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Abandoning the Common Enemy Doctrine and Adopting the Rule of Reasonable Use: More Problematic than Helpful

Heins Implement Co., et al. v. Missouri Hwy. & Transp. Comm'n, et al.[1]

by JASON W. JOHNSON

The flow of surface water has presented problems throughout the history of American law. The rights of landowners in discharging unwanted water from land became entangled with the rights of other landowners not to be injured by the acts of their neighbors. The common enemy doctrine was the earliest common law doctrine adopted with respect to landowners' rights in diverting the flow of surface water. The common enemy doctrine has since been supplanted in a number of jurisdictions by the civil law rule (also called the natural flow rule) and the rule of reasonable use. Even the common enemy doctrine itself has been modified in some jurisdictions to include some reasonableness standards. Until the present case was decided, Missouri followed a modified common enemy doctrine. That doctrine has now been abandoned, and replaced with the rule of reasonable use.

I. Facts and Holding

Heins Implement Co. and neighbors (Appellants) own or rent commercial and agricultural property near the Wakenda Creek river bottom.[2] At this location, Highway 65 runs north-south, and Route 10 runs east-west.[3] Before 1975, Wakenda Creek often flooded after heavy rains.[4] The water ran over Route 10 and gathered in a small artificial lake.[5] When this lake exceeded capacity, the water would run east over Appellants' lands although it never reached their buildings, before crossing Highway 65 and rejoining the creek further downstream.[6]

To build a bypass for Highway 65, Respondent, the Missouri Highway and Transportation Commission, ("MHTC"), condemned some of the property owned either by Appellants or their predecessors in title.[7] Mel Downs, chief design engineer for the project (and an employee of MHTC), designed a five-foot culvert under the bypass to handle normal drainage.[8] He testified that he did not know about the history of flooding in the area, but that he thought the culvert could handle normal rainfall drainage.[9] Downs admitted that the culvert was inadequate to drain the creek's other normal overflows.[10] In July 1981, after the bypass was completed, a flood occurred and the raised road, when coupled with the inadequate drainage, acted as a dam. This caused flooding of a much greater degree of severity than before.[11] Many buildings had up to thirty inches of water in them, and the water remained for seven days.[12] Similar floods occurred at least five times over the next nine years.[13]

Appellants filed suit in 1985 against MHTC, Mel Downs, Trager & Sons (the contractor), and Carroll County Recreation Club (the owner of the lake).[14] The trial court granted summary judgment, denying Appellants' claims against the contractor, the engineer, and the Club; and on Appellants' claims of negligence and nuisance against MHTC.[15] The negligence claim against Mel Downs was also rejected.[16] The counts alleging inverse condemnation against MHTC were tried before a jury.[17] The jury returned verdicts in favor of Appellants for damages of $298,175.[18] Appellants filed motions to increase the amount awarded or for a new

1 859 S.W.2d 681 (Mo. banc 1993). © 1994 Jason W. Johnson.
2 Heins Implement Co. v. Missouri Hwy. & Transp. Comm'n, 859 S.W.2d 681, 684 (Mo. banc 1993).
3 *Id.*
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.* at 694.
17 *Id.* at 684.
18 *Id.*

trial on the issue of damages only.[19] MHTC filed for judgment n.o.v., arguing that Appellants' action was barred by the original condemnation proceedings and the "common enemy doctrine."[20] The trial court sustained MHTC's motion and entered judgment n.o.v. in its favor.[21]

The Missouri Supreme Court, upon consideration, held: The common enemy doctrine no longer reflects the appropriate rule in situations involving surface water runoff, and the Court instead adopts the rule of reasonable use.

