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## THE LAW OF SURFACE WATER IN MISSOURI\*

*(In Two Installments)*

LAWRENCE O. DAVIS\*\*

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\*This Article began as an unpublished research paper written in 1948 by Charles L. Snodgrass while he was a senior law student. The original paper, about 15 double-spaced typewritten pages in length, was entitled "Surface Waters in Missouri," and gave special attention to terracing and soil conservation problems. Lawrence O. Davis while a senior law student put the paper in final form, adding a considerable amount of new material and additional cases and bringing it down to date.

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## I. SURFACE WATER, DISTINGUISHED

The term surface water is used in a technical and legal sense throughout this Article. While obviously the term does not include ground water which percolates through the soil, as herein used it also excludes that water on the ground surface which is confined to permanent lakes or ponds, or which flows in a stream through a well-defined channel.<sup>1</sup> Indeed, part I of this Article is devoted to the task of distinguishing "surface water," as used in this legal sense, from the other classifications of water which appears above ground. Such a distinction is necessary because of the different treatment given by the courts of this state to surface water and water which flows in a stream.<sup>2</sup>

### A. Surface Water and Watercourses Distinguished

The term 'surface water' refers to that form or class of water derived from falling rain or melting snow or which rises to the surface in springs and is diffused over the surface of the ground while it remains in that state or condition and has not entered a natural water course.<sup>3</sup>

This definition by the Kansas City Court of Appeals, taken from a recent case, is typical in that it appears in negative form<sup>4</sup> and offers little guidance unless the meaning of "natural water-course" is understood. Such a negative approach illustrates the usual analysis applied in cases where the classification of water is in issue; if a particular waterway does not meet the requirements of a natural watercourse, then the water therein is surface water. The same analysis will be applied here.

In an early Massachusetts case a watercourse was said to be "a stream of water, usually flowing in a definite channel, having a bed and

1. Frequently in legal writings the term "surface water" is used to distinguish all water that appears on the surface from ground water which percolates through the soil. See Danielson, *Ground Water in Nebraska*, 35 NEB. L. REV. 17 (1955); Hopkins, *Surface Water Rights in Kansas*, 5 KAN. L. REV. 584 (1957).

2. For a discussion of the treatment given to water-courses see Evans, *Riparian Rights in Artificial Lakes and Streams*, 16 MO. L. REV. 93 (1951); Burrell & Stubbs, *The Rights of a Riparian Landowner in Missouri*, 19 MO. L. REV. 138 (1954); Hanna, *Property—Rights of Riparian Owner in Missouri With Respect to Obstruction of a Natural or Artificial Watercourse*, 18 MO. L. REV. 67 (1953).

For a discussion of surface water see English, *The Law of Surface Water as Applicable to Missouri and States Bounded by Large Rivers*, 51 CENT. L.J. 360 (1900); Young, *Property—Surface Water—Drainage—Pollution*, 18 MO. L. REV. 74 (1953).

3. *Keyton v. Missouri-Kansas-Texas R.R.*, 224 S.W.2d 616, 622 (K.C. Ct. App. 1949).

4. See 93 C.J.S., *Waters* § 112 (1956). For a more positive definition see McCausland v. Jarrell, 136 W. Va. 569, 68 S.E.2d 729 (1951).

sides or banks, and usually discharging itself into some other stream or body of water.”<sup>5</sup> This statement was adopted and elaborated upon in the Wisconsin case of *Hoyt v. City of Hudson*,<sup>6</sup> and it has been quoted in many Missouri cases beginning with *Benson v. Chicago & A.R.R.*<sup>7</sup> in 1883. In a recent supreme court case the elaborated definition appeared as follows:

There must be a stream usually flowing in a particular direction, though it need not flow continually. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not in a legal contemplation water courses.<sup>8</sup>

Whether a particular waterway is mere surface water or a watercourse is an issue of fact to be found by the jury under proper instructions,<sup>9</sup> but helpful instructions to the jury are difficult because of the very nature of the question; the *same* water being first in one category and then the other, depending upon its physical situation.<sup>10</sup> As said in an early case:

All water-courses are made up more or less from surface-water, but after it enters into the stream and commences to flow within its banks, it is no longer considered surface-water.<sup>11</sup>

Under the above definitions it has been held that the main drainage ditch of an incorporated river-protection district should be treated as a watercourse, as it is a public ditch, devoted to public use, and bound to receive water from natural watercourses.<sup>12</sup> On the other hand where

5. *Luther v. Winnisimmet Co.*, 63 Mass. (9 Cush.) 171, 174 (1851).

6. 27 Wis. 656 (1871).

7. 78 Mo. 504 (1883).

8. *Happy v. Kenton*, 362 Mo. 1156, 1160, 247 S.W.2d 698, 701 (1952), 18 Mo. L. REV. 67 (1953).

9. *Munkers v. Kansas City, St. J. & C.B.R.R.*, 60 Mo. 334 (1875).

10. See *Tackett v. Linnenbrink*, 112 S.W.2d 160, 164 (K.C. Ct. App. 1938) where the court said that it would take judicial notice of the fact that “just where surface water ends and water course begins may be difficult of exact determination.”

11. *Jones v. Hannovan*, 55 Mo. 462, 467 (1874).

12. *Geisert v. Chicago, R.I. & P. Ry.*, 226 Mo. App. 121, 42 S.W.2d 954 (St. L. Ct. App. 1931).

a series of depressions or bogs were drained by a private drainage ditch which had been in some state of existence for the past forty years, it was indicated that a defendant across whose land the ditch extended could block it with impunity except for the doctrine of equitable estoppel.<sup>13</sup> A broad depression carrying natural drainage beginning on the plaintiff's farm and extending through the defendant's land is not a watercourse,<sup>14</sup> nor does it become such even after developing into a gully, carrying water only during rainy weather.<sup>15</sup> The approved definition of a watercourse would seem to exclude such drainways although they are "defined hollows or ravines."<sup>16</sup> In *Anderson v. City of Jefferson*<sup>17</sup> the Kansas City Court of Appeals affirmed a trial court finding that a wet weather ditch known as "Coon Creek" within the defendant city was not a watercourse, and the city could not increase its flow across the plaintiff's lot by diverting into it waters collected from a subdivision. Language approved by the court indicated that even though there is a definite channel and bed with well-defined banks, in order for it to be a watercourse the flow "must be fed from other and more permanent sources than mere surface water."<sup>18</sup>

A slough which is merely a place of lower elevation than the surrounding countryside, and which collects the natural surface drainage and becomes filled with surface water in wet seasons is not usually considered a watercourse, but is treated as a mere bog.<sup>19</sup> As later discussed, however, exceptional treatment exists where the slough is situated in such a position with relation to a flowing stream that during flood stages the overflow water from the stream runs through the slough between well-defined banks and returns to the main channel. As in such a case the water flowing through the slough may be regarded as

13. *Gibson v. Sharp*, 277 S.W.2d 672 (Spr. Ct. App. 1955).

14. *Gray v. Schriber*, 58 Mo. App. 173 (St. L. Ct. App. 1894).

15. *Benson v. Chicago & A.R.R.*, 78 Mo. 504 (1883).

16. See also *Anderson v. City of Jefferson*, 262 S.W.2d 169 (K.C. Ct. App. 1953).

17. 262 S.W.2d 169 (K.C. Ct. App. 1953).

18. 262 S.W.2d at 171. See also *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Ct. App. 1951), 18 Mo. L. Rev. 74 (1953) (overflow from city's sewer and storm drains is surface water); *Belveal v. H.B.C. Development Co.*, 279 S.W.2d 545 (K.C. Ct. App. 1955) (where small spring flowed much of the time and water ran in well-defined channel, jury could find there was a watercourse). *Caveat*, see *Haferkamp v. City of Rock Hill*, 316 S.W.2d 620 (Mo. 1958).

