 N. W. 334. Cf. Iowa, Code 1935, ch. 359, see 7736, which provides that a possessor of land is privileged by artificial means to drain his land into natural drainways leading to natural watercourses. The privilege, however, does not permit a possessor of land to discharge upon adjoining land through natural drainways, by artificial means, "unusually large quantities" of surface water which have been taken out of the natural course of drainage and deposited in the drainways. *Anton v. Stanke*, (1933) 217 Iowa 166, 251 N. W. 153. Nor is a possessor of land privileged, by means of ditches, to collect surface water and discharge it in a concentrated flow upon adjoining land otherwise than through natural drainways. *Livingston v. McDonald*, (1866) 21 Iowa 160, 89 Am. Dec. 563 (the drain carried surface water collected in a slough and discharged it upon adjoining land); *Baker v. Akron*, (1909) 145 Iowa 485, 122 N. W. 926, 30 L. R. A. (N.S.) 619 (watershed cut through and water collected in gutters which discharged the surface water upon adjoining land.)

¹⁵²Kansas, General Statutes 1935, ch. 24, sec. 106, p. 714, provides: "Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, into any natural depression, draw, or ravine, on his own land, whereby the water will be carried by said depression, draw or ravine into some natural watercourse, or into any drain upon a public highway, for the purpose of securing proper drainage to such land. . . ." But a possessor of land is not privileged, by means of ditches, to discharge upon adjoining land otherwise than through natural drainways the surface water upon his land. *Dyer v. Stahlhut*, (1938) 147 Kan. 767, 78 P. (2d) 900; cf. *Puhr v. Kansas City*, (1935) 142 Kan. 704, 707, 51 P. (2d) 911.

¹⁵³See *Board of Trustees of Town of Auburn v. Chyle*, (1934) 256 Ky. 283, 286, 75 S. W. (2d) 1039, quoted in footnote 145. A possessor of land is not privileged, however, "to collect surface water into a volume and empty it upon the lower proprietor." See *Franz v. Jacobs*, (1919) 183 Ky. 647, 649, 210 S. W. 163. Nor is a possessor privileged so to grade his land

Thus, through qualifications and modifications of both the civil law and common enemy rules, which in rationale are so dia-

as to discharge upon adjoining land surface water which naturally would not have flowed upon it. *Walter v. Wagner*, (1928) 225 Ky. 255, 8 S. W. (2d) 421; *Frank v. Dierson*, (1930) 235 Ky. 229, 30 S. W. (2d) 950.

¹⁵⁴At a very early time the Louisiana Court discussed the privilege of a possessor to cause surface water upon his land to flow upon adjoining land by artificial means. In *Martin v. Jett*, (1838) 12 La. 501, 505-506, 32 Am. Dec. 120, the court said, "We are by no means disposed to give to the code such an interpretation as would, in effect, condemn to sterility the superior estate. That every man has a right to clear and cultivate his land, cannot be doubted. The clearing of land, and fitting it for agricultural purposes, is not calculated to render this kind of servitude more onerous. . . . But it is one thing to clear and cultivate arable lands, and another thing to reclaim lands naturally covered with stagnant waters, in such a way as to throw the mass of water, which would naturally remain in pools or ponds, upon the lands of one's neighbor. . . ." In that case it was held that a possessor of land had no privilege, by means of ditches, to collect surface water and discharge it upon adjoining land. Subsequent cases reconsidered the problem, but the conflicting statements and decisions in these cases resulted in confusion, and the exact scope of a possessor's privilege in this regard remained uncertain for some time. See, for examples, *Lattimore v. Davis*, (1839) 14 La. 161, 164, 33 Am. Dec. 581 (held liable for collecting water in ditches which did not follow natural drainways and discharging it upon adjoining land); *Delahoussaye v. Judice*, (1858) 13 La. Ann. 587, 587-588, 71 Am. Dec. 521 (held liable for draining ponds into a coulee so as to flood plaintiff's land); *Sowers & Jamison v. Shiff*, (1860) 15 La. Ann. 300, 301 (held privileged to drain into natural drainways by means of ditches the surface water which ultimately would have flowed into the drainways without the aid of the ditches); *Hooper v. Wilkinson*, (1860) 15 La. Ann. 497, 497, 77 Am. Dec. 194 (held liable for discharging surface water into a bayou by means of ditches). It was not until 1882 in the case of *Ludeling v. Stubbs*, (1882) 34 La. Ann. 935, 937-938, that the scope of the possessor's privilege was tolerably well defined: "The owner of the superior estate may make all drainage works which are necessary to the proper cultivation and to the agricultural development of his estate. To that end, he may cut ditches and canals by which the waters *running* on his estate may be concentrated, and their flow increased beyond the slow process by which they would *ultimately* reach the SAME destination. But the owner of the superior estate cannot improve his lands to the injury of his neighbor, and thus he will not be allowed to cut ditches or canals, or do other drainage works by which the waters running on his lands will be diverted from their natural flow, and concentrated so as to flow on the lower lands of the adjacent estate at a point which would not be their natural destination, thus increasing the volume of water which would by natural flow run over or reach any portion of the lower adjacent estate, or to drain over his neighbor's lands stagnant waters from his, and to thus render the servitude due by the estate below more burdensome." These views were approved and applied in the relatively recent case of *Bolinger v. Murray*, (1931) 18 La. App. 158, 137 So. 761, where it was held that a possessor of land was privileged to drain into natural drainways by artificial means the surface water upon his land.

¹⁵⁵In Michigan, a possessor's privilege to rid his land of surface water by artificial means seems to have been restricted rather narrowly. It has been held to exist only where a possessor fills in natural depressions on his land, thereby causing the surface water which naturally would have collected in them to flow upon adjoining land. *Launstein v. Launstein*, (1907) 150 Mich. 524, 114 N. W. 383, 121 Am. St. Rep. 635; see *Gregory v. Bush*, (1887) 64 Mich. 37, 42, 31 N. W. 90, 8 Am. St. Rep. 797. There is no privilege to collect surface water in artificial channels which naturally

metrically opposed, the courts of both groups of jurisdictions have achieved very similar, if not substantially identical, results in cases

flows in a diffused state and, by means of the artificial channels, to cause it to flow upon adjoining land in a concentrated volume. *Yerex v. Eineder*, (1891) 86 Mich. 24, 48 N. W. 875. 24 Am. St. Rep. 113. And a possessor is not privileged, by means of artificial channels, to drain surface water collected in natural depressions on his land and to discharge it upon adjoining land, *Miller v. Zahn*, (1933) 264 Mich. 306, 249 N. W. 862, even where it is deposited in natural drainways. *Gregory v. Bush*, (1887) 64 Mich. 37, 31 N. W. 90, 8 Am. St. Rep. 797.