II. Legal Background

The issue of landowners' rights in tempering the forces of nature is deeply rooted throughout the history of property law. One of the more confusing areas within this genre of law is that of the control of surface waters. In the State of Missouri, the common enemy doctrine has governed since 1874.[22] The original doctrine, as established in Missouri in *McCormick v. Kansas City, St. Joseph and Council Bluff R.R. Co.*,[23] was as follows:

> [I]n the case of surface water, which is regarded as a common enemy, [each owner] is at liberty to guard against it, or divert it from his premises, provided he exercises reasonable care and prudence in accomplishing that object...[T]he owner of the dominant...heritage 'must improve and use his lands in a reasonable way, and in so doing he may turn the course of, and protect his own land from, the surface water flowing thereon; and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow, and for its increase upon the land of others. Each proprietor...is left to protect his own lands against the common enemy of all.'[24]

Over time, Missouri courts applied the common enemy doctrine in different ways. Gradually, a series of exceptions developed as the courts attempted to deal with the harshness of this doctrine.[25] As the many different opinions with the differing exceptions aggregated, reconciliation of the various precedents became impossible.[26]

Before the instant case, the doctrine used in Missouri was actually a "modified" common enemy doctrine. This doctrine differed from the original common enemy doctrine in that there were many exceptions not previously in existence. For example, the dominant (upper) landowner could not use impoundment (i.e. a reservoir) or artificial ditching to discharge surface water onto a lower tenement in "accelerated volume."[27] Likewise, the owner of a lower tenement could not use impoundment or artificial ditching to discharge surface water in an accelerated volume onto a dominant tenement.[28] The lower tenement could use a levee or embankment to stop the flow of surface water.[29] "Surface water" included overflow flooding from rivers and streams.[30] A dominant landowner could, with immunity, alter the grade of his land so long as the surface water was not accelerated in volume onto the lower tenement via impoundment or artificial ditching.[31] Lower land owners had considerable freedom in blocking the flow of water onto their lands; however they could not dam a natural drainway.[32] A landowner "may dam against surface water even though in doing so he casts it back upon his neighbor" — provided the landowner did not "gather it and discharge it at one place to the injury of an adjoining owner."[33] Upper landowners may have had to use some degree of care when discharging surface water onto lower lands.[34] A lower landowner needed no pure motive or good faith in blocking the water.[35]

As is obvious, the various exceptions were confusing and difficult to apply. "This opacity of the law, or perhaps more appropriately 'muddying of surface water,' resulted from a failure to . . . discern that the common enemy doctrine applied solely to surface water in its natural diffused state, not after it was artificially collected and accelerated in volume."[36] This opacity was evident in other jurisdictions as they dealt with the

19 *Id.*
20 *Id.*
21 *Id.*
22 See Pollock v. Rose, 708 S.W.2d 218 (Mo. Ct. App. 1986), Camden Special Road District v. Taylor, 495 S.W.2d 93, 96 (Mo. Ct. App. 1973), Heins Implement Co. v. Missouri Highway and Transportation Commission, 859 S.W.2d at 686; all *citing* Abbott v. Kansas City, St. Joseph & Council Bluffs R.R. Co., 83 Mo. 271, 286 (1884).
23 57 Mo. 433 (1874).
24 *Heins*, 859 S.W.2d at 686 (quoting McCormick v. Kansas City, St. Joseph and Council Bluff R.R. Co., 57 Mo. 433, 438 (1874)).
25 *Id.*
26 Brown v. H & D Duenne Farms, Inc. 799 S.W.2d 621, 628 (Mo. Ct. App. 1990).
27 Rychlicke v. St. Louis, 98 Mo. 497, 11 S.W. 1001 (1889).
28 Mehomay v. Foster, 111 S.W. 882 (Mo. Ct. App. 1908).
29 Goll v. Chicago & A. R.R. Co., 271 Mo. 655, 197 S.W. 244 (1917). *See also* Anderson v. Inter-River Drainage, 309 Mo. 189, 274 S.W. 448 (1925), City of Hardin v. Norborne Land Drainage, 360 Mo. 1112, 232 S.W.2d 921 (1950).
30 *Goll*, 271 Mo. 655.
31 Casanover v. Villanova Realty, 209 S.W.2d 556 (Mo. Ct. App. 1948).
32 Happy v. Kenton, 247 S.W.2d 698, 701 (Mo. 1952).
33 Gibson v. Sharp, 277 S.W.2d 672 (Mo. Ct. App. 1955).
34 *Heins*, 859 S.W.2d at 687 (quoting Looney v. Hindman, 649 S.W.2d 207, 211 (Mo. banc 1983); see also Hansen v. Naugle Construction Co., 801 S.W.2d 71, 75 (Mo. banc 1990)).
35 Millard Farms v. Sprock, 829 S.W.2d 1, 3 (Mo. App. 1991).
36 Camden Special Road District v. Taylor, 495 S.W.2d at 97 (Mo. App. 1973).