19. *Gibson v. Sharp*, *supra* note 13; *Young v. Moore*, 241 Mo. App. 436, 236 S.W.2d 740 (Spr. Ct. App. 1951); *Applegate v. Franklin*, 109 Mo. App. 293, 84 S.W. 347 (St. L. Ct. App. 1904).

still a part of the stream, for the purpose of carrying such water the slough will be considered a watercourse.<sup>20</sup>

More obscure considerations in distinguishing the two types of water seem to have been interjected by the supreme court's decision in *Happy v. Kenton*<sup>21</sup> in 1952. After a brief summary of some past cases the court concluded:

... in determining whether a given drain is a natural watercourse, we have considered the *function* of the drainway as it then existed, rather than making the determination depend wholly upon whether a given waterway fitted precisely some approved definition of natural watercourse.<sup>22</sup> (Emphasis added.)

The court did not elaborate on what function the drainway should perform in order to be treated as a natural watercourse, but from the facts involved, it is a reasonable conclusion that the drainway need not be a "watercourse," nor does it need to be entirely natural. It appears that the plaintiff and defendant were the owners of farm lands which touched respectively the upper and lower ends of a horseshoe shaped lake. The lake lay about one and one-quarter miles north of the Missouri River in a low region subject to drainage problems. This lake was fed solely from surface drainage, and in times of wet weather it would fill up to a certain height until the water flowed out of the lower end and through the defendant's land to the river by means of a natural draw or depression. Testimony showed that this "low draw" varied between one hundred and five hundred feet wide, and that it had definite banks or sides. The jury found that this constituted a natural watercourse, and judgment was given against the defendant for blocking that drainway, thereby causing the lake to back up over the plaintiff's land. On appeal, the court held that it was unnecessary to pass on the question of whether the evidence before the jury was sufficient to sustain the finding that the depression *in its natural condition* was a watercourse, because there was additional evidence that about fifty years before the action the land-owners had dug a ditch from the lower end of the lake to the river, exactly following the depression, and that this man-made ditch became an integral part of the natural drain. In affirming the

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20. *Jones v. Chicago, B. & Q.R.R.*, 343 Mo. 1104, 125 S.W.2d 5 (1939); *Schalk v. Inter-River Drainage Dist.*, 226 S.W. 277 (Spr. Ct. App. 1921).

21. 362 Mo. 1156, 247 S.W.2d 698 (1952), 18 Mo. L. REV. 67 (1953).

22. *Id.* at 1161, 247 S.W.2d at 701.

judgment the court held that as concerned the liability of the defendant for obstructing it, the waterway *as improved* should be treated as a natural watercourse. In summation it was said:

In other words, we think a natural drainway improved by an artificial ditch, following the exact course of the natural drainway, under circumstances indicating that it was to be permanent, and which combination thereafter meets the requirements of a 'natural watercourse' should be treated as a 'natural watercourse.'<sup>23</sup>

Whether this case will be looked upon as broadening the scope of "watercourse," or whether it will be looked upon as a case of "equitable estoppel" against the defendant remains to be seen.<sup>24</sup>

This problem of determining which water law, *i.e.*, watercourse law or surface water law, should apply arises only in the borderline situations, and is usually not a major issue. A number of cases show the courts' attitude toward the problem.<sup>25</sup> From these cases it can be concluded that the paramount considerations in distinguishing surface water from that flowing in a natural watercourse are the source of the water, continuity of flow, and the physical characteristics of the drainway, along with the general lay of the land. With these things the definitions are directly concerned, and used in conjunction with the cases provide a workable guide; however, the supreme court has made it clear that in some situations, depending upon its function, a drainway, artificially improved, may be treated as a watercourse when in fact, unimproved, it would not be such under the strict definition.

23. *Id.* at 1163, 247 S.W.2d at 702.

24. In *Place v. Township of Union*, 66 S.W.2d 584 (Spr. Ct. App. 1933), the court may have considered the function of the drainway, because as in *Happy v. Kenton*, *supra* note 21, it was held to be "something more than a mere temporary conduit of surface water."

25. See *Jones v. Chicago, B. & Q.R.R.*, 343 Mo. 1104, 125 S.W.2d 5 (1939), *reversing* 100 S.W.2d 617 (St. L. Ct. App. 1936) (lateral slough connecting Mississippi River with stream parallel thereto through which overflow from stream escaped into river could properly be found by jury to be a watercourse within meaning of statute making railroads liable for blocking watercourses); *Keener v. Sharp*, 341 Mo. 1192, 111 S.W.2d 118 (1937), *affirming* 95 S.W.2d 648 (Spr. Ct. App. 1936) (winding bayou with well-defined banks and channel, 10 to 12 feet deep, 20 to 30 feet wide, and containing running water from a natural lake during most of the year was a watercourse); *Place v. Township of Union*, 66 S.W.2d 584 (Spr. Ct. App. 1933) (mandatory injunction forcing the replacement of dams to keep water from draining out of a slough onto plaintiff's land approved where, although the slough did not connect with a stream, it was the natural drain for the area, and more than just the temporary conduit of surface water); *Applegate v. Franklin*, 109 Mo. App. 293, 84 S.W. 347 (St. L. Ct. App. 1904) (evidence was insufficient to sustain a jury finding

### B. Status of Floodwater

Any discussion of surface water in Missouri would be incomplete without some special attention to overflow water from natural streams.<sup>26</sup> The legal status of such water in Missouri is not unique in most of its aspects, as this state follows the almost universal rule that overflow from a stream is treated as surface water when it leaves the main current, never to return, and spreads out over the lower ground.<sup>27</sup> This rule is the Missouri law so far as it goes,<sup>28</sup> but such a rule covers only one of the two situations which may occur when a stream overflows. Most courts agree that if the water of a stream ceases to remain in the channel, and spreads out over the surface of lowlands, and runs in different directions in swags and flats without any definite channel, it becomes surface water.<sup>29</sup> On the other hand, where the stream is merely extended beyond its normal banks, and flows down over the adjacent lowlands in only a broader, but still definite stream, remaining contiguous with the main channel, the majority of courts would say that the "overflow" still retains its character as part of the watercourse.<sup>30</sup>

From a review of the cases there is no indication that Missouri has ever made this distinction, and it appears that *all* overflow water is treated as surface water.<sup>31</sup>

The first definite indication of how Missouri courts would treat any type of flood water came in 1874 in *McCormick v. Kansas City, St. J. &*

that plaintiff had rights akin to riparian rights in swamp where it showed such body of water to cover 2,500 acres, being 1½ miles wide and 3 miles long, always from 3 to 6 feet deep but fed solely from rain and snowfall; as the submerged land was private property there was no public interest, and court held as a matter of law that the swamp should be treated as surface water, taking notice "that swamps are detrimental to public health"; *St. Louis, I. Mt. & So. Ry. v. Schneider*, 30 Mo. App. 620 (St. L. Ct. App. 1888) (approved trial court finding that a back water of a stream extending about 600 feet at right angle back from the stream, and 150 to 200 feet wide at its mouth, being constantly filled with water from the stream, was not watercourse and could be obstructed as surface water).

26. In 40 WORDS & PHRASES, *Surface Water* 842, 846 (perm. ed. and 1953 Supp.), seventeen Missouri cases are listed under the subheading "Overflow or flood water."

About one-third of the surface water cases read in preparing this Article were directly concerned with overflow water of some type.

27. 93 C.J.S., *Waters* § 112 (1956). But see *Everett v. Davis*, 18 Cal. 2d 389, 115 P.2d 821 (1941), where flood water is neither surface water nor part of the stream.

28. *Abbott v. Kansas City, St. J. & C.B.R.R.*, 83 Mo. 271 (1884); *Munkres v. Kansas City, St. J. & C.B.R.R.*, 72 Mo. 514 (1880).

29. See note 27 *supra*.

30. See note 27 *supra*.

31. *Goll v. Chicago & A. Ry.*, 271 Mo. 655, 197 S.W. 244 (1917); *Blackburn v. Gaydou*, 241 Mo. App. 917, 245 S.W.2d 161 (Spr. Ct. App. 1951); *Keyton v. Missouri-Kansas-Texas R.R.*, 224 S.W.2d 616 (K.C. Ct. App. 1949).



