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Charles L. Snodgrass

Lawrence O. Davis

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## THE LAW OF SURFACE WATER IN MISSOURI\* (Continued from the April Issue.)

CHARLES L. SNODGRASS† AND LAWRENCE O. DAVIS\*\*

### IV. APPLICATION OF THE COMMON ENEMY RULE OF SURFACE WATER IN MISSOURI

Following the adoption of the common enemy rule by the supreme court in 1884,<sup>152</sup> it remained for the courts to apply that rule in all of the variety of situations which can arise in surface water litigation. This part is an attempt to show the present status of the law in regard to particular factual problems. Special attention is given to the liability of municipal corporations and railroads, and the small amount of statutory law relating to surface water is discussed. The final subheading is a discussion of the law of surface water as it relates to terracing for agricultural improvement.

#### A. Appropriation

While the common enemy doctrine is not concerned with the landowner's right to appropriate the surface water on his land, some discussion of that right would not seem out of place at this point. As before stated,<sup>153</sup> it is the general rule that a proprietor has the absolute right to

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\*Through an error on the part of the faculty editor, Mr. Snodgrass' name was omitted as an author. In addition, his contribution was substantially greater than indicated in the introductory footnote. We take this opportunity to tender our apologies to Mr. Snodgrass.

†Attorney, Tuscumbia, Missouri; LL.B., University of Missouri, 1948.

\*\*Member of the Missouri Bar; presently in active service, First Lieutenant, United States Air Force Reserve (Judge Advocate General's Department); A.B., University of Missouri, 1956, LL.B., 1958.

152. *Abbott v. Kansas City, St. J. & C.B.R.R.*, 83 Mo. 271 (1884).

153. See note 48, *supra*.

the use of surface water and riparian rights do not attach. The extent to which a landowner may appropriate such water in Missouri has never been directly decided, but inasmuch as the rule concerning the right to repel and obstruct surface water is presumably based on the theory that every proprietor has complete dominion over the soil,<sup>154</sup> it would logically follow that the right to appropriation would be practically unlimited.

Some jurisdictions have applied the same rules of appropriation to both surface water and water percolating through the ground in no definite channel.<sup>155</sup> A case decided by the Springfield Court of Appeals in 1895,<sup>156</sup> held that percolating water is to be regarded as part of the soil and belongs to the owner of the land. There, however, the defendants were enjoined from interfering with the percolating water even though it was running through no known channel, because the court found that they were acting maliciously and the interference was not for some beneficial use or betterment of the land. If there is any validity in comparing the landowner's right to appropriate surface water with the same right in percolating water, then the former right may be limited to the extent that the appropriation of surface water must be for the betterment of the land and not for malicious purposes.

When the overflow water of a stream becomes entirely separated from the main channel, never to return, it is generally treated as surface water, not only in regard to blocking and repelling, but also in regard to appropriation.<sup>157</sup> In Missouri, however, even that overflow which forms a continuous body with the water flowing in the ordinary channel is considered as surface water so far as repelling it is concerned,<sup>158</sup> and the question could arise as to whether such overflow will be treated likewise in regard to appropriation. In most other states this class of overflow is treated as still a part of the stream.<sup>159</sup> and accordingly riparian rights attach.<sup>160</sup> No case has come to the Missouri appellate courts raising this exact issue. In a 1951 case, *Blackburn v. Gaydou*,<sup>161</sup> the defendant

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154. See note 75, *supra*.

155. *City of Pasadena v. City of Alhambra*, 33 Cal. 2d 908, 207 P.2d 17 (1949). In New Hampshire the test of "reasonable use" is applied to interference with surface water or percolating water; see pt. II-C of this Article.

156. *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74 (Spr. Ct. App. 1895).

157. 56 AM. JUR., *Waters* § 93 (1947).

158. See pt. I, § B, *supra*.

159. 56 AM. JUR., *Waters* § 92 (1947).

160. *Id.* § 93.

161. 241 Mo. App. 917, 245 S.W.2d 161 (Spr. Ct. App. 1951).

had constructed a dike across his bottom land at right angles to a small stream so that overflow water would be confined and collected upon his land and deposit its load of silt thereon. The plaintiff was a lower landowner who objected, not to the appropriation, but rather to the unnatural discharge of the water upon his land caused by the dike. The right of the defendant to appropriate the floodwater was not mentioned in the court's opinion, but it was recognized that "the purpose of the dike was not to ward off the surface water," but rather for a beneficial purpose.

