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SURFACE WATER DRAINAGE

Donald V. Dobbins*

The intensified use of agricultural land, the expansion of industrial facilities and the rapid growth of our urban and suburban areas have all contributed to a constantly increasing awareness of our surface water¹ drainage problems and the laws applicable to those problems. In this country three basic rules of law have been applied to the drainage of surface waters. These rules are now commonly referred to as the "civil law," "common enemy" and "reasonable use" rules. These three rules differ greatly in both their basic theories and origins, and each has inherent benefits and shortcomings.

The civil law rule

The civil law rule finds its basis in the law of natural drainage. *Aqua currit, et debet curere, ut solebat ex jure naturae*. Water runs, and should run, as it is wont to do by natural right.²

In Illinois this rule was adopted by its highest court in two cases decided in 1869.³ The court in the later case stated the rule as follows:

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.⁴

Other states which have adopted the civil law rule have used comparable language in expressing their concept of the rule.⁵

The civil law rule seems to have had its origin in the Roman law from whence it moved into France and became a part of the Napoleonic Code.⁶ The Louisiana Code, which embodies the rule, states:

If rain-water or other waters have their course regulated from one ground to another, whether it be by nature of the place, or by some regulation, or by title, or by an ancient possession, the proprietors of the said grounds cannot innovate any thing as to the ancient course of the waters. Thus, he who has the upper grounds cannot change the course of the water, either by turning it some other way,

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1 For the purposes of this article a distinction will be made between surface waters and waters flowing in a natural watercourse or impounded in a lake or pond. This distinction is valid in most states which adhere to the "common enemy" rule but is generally ignored in the "civil law" and "reasonable use" jurisdictions. The general concept of the term "surface waters" includes only those waters which fall or come upon the surface of the ground in a diffused state. When these waters reach a ditch or natural watercourse they lose their character as surface waters. 56 AM. JUR., *Waters* § 65, pp. 547-48 (1957).

2 3 KENT, COMMENTARIES ON AMERICAN LAW 439 (14th ed. 1896); Kauffman v. Griesemer, 26 Pa. 407, 413 (1856).

3 Gillham v. Madison County R.R., 49 Ill. 484 (1869); Gormley v. Sanford, 52 Ill. 158 (1869).

4 Gormley v. Sanford, 52 Ill. 158 (1869).

5 Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976 (1893); Nininger v. Norwood, 72 Ala. 277 (1882); Martin v. Riddle, 26 Pa. 415 (1848).

6 FARNHAM, WATER AND WATER RIGHTS § 889a (1904); 1 DOMAT, THE CIVIL LAW § 1583 (Straham transl. 2d ed. 1850); FRENCH CIVIL CODE § 640 (1804).

or rendering it more rapid, or making any other changes in it to the prejudice of the owner of the lower grounds. Neither can he who has the lower estate do any thing that may hinder his grounds from receiving the water which they ought to receive, and that in the manner which has been regulated.⁷

It should be noted that in its pure form the civil law rule grants to the owner of the higher or dominant land an easement of natural flow over the lower or servient land, but it does not grant to the owner of the higher land any right to enlarge the natural easement or to increase the burden upon the lower land by hastening the flow of the water from the higher to the lower land.

The common enemy rule

The common enemy rule is the antithesis of the civil rule. The rule, as stated by Beasley, C.J., in an early New Jersey case is that:

[N]o right of any kind can be claimed in the mere flow of surface water, and . . . neither its retention, diversion, repulsion or altered transmission is an actionable injury, even though damage ensues.⁸

The origin of this rule is obscure. At first some courts were of the opinion that it was a part of the English common law and referred to it as the "common law" rule.⁹ This concept of the origin of the rule has been scrutinized on several occasions and it now is generally accepted by all authorities that the rule had its origin not in England but in Massachusetts.¹⁰ The term "common enemy" was first applied to this rule by the New Jersey Supreme Court.¹¹ Apparently the court mistakenly applied to surface waters the English rule that the *sea* was a common enemy.¹² Actually, the English rule as to the drainage of the surface waters did not start to develop until about the middle of the nineteenth century, and that rule follows the civil law.¹³

Under the common enemy rule, applied in its strict sense, the upper — although not dominant — landowner has the right to use any means he chooses to rid his land of surface water, and at the same time the lower — although

7 LA. CIVIL CODE § 660 (1870).

8 *Bowlsby v. Speer*, 31 N.J.L. 351, 353 (Sup. Ct. 1865).