problem of diffuse surface water. In response, American courts have developed (in addition to the common enemy doctrine) two other approaches in dealing with problems involving diffuse surface water: The civil law rule (also called the natural flow rule), and the reasonable use rule.[37]

The common enemy doctrine remains in a few jurisdictions.[38] The doctrine first appeared in Massachusetts[39], and is based "on an exaggerated view of the notion of absolute ownership of land."[40] The original formulation of the doctrine is as follows:

> The right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment.[41]

The doctrine "completely ignores the fact that invasion by an unwanted and destructive volume of water might otherwise have been viewed as a classic trespass."[42] The practical consequence of adherence to this rule has been described as "a neighborhood contest between pipes and dikes from which 'breach of the peace is often inevitable.'"[43]

The civil law rule[44] "appears to be derived from the French and Spanish civil codes, which in turn have their roots in Roman law."[45] It imposes liability for any interference with the natural surface drainage pattern that subsequently causes injury to another's land.[46] Under this theory, a landowner whose property is elevated is not allowed to retain any water that would naturally drain out of it.[47] A lower-elevated landowner "is obliged to accept the water that would naturally drain into it," and the land is functionally subject to an easement for the flow of surface water.[48] Many courts rejected the civil law rule "out of concern that it would impede the development of land and thus would retard the march of progress [and development]."[49] Courts also encountered an evidentiary problem as it was difficult to determine "what was the exact course of the 'natural flow' of the surface water before bulldozers arrived on the scene."[50]

Neither the civil law rule nor the common enemy doctrine has proved very functional. A prime example of this fact is that "courts applying these ostensibly opposite rules often reach similar results."[51] Over time, "the two doctrines have been laboriously drifting towards confluence...and toward the third doctrine of water use,"[52] — the "reasonable use doctrine."

The rule of reasonable use, first applied in New Hampshire,[53] is not really a rule at all. There are no bright lines or guidelines. It does not afford any specific rights to landowners. Instead, the rule "leaves each case to be determined on its own facts, in accordance with general principles of fairness and common sense."[54] As a consequence of the case-by-case application, precedent can be only of limited value. What may make sense under one set of circumstances may not in another set of seemingly similar circumstances.

An interesting aspect of the reasonable use doctrine is its dual nature. It is applied as both a tort (characterizing interference with the flow of surface water so as to inflict personal injury on another — "an invasion of one's use and enjoyment of land")[55] and as a property law concept (a form of nuisance).[56] Under either theory, the ideology is the same: "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, (but is liable if the harm) is unreasonable."[57] The reasonableness standard is a question of fact, determined in each case by a risk/utility analysis weighing the defendant's acts against