Because of the overabundance of water in many areas of this state at overflow periods and the relatively small use for irrigation at such times, it seems that the landowner's right to appropriate overflow water or ordinary surface water may go unchallenged for some time.<sup>162</sup>

### B. *Municipal Corporation*

Because of its activity in street improvement and sewer construction, the municipal corporation is often involved in surface water litigation; much of the law of municipal corporations has been developed in cases of that nature. For example, *City of St. Louis v. Gurno*,<sup>163</sup> decided in 1849, raised the question of the city's liability for obstructing surface water and flooding the plaintiff's lot. That was the first case to come before the Missouri supreme court involving the liability of a municipal corporation, and it was also the first Missouri case reported concerned with surface water law.

In that early case it was decided that the defendant city, being a political subdivision of the state and functioning under authority granted by the state, occupied a privileged position and was immune to a civil action for damages for the consequential injuries to the plaintiff's lot caused by the skillful execution of an authorized municipal plan to grade its streets. It was indicated, however, that the city would be liable if the injuries were caused by the negligent execution of the authorized plan. This dictum concerning negligence was followed in *Thurston v. City of St. Joseph*<sup>164</sup> in 1873, where it was held that a cause of action was stated in a petition alleging that the plaintiff was injured in consequence of the

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162. For a discussion of irrigation techniques in Missouri, see Rubey, *Supplemental Irrigation for Missouri and Regions of Similar Rainfall*, U. OF MO. ENG. EXP. STA. BULL. No. 33 (rev. ed. 1951).

163. 12 Mo. 414 (1849).

164. 51 Mo. 510 (1873).

negligent manner in which the city constructed a sewer line. The decision, however, was not based upon the narrow ground of negligence. The provisions of the then existing Missouri constitution provided in part that private property shall not be taken, or applied to public use without just compensation,<sup>165</sup> and this was thought to preclude any municipal privilege.<sup>166</sup> That broader basis for the decision was not followed in later cases,<sup>167</sup> and it was not until the constitution of 1875 that the municipal privilege was eliminated.

The effect of the 1875 constitution in this area was aptly summed up by Hough, C. J., in *Werth v. City of Springfield* in 1883:

Prior to the adoption of section 21 of article 2 of the constitution of 1875, a city could not be held liable for damages necessarily attendant upon the proper and skillful execution of the plan adopted by the city council, but was liable for such damage as resulted alone from the negligent and unskillful execution of the work done in pursuance of the plan adopted. . . . That rule has been changed by the section of constitution above cited.<sup>168</sup>

Section twenty-one of article two of the 1875 constitution provided:

Private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the property rights of the owner therein divested.<sup>169</sup>

In the *Werth* case, the plaintiff alleged that the city was *neglect* in the execution of a plan to change the grade of its street, so it was unnecessary for the court to decide the city's liability if the work had been carefully done. The next year, however, in *Householder v. City of Kansas*,<sup>170</sup> the court affirmed a judgment for the plaintiff based upon a petition which merely alleged that the plaintiff was injured when the city changed the grade of its street as authorized by ordinance. Also in

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165. Mo. CONST. art. I, § 16 (1865). This provision had existed in the 1820 constitution as art. 13, § 7.

166. 51 Mo. at 516.

167. See *Foster v. City of St. Louis*, 71 Mo. 157 (1879); *Wegmann v. City of Jefferson*, 61 Mo. 55 (1875); *Imler v. City of Springfield*, 55 Mo. 119 (1874); *Schattner v. City of Kansas*, 53 Mo. 162 (1873). See also *Hoffman v. City of St. Louis*, 15 Mo. 651 (1852); *Taylor v. City of St. Louis*, 14 Mo. 20 (1851).

168. 78 Mo. 107, 109 (1883).