9 *Barnett v. Matagorda Rice & Irrigation Co.*, 98 Tex. 355, 83 S.W. 801 (1904); *Abbott v. Kansas City, St. J. & C.B.R.R.*, 83 Mo. 271 (1884); *Edwards v. Charlotte, C. & A.R.R.*, 39 S.C. 472, 18 S.E. 58 (1884).

10 FARNHAM, WATER AND WATER RIGHTS § 889c (1904); Kinyon and McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891 (1940); Thompson, *Surface Waters*, 23 AM. L. REV. 372 (1889); *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956); *Miller v. Letzerich*, 121 Tex. 248, 49 S.W.2d 404 (1932); *Gannon v. Hargadon*, 92 Mass. 106 (1865); *Dickinson v. Worcester*, 89 Mass. 19 (1863); *Luther v. Winnisimmet Co.*, 63 Mass. 171 (1851). In this connection it should be noted that the Michigan court in the case of *Boyd v. Conklin*, 54 Mich. 583, 20 N.W. 595, 598 (1884), referred to the common enemy rule as the "Massachusetts doctrine."

11 *Town of Union ads. Durkes*, 38 N.J.L. 21 (Sup. Ct. 1875).

12 Lord Tenterden in his concurring opinion in *The King v. Commissioners of Sewers for Pagham, Sussex*, 8 Barn. & C. 356, 108 Eng. Rep. 1075, 1076 (K.B. 1828) stated "the sea is a common enemy." The Texas Supreme Court in *Miller v. Letzerich*, 121 Tex. 248, 49 S.W.2d 404, 411 (1932) said, "To say that surface waters . . . are a 'common enemy,' comparable to the constant ravages of the sea against its shore line, would tax the credulity of a child."

13 Thompson, in his article, *Surface Waters*, 23 AM. L. REV. 372, 391 (1889), stated: "In view of the fact that there is not, and never has been, any law in England which will support the Massachusetts doctrine, it is difficult to see how it can be justified, and certainly it can have no claim to the name so commonly applied to it." See also Kinyon and McClure, *Interferences With Surface Waters*, 24 MINN. L. REV. 891, 899 (1940).

not servient — landowner may use similar means to prevent the surface water from coming upon his land. Under this concept of the law, it is quite possible for a contest to develop in which the owner of the higher land may lawfully hasten the discharge of surface water from his land while the owner of the lower land, equally within his rights, may prevent the water from flowing onto his land.¹⁴

The reasonable use rule

The rule of reasonable use seeks to avoid the obvious inequities which arise from the strict application of either the civil law or the common enemy rule. This rule, as announced by the New Jersey Supreme Court, is:

The rule of reasonableness has the particular virtue of flexibility. The issue of reasonableness or unreasonableness becomes a question of fact to be determined in each case upon a consideration of all the relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm which results, the purpose or motive with which the possessor acted, and all other relevant matter. . . . It is . . . properly a consideration in these cases whether the utility of the possessor's use of his land outweighs the gravity of the harm which results from his alteration of the flow of surface waters.¹⁵

This concept of the reasonable use rule with further refinements was adopted by the American Law Institute in its *Restatement of the Law of Torts*.¹⁶ The rule amounts to a balancing of equities, taking into consideration not only the relative benefit to the one tract and harm to the other,¹⁷ but also, according to the Restatement, such items as the social value which the law attaches to the land use which has been invaded,¹⁸ the suitability of the land for the use to which it is devoted,¹⁹ the impracticality of preventing or avoiding the invasion²⁰ and common standards of decency.²¹

The New Jersey and Restatement versions of this rule achieve their objective of relieving the hardships which were bound to flow from the strict application of the other two rules, but the guides for the application of the rule are so amorphous and uncertain as to cause hardship.