C.B.R.R.<sup>32</sup> There, overflow water and ordinary surface water had collected on the upper side of the defendant railroad's embankment, and in order to protect its track the defendant had cut a culvert through the bank. Referring to the rule governing ordinary surface water, the supreme court said, "The same rule would apply to water flowing over the country, which had escaped from the banks or natural channel of a running stream."<sup>33</sup> No authority was cited. Five years later the same court in *Shane v. Kansas City, St. J. & C.B.R.R.* had this to say: "But it must be considered as well settled that this overflow of the Missouri [River] is what is in law termed surface water."<sup>34</sup> In the *McCormick* case it appears that the overflow was separated from the main channel, but in the later instance that was not the case. There was no distinction made as to these two types of overflow.

In *Johnson v. Gray's Point Term. Ry.*<sup>35</sup> this question of distinguishing the types of overflow water was considered. It was there stated:

Now it is universally agreed by courts and text writers that flood water of a stream which entirely escapes from the bed of the stream, passes beyond *even its flood banks* and spreads over the adjacent country, is surface water and may be treated as such by everyone.<sup>36</sup> (Emphasis added.)

Then after referring to the flood water which merely overflows its "principal channel," but which remains contiguous with the stream, the court concluded, "According to the decisions in Missouri, it seems that the flood water of a stream is held to be surface water in that sense," although "perhaps the weight of authority elsewhere is to the contrary."<sup>37</sup>

That conclusion by the St. Louis court was entirely and emphatically substantiated by the supreme court in the 1917 case of *Goll v. Chicago & A. Ry.*<sup>38</sup> There it was clear beyond doubt that the overflow water was not separate from the main stream, but was rather merely flowing in its normal flood channel. Without hesitation the court in affirming the principle of the earlier cases said, "law, like water, should be kept as near as possible within its old and well defined channels, and

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32. 57 Mo. 433 (1874).

33. *Id.* at 438.

34. 71 Mo. 237, 248 (1879).

35. 111 Mo. App. 378, 85 S.W. 941 (St. L. Ct. App. 1905).

36. *Id.* at 385, 85 S.W. at 943.

37. *Id.* at 384, 85 S.W. at 942.

38. 271 Mo. 655, 197 S.W. 244 (1917).

we shall hold fast to our rule that overflow water in Missouri is surface water."<sup>39</sup>

To this rule that all floodwater is surface water there is one well recognized exception. Where the overflow just temporarily escapes from the stream and runs through a slough or other defined channel back into the main body of water, it is still regarded as part of the watercourse.<sup>40</sup> This exception was not recognized in some early cases and resulted in some confusion until the matter was finally settled.<sup>41</sup> It is essential that the slough lead the water back into some natural stream in order to be considered a watercourse.<sup>42</sup> In accordance with this rule, the Springfield Court of Appeals in *Schalk v. Inter-River Drainage Dist.*<sup>43</sup> held that where the evidence showed the defendant's levee had cut across a slough which connected at both ends with the river, through which slough the overflow from the river was accustomed to run, it was a question for the jury as to whether the banks of this slough were so well-defined that the defendant would be liable for obstructing a natural watercourse.

Since the same law applies to overflow water in this state as applies to ordinary surface water, the two types of water will be treated without distinction in this Article.<sup>44</sup>

## II. LAW OF SURFACE WATER, IN GENERAL<sup>45</sup>

Surface water is treated differently from water in a natural watercourse both as to ownership and use, and as to control or interference

39. *Id.* at 668, 197 S.W. at 247.

40. 93 C.J.S., *Waters* § 112 (1956).

41. In *Shane v. Kansas City, St. J. & C.B.R.R.*, 71 Mo. 237 (1879), the overflow from the Missouri River was running through a slough back to the main stream. The failure to recognize the slough as a watercourse under the exception to the law of overflow water probably caused the court to adopt a new theory of surface water law, as it did. See pt. III of this Article.

42. *Jones v. Wabash, St. L. & Pac. Ry.*, 18 Mo. App. 251 (K.C. Ct. App. 1885).

43. 226 S.W. 277 (Spr. Ct. App. 1921).

44. For recent floodwater cases see *Vollrath v. Wabash R.R.*, 65 F. Supp. 766 (W.D. Mo. 1946); *City of Hardin v. Norborne Land Drainage Dist.*, 360 Mo. 1112, 232 S.W.2d 921 (1950); *Jones v. Chicago, B. & Q.R.R.*, 343 Mo. 1104, 125 S.W.2d 5 (1939); *Blackburn v. Gaydou*, 241 Mo. App. 917, 245 S.W.2d 161 (Spr. Ct. App. 1951); *Keyton v. Missouri-Kansas-Texas R.R.*, 224 S.W.2d 616 (K.C. Ct. App. 1949).

45. For a general discussion of the law of surface water see 3 FARNHAM, *WATERS* §§ 877-934 (1904); GOULD, *WATERS* §§ 263-79 (2d ed. 1891); 6A *AMERICAN LAW OF PROPERTY* §§ 28.61-.64 (Casner ed. 1954); Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891 (1940); Rood, *Surface Water in Cities*, 6 MICH. L. REV. 448 (1908); Thompson, *Surface Waters*, 23 AM. L. REV. 372 (1889).

with its flow. There are relatively few cases dealing with the appropriation of surface water,<sup>46</sup> and many jurisdictions have not passed on the problem at all<sup>47</sup> This is to be expected, however, since in all except the most arid areas surface water is a thing more to be shunned than desired, and the main interest has been in perfecting rules governing its disposition. These rules and their development constitute the major subject of this section.

With respect to appropriation however, as a general rule a landowner has the absolute right to the use of surface water on his land.<sup>48</sup> He may retain it and appropriate it to his own use without liability to adjoining proprietors on whose property it would flow if not so appropriated. Riparian rights do not attach to surface waters. The absolute right of appropriation of the higher owner is qualified in some jurisdictions by the rule that surface water can be appropriated only in so far as it is necessary to a reasonable use of the land.

The rules developed by the courts to guide them in determining liability for the obstruction or repulsion of surface water are much more sophisticated than the simple rules of appropriation. Beginning with a slow start in the early 1800's, the litigation arising from surface water drainage has steadily increased with urban growth, railroad construction, agricultural development, and land reclamation.<sup>49</sup> As these early cases came before the courts, owing to lack of precedent and the different needs of the states, different theories of surface water law began to develop. Within a period of about fifty years, beginning in 1812, there

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46. Since 1897 fourteen cases have been digested in the American Digest System under the heading "Right to Surface Water." Fifteen cases are listed in Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 914-15 nn.112-19 (1940).

47. There is no case in Missouri directly deciding the extent to which surface water can be appropriated. Some cases indirectly involve the problem. See pt. IV, § A of this Article, which will appear in the June issue.

48. 93 C.J.S., *Waters* § 113 (1956). This absolute right to appropriate surface water is independent of the law regarding obstruction and repulsion of such water. See *Terry v. Heppner*, 59 S.D. 317, 239 N.W. 759 (1931), *Pecos Co. Water Dist. v. Williams*, 271 S.W.2d 503 (Tex. Civ. App. 1954) for recognition of the right in jurisdictions committed to the civil law rule. In *Orchard v. Cecil F. White Ranches*, 97 Cal. App. 2d 35, 217 P.2d 143 (1950) it was held that surface water could only be *reasonably* appropriated, and that "reasonably" does not mean all that is needed.