37 *See generally Heins*, 859 S.W.2d at 688.
38 The common enemy doctrine exists in these jurisdictions: Gillespie Land & Irrigation Co. v. Gonzalez, 379 P.2d 135, 146 (Ariz. 1963); Ballard v. Ace Wrecking Co., 289 A.2d 888, 890 (D.C. 1971); Argyelan v. Haviland, 435 N.E.2d 973, 976 (Ind. 1982); State Dept. of Highways v. Feenan, 752 P.2d 182, 184 (Mont. 1988); Buffalo Sewer Auth. v. Town of Cheektowaga, 228 N.E.2d 386, 389 (N.Y. 1967).
39 Gannon v. Hargadon, 10 Allen 106, 110 (Mass. 1865).
40 *Heins*, 859 S.W.2d at 688.
41 *Gannon*, 10 Allen at 110.
42 *Heins*, 859 S.W.2d at 689.
43 *Id.* (quoting from R. Timothy Weston, *Gone With the Water: Drainage Rights and Storm Water Management in Pennsylvania*, 22 VILL. L. REV. 901, 908 (1977)).
44 Courts that follow the civil law rule include: Fisher v. Space of Pensacola, Inc., 483 So.2d 392, 393 (Ala. 1986); Dougan v. Rossville Drainage Dist., 757 P.2d 272, 275 (Kan. 1988); Lee v. Schultz, 374 N.W.2d 87, 90 (S.D. 1985); Powers v. Judd, 553 A.2d 139, 140 (Vt. 1988).
45 *Heins*, 859 S.W.2d at 688.
46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 Butler v. Bruno, 341 A.2d 735, 738 (R.I. 1975).
51 *Id.*
52 *Id.*
53 *See* City of Franklin v. Durgee, 51 A. 911 (N.H. 1901).
54 *Id.* at 7.
55 Kinyon & McClure, 24 MINN. L. REV. at 936-38; RESTATEMENT (SECOND) OF TORTS § 833 (1977).
56 Highview North Apartments v. County of Ramsey, 323 N.W.2d 65. 72 (Minn. 1982); Bush v. City of Rochester, 255 N.W. 256 (Minn. 1934).
57 *Heins*, 859 S.W.2d at 689 (quoting Armstrong v. Francis Corp., 120 A.2d 4, 8 (N.J. 1956)).

the plaintiff's injuries.[58] Today, most states have adopted the reasonable use rule, while some others have added a reasonableness requirement to their existing common enemy or civil rule approach.[59] As mentioned above, a few courts still apply the common enemy doctrine or the civil law rule, or different rules for different situations.[60]

III. The Instant Decision

The Missouri Supreme Court decided in the present case to abandon the "modified" common enemy doctrine, and to adopt the reasonable use rule.[61] "[T]he common enemy doctrine, even as modified, has outlived its usefulness in our state."[62] The Court stated that the "labyrinth of exceptions are unduly complicated and confusing and threaten arbitrary and unjust results."[63] The Court believed that the rule of reasonable use is most likely to promote the optimum development and enjoyment of land, and that the rule will ensure the equitable distribution of costs, while maintaining enough flexibility to apply as different factual situations so mandate.[64]

The Court noted that this standard of reasonableness harmonizes with tenets of Missouri law already in existence.[65] For example, reasonable use concepts already govern the rights of users of Missouri watercourses, subterranean streams, and subterranean percolating waters.[66] In the instant case, MHTC had the power to exercise eminent domain in building the Highway 65 bypass (via § 227.120 RSMo 1986).[67] The Court cited *Haferkamp v. City of Rock Hill*[68] in deciding whether such "taking," as allowed under the eminent domain statute, applies in situations where the common enemy doctrine is invoked.[69] "If defendants' acts in disposing of the surface water were within the permitted limits, there could be no taking or damaging of plaintiffs' property within the meaning of Art. I, § 26, Constitution of Missouri 1945."[70] The Court concluded, therefore, that even if there were measurable damages to plaintiffs' property due to the defendant diverting the flow of excess surface water, there can be no recovery if the defendant was legally allowed to do so. The Court extended this idea to the reasonable use rule (substituted for the common enemy doctrine).[71] "Accordingly, we hold that when, as a result of a public works project, private property is damaged by an unreasonable diversion of surface waters, whether by design or by mistake, the owner may bring an action for inverse condemnation."[72] The extent and regularity of the flooding caused by the bypass, combined with MHTC's negligence in installing inadequate drainage, "would be sufficient to allow a jury to find an unreasonable use (and therefore inverse condemnation)."[73] The Court then remanded the case to the trial court, because the original jury instructions were unavailable.[74] The Court stated that if the original instructions are consistent with the principles of an inverse condemnation claim, judgment for the plaintiff should be entered;[75] if not, a new trial should be awarded.[76]

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58 *See generally* Pendergrast v. Aiken, 236 S.E.2d 787, 797 (N.C. 1977).