¹⁵⁶The North Carolina cases dealing with this problem are not very satisfactory. In most of the cases the statements of facts are not adequate, and the language employed by the court is not sufficiently clear. The statement frequently is found, as in *Hocutt v. Wilmington & W. R. R.*, (1899) 124 N. C. 214, 32 S. E. 681, that "neither a corporation nor an individual can divert water from its natural course so as to damage another. They may increase and accelerate, but not divert." Although the exact meaning of this statement is not very clear, it would seem that a possessor is privileged to accelerate and increase the flow of surface water from his land in its natural course of drainage. Thus, in *Briscoe v. Parker*, (1907) 145 N. C. 14, 17, 58 S. E. 443, it was said, "The principle settled by our decisions is, that in the interest of health and good husbandry better drainage is to be encouraged. Hence, an upper proprietor can accelerate and even increase the flow of water from his land, but due regard for the rights of the lower proprietor forbids that the flow of water should be diverted to his detriment." See *Staton v. Norfolk & N. C. R. R.*, (1891) 109 N. C. 337, 340, 13 S. E. 933; *Greenwood v. Southern Ry.*, (1907) 144 N. C. 446, 448, 57 S. E. 157, 119 Am. St. Rep. 967. But it is well established that the scope of this privilege is not so broad as to permit a possessor of land to divert surface water from its natural course of drainage by artificial means and to cause it to flow upon other land. Thus, in *Cardwell v. Norfolk & W. Ry.*, (1916) 171 N. C. 365, 88 S. E. 495, where defendant placed three culverts through its railway embankment and the surface water which collected on the upper side of the embankment was discharged through the culverts upon plaintiff's land, defendant was held liable to plaintiff for the harm thus caused. The culverts were not placed in natural drainways. See also *Lassiter v. Norfolk & C. R. R.*, (1900) 126 N. C. 509, 36 S. E. 48 (liable for causing surface water which naturally collected in a natural depression to flow upon plaintiff's land); *Barcliff v. Norfolk & S. R. R.*, (1915) 168 N. C. 268, 84 S. E. 290 (liable for draining a basin of boggy land by means of ditches so as to cause the water thus drained to flood plaintiff's land); *Winchester v. Byers*, (1928) 196 N. C. 383, 145 S. E. 774 (liable for diverting the natural flow of surface water by defendant placing dirt in such quantities on his land that the water flooded plaintiff's land); see *Staton v. Norfolk & C. R. R.*, (1891) 109 N. C. 337, 341, 13 S. E. 933; *Brown v. Southern Ry.*, (1914) 165 N. C. 392, 396, 81 S. E. 450.

¹⁵⁷In *Mason v. Fulton*, (1909) 80 Ohio St. 151, 159-160, 88 N. E. 401, 24 L. R. A. (N.S.) 903, a possessor's privilege to rid his land of the surface water upon it by causing it by artificial means to flow upon adjoining land was defined in the following terms: "It is well settled under the rule of both the common and civil law that surface water cannot be collected into a ditch and discharged upon the land of another, to his damage; but the landowner may, in the reasonable use of his land drain the water from it into its natural outlet, whether that be a watercourse or a natural drainage channel, and thus increase the volume and accelerate the flow of water of such watercourse or channel, without incurring liability for damages to owners of lower lands." This quotation seems to be a substantially correct statement of the Ohio law governing this problem. Thus, a possessor, by cultivating his land in the interest of ordinary good husbandry, is privileged to alter somewhat the natural flow of surface water and to concentrate its flow upon adjoining land.

involving the various situations falling within this general category.

3. OBSTRUCTION OF THE NATURAL FLOW OF SURFACE WATER.

The situations here dealt with are those in which a possessor of lower land obstructs the natural flow of surface water from adjoin-

See *Sheldon v. Cole*, (1895) 2 Ohio N. P. 301, 313; *Dill v. Oglesbee*, (1898) 5 Ohio N. P. 271. The possessor's privilege, however, does not extend so far as to permit him to collect in one artificial channel and thereby discharge upon other land surface water which naturally flowed through several channels, *Evers v. Akron*, (1912) 23 Ohio C. C. (N.S.) 168, or to drain, by means of ditches, the surface water which collected upon his land in natural depressions and discharge it upon adjoining land. *Butler v. Peck*, (1865) 16 Ohio St. 334, 88 Am. Dec. 452; *Dill v. Oglesbee*, (1898) 5 Ohio N. P. 271.

¹⁵⁸In *Rhoads v. Davidheiser*, (1890) 133 Pa. St. 226, 233, 19 Atl. 400, 19 Am. St. Rep. 630, it was said, "The owner of the upper field may improve and drain it for agricultural purposes or the like, and in so doing may increase the flow of water in the natural channel for it; but if he diverts it from this channel, and creates a new channel, by which it is discharged upon the lower field at another place, he must answer for the damages caused by the diversion." Thus, it has been held that a possessor of land is privileged, by means of mole drains, to rid his land of the surface water upon it where he discharges the water upon adjoining land at the point at which the surface water naturally would have flowed upon the adjoining land. *Meixel v. Morgan*, (1892) 149 Pa. St. 415, 24 Atl. 216, 34 Am. St. Rep. 614. Similarly, a possessor is privileged to clear his land of brush and trees although the result is to cause the surface water on it to flow upon adjoining land in greater quantities and with increased acceleration. See *Strauss v. Allentown*, (1906) 215 Pa. St. 96, 98, 63 Atl. 1073; cf. *Tess v. Charleroi Home Bldg. Co.*, (1929) 96 Pa. Super Ct. 505. On the other hand, a possessor of land is not privileged to collect in artificial channels and to discharge in a concentrated flow upon other land the surface water existing on his land which naturally would not have flowed upon such adjoining land. *Kauffman v. Griesemer*, (1856) 26 Pa. St. 407, 67 Am. Dec. 437; *Miller v. Laubach*, (1864) 47 Pa. St. 154, 86 Am. Dec. 521; *Rhoads v. Davidheiser*, (1890) 133 Pa. St. 226, 19 Atl. 400, 19 Am. St. Rep. 630.

In at least two cases, however, it was indicated that the scope of the possessor's privilege to rid his land of surface water by discharging it upon other land is determined and measured by principles of reasonable use. See *Pfeiffer v. Brown*, (1895) 165 Pa. St. 267, 30 Atl. 844, 44 Am. St. Rep. 660; *Markle v. Grothe*, (1931) 102 Pa. Super. Ct. 90, 156 Atl. 585.