49. A study of the cases in Missouri has shown that each of these factors has contributed to surface water litigation, each being predominant during a short period of history in the order listed. See pt. III of this Article for the history of the law of surface water in Missouri.

appeared three separate rules relating to the repulsion of surface water.<sup>50</sup> These three may be termed the civil law rule, the common enemy rule, and the reasonable use rule. It seems worthwhile at this point to enter upon some discussion of these different rules, inasmuch as both the civil law and the common enemy rules have been followed in Missouri, and at the present, there appears to be a trend toward the principles of reasonable user.<sup>51</sup>

#### A. Civil Law Rule: "Natural Flow" Theory

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.<sup>52</sup>

This rule is usually stated in more specific terms such as the following:

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. . . . Hence the owner of the lower ground has no right to erect embankments whereby the natural flow of the 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 field by several channels, and thus increase the wash upon the lower fields.<sup>53</sup>

The rationale of the rule is the same as that of the rule forbidding the obstruction of a natural stream:

What difference does it make, in principle, whether the water comes directly upon the field from the clouds above, or has fallen upon remote hills, and comes thence in a running stream upon the surface . . . there can clearly be no other rule

50. The civil law rule, taken from the foreign codes, was adopted in Louisiana in 1812; the common enemy rule was conceived in Massachusetts in 1851; and the reasonable use rule was conceived in New Hampshire in 1862.

51. See pts. III and IV of this Article for the law in Missouri.

52. Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 893 (1940).

53. *Martin v. Riddle*, 26 Pa. 415, 416 (1848).

[governing the disposition of water] at once so equitable and so easy of application as that which enforces natural laws.<sup>54</sup>

This principle of natural law, expressed in the maxim *aqua currit et debet currere*, is often found as justification for the civil law rule.<sup>55</sup>

Most writers on the subject agree that the courts of Louisiana were the first American courts of highest resort to be confronted with a surface water case,<sup>56</sup> and it is not surprising that the law as it appeared in the Code Napoleon was there adopted.<sup>57</sup> Such a result in a civil law jurisdiction would be expected, but it appears that some common law jurisdictions likewise fell back upon the civil codes when faced with lack of other authority.<sup>58</sup> As a result of this, not only was the "natural flow" theory adopted, but, even the rights of a landowner under the civil law rule are at times spoken of in the civil law terms of natural "services" or "servitudes."<sup>59</sup> From the language of these early cases it is obvious that the rule of law found in the foreign codes was the only rule then known relating to surface water. Not until 1851 was there any indication that another theory was being considered.<sup>60</sup>

In recent years an exception to the civil law rule has been recognized in regard to urban land.<sup>61</sup> That rule itself gives recognition to the undesirability of surface water, but follows the theory that the best way to

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

55. *Gillham v. Madison Co. R.R.*, 49 Ill. 484 (1869); *Kauffman v. Griesemer*, 26 Pa. St. 407 (1856).

56. See *Kinyon & McClure*, *supra* note 52, at 895; *Rood*, *Surface Water in Cities*, 6 MICH. L. REV. 448, 453 (1907).

57. *Orleans Nav. Co. v. Mayor of New Orleans*, 2 Martin 214 (La. 1813) was the first reported case in this country involving a surface water problem. It was followed in the same jurisdiction by *Martin v. Jett*, 12 La. 501 (1838) and *Lattimore v. Davis*, 14 La. 161 (1839).

58. The absence of English cases was due to the early establishment of administrative agencies in that country to deal with drainage problems. In *Martin v. Riddle*, 26 Pa. 415, 416 (1848) it was said: "Not readily finding the subject [of surface water] treated of in any of our usual books of reference, I venture to extract the law from books of foreign origin. . . ."

59. See *Nininger v. Norwood*, 72 Ala. 277 (1882); *Fennema v. Menninga*, 236 Iowa 543, 19 N.W.2d 689 (1945); *Stone v. Ashurst*, 285 Ky. 687, 149 S.W.2d 4 (1941); *Schneider v. Missouri Pac. Ry.*, 29 Mo. App. 68 (K.C. Ct. App. 1888).

60. In *Luther v. Winnisimmet Co.*, 63 Mass (9 Cush.) 171 (1851) the principles of liability now embodied in the common enemy rule were set forth.

61. In *Rood*, *Surface Water in Cities*, 6 MICH. L. REV. 448, 450 (1907) it is concluded that, "Wherever the civil law rule has been recognized, the right of surface drainage has been recognized in the cities as much as in the country. . . ." But see *Kinyon & McClure*, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 931 (1940) where this exception with respect to urban land is referred to and cases are cited to support it.

dispose of it is by enforcing the natural drainage. It can immediately be seen that if this rule should be strictly enforced it would greatly interfere with the development of city property. Each time a lot is stripped of vegetation, a building constructed, or a change in elevation made, there is some effect on the natural drainage. Many of the jurisdictions which adopted this rule have recognized the hindrance put upon urban development and have not applied the natural flow theory to urban land, but rather as to urban land have allowed much more freedom in disposing of surface water.<sup>62</sup>

#### B. *Common Enemy Rule: "Common Law" Rule*

Under the common enemy rule surface water is regarded as the enemy of all, and every landowner has an unlimited and unrestricted legal privilege to fight it as best he can regardless of the effect on his neighbors. He can drain it from his fields, or he can build embankments and throw it back upon adjacent lands without liability.<sup>63</sup> There is no natural easement or "servitude" existing in favor of anyone to prevent a proprietor from interfering with the natural flow of surface water either to block its entry onto, or to expel it from his land.<sup>64</sup> Under this rule it has been held that a railroad would not be liable for damages where its embankment obstructed the natural flow of surface water and caused sixty acres of the plaintiff's land to be inundated.<sup>65</sup> Also in an early case it was held that in the same situation the railroad would not be liable where, in order to dispose of the water so obstructed and collected, it dug an opening through the embankment and discharged the water directly upon the lower owner's land in an unnatural volume and force.<sup>66</sup>

It should be mentioned at the outset of this discussion that many writers and courts have referred to this rule as the "common law" rule.<sup>67</sup> Such nomenclature appears to be not entirely correct, and it has misled

62. A recent case to recognize the exception is *Drummond v. Franck*, 252 Ala. 474, 41 So. 2d 268 (1949). Also in *Alabama Power Co. v. Alford*, 210 Ala. 98, 97 So. 224 (1923) the court stated that the majority of jurisdictions following the civil law rule allowed the exception to urban land. But cf. *Cox v. Martin*, 207 Ga. 442, 62 S.E.2d 164 (1950).

63. 93 C.J.S., *Waters* § 114(2) (1956).

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

65. *Collier v. Chicago & A.R.R.*, 48 Mo. App. 398 (K.C. Ct. App. 1892).

66. *Greeley v. Maine Cent. R.R.*, 53 Me. 200 (1865).

67. See GOULD, *WATERS* § 265 (2d ed. 1891).

judges into applying the rule as being that of the English common law.<sup>68</sup> Those writers who have searched the cases have established with reasonable certainty that the rule of surface water hereinafter called the common enemy rule had its genesis in a series of cases decided by the Massachusetts' courts beginning in the year 1851.<sup>69</sup> It seems that the English courts have followed a rule much akin to the civil law rule of natural flow.<sup>70</sup> The term "common enemy", however, is of English origin, being used by Lord Tenderden in an early case<sup>71</sup> to describe the legal attitude toward the *sea*. That term was first employed in this country by a New Jersey court in 1875<sup>72</sup> to describe the rule of surface water above stated which grew out of the early Massachusetts' decisions. At that time the rule was far along in its development, but because the basic theory behind the rule is so properly described by calling surface water the "common enemy", the rule has come to be known by that name.

By 1865 the common enemy rule had met with approval in a number of courts, but in that year *Gannon v. Hargadon*<sup>73</sup> was decided in Massachusetts which is known as the leading case representing the doctrine. The plaintiff brought his action in tort to recover damages for injury caused when the defendant placed sod in the wagon ruts of a lane and thereby caused surface drainage to flow over the plaintiff's lot. The lower court gave an instruction making the defendant liable if after allowing the water to come on his land, he *then* diverted it in a new direction onto the plaintiff. This instruction was held to be erroneous; the supreme judicial court reviewed the earlier cases and said:

The point of these decisions is, that where there is no water-course by grant or prescription, and no stipulation exists between

68. *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 (1893).

69. To the effect that the common enemy rule was conceived in *Luther v. Winnisimmet Co.*, 63 Mass. (9 Cush.) 171 (1851), and first applied in *Parks v. Newburyport*, 76 Mass. (10 Gray) 28 (1857), see 3 FARNHAM, *WATERS* § 889(c) (1904); Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891 (1940); Rood, *Surface Water in Cities*, 6 MICH. L. REV. 448 (1908); Thompson, *Surface Waters*, 23 AM. L. REV. 372 (1889).