Modifications of the civil law rule

It is not feasible in this article to detail all of the enlargements, qualifications and restrictions which have been granted onto the civil law rule by the courts and legislatures of the jurisdictions which adhere to it.²² Instead, it is

14 *King v. Cade*, 205 Okla. 666, 240 P.2d 88 (1951).

15 *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956).

16 RESTATEMENT, TORTS § 833 (1939).

17 *Id.* at § 826.

18 *Id.* at § 827.

19 *Ibid.*

20 *Id.* at § 828.

21 *Id.* at § 829.

22 The following states are presently classified as "civil law" states in Annot., 59 A.L.R.2d. 421 (1958): Alabama, Arizona (?), California, Georgia, Idaho, Illinois, Iowa, Kansas (as to agricultural land only), Kentucky, Louisiana, Maryland, Michigan, Mississippi (?), New Mexico, North Carolina, Ohio (as to rural areas only), Oregon, Pennsylvania (as to rural land only), South Dakota, Tennessee, Texas (formerly a common enemy state) and Vermont.

only possible to enumerate a few of these modifications as a sampling of the present status of this rule. It is, however, safe to assume that no jurisdiction strictly applies the civil law rule in its original form and that the rule has been modified by the courts and legislatures to increase by varying degrees the rights of the owners of the higher lands.

As has been previously pointed out, the civil law rule in its original form was a grant of an easement of natural flow to the owner of the higher land; the owner of the lower land was prohibited from obstructing or interfering with the natural flow of surface water onto his land. The rule did not grant to the owner of the higher land any right to improve or alter the natural drainage of his land and thereby accelerate the flow of surface water from his land onto the lower land. Over the course of the past hundred years this rule has been enlarged and modified rather extensively as to the upper owner.

When Illinois first adopted and applied the civil law rule²³ the sole question presented was whether a lower owner had the right to obstruct the flow of surface water from higher agricultural lands. The court rejected the common enemy doctrine which had been announced in the earlier Massachusetts cases and in effect adopted the Pennsylvania civil law rule. One of the Pennsylvania cases²⁴ cited by the Illinois court had already extended the concept of the civil law rule to permit the owner of the dominant tenement to improve his land by throwing an increased volume of water upon the inferior estate through natural and customary channels.

The second time the question was presented to the Illinois court²⁵ the case involved the obstruction of the natural flow of surface water across unimproved city lots. The court adhered to its former conclusions and indicated that the same rule would be applied to urban lands.

Illinois in 1870 adopted a new constitution in which it authorized its legislature to "pass laws permitting the owners of land to construct drains, ditches and levees for agricultural, sanitary or mining purposes across the lands of others."²⁶ This grant of power was a substantial enlargement of the theory of the civil law rule. The Illinois legislature in 1885²⁷ and again in 1955²⁸ exercised the power conferred upon it by enacting such laws. The legislature, however, did not limit itself to a mere exercise of the authority granted by the constitution, but still further enlarged the rights of an upper owner under the civil law rule:

Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water course, or into any natural depression whereby the water will be carried into some natural

The Iowa Court has recently said in *Boat v. Van Veen*, 241 Iowa 1152, 44 N.W.2d 671 (1950), and in *Stouder v. Dashner*, 242 Iowa 1340, 49 N.W.2d 859 (1951), that it had not adopted either the civil law or the common enemy rules entirely.

23 *Gillham v. Madison County R.R.*, 49 Ill. 484 (1869).

24 *Kauffman v. Griesemer*, 26 Pa. 407 (1856).

25 *Gormley v. Sanford*, 52 Ill. 158 (1869).