59 According to *Heins* fn.13, the following jurisdictions have adopted the reasonable use rule: Weinberg v. Northern Alaska Dev. Corp., 384 P.2d 450, 452 (Alaska 1963); Page Motor Co., Inc. v. Baker, 438 A.2d 739, 741 (Conn. 1980); Weldin Farms, Inc. v. Glassman, 414 A.2d 500, 505 (Del. Super. Ct. 1980); Westland Skating Center, Inc. v. Gus Machado Buick, 542 So.2d 959, 962 (Fla. 1989); Rodrigues v. State, 472 P.2d 509, 516 (Haw. 1970); Klutey v. Commonwealth, Dept. of Highways, 428 S.W.2d 766, 769 (Ky. 1967); Tucker v. Badoian, 384 N.E.2d 1195, 1201 (Mass. 1978); Enderson v. Kelehan, 32 N.W.2d 286, 289 (Minn. 1948); Hall v. Wood, 443 So.2d 834, 840 (Miss. 1983); County of Clark v. Powers, 611 P.2d 1072, 1076 (Nev. 1980); City of Franklin v. Durgee, 51 A. 911, 913 (N.H. 1901); Armstrong v. Francis Corp., 120 A.2d 4, 10 (N.J. 1956); Pendergrast v. Aiken, 236 S.E.2d 787, 796 (N.C. 1977); Jones v. Boeing Co., 153 N.W.2d 897, 904 (N.D. 1967); McGlashan v. Spade Rockledge Terrace Condo Dev. Corp., 402 N.E. 2d 1196, 1200 (Ohio 1980); Butler v. Bruno, 341 A.2d 735, 740 (R.I. 1975); Sanford v. University of Utah, 488 P.2d 741, 744 (Utah 1971); Morris Associates, Inc. v. Priddy, 383 S.E.2d 770, 774 (W.Va. 1989); State v. Deetz, 224 N.W.2d 407, 416 (Wis. 1974).

According to *Heins* fn.13, the following jurisdictions have imposed a reasonableness requirement upon the civil law rule: Keys v. Romley, 412 P.2d 529, 536-37 (Cal. 1966); Templeton v. Huss, 311 N.E.2d 141, 146 (Ill. 1974); Burgess v. Salmon River Canal Co., 805 P.2d 1223, 1230 (Idaho 1991); O'Tool v. Hathaway, 461 N.W.2d 161, 163 (Iowa 1990); Whitman v. Fornay, 31 A.2d 630, 633 (Md. 1943).

States that have done so for the common enemy doctrine include: Pirtle v. Opco, Inc., 601 S.W.2d 265, 267 (Ark. 1980); Mattoon v. City of Norman, 617 P.2d 1347, 1349 (Okla. 1980); Irwin v. Michelin Tire Corp., 341 S.E.2d 783, 785 (S.C. 1986); Mullins v. Greer, 311 S.E.2d 110, 112 (Va. 1984).

60 *See* fn. 37 *supra* for courts still applying the civil law rule and *supra* note 44 for common enemy jurisdictions. Courts that observe more than one rule include: Nu-Dwarf Farms v. Stratbucker Farms, 470 N.W.2d 772, 777 (Neb. 1991); Westbury Realty Corp. v. Lancaster Shopping Center, Inc., 152 A.2d 669, 671-72 (Pa. 1959) (modified by statute in Pastore v. State System of Higher Ed., 618 A.2d. 1118, 1121 (Pa. Commw. Ct. 1992)); Kraft v. Langford, 565 S.W. 2d 223, 229 (Tex. 1978).

61 *Heins*, 859 S.W.2d at 690-91.

62 *Id.* at 690.

63 *Id.* at 690-91.

64 *Id.* at 691.

65 *Id.*

66 *Id. See also* Bollinger v. Henry, 375 S.W.2d 161, 166 (Mo. 1964); Higday v. Nickolas, 469 S.W.2d 859, 869 (Mo. Ct. App 1971).