¹⁵⁹*Thompson v. Andrews*, (1917) 39 S. D. 477, 165 N. W. 9. See also 2 South Dakota, Compiled Laws 1929, ch. 5, sec. 8479, p. 2698, which provides that an owner of land is privileged to drain his land in the general course of natural drainage by means of artificial drains which deposit the surface water into natural drainways leading to natural water-courses. Thus, in *Mishler v. Peterson*, (1918) 40 S. D. 183, 166 N. W. 640, it was held that a possessor of land, by means of artificial drains, is privileged to drain the surface water collecting in natural depressions on his land and to deposit such water into a natural drainway through which the surface water in the locality, including the overflow from the natural depressions, naturally flowed. But the possessor's privilege does not extend so far as to permit him to dispose of the surface water collected in a slough on his land by means of an artificial drain which cuts through a natural watershed and discharges such water upon other land where it naturally would have flowed. *Boll v. Ostroot*, (1910) 25 S. D. 513, 127 N. W. 577.

ing higher land with resultant damage to that land. Such obstructions may be caused in a number of ways. The natural flow of surface water from higher land to lower land may be through natural drainways, or it may be in a diffused state over a wide area. The obstruction of the natural flow may result from the erection of walls, dams, embankments, or buildings, or from the grading and filling in of the lower land.

In jurisdictions committed to the civil law rule, the courts, following the rationale of that rule,¹⁶¹ have uniformly taken the position that a possessor of lower land is not privileged to obstruct the natural flow of surface water from adjoining higher land to and upon his lower land, not only where the natural flow of the surface water is through natural drainways,¹⁶² but also where it flows in a diffused state over a wide area.¹⁶³

The courts following the common enemy rule, on the other hand, are not in complete accord. In the situation where the natural flow of the surface water is in a diffused state over a wide area, these courts are agreed that the possessor of the lower land is privileged to obstruct it.¹⁶⁴ But where the natural flow is

¹⁶⁰In Texas a possessor's privilege, by artificial means, to drain his land into natural drainways for the flow of surface water seems to be relatively broad. In *Johnson v. McMahan*, (1929) 118 Tex. 633, 15 S. W. (2d) 1023, it was held that a possessor of land is privileged, by artificial means, to dispose of the surface water collecting upon his land in a large natural depression by discharging it into a natural drainway where the tendency of the surface water is to flow naturally in the direction of the drainway and where the possessor acts reasonably in so doing. And see *Jefferson County Drainage District No. 6 v. McFaddin*, (Tex. Civ. App. 1927) 291 S. W. 322, 327. But a possessor of land is not privileged to collect surface water which naturally flowed upon adjoining land in a diffused state over a wide area and to discharge such water upon the adjoining land in a concentrated flow at a single point. *Bunch v. Thomas*, (1932) 121 Tex. 225, 49 S. W. (2d) 421; *Miller v. Letzerich*, (1932) 121 Tex. 248, 49 S. W. (2d) 404, 85 A. L. R. 451.

¹⁶¹See footnotes 4-9 and text, *supra*.

¹⁶²*Ogburn v. Connor*, (1873) 46 Cal. 346, 13 Am. Rep. 213; *Heinse v. Thorborg*, (1930) 210 Iowa 435, 230 N. W. 881; *Bolinger v. Murray*, (1931) 18 La. App. 158, 137 So. 761; *Boyd v. Conklin*, (1884) 54 Mich. 583, 20 N. W. 595, 52 Am. Rep. 831; *McKiernann v. Grimm*, (1928) 31 Ohio App. 213, 165 N. E. 310.

¹⁶³*Johnson v. Marcum*, (1913) 152 Ky. 629, 153 S. W. 959. In 3 *Farnham, Law of Waters and Water Rights* (1904) sec. 889a, pp. 2586-2587, it is said that, under the original civil law, a possessor of lower land was privileged to obstruct the natural flow of surface water from adjoining higher land where it flowed naturally in a diffused state over a wide area but that, under the Code Napoleon and the Louisiana Civil Code, from which the American courts have derived their conception of the civil law rule, a possessor of lower land is not privileged to obstruct the natural flow of surface water in this situation.

¹⁶⁴*Cairo & V. R. R. v. Stephens*, (1881) 73 Ind. 278, 38 Am. Rep. 139; *Muhleisen v. Krueger*, (1930) 120 Neb. 380, 232 N. W. 735. In 3

through natural drainways, there is a division of authority. Many of these courts, principally those of Maine,¹⁶⁵ Massachusetts,¹⁶⁶ Montana,¹⁶⁷ New Mexico,¹⁶⁸ South Carolina,¹⁶⁹ and Wisconsin,¹⁷⁰ have taken the position that a possessor of lower land is privileged to obstruct the surface water even though it flows through natural drainways. The courts of Arizona,¹⁷¹ Nebraska,¹⁷² North Dakota,¹⁷³ Oklahoma,¹⁷⁴ Virginia,¹⁷⁵ and West Virginia,¹⁷⁶ however,

Farnham, *Law of Waters and Water Rights* (1904) sec. 890, p. 2615, it is said that the universal rule is that a possessor of lower land is privileged to obstruct the natural flow of surface water from adjoining higher land where it is in a diffused state over a wide area. The cases cited in support of that proposition are cases from common enemy rule jurisdictions.

¹⁶⁵*Bangor v. Lansil*, (1863) 51 Me. 521.

¹⁶⁶*Bates v. Smith*, (1868) 100 Mass. 181.

¹⁶⁷*Le Munyon v. Gallatin Valley Ry.*, (1921) 60 Mont. 517, 199 Pac. 915.

¹⁶⁸*Walker v. New Mexico & S. P. R. R.*, (1897) 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837. On this case in a dictum, however, the court indicated that, if the natural drainways were sufficiently large and well defined, a possessor of lower land would not be privileged to obstruct the flow of surface water through them. See footnote 177.

¹⁶⁹*Baltzegeer v. Carolina Midland Ry.*, (1899) 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789. For the general rules in South Carolina see footnotes 74, 139, and 198-200.

¹⁷⁰*Hoyt v. Hudson*, (1871) 27 Wis. 656, 9 Am. Rep. 473. But the court in this case, in a dictum, indicated that a lower possessor would not be privileged to obstruct the flow of surface water through sufficiently large and well-defined natural drainways. See footnote 177.

¹⁷¹*Kroeger v. Twin Buttes R. R.*, (1911) 13 Ariz. 138, 114 Pac. 553, Ann. Cas. 1913E 1229. On rehearing the same result was achieved but upon a different ground. (1912) 14 Ariz. 269, 127 Pac. 735, Ann. Cas. 1914A 1289. For the general rules in Arizona see footnotes 57 and 183.

¹⁷²*Leaders v. Sarpy County*, (1938) 134 Neb. 817, 270 N. W. 809; see *Aldritt v. Fleischauer*, (1905) 74 Neb. 66, 70-71, 103 N. W. 1084. Cf. *Lincoln & B. H. R. R. v. Sutherland*, (1895) 44 Neb. 526, 62 N. W. 859, in which the liability for obstructing the natural flow of surface water through natural drainways seems to have been predicated upon negligence. For the general rules in Nebraska see footnotes 67 and 181.