70. Rood, *supra* note 69; see *Miller v. Letzerich*, 121 Tex. 248, 49 S.W.2d 404 (1932).

71. *King v. Commissioners of Sewers*, 8 B. & C. 356, 108 Eng. Rep. 1075 (K.B. 1828).

72. *Town of Union v. Durkes*, 38 N.J.L. 21 (1875). While the New Jersey court was the first to use the term "common enemy" to refer to the rule of law governing the disposition of surface water, the Missouri court in *Jones v. Hannovan*, 55 Mo. 462 (1874), referred to surface water as the common enemy of all.

73. 92 Mass. (10 Allen) 106 (1865).

conterminous 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.<sup>74</sup>

This decision was based upon the maxim which gives every owner of real property the free and unfettered control of his own land above, upon and beneath the surface. This is the rationale often given for the rule,<sup>75</sup> but some jurisdictions have based their adoption of it upon the more laudable ground that it is consistent with improvement and development of land,<sup>76</sup> particularly in the urban areas. Because of this great freedom in property development, those jurisdictions adhering to the common enemy rule as to rural property have no occasion to apply a different rule to city property.

There is one major qualification of the common enemy rule which deserves mention at this point. In a jurisdiction which allows a landowner an unlimited right to deal with surface water as he pleases, regardless of the harm to others, there would seem to be no restriction upon draining surface water onto a neighbor's field. However, in almost every jurisdiction following the common enemy rule (as well as in those following the civil law rule), a landowner is prohibited from *collecting* surface water in a body and discharging it upon the adjoining land in a concentrated flow.<sup>77</sup> It seems that originally the common enemy rule allowed such action by the dominant owner,<sup>78</sup> but the injustice of it was too apparent to be acceptable in later cases.<sup>79</sup>

### C. *Reasonable Use Rule*

While many courts were choosing between the theory of the common enemy rule and the civil law or natural flow rule, New Hampshire was developing a rule founded upon the theory of "reasonable use" as a basis

74. *Id.* at 109.

75. See *Goodale v. Tuttle*, 29 N.Y. 459 (1864).

76. See *Barkley v. Wilcox*, 86 N.Y. 140 (1881).

77. See Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891 (1940).

78. *Greeley v. Maine Cent. R.R.*, 53 Me. 200 (1865).

79. In *Pettigrew v. Village of Evansville*, 25 Wis. 223, 237-38 (1879), it is said: "The proposition that an owner of land may, with impunity, drain off the ponds and stagnant waters therefrom upon the land of another, destroying its value, is so iniquitous and unjust as to be abhorrent to the sense of justice of every intelligent mind."



of determining liability. The rule is not limited to surface water but applies to all uses of land.<sup>80</sup>

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 water, but leaves the whole matter to be determined upon the facts of each case in accordance with general principles of fairness and common sense.<sup>81</sup>

The rule was first applied to surface water in the New Hampshire case of *Swett v. Cutts*<sup>82</sup> in 1870. All of the circumstances of the case are to be considered, and with that as a basis, the defendant will be liable only if he has made unreasonable modifications in the natural flow of water.<sup>83</sup>

A strong and convincing argument was made in favor of the reasonable use rule by the New Hampshire court in *City of Franklin v. Durgee*.<sup>84</sup> There the harsh effects of any strict application of either of the other two rules were pointed out, and the justice of enforcing correlative surface water rights of adjoining landowners was made apparent. Notwithstanding the logic of the argument only two states other than New Hampshire have expressly adopted the reasonable use rule to date.<sup>85</sup> This is also the rule followed by the American Law Institute in the *Restatement of Torts*.<sup>86</sup>

#### D. Civil Law and Common Enemy Rules in Practice

Both of the major rules of surface water have been strongly criticized because of their inflexibility and resulting injustice in some situations.<sup>87</sup>

80. The rule was developed and applied to percolating water in *Bassett v. Salisbury Mfg. Co.*, 43 N.H. 569 (1862).

81. *Kinyon & McClure*, *supra* note 77.

82. 50 N.H. 439 (1870).

83. *Ibid.*

84. 71 N.H. 186, 51 Atl. 911 (1901).

85. Minnesota and New Jersey have adopted the rule, and have applied it in recent cases; See *Johnson v. Agerbeck*, 247 Minn. 432, 77 N.W.2d 539 (1956); *Enderson v. Kelehan*, 226 Minn. 163, 32 N.W.2d 286 (1948); *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).

86. RESTATEMENT, TORTS § 833 (1934).

87. In *Rood*, *Surface Water in Cities*, 6 MICH. L. REV. 448, 457 (1907), speaking of the common enemy rule it is stated: "It is believed also to be contrary to the spirit of the common law in refusing to arbitrate and leaving the result to the law of force; moreover, if one may build a dike, so may another, and he will succeed who can build the highest one. . . ." Also see *Kinyon & McClure*, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 913 (1940).

But whatever the application of either rule may have been in its formative years, each has been modified to the extent that presently many of the objectional features have disappeared. The major exception to each rule has already been indicated; the inapplicability of the civil law rule to urban property, and the modification of the common enemy rule to prohibit the artificial discharge of water in a concentrated body upon the lower land. There are minor exceptions worth mentioning. For example the common enemy rule has been modified in some states to prohibit obstructing the flow of surface water which runs through a defined natural depression or ravine.<sup>88</sup> Also greater flexibility is given in the application of the latter rule by the frequently found requirement that every landowner must use reasonable care to avoid causing unnecessary harm to others.<sup>89</sup> Under a strict application of the civil law rule there would be no privilege to obstruct or alter in any way the natural flow of surface water. The impracticability of such an application is apparent, and many of the states following that rule do allow minor alterations where it is necessary to the normal use and improvement of the land.<sup>90</sup>

By making these exceptions and qualifications the harsh effects of both rules have been eliminated, and the two rules, originally at extreme poles, have tended toward a middle ground. The result is that in a few areas, notably the artificial discharging of water on the adjoining land, the two rules coincide.<sup>91</sup> This tendency of the two rules to eliminate the unjust results by merely making exceptions in certain cases and imposing qualifications in others has been criticized as making "specific qualifications to the rules which are as arbitrary and inflexible as the general rules themselves."<sup>92</sup> That is the argument for the reasonable use rule which would appear to solve many of the problems inherent in each of the other two. Notwithstanding this argument each of the two leading

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88. See *Leaders v. Sarpy County*, 134 Neb. 817, 279 N.W. 809 (1938).

89. See *Brasko v. Prislovsky*, 207 Ark. 1034, 183 S.W.2d 925 (1944).

90. See *Beals v. Robertson*, 356 Pa. 348, 52 A.2d 316 (1947).

91. In *Schneider v. Missouri Pac. Ry.*, 29 Mo. App. 68, 74 (K.C. Ct. App. 1888), after a discussion of both of the major rules it is stated, "under neither rule has the superior proprietor the right to collect the water in a body on his land and precipitate it in a body, or in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter." Also see *Rychlicke v. City of St. Louis*, 98 Mo. 497, 11 S.W. 1001 (1889).

92. *Kinyon & McClure, Interferences with Surface Waters*, 24 MINN. L. REV. 891, 913 (1940).

rules has had a popular following, and today there is almost an even split in the jurisdictions which have considered the problem.<sup>93</sup>

### III. HISTORY OF MISSOURI LAW OF SURFACE WATER

Since 1884 the theory of surface water law in this state has never been seriously questioned. In that year the supreme court decided *Abbott v. Kansas City, St. J. & C.B.R.R.*<sup>94</sup> adopting the common enemy rule as the law of surface water in Missouri. Up until then, however, there was considerable confusion as to what rule of law the court would follow. Because of this confusion, part III of this Article will trace the development of the law through this early period and up to the final adoption of the common enemy rule<sup>95</sup> in the *Abbott* case. This historical discussion will place the older cases in their proper perspective, and thereby avoid any misunderstanding of their significance today. Part IV of this Article will continue with a discussion of the more important cases since 1884, each section of that Part being devoted to the recent development of the law in a specific area.