26 ILL. CONST. art. IV, § 31 (1870).

27 Ill. Laws 1885, at 77, §§ 5-10.

28 ILL. ANN. STAT. ch. 42, § 2-2-10 (Smith-Hurd 1956).

water course . . . and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor. . . .²⁹

This statutory enlargement of the civil law rule granted to the owner of the dominant heritage a very substantial right which he did not possess under the rule in its original form and also increased the burden upon the servient land. Kansas has adopted a similar statute which, however, is only applicable to agricultural lands.³⁰

Illinois courts have in several instances attempted to limit the right of an upper owner to improve the natural drainage upon his land by restricting the volume of water he can throw off to the capacity of the depression or water-course into which the water is emptied.³¹ For the most part this limitation has been ineffective because of the broad grant of power contained in the statute and the practical impossibility of ascertaining the natural capacity of the outlet under all circumstances.

The Illinois courts have repeatedly upheld the right of the upper owner to improve the drainage of his land by hastening the flow of water from his land.³² The only real limitations in Illinois upon this right are that the improvement of the drainage upon the upper land must be in the general course of natural drainage and that water from one watershed cannot be diverted into a different watershed.³³

As a result of these developments the improvement of drainage conditions in Illinois usually begins in the flat lands, which lie in the upper reaches of a watershed, and gradually works its way downstream. The upper owners improve the natural drainage of their lands by artificial means and hasten the flow of the water onto the lower lands. The drainage condition of the lower lands is thereby aggravated and the owners thereof improve their drainage by artificial means. This process continues until the waters reach the streams and watercourses, which are then deepened and widened by excavation. When the water reach the larger rivers the landowners along these rivers construct or raise levees to prevent ever more frequent flooding of their lands. While this is far from being an ideal situation, it most certainly is a logical consequence of a rule of law which states "each successive owner takes with whatever advantages or inconveniences nature has stamped upon his land."³⁴

A considerable portion of this article has been devoted to the evolution of the civil law rule in Illinois. This is due not only to the fact that the author is more familiar with Illinois law, but also because he believes the growth of the law in that state to be rather typical of the way the civil law rule has grown

²⁹ Ill. Laws 1885, at 77, § 4.

³⁰ KAN. GEN. STAT. ANN. § 24-106 (1949).

³¹ *Dettmer v. Illinois Terminal R.R.*, 287 Ill. 513, 123 N.E. 37 (1919); *People v. Peeler*, 290 Ill. 451, 125 N.E. 306 (1919); *Fenton & Thompson R.R. v. Adams*, 221 Ill. 201, 77 N.E. 531 (1906); *Daum v. Cooper*, 208 Ill. 391, 70 N.E. 327 (1904).

³² *Adams v. Abel*, 290 Ill. 496, 125 N.E. 320 (1919); *Broadwell Special Drainage Dist. v. Lawrence*, 231 Ill. 86, 83 N.E. 104 (1907); *Wilson v. Bondurant*, 142 Ill. 645, 32 N.E. 498 (1892); *Peck v. Herrington*, 109 Ill. 611 (1884).

³³ *Graham v. Keene*, 143 Ill. 425, 32 N.E. 180 (1892); *Young v. Commissioners of Highways*, 134 Ill. 569, 25 N.E. 689 (1890); *Anderson v. Henderson*, 124 Ill. 164, 16 N.E. 232 (1888).

³⁴ *Gormley v. Sanford*, 52 Ill. 158 (1869).

in other states. The courts of Alabama,³⁵ Iowa,³⁶ Louisiana,³⁷ Maryland,³⁸ Ohio,³⁹ Oregon,⁴⁰ Pennsylvania⁴¹ and South Dakota,⁴² among others, have modified the civil law rule in effect in their states in order to permit the owner of the dominant estate to improve the drainage on his land, even though such improvement increases the burden upon the servient estate. The courts applied varying reasons for reaching this result, but the enlargement of the rights of the upper owner is usually qualified by such terms as "reasonable use," "without unreasonable injury" and "materially and unduly increased."