¹⁷³*Soules v. Northern Pacific Ry.*, (1916) 34 N. D. 7, 157 N. W. 823, L. R. A. 1917A, 501; *Reichert v. Northern Pacific Ry.*, (1917) 39 N. D. 114, 167 N. W. 127. In these cases the lower possessor's liability for obstructing the natural drainways seems to have been predicated upon negligence. Thus, if the lower possessor is not negligent in obstructing the drainways, liability will not be imposed. *Henderson v. Hines*, (1921) 48 N. D. 152, 183 N. W. 531. For the general rules in North Dakota see footnotes 71 and 184.

¹⁷⁴*Chicago, R. I. & P. Ry. v. Groves*, (1908) 20 Okla. 101, 93 Pac. 755, 22 L. R. A. (N.S.) 802; *Gulf, C. & S. F. Ry. v. Brown*, (1925) 112 Okla. 1, 239 Pac. 599. Cf. *Garrett v. Haworth*, (1938) 183 Okla. 569, 570-571, 83 P. (2d) 822, where the definition of watercourse was extended to include natural drainways for the flow of surface water. For the general rules in Oklahoma see footnotes 72, 185, and 195-197.

¹⁷⁵*Norfolk & W. R. R. v. Carter*, (1895) 91 Va. 587, 22 S. E. 517. For the general rules in Virginia see footnotes 75 and 182.

¹⁷⁶In *Neal v. Ohio River R. R.*, (1899) 47 W. Va. 316, 34 S. E. 914, the definition of watercourse was extended so as to include natural drainways for the flow of surface water. Consequently, a possessor of lower land is not privileged to obstruct natural drainways.

have adopted the contrary view that a lower possessor is not privileged to obstruct natural drainways. A compromise view to the effect that a lower possessor is privileged to obstruct relatively small natural drainways, but is not privileged to obstruct the natural flow of large quantities of surface water through relatively large and well defined natural drainways is followed in New Jersey.¹⁷⁷

Thus, although the two rules produce opposite results in the cases involving the obstruction of diffused surface waters, the modifications of the strict common enemy rule in a number of jurisdictions, where the case involves obstruction of natural drainways, produces decisions in accord with those in the civil law states.

4. THE QUALIFIED COMMON ENEMY RULE. In a number of jurisdictions purportedly committed to the common enemy rule, the courts have substantially modified the entire rule by developing and, in a sense, substituting a principle of liability which makes a near approach to the reasonable use doctrine. Although the courts of these jurisdictions have stated the principle in somewhat different terms,¹⁷⁸ it would seem to be, in substance, that where a

¹⁷⁷In *Earl v. De Hart*, (1856) 12 N. J. Eq. 280, 72 Am. Dec. 395, it was held that a possessor of land is not privileged, by means of a dam, to obstruct the natural flow of surface water through well-defined natural drainways. This result was achieved by extending the definition of water-course. It was said on pages 283-284, "If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir, and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural water-course." But in the later case of *Bowlsby v. Speer*, (1865) 31 N. J. L. 351, 86 Am. Dec. 216, the *Earl* Case was distinguished on a seemingly immaterial basis, and it was held that a possessor of lower land was privileged, by means of the erection of a stable, to obstruct the natural flow of surface water through a small ravine. On page 353, the court said, ". . . no right of any kind can be claimed in the mere flow of surface water, and . . . neither its retention, repulsion, or altered transmission is an actionable injury, even though damage ensues. How far it may be necessary to modify this general proposition in cases in which, in a hilly region, from the natural formation of the surface of the ground, large quantities of water, in times of excessive rains or from the melting of heavy snows, are forced to seek a channel through gorges or narrow valleys, will probably require consideration when the facts of the case shall present the question. It would seem that such anomalous cases might reasonably be regarded as forming exceptions to the general rule. Subsequently, in *Kelly v. Dunning*, (1885) 39 N. J. Eq. 482, 483-484, both cases were cited with apparent approval, thus indicating that the *Earl* Case fell within the possible exception to the general rule noted in the *Bowlsby* Case. An examination of the facts of the cases seems to indicate that that conclusion is well founded.

¹⁷⁸In *Holman v. Richardson*, (1917) 115 Miss. 169, 179, 76 So. 136,

possessor of land uses reasonable care to avoid causing unnecessary harm to others, he is privileged to use and improve his land for proper purposes although the natural flow of surface water is thereby altered. The courts of Arkansas,¹⁷⁹ Mississippi,¹⁸⁰ Ne-

L. R. A. 1917F, 942, it was said, ". . . the rule with us . . . is that when adjoining lots owned by different persons are on a different level, so that there will be a natural flow of rainwater in a diffused state from the higher to the lower level, the owner of the lower lot may fend the water therefrom, provided he does so for proper objects and exercises reasonable care to prevent unnecessary injury to the higher lot. . . . This rule . . . is simply a concrete application of the maxim that, 'One must so use his own as to not unnecessarily injure others.'" See also *Norfolk & W. R. R. v. Carter*, (1895) 91 Va. 587, 592-593, 22 S. E. 517.

¹⁷⁹In *Little Rock & Ft. S. Ry. v. Chapman*, (1882) 39 Ark. 463, 43 Am. Rep. 280, defendant constructed its railway embankment so as to obstruct the natural flow of surface water from plaintiff's land. The two small tile drain pipes which defendant placed through its embankment were not sufficient to dispose of the surface water, and as a result plaintiff's land was flooded. A culvert could have been placed through the embankment at a reasonable expense which would have adequately disposed of the surface water. Defendant was held liable, the court saying on page 481, "It was not *necessary* to the enjoyment of that (the right of way), that the bed should be solid throughout. The damage was of course unnecessary. . . . It was not reasonable that it [the defendant] should render so much property useless, when it might so easily have prevented it without detriment to its operations." See also *Little Rock & Ft. S. Ry. v. Wallis*, (1907) 82 Ark. 447, 102 S. W. 390; *St. Louis, I. M. & S. Ry. v. Hardie*, (1908) 87 Ark. 475, 113 S. W. 31; *Burel v. Hutson*, (1924) 165 Ark. 111, 263 S. W. 57. However, the possessor is not absolutely prohibited from altering the natural flow of surface water in such a way as to cause harm to others. He merely has to exercise reasonable care. *Baker v. Allen*, (1899) 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93; *Leader v. Matthews*, (1936) 192 Ark. 1049, 95 S. W. (2d) 1138. See supra, footnote 58.