Only about half a dozen surface water cases, all in two jurisdictions, had been decided when the first such case came to our supreme court in 1849. The states of Louisiana<sup>96</sup> and Pennsylvania<sup>97</sup> had become committed to the natural flow doctrine of the civil law when *City of St. Louis v. Gurno*<sup>98</sup> shed the first light on how surface water would be treated in Missouri. It is only the slightest indication, but from that case it appears that the lower courts of our state were also applying the civil law doctrine. There the defendant city had graded certain streets in such a manner that surface water was caused to collect, and because of the insufficiency of the city's sewer, the water flowed over the plaintiff's premises in times of heavy rain and on one occasion ran into his cellar. The plaintiff alleged that the city should be liable because the

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93. *Ibid.* Also see Note, 2 U. FLA. L. REV. 392 (1949).

94. 83 Mo. 271 (1884).

95. A good general discussion of the Missouri law of surface water in this same period may be found in English, *The Law of Surface Water as Applicable to Missouri and States Bounded by Large Rivers*, 51 CENT. L.J. 360 (1900).

96. *Hays v. Hays*, 19 La. 351 (1841); *Lattimore v. Davis*, 14 La. 161 (1839); *Martin v. Jett*, 12 La. 501 (1838); *Orleans Nav. Co. v. Mayor of New Orleans*, 2 Martin 214 (La. 1813).

97. *Martin v. Riddle*, 26 Pa. 415 (1848) (the case was decided in 1848 but was not reported until 1856); *Bentz v. Armstrong*, 8 W. & S. 40 (Pa. 1844).

98. 12 Mo. 414 (1849).

work was negligently done, but at the trial the court instructed the jury that the city was liable for the injury complained of *whether or not* there was any negligence. On appeal the supreme court merely held that the municipal corporation would not be liable where the act was skillfully done in pursuance of an ordinance authorized by its charter. The decision of that controversial issue of municipal immunity would have been unnecessary unless it was assumed that an individual would have been liable on the same facts. Except for negligence, any liability under the circumstances would indicate the application of a "natural flow" theory.<sup>99</sup>

Seven years later, in 1856, the case of *Laumier v. Francis*<sup>100</sup> was decided. This case has been referred to by writers as adopting the civil law rule in Missouri,<sup>101</sup> and it is certainly true that it is the first case where the supreme court definitely recognized that rule. However, the main issue of the appeal involved the propriety of excluding an interested witness from testifying, and only incidentally and as pure dictum, did the court consider the surface water problem. After discussing the easements and natural servitudes of the civil law, it was said:

Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, the inferior field is obliged to receive the water that falls from the superior, and this is given as an instance of a servitude constituted by nature (Irskine's Institutes, 408, 409).<sup>102</sup>

The quoted material was merely stated as an example of a natural easement, and there was no indication that it was the Missouri law. The court admitted that it knew nothing about the facts of the case and went on to suppose a situation where a plaintiff in building a house on his lot caused surface water to form a pond on the defendant's land which injured the plaintiff's own house. It was observed that the plaintiff there "can not recover any damage occasioned thereby to his own property"

99. In more recent cases there has been liability under the common enemy rule where due to insufficient sewers, the water which the city has collected by its streets is allowed to stand in a pond which backs upon the adjacent land. See *Kelly v. City of Cape Girardeau*, 227 Mo. App. 730, 60 S.W.2d 84 (Spr. Ct. App. 1933); *Lewis v. City of Springfield*, 142 Mo. App. 84, 125 S.W. 824 (Spr. Ct. App. 1910).

100. 23 Mo. 181 (1856).

101. GOULD, *WATERS* § 266 (2d ed. 1891); Rood, *Surface Water in Cities*, 6 MICH. L. REV. 448, 455 (1907). For an instance in which the principal case was cited as standing for the common enemy rule see Thornton, *Surface Water on Agricultural Land*, 17 CENT. L.J. 62, 64 (1883).

102. 23 Mo. at 184.

as "the plaintiff himself would be the author of the nuisance."<sup>103</sup> That is the extent of the case, and the propriety of the court's conclusion on the "supposed" facts would seem apparent independent of any rule of surface water law.<sup>104</sup>

There is no attempt here to criticize the holding in the *Laumier* case or to imply that it stands for any rule other than that attributed to it; indeed at the time the case was decided there was no judicially declared rule other than that found in the civil codes.<sup>105</sup> It does seem however, that the case has been given an unwarranted significance by most text writers.<sup>106</sup>

*Laumier v. Francis* was seldom referred to in the later cases, but the rule of surface water law recognized in that case was applied by the court for some eighteen years following its decision. In *Clark's Adm'x v. Hannibal & St. J. R.R.*,<sup>107</sup> decided nine years later in 1865, it was held that in the absence of negligence, unskillfulness, or mismanagement, the defendant railroad would not be liable for injuries caused when its embankment backed surface water over the plaintiff's fields. This would seem to be in accord with the common enemy rule. However, the holding was based on the ground that:

. . . the injury thereby done to the plaintiff's property must be considered as the natural and necessary consequence of what the corporation had acquired the lawful right to do; and such damages must be taken to have been included in the compensation assessed. . . .<sup>108</sup>

Unless it was originally a wrong under the law there would have been no need to compensate the plaintiff in order to acquire the "right" to block the water. Therefore we can see it would have been unnecessary

103. *Ibid.*

104. In *Doerbaum v. Fischer*, 1 Mo. App. 149 (St. L. Ct. App. 1876), the identical facts actually occurred, and the court cited the principal case as authority for denying relief to the plaintiff. Presumably at that time the common enemy rule was in force in Missouri.

105. Most authorities agree that the common enemy rule was first declared in 1851, but it was first applied in 1857 in *Parks v. Newburyport*, 76 Mass. (10 Gray) 28 (1857). See note 69 *supra*.

106. See the dissent by Hough, J. in *Shane v. Kansas City, St. J. & C.B.R.R.*, 71 Mo. 237, 258 (1879) where it is said of the principal case: "The judgment of the circuit court, however, was expressly reversed upon another ground, and no decision was, or could have been made upon facts which were not before the court."

107. 36 Mo. 202 (1865).

108. *Id.* at 224.

for the court to thus extend the doctrine of eminent domain unless the civil law rule of surface water was in effect.

In *Rose v. City of St. Charles*,<sup>109</sup> decided in 1872, the defendant city was being sued for constructing its street in such a manner as to dam a waterway running across the plaintiff's lot, thereby causing the water to back up and do harm. The jury found that there was "no living stream" which had been blocked and gave a verdict for the defendant. On appeal the court considered the finding and interpreted it to mean that in the eyes of the jury there would be no liability for blocking a waterway unless it was a "permanent stream." Judge Bliss said:

In this view of the law the jury was mistaken, and the court should have set aside the verdict, as would have been its duty had the same view been embodied in an instruction given by the court.<sup>110</sup>

The jury's application of the common enemy rule was declared error.

The next Missouri case to involve the question of liability for diverting surface water was *Thurston v. City of St. Joseph*,<sup>111</sup> decided in 1873. The exact question was whether a petition stated a cause of action which alleged that through the defendant's negligent construction of its sewer, surface water was thrown onto the plaintiff's lot injuring her property. The case is most important for its clarification of the law as found in *City of St. Louis v. Gurno*.<sup>112</sup> In upholding the petition, the court held that a municipal corporation can be held liable where it negligently performs authorized acts. This holding, however, gives no indication of the theory of surface water law involved since it is justified under either the common enemy or civil law rule.

Less than a year after the *Thurston* case, in *Imler v. City of Springfield*,<sup>113</sup> a similar question was presented concerning the city's liability for filling up a street in such a way that surface water flowed into and damaged the plaintiff's cellar. Judgment was for the plaintiff in the trial court, but this was reversed and the cause remanded, the court holding

109. 49 Mo. 509 (1872).