169. This provision is now found in Mo. CONST. art. I, § 26.

170. 83 Mo. 488 (1884).

the *Householder* case it was held that the provision of the constitution above stated was "self executing," and could be the foundation of an action notwithstanding the lack of legislative enactment. It was further held that as there was no remedy provided for in the constitutional provision, a landowner could resort to any common law action which would give him redress.<sup>171</sup>

The *Werth* and *Householder* decisions interpreting the new constitution were apparently overlooked in *Rychlicke v. City of St. Louis*<sup>172</sup> decided in 1889. There it was stated:

According to our adjudications, at this day the defendant may grade and improve its streets, and is not liable for injuries arising from the incidental interruption or change in the flow of the surface water, save such injuries as may arise from the negligent doing of the work.<sup>173</sup>

The city was held liable, however, because after having incidentally collected the surface water by its streets, the city had discharged it upon the plaintiff's land in a concentrated stream. There was no indication that this latter action was done through negligence, or in any other manner than as prescribed by the original plan of improvement. Thus it would appear that the absence of liability for the incidental change of flow was not because of the municipality's immunity to suit, but rather was based on the absence of a wrongful act under the recently adopted common enemy rule. It is interesting to note that as soon as the protective veil of municipal immunity was lifted by the constitutional provision, the protective covering of the common enemy rule was recognized in its place.

Even under the lenient terms of the common enemy rule a municipal corporation can not escape liability as it could before the 1875 constitution. It has been held under that rule that a city will be liable when, in improving its streets, it collects surface water in a pond, and because of insufficient sewer openings this is allowed to back up on the adjacent land.<sup>174</sup> The liability in such an instance could be based upon negligence

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171. *Id.* at 495.

172. 98 Mo. 497, 11 S.W. 1001 (1889).

173. *Id.* at 501, 11 S.W. at 1001.

174. *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); *Carson v. City of Springfield*, 53 Mo. App. 289 (St. L. Ct. App. 1893).

in making the drain pipes too small, or in allowing them to clog up.<sup>175</sup> A city will also be liable where it collects surface water and artificially discharges it in a concentrated stream on the lands below.<sup>176</sup>

Notwithstanding the liability in the above mentioned instances, the municipal corporation *appears* to be favored because of its public nature. This is especially true in situations where there has been interference with the natural flow of surface water because of a change in grade of a street. For example, in *Cannon v. City of St. Joseph* the court said:

A city, being under obligation to improve its streets and keep them in repair, may establish grades which have the direct effect of changing the course of surface water, and run it in a direction where it may do damage to landowners, which was not suffered before the improvement. In other words, the natural result following the street improvement will not render the city liable, though it works injury.<sup>177</sup>

This language of the court is often quoted as correctly expressing the liability of the municipal corporation. Although this *seems* to place the city in a privileged position, it is submitted that the city's action constitutes no wrongful act under the common enemy rule, especially when the wide scope of permissible interference under that rule<sup>178</sup> is still further broadened by the exception which even allows surface water to be collected and discharged in a concentrated stream if that result is merely incidental to the lawful improvement of the streets.<sup>179</sup> If this submission is correct, then the liability of the municipal corporation for the interference with the surface drainage is the same as that of a private individual.

### C. Railroads

Much of the surface water litigation in Missouri has resulted from

175. But see *Sandy v. City of St. Joseph*, 142 Mo. App. 330, 126 S.W. 989 (K.C. Ct. App. 1910) where the city was held liable although there was no attempt to drain off the water so collected, presumably on the basis that the city had collected and discharged the water on the plaintiff's land.

176. *Rychlicke v. City of St. Louis*, 98 Mo. 497, 11 S.W. 1001 (1889); *Anderson v. City of Jefferson*, 262 S.W.2d 169 (K.C. Ct. App. 1953); *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Ct. App. 1951); *Zook v. City of Louisiana*, 12 S.W.2d 518 (St. L. Ct. App. 1929); *Bodam v. City of New Hampton*, 290 S.W. 621 (K.C. Ct. App. 1927). *Caveat*, see *Haferkamp v. City of Rock Hill*, 316 S.W.2d 620 (Mo. 1958).

177. 67 Mo. App. 367, 370 (K.C. Ct. App. 1896).

178. See pt. II, § B, *supra*.

179. See pt. IV, § I, *infra*.

the construction of railroad lines with their accompanying embankments, trestles, culverts and ditches. The common enemy rule is favorable to the railroads. That rule allows a railroad to block the flow of surface water with its embankment and cause the water to form a pond on the lands of the upper owner.<sup>180</sup> It was early held, however, that the railroad could not build a culvert and discharge this water so collected directly upon the lower lands in a concentrated stream.<sup>181</sup> This presented the situation of not only *allowing* the railroad to back the water upon the higher ground, which was injurious to the upper owner, but *requiring* the railroad either to let the water form a pond, which was detrimental to its roadbed, or else place numerous small openings through its embankment which was neither good engineering nor economical. As an answer to this problem, it was Judge Vories' opinion, as expressed in *McCormick I*<sup>182</sup> in 1874 that, "If there was a running stream of water in the vicinity of the road, into which the water could have been drained by a ditch cut on defendant's own land, that should have been done."<sup>183</sup> This idea was embodied in a statute in the same year,<sup>184</sup> and with a minor revision in 1907<sup>185</sup> remains the law today.