¹⁸⁰In *Sinai v. Louisville, N. O. & T. Ry.*, (1893) 71 Miss. 547, 14 So. 87, defendant constructed a solid railway embankment which obstructed the natural flow of surface water from plaintiff's land and flooded it. The court reversed an order sustaining defendant's demurrer to the complaint, saying on page 554, "The rule possessing flexibility and adaptability to all conditions likely to arise, is that which guards the right of the landowner to deal with his own as he will, qualified by the duty imposed upon him to so use his own as not to hurt his neighbor, if that be reasonably within his power. In the case at bar, to reach a right conclusion, we must consider the character and value of construction or embankment; the likely to be foreseen interference with the usual flow of the waters . . . ; the extent and amount of the injury done to adjacent landowners compared with the cost and value of the embankment, and whether any other type of construction, equally safe, convenient and inexpensive might have been adopted." See also *Holman v. Richardson*, (1917) 115 Miss. 169, 76 So. 136, L. R. A. 1917F 942. Of course, a possessor is not absolutely prohibited from making harmful alterations in the natural flow of surface water. *Columbus & G. Ry. v. Taylor*, (1928) 149 Miss. 269, 115 So. 200. Compare *Kansas City, M. & B. R. R. v. Smith*, (1895) 72 Miss. 677, 17 So. 78, 27 L. R. A. 762, 48 Am. St. Rep. 579, which deals with the flood water of watercourses. See supra, footnote 64.

braska,¹⁸¹ Virginia,¹⁸² and perhaps Arizona,¹⁸³ North Dakota,¹⁸⁴ and Oklahoma¹⁸⁵ have developed such a principle.

¹⁸¹In *Lincoln & B. H. R. R. v. Sutherland*, (1895) 44 Neb. 526, 62 N. W. 859, defendant railway constructed a solid railway embankment across a natural drainway, with the result that the flow of surface water was obstructed so as to flood plaintiff's land. The court found that defendant was negligent in failing to provide an outlet for the water, and so held it liable for the harm caused to plaintiff. In *Todd v. York County*, (1904) 72 Neb. 207, 100 N. W. 299, a possessor cleaned out and deepened an existing ditch which drained surface water on his land into a natural drainway. He was held not liable because he acted with reasonable care and followed "the practical, most natural, and reasonable plan that could be adopted." A similar situation was involved and the same result reached in *Aldritt v. Fleischauer*, (1905) 74 Neb. 66, 103 N. W. 1084. See *supra*, footnote 67.

¹⁸²In *McGehee v. Tidewater Ry.*, (1908) 108 Va. 508, 62 S. E. 356, defendant railway constructed a solid railway embankment which had the effect of obstructing the natural flow of surface water from plaintiff's land and flooding it. It was held error to charge the jury that defendant was not subject to liability for obstructing the natural flow of surface water. The court said on page 511, "And the qualified rule of the common law in this State, with regard to surface water . . . , imposes upon the lower land owner, in the betterment or protection of his own property, the duty of exercising his rights, not wantonly, unnecessarily, or carelessly, but in good faith and with such care as not to needlessly injure the upper owner." See also *Raleigh Court v. Faucett*, (1924) 140 Va. 126, 124 S. E. 433. In *Harris Motor Co. v. Pulaski Furniture Co.*, (1928) 151 Va. 125, 144 S. E. 414, where defendant constructed a building which obstructed the natural flow of surface water from plaintiff's adjoining land, and it was not shown that the defendant has "so carelessly and recklessly constructed its building as to inflict needless and unnecessary injury, which could have been avoided by the exercise of reasonable care." defendant was held not liable. See also *Town of Farmville v. Wells*, (1920) 127 Va. 528, 103 N. E. 596, and the quotation in footnote 178 from *Norfolk & W. R. R. v. Carter*, (1895) 91 Va. 587, 592-593, 32 S. E. 517. See *supra*, footnote 75.

¹⁸³In *Tucson v. Dunseath*, (1914) 15 Ariz. 355, 139 Pac. 177, defendant was held liable for harm caused to plaintiff by the filling in of a drainage ditch and the throwing up of an embankment which diverted surface water upon plaintiff's land. The court quoted at length from the case of *Sheehan v. Flynn*, (1894) 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632, discussed in footnotes 94-100, and may have predicated the defendant's liability upon a finding of negligence. Probably, however, the defendant's liability was based upon the rule followed in most common enemy jurisdictions, considered in footnotes 121-143 and text. Subsequent Arizona cases have not cleared up the doubt. See *Gibson v. Duncan*, (1915) 17 Ariz. 329, 152 Pac. 856; *Roosevelt Irr. Dist. v. Beardsley Land & Investment Co.*, (1929) 36 Ariz. 65, 282 Pac. 937. See *supra*, footnote 57.

¹⁸⁴In *Henderson v. Hines*, (1921) 48 N. D. 152, 159-161, 183 N. W. 531, it was said that the common enemy rule of surface waters was subject to the qualification that a possessor is not privileged to cause harm by his negligent acts in altering the natural flow of surface water. For a further discussion see footnote 173 and text. See also footnote 71.

¹⁸⁵In *Chicago, R. I. & P. Ry. v. Groves*, (1908) 20 Okla. 101, 93 Pac. 755, 22 L. R. A. (N.S.) 802, where it was held that a possessor of lower land is not privileged to obstruct the flow of surface water through natural drainways so as to cause harm to possessors of higher land, (see footnote 174 and text) the court said on pages 111-112, "Practically all of the common-law courts agree that the surface water, flowing naturally or

The similarity of the principle developed by these courts to that expounded and applied in the relatively early Minnesota case of *Sheehan v. Flynn*¹⁸⁶ is apparent. Consequently, it would seem justifiable to conclude that the courts following the so-called "qualified" common enemy rule are on their way toward complete acceptance of the reasonable use principle.

5. MISCELLANEOUS MODIFICATIONS AND QUALIFICATIONS. In addition to the foregoing, many other modifications and qualifications of the civil law and common enemy rules are to be found in the cases. Since many of them are not of sufficient importance to justify discussion, only the most important will be considered. These are, first, the so-called exception to the civil law rule with respect to urban land and, second, the peculiar rules developed in Oklahoma and South Carolina.

In several of the states following the civil law rule, the question of whether it is applicable to cases involving urban land has been considered. On this question there is a split of authority. The courts of Alabama,¹⁸⁷ California,¹⁸⁸ and Pennsylvania¹⁸⁹ have

falling upon the soil, may be diverted in its course, and even thrown back upon the dominant estate whence it came. But is this right absolute at the will of the lower proprietor, or must such exercise be reasonable, for proper purposes, and with due care to inflict injury only when it is necessary? The question of good faith and the manner of doing it are necessarily involved in determining whether or not such right may be exercised. When necessary, and with due care and regard as to the rights of others, although injury may accompany its exercise, under the common law there is no relief. The doctrine that the right may not be exercised wantonly, unnecessarily or carelessly does not rest upon the civil law so much as upon the common law. 'Sic utere tuo ut alienum non laedas.' But this statement apparently has not been followed in subsequent Oklahoma cases. Rather it appears to have been perverted into a very peculiar and contradictory principle of liability. See footnotes 195-197. See also footnote 72.