110. *Id.* at 512. In *Imler v. City of Springfield*, 55 Mo. 119, 127 (1874), the quoted portion of the opinion was interpreted as meaning that the jury was wrong in believing that a waterway had to be a stream flowing at all times in order to be a "watercourse."

111. 51 Mo. 510 (1873).

112. *Supra* note 98.

113. 55 Mo. 119 (1874).

that the city would be liable only for negligence. This is in accord with the decision in the *Thurston* case. This holding could be correct under either of the surface water rules; if the civil law rule was in force the city would be liable only for negligence because of its privileged position, and under the common enemy rule there would be no wrongful act except for the negligence. Fortunately the court went further and left no doubt as to the basis of its opinion; the seeds of the common enemy rule were planted! The lower court had declared the law to be that the city had a duty not to cause the surface water to flow into plaintiff's premises which it must fulfill even at reasonable extra expense in construction. As stated by Judge Vories:

This assumes, that it was the duty of the city . . . to prevent the surface water from flowing upon the lots of the adjoining proprietors, and that it was negligence in the city not to have done so, for which it is liable. I think it will be found by reference to the authorities, that no such liability exists. A liability would exist against a city for filling up or damming back a stream of running water, so that it would overflow its banks and flow upon the land of another; but a very different rule exists with reference to surface water.<sup>114</sup>

*Gannon v. Hargadon*,<sup>115</sup> a Massachusetts decision, and the leading case on the common enemy rule, was cited as authority. There was no mention of *Laumier v. Francis*.<sup>116</sup>

Just a few days later *Jones v. Hannover*<sup>117</sup> was decided and although that case involved a natural watercourse, the opinion, again by Judge Vories, reads in part as follows:

This as a general rule is unquestionably the law; each proprietor may control merely surface-water, so as to protect himself, and drain it off from his own land. Surface-water is considered a common enemy that each proprietor may and must fight for himself, with a view to protect himself, without being responsible to others therefor, provided he does so in an usual and careful manner.<sup>118</sup>

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114. *Id.* at 126.

115. 92 Mass. (10 Allen) 106 (1865).

116. The court did, however, review *City of St. Louis v. Gurno*, *supra* note 98; *Rose v. City of St. Charles*, *supra* note 109; and *Thurston v. City of St. Joseph*, *supra* note 111, and decided that they were not in conflict with the doctrine pronounced.

117. 55 Mo. 462 (1874).

118. *Id.* at 466. This is the first instance in any Missouri case that surface water was referred to as being the "common enemy."

As authority for this statement the opinion cited *Imler v. City of Springfield*, discussed above. The seed has grown into respectable dictum! The next ten years would see the common enemy rule burst into blossom, wilt away completely for a short span, and then reappear with enough vitality to carry it through to the present.

Later in 1874, Judge Vories was again able to propagate this new-found doctrine in *McCormick v. Kansas City, St. J. & C.B.R.R.*<sup>119</sup> which we must recognize as the leading Missouri case on the common enemy rule. Although that opinion was grossly misunderstood a short time later and thus resulted in the temporary adoption of the civil law doctrine, the case qualified some of the harsh features of the common enemy rule in a manner which made it acceptable to our courts in later years. The *McCormick* case went to the supreme court twice, first in 1874<sup>120</sup> when Judge Vories wrote the opinion above mentioned, and again in 1879<sup>121</sup> when the case was decided under the civil law rule. A rather narrow question was before the court in each instance, and as the facts are rather simple, they will be stated. The defendant railroad had constructed its embankment or roadbed across a low basin. The tracks crossed over a small creek which flowed down one side of the basin. During the rainy season water from this creek would overflow the banks and, combining with general surface drainage, would cause a pond to form in the basin on the upper side of the tracks. To prevent this accumulation of surface water, and to protect its embankment, the railroad company built a small box culvert through the roadbed. Thereafter, this accumulated water ran through the culvert and, coming out at a single point in a greatly concentrated stream, damaged the plaintiff's adjoining land.

The question before the court on the first appeal was the propriety of certain instructions which would make the railroad company liable only if the culvert was installed "for the sole purpose of maliciously injuring the plaintiff." In clear and unambiguous language Judge Vories elaborated upon his previous statements concerning the common enemy rule:

The general rule, however, is, that . . . persons may so occupy and improve their land, and use it for such purposes as they may

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119. 57 Mo. 433 (1874).

120. *Ibid.*

121. 70 Mo. 359 (1879).



see fit, either by grading or filling up low places, or by erecting buildings thereon, or by making any other . . . profitable or desirable enjoyment; and it makes no difference that the effect of such improvement is to change the flow of the surface water accumulating or falling on the surrounding country, so as to either increase or diminish the quantity of such water, which had previously flowed upon the land of the adjoining proprietors to their inconvenience or injury.<sup>122</sup>

Then, after holding that overflow water is surface water, the opinion goes on to qualify the rights of the landowner by adding: "But persons exercising this right to improve and ameliorate the condition of their own land, must exercise it in a *careful and prudent way*."<sup>123</sup> (Emphasis added.) The rule with this qualification is sometimes known as the modified common enemy rule.<sup>124</sup> As stated earlier in this Article, most if not all, common enemy jurisdictions have prohibited a landowner from collecting and discharging water onto his neighbor.<sup>125</sup> This limitation has been treated as separate from the "reasonable use" qualification, added by Judge Vories, but certainly to him, collecting and discharging was one of the things attempted to be prohibited. He said: "nor could he collect the surface water from the surrounding country into a large reservoir or pond . . . and then turn it loose in large quantities."<sup>126</sup> The judgment for the defendant was reversed and the cause remanded, since the efforts of the railroad to protect its roadbed had not "been done in a reasonable manner with reference to the rights of others."<sup>127</sup>

While at this time at least three opinions by Judge Vories had expounded the common enemy rule, no case had applied that doctrine in its strict form, and it was not until 1875 in *Hosher v. Kansas City, St. J. & C.B.R.R.*<sup>128</sup> that the court affirmed a verdict found under instructions which enunciated the real theory of the rule.<sup>129</sup> It is true that *Mc-*

122. 57 Mo. at 437.

123. *Id.* at 438.

124. See Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 928 (1940); 93 C.J.S., *Waters* § 114(3) (1956).

125. See Kinyon & McClure, *supra* note 12.

126. 57 Mo. at 438.

127. *Id.* at 439.

128. 60 Mo. 329 (1875).

129. *Id.* at 333. In affirming the instruction the court said, "The instruction enunciates the very doctrine laid down by this court in the case cited [the first *McCormick* case], and was drawn up in conformity with it." The instruction read in part, ". . . and if it was found that the company made its roadbed and ditches with reasonable skill, and the plaintiff was incidentally injured thereby, by the flow of surface water on his land, he could not recover for an injury caused by the collection of such surface water. . . ."

*Cormick I*<sup>130</sup> applied the rule in its modified form, but the holding could have been the same under the "natural flow" theory. A second case in 1875, *Munkers v. Kansas City, St. J. & C.B.R.R.*,<sup>131</sup> was remanded with orders to follow the newly announced rule.

In 1879 the *McCormick* case came up for the second time,<sup>132</sup> and in an amazing opinion by Judge Napton the civil law rule was adopted. The first sentence of Judge Napton's opinion reads: "When this case was here in 1874 [*McCormick I*] the court clearly indicated the ground upon which the plaintiff's right of recovery must be based."<sup>133</sup> He then seized upon the paragraph where Judge Vories had condemned collecting and discharging the water and said, "These general principles were in truth drawn from the Roman law . . . and were the basis of the decision of this court when the case was here before."<sup>134</sup> In a vigorous dissent Judge Hough pointed out the error in interpreting the previous decision, and noted that the cases relied on by the majority were suits for the obstruction of water-courses.