Modifications of the common enemy rule

Approximately the same number of jurisdictions have adopted the common enemy rule⁴³ as have adopted the civil law rule, and again it is impossible to explore in detail all the modifications which the "common enemy" jurisdictions have made in their rule. The common enemy rule in its original form, by permitting an upper owner to dispose of his surface water as he pleased and permitting a lower owner to fend off the water as he saw fit, invited conflicts rather than settled them.⁴⁴ As a result, modifications of the rule were imperative, and the various definitions of the rule as applied today bear only slight resemblance to the rule as first announced.

In one of the earlier cases which applied the common enemy rule in a modified form the Iowa court said that in improving the drainage conditions of his land the landowner must respect the rights of his neighbor and that he could not make his property more valuable by an act which renders his neighbor's property less valuable.⁴⁵ In another early case in Missouri, a strong common enemy state, the court held that a landowner was not warranted in improving his own property in such a manner as to seriously interfere with the property of his neighbor.⁴⁶

Modifications of the common enemy rule have become still more frequent in recent years. Arkansas has said that a landowner, in fending off surface waters, must do no "unnecessary" harm to the land of his neighbor,⁴⁷ and that

35 *Vinson v. Turner*, 252 Ala. 271, 40 So. 2d 863 (1949).

36 *Boat v. Van Veen*, 241 Iowa 1152, 44 N.W.2d 859 (1951).

37 *Martin v. Jett*, 12 La. 501 (1838).

38 *Bishop v. Richard*, 193 Md. 6, 65 A.2d 334 (1949).

39 *Ratliffe v. Indian Hill Acres, Inc.*, 93 Ohio App. 231, 113 N.E.2d 30 (1952).

40 *Levene v. City of Salem*, 191 Ore. 182, 229 P.2d 255 (1951).

41 *Kauffman v. Griesemer*, 26 Pa. 207 (1856).

42 *La Fleur v. Kolda*, 71 S.D. 162, 22 N.W.2d 741 (1946).

43 The following jurisdictions are presently classified as "common enemy" jurisdictions in Annot., 59 A.L.R.2d 421 (1958): Arizona (?), Arkansas, Connecticut, District of Columbia, Hawaii, Indiana, Kansas (as to urban land only), Maine, Massachusetts, Mississippi (?), Missouri, Montana, Nebraska, New York (which recognizes a distinction between rural and urban lands), North Dakota, Ohio (as to urban areas only), Oklahoma, Pennsylvania (as to urban lands only), South Carolina, Virginia, Washington and Wisconsin.

44 For a collection of several cases in which the common enemy rule was applied in its strict sense see Annot., 12 A.L.R.2d 1338, 1341-44 (1950).

45 *Livingston v. McDonald*, 21 Iowa 160 (1866).

46 *Freudenstein v. Heine*, 6 Mo. App. 287 (Ct. App. 1878).

47 *Stacey v. Walker*, 222 Ark. 819, 262 S.W.2d 889 (1953); *Turner v. Smith*, 217 Ark. 441, 231 S.W.2d 110 (1950).

he must act in good faith and without negligence.⁴⁸ Montana has stated that the landowner's "use must be without malice of negligence."⁴⁹

In a Nebraska case a landowner was held liable for the damages occasioned by the construction of a flume in such a manner as to change the course of the water and inflict injury to the plaintiff's land, even though it was undisputed that there was no negligence in the construction of the flume.⁵⁰ In a more recent Nebraska case the court held that a lower landowner's construction of a dike across a swale was not a "reasonable use" of the lower land.⁵¹

The Ohio courts have also modified the common enemy rule in force in the urban areas of that state by requiring that the action be "reasonable."⁵² Oklahoma has expressly stated that the common enemy rule has been modified by limiting the exercise of the rights granted by the rule to those instances in which no injury is done to the adjoining land.⁵³