¹⁸⁶(1894) 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632, discussed in footnotes 94-100 and text.

¹⁸⁷In *Hall v. Rising*, (1904) 141 Ala. 431, 37 So. 586, it was held that a possessor of urban land is privileged to raise the level of his land, although the natural flow of surface water is thereby diverted upon other urban land. In *Shahan v. Brown*, (1913) 179 Ala. 425, 60 So. 891, 43 L. R. A. (N.S.) 792, and *Ex parte Tennessee Coal, Iron & R. R. Co.*, (1921) 206 Ala. 403, 90 So. 876, it was held that a possessor of lower urban land is privileged to obstruct the natural flow of surface water from adjoining higher urban land by a fence or wall. However, this non-applicability of the civil law rule with respect to urban land does not extend to railway embankments which obstruct the natural flow of surface water from adjoining urban land. With respect to such embankments the civil law rule applies. *Alabama Power Co. v. Alford*, (1923) 210 Ala. 98, 97 So. 224; cf. *Southern Ry. v. Lewis*, (1910) 165 Ala. 555, 51 So. 746. See *supra*, footnote 16.

¹⁸⁸In *Los Angeles Cemetery Assn. v. Los Angeles*, (1894) 103 Cal. 461, 467, 37 Pac. 375, it was said, "The doctrine of the civil law, in

apparently adopted the view that although the civil law rule is applicable to rural land, the common enemy rule in some form applies to urban land. In Kansas the same result has been achieved through the enactment of a statute.¹⁹⁰ On the other hand, the courts of Georgia,¹⁹¹ Kentucky,¹⁹² Tennessee,¹⁹³ and perhaps Ohio,¹⁹⁴ have taken the opposite position, namely, that the civil law rule applies to urban as well as to rural land.

reference to a servitude in the lower tenement in favor of the upper or dominant tenement, for the flow of surface water, had no application to lots held in cities and towns, where changes and alterations in the surface were essential to the enjoyment of such lots, and this rule has been very generally adopted in this country." However, in *Jaxon v. Clapp*, (1919) 45 Cal. App. 214, 187 Pac. 69, where the court expressly recognized the general non-applicability of the civil law rule to urban land, the court nevertheless held that a possessor of urban land is not privileged to collect a volume of surface water and discharge it through a pipe with a high velocity and in a concentrated flow upon adjoining urban land. This decision is in accord with the decisions of courts in most *common enemy* jurisdictions. See footnotes 121-143. See also *supra*, footnote 17.

¹⁸⁹The early Pennsylvania case of *Bentz v. Armstrong*, (1844) 8 Watts & S. 40, 42 Am. Dec. 265, contained a dictum to the effect that a possessor of urban land is privileged to alter the natural flow of surface water by using and improving his land. Since that case it has been established that the civil law rule does not apply to urban land. *Kohn v. Moore*, (1872) 4 Leg. Gaz. 46; *Rielly v. Stephenson*, (1908) 222 Pa. St. 252, 70 Atl. 1097, 22 L. R. A. (N.S.) 947, 128 Am. St. Rep. 804; *Wilson v. McCluskey*, (1911) 46 Pa. Super. Ct. 594; see *Davidson v. Sanders*, (1896) 1 Pa. Super. Ct. 432, 436-437; *McMahon v. Thornton*, (1897) 5 Pa. Super. Ct. 495, 502. However, a possessor of urban land is not absolutely privileged to alter the natural flow of surface water as he pleases regardless of the harm he thereby causes to others. His privilege exists only where he uses reasonable care to avoid causing unnecessary harm to others. *Davidson v. Sanders*, (1896) 1 Pa. Super. Ct. 432; see *Rielly v. Stephenson*, (1908) 222 Pa. St. 252, 70 Atl. 1097, 22 L. R. A. (N.S.) 947, 128 Am. St. Rep. 804; *Wilson v. McCluskey*, (1911) 46 Pa. Super. Ct. 594, 596-599. This limited privilege seems to be practically identical with the qualified common enemy rule discussed at footnotes 179-185 and text. See also *supra*, footnote 30.

¹⁹⁰Kansas, Gen. Stat. 1935, ch. 24, sec. 105. In Kansas the common enemy rule was originally adopted. And because the statute in question in effect applies the civil law rule only to agricultural lands and to highways in rural districts, it follows that the common enemy rule is still in force with respect to urban land. See *supra*, footnote 22.

¹⁹¹*Goldsmith v. Elsas*, (1874) 53 Ga. 186. See *supra*, footnote 19.

¹⁹²Although in the early case of *Middlesborough Town Co. v. Helwig*, (1892) 14 Ky. L. Rep. 430, it was held that the civil law rule did not apply to urban land, that case has since been overruled, and it is now settled that the civil law rule applies to urban land. *Johnson v. Marcum*, (1913) 152 Ky. 629, 153 S. W. 959. See *supra*, footnote 23.

¹⁹³*Garland v. Aurin*, (1899) 103 Tenn. 555, 53 S. W. 940, 48 L. R. A. 862, 76 Am. St. Rep. 699. See *supra*, footnote 32.

¹⁹⁴In *Cincinnati, H. & D. R. R. v. Ahr*, (1873) 2 Cin. Super. Ct. Rep. 504, 13 Ohio Dec. (Repr.) 1035, it was held that the civil law rule applied to urban land. But in the case of *Brown v. Krody*, (1921) 19 Ohio L. Rep. 506, it was held that a possessor of urban land is privileged to fill his land and erect buildings upon it although the natural flow of surface water is thereby diverted upon other land. The conflict between

In Oklahoma and South Carolina, the courts have developed unique rules which, in statement, appear to be quite ambiguous. In Oklahoma it is said that the common enemy rule is in force subject to the qualification that a possessor of land is not privileged to alter the natural flow of surface water so as to cause "injury" to others.¹⁹⁵ On its face this rule is ambiguous and silly. If by the term "injury" the court means the invasion of a legal right, the rule begs the question. If the court means physical damage, then it is for all practical purposes stating the civil law rule. An examination of the cases throws little light on the meaning of "injury" as the court uses the term. Thus, for example, where a possessor of lower land obstructs the natural flow of surface water from adjoining higher land so as to flood the higher land, there is no "injury" within the meaning of the rule.¹⁹⁶ But where a possessor by artificial means discharges upon adjoining land, in large quantities and in a concentrated flow, surface water which has been collected upon his land in a volume, there is "injury" within the meaning of the rule.¹⁹⁷ The conclusion would seem to be that in spite of the language used by the court in stating its rule, the cases decided under it are in substantial accord with those in most common enemy jurisdictions.