If after *McCormick II* there remained any doubt as to the theory of surface water law in Missouri, certainly it was cleared away by the decision in *Shane v. Kansas City, St. J. & C.B.R.R.*,<sup>135</sup> decided in the same term of court. The facts there were the reverse of the *McCormick* cases. The railroad embankment cut across a slough through which the floodwater of the Missouri River was accustomed to flow from the river to a lake and thence to the river again. This obstruction forced the floodwater back upon the plaintiff's land and destroyed his crops. The overflow was treated as surface water, but the exception relating to flood waters flowing through a natural drain back into the main channel was not perfected.<sup>136</sup> The opinion, again by Judge Napton, recognized that

130. For convenience, the first *McCormick* case, 57 Mo. 433 (1874) will hereinafter be referred to as *McCormick I*, and the second *McCormick* case, 70 Mo. 359 (1879) will be referred to as *McCormick II*.

131. 60 Mo. 334 (1875).

132. See note 130 *supra*. Having been remanded for a new trial in *McCormick I* because of improper instructions, on remand the trial court gave instructions which in effect allowed the defendant to protect its roadbed from the water collected by its embankment, and made it liable only for negligence. The judgment was for the defendant, and again the plaintiff appealed alleging error in the instructions. On this appeal, *McCormick II*, these instructions were held to be erroneous, under the civil law doctrine and the cause was remanded for a third trial.

133. 70 Mo. at 360.

134. *Id.* at 361.

135. 71 Mo. 237 (1879).

136. See pt. I, § B of this Article.

this situation was the converse of that involved in the *McCormick* cases but concluded that "the principle involved is the same"; of course the court meant by that the principle of the civil law prohibiting interference with the natural drainage. In accordance with that view the judgment for the plaintiff was affirmed because of the violation of his easement in the unobstructed flow of the water. Judge Hough again dissented on grounds of precedent and of principle.

We may ask, what was the effect of these decisions; was the civil law rule actually adopted? The answer can be found in the later cases. One year later the court speaking through Judge Hough approved instructions which clearly stated the common enemy rule,<sup>137</sup> seemingly ignoring *McCormick II* and the *Shane* case, but even under those instructions the verdict had been *against the defendant* for blocking the drainage, and certainly his liability would have been at least as great under the civil law rule. As observed by the court, there was nothing of which the defendant had a right to complain, and the instructions could not have been prejudicial. From later cases it would appear that the court was still somewhat confused on the problem. It seems however that the common enemy rule was favored, and the civil law rule applied only where the water was collected and discharged. Thus in *Benson v. Chicago & A.R.R.*<sup>138</sup> it was said: "mere surface water . . . is regarded as a common enemy, against which any land owner affected by it may fight"<sup>139</sup> but the opinion goes on to say:

Whatever may be the rule prevailing in some states, it seems to be established in this State, that in respect even to surface water the dominant proprietor has no right in diverting it to obstruct its egress by collecting it together . . . and conduct it to and discharge it upon the servient land, in increased volume. . . .<sup>140</sup>

As authority for the last quoted statement the court cited *McCormick II* and the *Shane* case. Another decision in the same term,<sup>141</sup> in more definite words, holds that the common enemy rule is the law of this state, *subject however*, to the prohibition against collecting and discharging; the other provisions of the civil law rule are not mentioned. Thus the law appears to be the same as that declared in *McCormick I*.

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137. *Munkres v. Kansas City, St. J. & C.B.R.R.*, 72 Mo. 514 (1880).

138. 78 Mo. 504 (1882).

139. *Id.* at 512.

140. *Ibid.*

141. *Stewart v. City of Clinton*, 79 Mo. 603 (1883).

Those three decisions take us from the *Shane* case, which attempted to adopt the civil law rule, up to 1884 when *Abbott v. Kansas City, St. J. & C.B.R.R.*<sup>142</sup> was decided. As before stated, the civil law rule was not being followed except in the situations exactly presented in the *McCormick* cases and even these were treated as mere qualifications of the common enemy rule. The *Abbott* case is the one most often referred to as readopting the common enemy rule in Missouri.<sup>143</sup> One may ask if there was anything left to be done. The plaintiff in that case was seeking to hold the railroad company liable for the injuries caused by reason of its failure to provide waterways through its embankment sufficient to keep the water from backing up over his land. The "surface water" was the overflow from a small stream, but unlike the overflow in the *Shane* case, it "spread out everywhere" and flowed in "all directions." There was a general verdict for the plaintiff but the judgment was reversed on appeal, the supreme court holding the instructions erroneous in that they applied the doctrine of the civil law. The *Shane* case was expressly overruled. There seemed to be three reasons given for rejecting the civil law rule. The first of these was precedent; the court reviewed all of the cases on the problem, and concluded that all of its decisions (except *McCormick II* and the *Shane* case) expounded the common enemy rule. Certainly for about ten years that rule had been recognized as a rule of surface water law, but even that occurred in no more than eight cases, and only in three of them was the rule necessary to the decision. So while there was some precedent, it would not appear to be any stronger than that of the civil law rule. In recent years the *Abbott* case has been somewhat embarrassed by the second reason given for adopting the common enemy rule. Throughout the opinion the rule was referred to as the "common law doctrine," and it was inevitable that the Missouri statute adopting the common law of England<sup>144</sup> should be mentioned. Immediately following the discussion of this statute the opinion reads:

This statutory obligation and duty has been recognized and enforced, as we have seen, in all the earlier and later [since *McCormick II* and the *Shane* case] adjudications of this court on this subject. In fact the rule of the common law on this subject

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142. 83 Mo. 271 (1884).

143. See Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891 n.65 (1940); English, *The Law of Surface Water as Applicable to Missouri and States Bounded by Large Rivers*, 51 CENT. L.J. 360 (1900).

144. Now § 1.010, RSMo 1949.

was never questioned in this state or departed from until [*McCormick II*]. . . .<sup>145</sup>

The third reason, it is hoped, was the real rationale for the decision. In discussing the common enemy rule the court was of the opinion that it:

. . . best promotes and conserves the varied and important interests of both the public and private individuals incident to and growing out of this question. It permits and encourages public and private improvements, and at the same time restrains those engaged in such enterprises [railroads] from unnecessarily or carelessly injuring another.<sup>146</sup>

There was a concurring opinion by Hough, C.J.

Since cases both before and after *McCormick II* and the *Shane* case applied the common enemy rule, there has been some question as to whether the civil law rule was ever a part of Missouri surface water law.<sup>147</sup> There is little doubt but that in both of the "civil law" decisions the same result could have been reached under application of the common enemy rule as it is now applied in Missouri, and it is also true that the decisions immediately following those two cases failed to recognize any great change in the law. Even in the *Abbott* case there was an effort to bring the ruling of the *Shane* decision under the common enemy rule by suggesting that the court there had considered the obstructed slough a water-course.<sup>148</sup> It has been said that "the statement of the court in the two cases [*McCormick II* and *Shane*], being mere *obiter dicta*, they may be disregarded as authority."<sup>149</sup> This is no doubt true if we look only to the result of the holding and refuse to consider the court's reasoning in those cases. To do this would discredit both the court and the civil law rule which has a popular following.<sup>150</sup> In the *Shane* case the court had before it the best cases of both of the conflicting rules. It chose to follow the civil law rule, being well appraised of its full meaning. At least for a short period that rule of the civil codes was the law of Missouri.

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145. 83 Mo. at 285.

146. *Id.* at 286.

147. See English, *supra* note 143, at 364.

148. 83 Mo. at 287.

149. See English, *supra* note 143, at 364.

150. See pt. II, § A of this Article.

That invasion of the civil law rule was promptly ended by the *Abbott* decision which unequivocally pronounced the common enemy rule as the law of surface water in this state, and except for a few misconceived cases,<sup>151</sup> that rule of law has gone unchallenged. Subsequent cases have elaborated upon the basic doctrine.

*(To be continued in the June issue.)*

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151. See *Arn v. Kansas City*, 14 Fed. 236 (W.D. Mo. 1882) where the federal court concluded that Missouri followed the civil law rule, and *Simpson v. Wabash R.R.*, 145 Mo. 64, 46 S.W. 739 (1898) where the language seems to favor that rule also.