In Pennsylvania the rule applicable in urban areas has been modified by forbidding unreasonable or unnecessary changes in the quantity or the quality of the flow.⁵⁴ In Virginia the rule has been comparably modified by subjecting it to the qualification that the landowner "must exercise his rights not wantonly, unnecessarily or carelessly, but in good faith and with such care as not to injure needlessly the property of the adjacent owner."⁵⁵

In view of the severe limitations which the courts of several states have placed upon the exercise, by both the upper and lower owners, of the rights originally conferred upon them by the common enemy rule, it would seem that a new rule—the modified common enemy rule—has emerged. This rule recognizes the right to make changes in natural drainage but places reasonable use limitations upon the exercise of that right. The limitations are, however, rather nebulous in character and thus uncertainty has again been substituted for certainty in order to avoid the harsh results which necessarily followed the strict application of the rule in its original form.

The evolution of the reasonable use rule

In an 1862 New Hampshire case involving percolating waters the court refused to embrace any rule which would give a landowner either an absolute right to drain or protect his land or no right to do so.⁵⁶ The court adopted a rule which permitted the "reasonable use or management" of one's land under the facts peculiar to his particular case with due consideration being given to the rights of each of the parties. The court further pointed out that what con-

48 *Timmons v. Clayton*, 222 Ark. 327, 259 S.W.2d 501 (1953).

49 *Ryan v. Quinlan*, 45 Mont. 521, 124 Pac. 512, 516 (1912).

50 *Snyder v. Platte Valley Pub. Power & Irrigation Dist.*, 144 Neb. 308, 13 N.W.2d 160 (1944).

51 *Everett v. Teigeler*, 162 Neb. 769, 77 N.W.2d 467 (1956).

52 *Keiser v. Mann*, 102 Ohio App. 324, 143 N.E.2d 146 (Ct. App. 1956), *appeal dismissed*, 166 Ohio 190, 140 N.E.2d 565 (1957); *Lunsford v. Stewart*, 95 Ohio App. 383, 120 N.E.2d 136 (Ct. App. 1953).

53 *Gregory v. Bogdanoff*, 307 P.2d 841 (Okla. 1957); *Haskins v. Felder*, 240 P.2d 960 (Okla. 1954); *King v. Cade*, 205 Okla. 666, 240 P.2d 88 (1951); *Garrett v. Haworth*, 183 Okla. 569, 83 P.2d 822 (1938).

54 *Chamberlain v. Ciaffoni*, 373 Pa. 430, 96 A.2d 140 (1953).

55 *Mason v. Lamb*, 189 Va. 348, 53 S.E.2d 7, 10 (1949).

56 *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862).

stitutes a reasonable use is a mixed question of law and fact to be determined by a jury under proper instructions. In 1870 the New Hampshire court applied this same rule to other surface waters⁵⁷ and re-applied it in a 1901 case.⁵⁸

Minnesota originally adopted and applied a modified common enemy rule,⁵⁹ but in 1948 the Minnesota court said that its reasonable use modifications of the common enemy rule had developed to the point where its doctrine was a distinct reasonable use rule, independent of both the common enemy and the civil law rules.⁶⁰ The Minnesota court in a 1956 case adhered to its position that its doctrine was a separate and distinct rule.⁶¹

New Jersey, which long adhered to the common enemy rule,⁶² expressly abandoned that rule in 1956 and adopted the reasonable use rule,⁶³ which it reaffirmed in 1957.⁶⁴ Justice Brennan's opinion in the 1956 case⁶⁵ leaves little doubt but that the court was primarily persuaded to abandon its former position and adopt the reasonable use doctrine by the Kinyon and McClure article entitled "Interferences With Surface Waters,"⁶⁶ which had appeared 16 years previously.

So far as the author has been able to ascertain, the three states mentioned above—New Hampshire, Minnesota and New Jersey—are the only states which purport to have embraced the reasonable use doctrine as a separate and distinct rule. And despite the protestations of the Minnesota court, the author is of the opinion that the Minnesota rule is a classic statement of the modified common enemy rule, rather than the pure reasonable use rule as exemplified by the statements of that rule in the New Jersey cases⁶⁷ and the Restatement.⁶⁸

Conclusion

Some authors and courts have taken the position that the civil law and the common enemy rules have been so modified that there is now no valid distinction between those rules and the rule of reasonable use. While it is true that the modifications of the first two rules have been substantial, the conclusion that the three rules are now one and the same appears to be unjustified.