67 *Id.*

68 316 S.W.2d 620 (Mo. 1958)

69 *Id.*

70 *Id., quoting Haferkamp*, 316 S.W.2d 620, 630 (Mo. 1958).

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 691-92.

75 *Id.* at 692.

76 *Id.*

77 *See supra* note 57.

IV. Comment

The Court, in abandoning the common enemy doctrine and adopting the rule of reasonable use, has seemingly done the prudent (if not the inevitable) thing. A large plurality of states have either adopted the rule or the functional facsimile of the rule.[77] The reasonable use rule promotes cooperation between neighboring landowners. Landowners now have more incentive to work together to find a common solution to the common enemy of surplus ground water runoff. This differs from the common enemy doctrine, which was extremely adversarial in nature. Landowners could do whatever it took to divert the flow of excess water from their lands, regardless of what effect the diversion had on their neighboring landowner. This new cooperation has beneficial side effects as well. Municipalities will now have to structure their drainage systems so as not to pose an unreasonable risk to landowners. This fact will lead to better flood and drainage planning. Furthermore, instilling culpability will lessen damages to private and public property, thus protecting property values.

Another benefit of the rule of reasonable use is its flexibility and applicability in different situations. The consequences of adherence to the reasonable use rule are not as rigid or occasionally harsh as the common enemy doctrine. As the name suggests, there is room for reasonableness.

There are, however, some problems with the rule of reasonable use not addressed by the Court. There is an element of unpredictability with the rule because of the limited value of precedent and its case-by-case nature. There is also the problem of retroactivity. Will the rule apply to pre-*Heins* cases? Will there be some type of "grandfather" exception – perhaps to drainage projects that began X number of years before the *Heins* decision? And what about litigation pending at the time of this decision?

Another potential problem is the fact that flood waters are treated as surface water for purposes of this rule.[78] This means that, after flooding, new or rebuilt levees cannot unreasonably divert water onto adjacent land. Neither can they effectively dam the floodwater so as to cause "pooling" upstream onto other land. There is a potential for a flood of litigation. Finally, what is the nature of the remedies available, and in what situations do they apply? While none of these questions are addressed by *Heins*, they are discussed below:

• The unpredictability of the rule of reasonable use could be problematic. Precedent is of limited value, because what is reasonable in one county in Missouri may not be reasonable in another. For example, jurors from a predominantly rural county might have a different definition of reasonable treatment of surface water than a jury from an urban area, even if the facts in each situation were nearly identical. This would lead to forum shopping within the state court system, depending upon residency of the parties. While this discrepancy between rural and urban juries is certainly not new, the effects on property in different areas could be substantial. The perception of what land ownership means may be much different in an area where one cannot see his neighbors, as opposed to an area where apartment buildings thrive. Certainly the opinions of the respective juries will reflect their social attitude.

Inconsistent results could also occur in the same area; just at different times. In a time of serious flooding, one type of activity may be reasonable; however, when weather situations are normal, the same activity may be unreasonable. This discrepancy may be what the Supreme Court intended when it lauded the "flexibility" of the rule: "The greatest virtue of the reasonable use standard is its ability to adapt to any set of circumstances while remaining firmly focused on the equities of the situation."[79] While in theory this rule sounds good, there could be problems in practice. At least one court has expressly declined to extend the rule of reasonable use to underground percolating waters (specifically, private wells).[80] Instead, the court kept the absolute ownership right of the common enemy doctrine.[81] The policy considerations were "because the existence, origin, and movement . . . of such waters are so secret, occult, and concealed that an attempt to administer any set of legal rules (to them) would be . . . practically impossible."[82] While this policy may not apply in Missouri, it may be illustrative of potential problems of determining the reasonableness and difficulty of dealing with different types of drainage water — especially subterranean water. For example, Judge Price's critique of the common enemy doctrine, — "invasion by an unwanted and destructive volume of surface water might...(be) viewed as a classic trespass." — is interesting in that "trespass" usually involves something within one's control that encroaches onto another's land. Judge Price extends this theory to a natural condition (the existence of surface water). A landowner raising the elevation of one side of his land to prevent water from running onto his land could be liable for trespass if the amount of water is unwanted and destructive. This would be true even if the water was never in the offending landowners's control. How-