In South Carolina it is said that the common enemy rule is in force, subject to the qualification that a possessor of land is not privileged, by altering the flow of surface water, to create a "nuisance" or a "nuisance per se."¹⁹⁸ The general acceptance of this proposition seems to have been brought about through the reiteration of a dictum from a relatively early case.¹⁹⁹ Whatever its source,

these two decisions was not resolved in the later case of McKiernann v. Grimm, (1928) 31 Ohio App. 213, 165 N. E. 310, where the court expressly refused to decide the question fully. In that case a possessor of urban land, by grading his land and erecting a garage upon it, obstructed the flow of surface water through a natural drainway and diverted it upon other urban land. He was held liable for the harm thereby caused. See supra, footnote 29.

¹⁹⁵Garrett v. Haworth, (1938) 183 Okla. 569, 572, 83 P. (2d) 822. See supra, footnotes 72 and 185.

¹⁹⁶Taylor v. Shriver, (1921) 82 Okla. 11, 198 Pac. 329.

¹⁹⁷Hatmaker v. Gripe, (Okla. 1937) 84 P. (2d) 418; see Gulf, C. & S. F. Ry. v. Richardson, (1914) 42 Okla. 457, 460-461, 141 Pac. 1107; Garrett v. Haworth, (1938) 183 Okla. 569, 572, 83 P. (2d) 822. This result is achieved in most common enemy rule jurisdictions. See supra, footnotes 121-143.

¹⁹⁸Touchberry v. Northwestern R. R., (1911) 87 S. C. 415, 423-424, 69 S. E. 877; Garmany v. Southern Ry., (1929) 152 S. C. 205, 207, 149 S. E. 765. See supra, footnote 74.

¹⁹⁹"The only exception to the rule that surface water being a common enemy, every landowner has the right to deal with it in any such

however, the proposition is relatively meaningless, and its principal effect has been to throw the South Carolina law of surface waters into confusion.²⁰⁰

With the foregoing modifications and qualifications of the civil law and common enemy rules in mind, it should be rather apparent that the uniform and predictable conflict of decision which would seem inevitable from the general statements of the two rules is not an actuality, and that in many types of situation, though by no means in all, the actual decisions under both rules are harmonious. Furthermore, it should be obvious that the development of the law of surface waters under these two rules has been from generalization to particularization. Starting with absolute, unqualified general rules, the courts soon found that their decisions under either rule would be harsh and unjust in many cases, and following

manner as he may see fit, is that it is subject to the general law in regard to nuisances, if its accumulation has become a nuisance *per se*, as for example, whenever it has become dangerous at all times and under all circumstances to life, health or property." *Baltzeger v. Carolina Midland Ry.*, (1899) 54 S. C. 242, 247, 32 S. E. 358, 71 Am. St. Rep. 789. This quotation has been repeated in the following cases: *Touchberry v. Northwestern R. R.*, (1911) 87 S. C. 415, 423-424, 69 S. E. 877; *Rivenbark v. Atlantic Coast Line Ry.*, (1923) 124 S. C. 136, 141, 117 S. E. 206; *Deason v. Southern Ry.*, (1927) 142 S. C. 328, 333, 140 S. E. 575; *Fairey v. Southern Ry.*, (1931) 162 S. C. 129, 132-133, 160 S. E. 274.

²⁰⁰The decisions of the South Carolina Court reveal the extent to which it has been confused by the rule here considered. In *Rivenbark v. Atlantic Coast Line Ry.*, (1923) 124 S. C. 136, 117 S. E. 206, and *Fairey v. Southern Ry.*, (1931) 162 S. C. 129, 160 S. E. 274, where railway companies obstructed the natural flow of surface water from adjoining higher land and thereby ponded the surface water upon such adjoining land, the railway companies were held not liable for the harm caused for the reason that the facts of the cases did not bring them within the so-called nuisance exception to the common enemy rule. But in *Deason v. Southern Ry.*, (1927) 142 S. C. 328, 140 S. E. 575, where a similar situation was involved, a different result was reached. In that case defendant railway obstructed the natural flow of surface water from plaintiff's adjoining higher land and caused it to be ponded upon plaintiff's land. On trial the jury was charged that defendant was liable if it backed surface water upon plaintiff's land so as to create a nuisance and also that it was for the jury to determine whether a nuisance has been created. The jury returned a verdict for plaintiff and judgment was entered accordingly. On appeal that judgment was affirmed, two justices dissenting. These cases seem indistinguishable.

Of course, the meaning of the South Carolina rule depends upon the interpretation given to the term "nuisance." In the *Rivenbark* and *Fairey* Cases, *supra*, the court did not discuss the meaning of that term, but in the *Deason* Case, *supra*, the court employed the standard and thoroughly unsatisfactory dictionary definition that a "nuisance" is "anything that unlawfully worketh hurt, inconvenience or damage." Consequently, it would seem that it is at this point that the confusion in the South Carolina cases has arisen. If the American Law Institute's interpretation of "private nuisance" were accepted by the South Carolina court, there would be no difficulty, for in that case the reasonable use doctrine would, in effect, be adopted. See Restatement, Torts (Vol. IV) secs. 822-831.

the characteristic tendency so obvious in many fields of our common law they proceeded to single out one specific type of case after another for special treatment, without bothering to reconsider the validity of their general rule in the light of the constantly growing body of "exceptions" to it. The result is a mass of particularized local rules, varying from state to state, and defying accurate generalization or reconciliation. The only solution in these states would seem to be a reversion to a broad general rule, but not of the sort they started with. Instead of a general rule prescribing absolute privileges or prohibitions they need a flexible rule like the rule of reasonableness, which merely lays down a general objective and a list of factors to be considered in determining whether or not that objective has been attained in any given case. The Minnesota cases,²⁰¹ of which there have been many, present a striking picture of the complete cycle: First, the unqualified common enemy rule; then specific exceptions; then the "qualified" common enemy rule; and finally, the gradual adoption of the reasonable use principle as the sole test. Several other states have completed all but the last step in this cycle,²⁰² and it seems only a matter of time until many will have finished it. Certainly the trend in this direction is unmistakable.

II. GENERAL COMMENT

So far this discussion has been devoted primarily to an exposition of the existing case law on the subject of surface waters and the remarkable confusion it has produced in the way of rules and principles. Occasional statements of the reasons given by the courts for their decisions have been made, and some critical analysis was presented in the discussion of the reasonable use rule. However, no comprehensive critique has been made, and it is questionable whether one should be attempted. It is no doubt obvious from the tenor of the discussion that the writers whole-heartedly approve the reasonable use approach, and in view of the fact that the American Law Institute has adopted it in the recently published fourth volume of the Restatement of Torts,²⁰³ it might be appropriate to end on that note. Nevertheless, there is one aspect of this branch of the law that has not received attention in the cases or legal writings, and it therefore seems worth while to mention it.