The civil law rule in its unmodified form creates an implied easement of natural flow in favor of the higher land across the lower land. This easement concept remains as the basic element of the civil law rule, which is not to be found in the common enemy rule (either in its original or modified form) or in the reasonable use rule. The rule has been modified in some jurisdictions to permit the owner of the dominant estate to improve the drainage upon his

57 *Swett v. Cutts*, 50 N.H. 439 (1870).

58 *Franklin v. Durgee*, 71 N.H. 186, 51 Atl. 911 (1901).

59 *O'Brien v. St. Paul*, 25 Minn. 331 (1878).

60 *Enderson v. Kelehan*, 226 Minn. 163, 32 N.W.2d 286 (1948).

61 *Johnson v. Agerbeck*, 247 Minn. 432, 77 N.W.2d 539 (1956).

62 *Town of Union ads. Durkes*, 38 N.J.L. 21 (Sup. Ct. 1875).

63 *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956).

64 *Hopler v. Morris Hills Regional Dist.*, 45 N.J. Super. 409, 133 A.2d 336 (Super. Ct. App. Div. 1957).

65 *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956).

66 24 MINN. L. REV. 891 (1940).

67 *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956); *Hopler v. Morris Hills Regional Dist.*, 45 N.J. Super. 409, 133 A.2d 336 (Super. Ct. App. Div. 1957).

68 RESTATEMENT, TORTS §§ 822-31, 833 (1939).

land in any manner that he pleases, so long as he does so in the general course of natural drainage. This modification is a grant of an additional right to the upper owner and is an enlargement of, not a restriction upon, the burden which the lower land must bear. In other jurisdictions the rule has been less drastically modified in that the improvement of the drainage on the upper lands must be reasonable and not cause undue hardship to the lower lands. Again the easement element of the rule remains and the reasonable use limitation is placed only upon the upper landowner. Thus, the rule, both in its original and modified forms, grants a right to the owner of the dominant estate and places a corresponding duty upon the owner of the servient estate.

The common enemy rule in its inception granted unqualified rights to both the upper and lower landowners but placed no corresponding duty on either. The modifications of this rule have all had the result of limiting the rights originally granted under the rule. Thus the rights still remain—although they must be exercised in a reasonable manner so as not to cause undue hardships upon the land of a neighbor.

The reasonable use rule is essentially a tort rule involving both intentional and unintentional invasions of another's interest in the use and enjoyment of his land. The rule is negative in its concept. It does not grant any rights, but attempts to define the circumstances under which an owner of land will be held liable in damages for the use which he makes of his land. It puts the law of surface water drainage in the category of a private nuisance. No one has the right to create or maintain a nuisance, but not every nuisance is an actionable one. So it is with surface waters under this rule. No owner is given any right to improve the drainage of his land under this rule but if he does so he may or may not be liable for any injury which results.

Under this analysis of the rules and their present-day applications the author believes that the differences in the rules are still readily apparent. The author recognizes the theoretical superiority of the reasonable use rule but feels that the practical application of the rule is so difficult, and the results are so uncertain, that this theoretical superiority should give way to more practical considerations. Both agriculture and industry need a rule which is sufficiently definite to permit the improvement of surface water drainage without the threat of a law suit each time such an improvement is constructed. In the absence of such a rule a prudent man might well be required to seek a declaratory judgment to determine the reasonableness of his plans before starting the construction of any drainage work which will in any way alter existing conditions. The very real possibility that what the landowner considers to be reasonable might be held to be unreasonable by a judge or jury would dictate such a course. Progress is better served by providing the landowner with a rule of law which can be interpreted and applied with as much certainty as the public policy of the state will allow.