78 *See* Campbell v. Anderson, 866 S.W.2d 139 (Mo. Ct. App. 1993).
79 *Heins*, 859 S.W.2d at 690.
80 Friendswood Development Co. V. Smith-Southwest Industries, Inc., 576 S.W.2d 21, 25 (Tex. 1978).
81 *Id.*
82 *Id.*

ever, this act seems analogous to a landowner putting up a privacy fence to keep deer out of his yard. Is he guilty of a trespass if the deer go around his fence into an adjacent landowner's yard, doing damage to that landowner's garden? Surely not. The same logic should apply to surface water cases.

• The problem of the retroactive application of the rule of reasonable use is not considered in *Heins*. It is unknown if the Court intended retroactive as well as prospective application of the rule. However, the Missouri Court of Appeals (Western District) offered its opinion on the issue after the *Heins* case. In *Campbell v. Anderson*,[83] the court said "[a]t the time of trial, the common enemy doctrine was (the rule)...the subsequent change in the law creates an issue...(of) whether *Heins* should be applied retroactively."[84] The court went on to quote *Sumners v. Sumners*, in which the Missouri Supreme Court stated:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied.[85]

The *Sumners* court then stated "[a] decision overruling a prior rule of substantive law should generally be applied retroactively,"[86] and developed a three-pronged test in determining whether an overruling decision by the Missouri Supreme Court should be given prospective effect only:

> 1) the decision must establish a new principle of law by overruling clear past precedent; 2) the court must evaluate whether retroactive application will enhance or retard the purpose and effect of the newly announced rule; and 3) the court must balance the interests of those affected by the change in the law, determine the degree to which the parties may have relied upon the previous rule, and weigh the hardship the parties might suffer from retroactive application of the new rule against the hardship to the parties denied the benefit of the new rule.[87]

Do these quotes mean that all Missouri courts should apply the rule retroactively? The *Sumners* court seems to indicate that the reasonable use rule should be applied only cases in which litigation was pending at the time of *Heins* (hence the appellate court distinction). In *Campbell*, the court mandated that the litigants should be given a new trial in order to apply the new law.

What should occur in a case filed after *Heins* involving a pre-*Heins* surface water issue?[88] The *Campbell* court deals with this issue somewhat by classifying the surface water issue as a type of nuisance.[89] It then further subdivides the nuisance into "permanent" or "temporary."[90] "A permanent nuisance must result from a permanent construction which is necessarily injurious as installed not from one which becomes injurious through its use. The distinguishing feature between a permanent and temporary nuisance is the 'abatability' of the nuisance."[91] Once the nature of the nuisance is determined, the applicable statute of limitations begins to toll after the last injurious event. "The action is barred if it was not filed (within the time prescribed by the statute of limitations) from the last successive invasion of interest."[92] Consequently it seems that if a surface water case may be brought under the statute of limitations, the *Sumner* test would be used to see if the rule of reasonable use would supplant the common enemy doctrine. This should occur on a case-by-case basis, and should apply to all courts — not just on the appellate level. (Note: other jurisdictions have made the reasonable use rule retroactive to cases still pending at the time of their decision to implement the reasonable use rule[93].)

• The third problem revolves around the classification of flood water as under the domain of the reasonable use rule. In light of the recent flooding, new or rebuilt levees will have to be installed so as not to unreasonably subject neighboring land to the risk of damage. Also, if the rule is retroactive, this could impute a huge amount of liability on the state or municipality that owns the levee system. Such liability would, of course, be contingent on the jury's finding of the unreasonableness of the levee structure. Under the common enemy doctrine, no such liability would be found. Different standards of reasonableness may have to apply to different structures