²⁰¹See *supra*, footnotes 89-103 and text.

²⁰²See *supra*, footnotes 178-186 and text.

²⁰³Sec. 833. See generally, Sections 822-864.

PROPERTY OR TORT

Under most of the existing classifications of the law, the rules relative to surface waters are treated as part of the general law of private waters which, in turn, is usually regarded as a branch of property law. And though "Water Law" is sometimes a separate course in law schools, it is more often dealt with in one of the property courses along with such things as Lateral Support, Oil and Gas and Air Law. This classification is probably due to the fact that most controversies over private waters arise between adjoining landowners and nearly always involve invasions of interests in land rather than interests in personality or chattels. Whatever the reason, the consequence is that the legal relations of the parties have been stated almost invariably in terms of property concepts—rights, privileges, servitudes, "natural easements" and so on. There is no question, however, that one's liability for interfering with surface waters, when incurred, is a tort liability. An unjustified invasion of a possessor's interest in the use and enjoyment of his land through the medium of surface waters, or any other type of waters, is as much a tort as a trespass or a private nuisance produced by smoke or smells. Nevertheless, the courts and writers seldom analyze the problems in terms of tortious conduct, causation or other tort concepts.

Analytically, of course, a determination of the scope of a possessor's rights with respect to his land is automatically a determination of the extent of the legal duties that others owe him, and the ascertainment of his privileges as a possessor determines the scope of others' rights against him. Therefore, it should make little difference, so far as a satisfactory solution of surface water problems is concerned, whether the courts deal with the matter in terms of property rights or in terms of legal duties and tort liabilities. As a matter of fact, however, the property approach has not proved very successful, and is undoubtedly responsible for a substantial amount of the existing confusion in the law.

In the first place, the property terms have not always been carefully defined or used. Many courts, for example, have employed the term "right" in a loose, indefinite way to describe both claims and privileges. The following quotation from the case of *Martin v. Simpson*²⁰⁴ is illustrative:

"No one has a *right*, by an artificial structure of any kind

²⁰⁴(1863) 6 Allen (Mass.) 102, at p. 104.

upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon land of an adjacent proprietor. Such an erection, if it occasions the water to flow, either in the form of a stream, or only in drops, works a violation of the adjoining proprietor's *right* of property, and cannot be justified unless a *right* is shown by express grant or by prescription." [Italics added].

This use of the same term to denote both the plaintiff's legal claim and the defendant's privilege is quite common in the cases, and little argument is needed to show that it inevitably produces confusion.

Another and more serious difficulty is that the property terms have hindered if not precluded a careful analysis of the surface water problem. As indicated at the beginning of this paper, the fundamental question in all of these cases is whether the loss or inconvenience resulting to one person from another's interference with surface waters should be left where it falls or shifted to the person causing it. If we could give as an answer to this question a flat "yes" or "no" under a strict "common enemy" or "civil law" rule, the property concepts would clearly be suitable. Witness, for example, the following statements:

"The *right* which the higher tenement has to require the lower one to receive from it the surface water that naturally drains to and upon it is a *right* incident to the higher tenement, and a part of the property of the owner in it; and for any invasion of this *right* the law will afford him a remedy."²⁰⁵

". . . the *right* of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment."²⁰⁶ [Italics added].

As we have seen, however, the strict, uncompromising civil law and common enemy rules have given way and been modified to a considerable extent in most jurisdictions. The courts have recognized that the "right" or "servitude" must, in some respects, be restricted and qualified, but most of them have had difficulty in analyzing that qualification and in expressing it. Such words as "right," "servitude" and "easement" seem to connote something fixed and definite to most courts, and it is difficult for them to use those terms in describing flexible legal

²⁰⁵Blue v. Wentz, (1896) 54 Ohio St. 247, at p. 255.

²⁰⁶Gannon v. Hargadon, (1865) 10 Allen (Mass.) 106, 109.

relations dependent on varying circumstances. The terms have acquired a certain rigidity and absoluteness from their long association with the Land Law. It is hard not to think of them as tangible things existing independently of the acts and motives of men or the configurations of land and vicissitudes of climate. It is true, of course, that the New Hampshire courts have succeeded in analyzing the problem and working out, in terms of "qualified rights," their principle of flexible legal relations based on reasonable use. Occasional cases in other jurisdictions manifest similar success. By and large, however, the property approach and terminology has proved to be a stumbling block to clear analysis. Note, for example, the confusion of thought in the following quotation, largely engendered by the way in which the term "right" is used:

"This *right* in regard to surface water may not be exercised wantonly, unnecessarily, or carelessly; but is modified by that golden maxim of the law, that one must so use his own property as not to injure the *rights* of another. It must be a reasonable use of the land for its improvement or better enjoyment, and the *right* must be exercised in good faith, with no purpose to abridge or interfere with the *rights* of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary. Where the exercise of the *right* is thus guarded, although injury may result to the land of another, he is without remedy."²⁰⁷ [Italics added].

In making the above statement the court was apparently trying to express the idea that the legal relations of the parties depended upon the reasonableness of their activities in view of the circumstances of the case. The haziness comes from the assumption that each party has some sort of preexisting, semi-tangible thing called a "right" which in some unexplained way enters the picture and must be dealt with.

It is interesting to observe the increased clarity of thought and expression when the same court abandons the property terminology and expresses the legal relations of the parties in terms of legal obligations:

"The law of this state . . . as to surface waters . . . imposes upon the lower landowner the duty of so using his land as not needlessly or negligently to injure the upper owner in the enjoyment of his property."²⁰⁸

²⁰⁷Norfolk & W. R. R. v. Carter, (1895) 91 Va. 587, 592-93, 22 S. E. 517.

²⁰⁸Raleigh Court v. Faucett, (1924) 140 Va. 126, 136, 124 S. E. 433.

It is not suggested that the law of torts is perfect or that tort terminology is a panacea for all ills, but it is certainly true that an approach to the surface water problems from the standpoint of the "prerequisites of liability" rather than the "rights of the parties" brings out a clearer and more penetrating analysis of the fundamental considerations involved. Treating the matter as a question of tort liability, attention is focused on such practical and concrete problems as "the necessity of actual damage," "the reasonable or unreasonable character of the defendant's conduct in view of all the circumstances," and "the relative value of the interests involved," rather than on the limitations and qualifications of a categorical "right" or "servitude" presupposedly assumed and ill-defined.