83 866 S.W.2d 139 (Mo. Ct. App. 1993).
84 *Id.* at 144.
85 *Id.*, *quoting* Sumners v. Sumners, 701 S.W.2d 720, 722-23 (Mo. banc 1985).
86 *Id. quoting Sumners*, 701 S.W.2d at 723.
87 *Id. quoting Sumners*, 701 S.W.2d at 724.
88 An example is: A builds a ditch which diverts water onto X's land in 1988. Previously, the common enemy doctrine governed, and A's act would be OK. Under current law, however, A's act is unreasonable. The suit is filed after the change in law, for an act that occurred well before the change. Is it fair to hold A's conduct in 1988 to the 1993 standard? The *Campbell* court indicated that it may depend on the "permanence" of the construction.
89 *Campbell*, 866 S.W.2d at 142.
90 *Id.*
91 *Id.* at 143, *quoting* Racine v. Glendale Shooting Club, Inc., 755 S.W.2d 369, 374 (Mo. Ct. App. 1988).
92 *Id.* (Note: The court stated that the statute of limitations for the temporary nuisance was 5 years and could be found inMo. Rev. Stat. § 516.120, 1986.)
93 *See* Yonadi v. Homestead Country Homes, 127 A.2d 198, 202 (N.J. Super. Ct. App. Div. 1956) (implementing a reasonable time and interest of justice test).

as well. For example, Bagnell Dam is a permanent structure, built when the state applied the common enemy doctrine. It should not be subject to the same reasonableness standard as temporary diversions of surface water, which are easily rebuilt to conform to the new rule. This would require, however, a balancing of the statute of limitations and the requirements of the *Sumner* test. It may also require an age exception ("grandfather" clause).

An example of this type of "grandfathering" problem occurred in *Campbell*. The re-channeling project was almost seven years old when the case was filed, and fifteen years old by the time a judgment was rendered.[94] While the court found the re-channeling to be temporary, the fact is that the owner, benefitting from his re-channeling, had invested a lot of time and money. His investment came when Missouri followed the common enemy doctrine. While the court concluded that the owner had in no way relied on the common enemy doctrine when he rechannelled the creek,[95] this is illustrative of the difficulty of applying the rule of reasonable use in some cases. This is also demonstrative of the delicate manner in which courts may have to apply the *Sumner* test. Also, since the *Campbell* court ordered a new trial,[96] the issue is not resolved in an efficient manner. That case dragged on for several years. Such delay is probably not what the Missouri Supreme Court contemplated in these cases.

In the design of levees, municipal drainage systems, bridges, roads, and even residential grading, the *Campbell* decision would require that such projects be done so as not to unreasonably expose neighboring land to the risk of excess drainage. This may result in skyrocketing costs. Under the old rule, each landowner was to fend for themselves. Now, extra steps will have to be taken to ensure that no unreasonable damage could occur. This rule may be appropriate when applied to government projects, which are presumably for the good of the citizenry. However, if this theory is strictly applied to private landowners, it would be contrary to the autonomy of land ownership. The reasonable use standard should be modified in private landowner cases to strike a fair compromise between a landowner fending for him/herself and taking care of everyone else.

• The last problem deals with the relief available. Should the relief be prospective (i.e. injunctive relief) or retroactive (i.e. compensation for damages)? In cases involving conditions created after *Heins*, any damages obviously should be compensated fully as per the relief requested. Common sense indicates that for any cases involving a pre-*Heins* condition, however, the only relief that can be granted is some type of injunctive relief.

It would be inherently unfair to assess monetary damages on a landowner who had created a condition while the common enemy doctrine was in force, even if the landowner had not consciously contemplated the doctrine in designing the condition. Injunctive relief in such a situation is fair, as it affords the offending landowner a chance to correct the condition pursuant to the newly-adopted rule without financially penalizing the ת. This also gives a plaintiff some reward without enriching them unreasonably, and stops the offending condition under the newly-adopted standard.

V. Conclusion

While the decision in *Heins* finally unifies the State's treatment of excess surface water and flood drainage, there are still problems that need to be addressed by the Missouri Supreme Court. Resolution of these problems will effectuate a smooth and fair transition from the common enemy doctrine to the rule of reasonable use.

94 *Campbell*, 866 S.W.2d at 139-141.
95 *Id.* at 144.
96 *Id.* at 145.