Section 389.660, Missouri Revised Statutes (1949), requires all railroad corporations to provide openings through their roadbeds and suitable ditches connected with other existing ditches, drains, and watercourses so as to afford sufficient drainage and prevent obstruction of surface water. The ordinary rules touching the diversion of surface water do not apply to cases prosecuted under the statute; it furnishes a different rule by which the liability of railroad companies is to be judged.<sup>186</sup> The present provisions of the statute have been in effect since 1907, and a wealth of case law is available.<sup>187</sup> The statute requires only that the railroad provide openings and ditches "to connect with ditches, drains and watercourses" already in existence; where these are not available the statute does not apply, and there is no liability for

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

181. *McCormick v. Kansas City, St. J. & C.B.R.R.*, 57 Mo. 433 (1874)

182. The first decision in the *McCormick* case, reported in 57 Mo. 433 (1874), will hereinafter by referred to as *McCormick I*, and the second decision, reported in 70 Mo. 359 (1879), will be referred to as *McCormick II*.

183. 57 Mo. at 439.

184. Mo. Laws 1874, at 121.

185. Mo. Laws 1907, at 169.

186. *Byrne v. Keokuk & W.R.R.*, 47 Mo. App. 383 (St. L. Ct. App. 1892).

187. See Annot., V.A.M.S. § 244.010 (1952).



inundating the upper land.<sup>188</sup> It has been held that there must be some drainway *adequate* to receive and furnish an outlet for the water complained of;<sup>189</sup> it need not be a running stream, but it must be a *well defined channel* and not a mere depression or swale with no channel or banks.<sup>190</sup> However it has been held that a natural depression through which overflow water from a stream is wont to run is a watercourse within the contemplation of the statute,<sup>191</sup> and the term "surface water" in the statute includes overflow water.<sup>192</sup> Of course to provide an opening in the railroad embankment where there is no natural drain to receive the water would violate the rule against collecting and discharging to be discussed later;<sup>193</sup> but it has been decided that the statute not only imposes obligations on the railroad, but also gives it certain rights in this area, and that a railroad could not be held liable where its culvert discharged a *greater quantity* of water on the plaintiff's land in the same channel through which surface water had always entered the field, even though the channel became three or four feet deeper and ten or twelve feet wider as a result of the increased volume.<sup>194</sup> Notwithstanding the statute and an abundance of supporting case law, diversion of surface water by railroad embankments constitutes a substantial portion of all surface water litigation today.

#### D. Drainage and Levee Districts

Chapter 241, Missouri Revised Statutes (1949), provides for the reclamation of swamp and overflowed lands; chapters 242 and 243 contain provisions for organizing drainage districts; chapter 245 contains provisions for organizing levee districts; and chapter 246 contains provisions relating to the operation of the districts organized under the preceding chapters.

Considerable litigation has centered around the activities of these

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188. *Vollrath v. Wabash R.R.*, 65 F. Supp. 766 (W.D. Mo. 1946); *Alexander v. Wabash R.R.*, 38 S.W.2d 545 (K.C. Ct. App. 1931).

189. *Pace v. St. Louis, S.W. Ry.*, 174 Mo. App. 227, 156 S.W. 746 (St. L. Ct. App. 1913).

190. *Byrne v. Keokuk & W.R.R.*, *supra* note 186.

191. *Jones v. Chicago, B. & Q. R.R.*, 343 Mo. 1104, 125 S.W.2d 5 (1939).

192. *Ibid.*

193. See pt. IV, § I, *infra*.

194. *White v. Wabash R.R.*, 240 Mo. App. 344, 207 S.W.2d 505 (K.C. Ct. App. 1947). To the effect that this may now be the general law as to increased volume, see *Haferkamp v. City of Rock Hill*, 316 S.W.2d 620 (Mo. 1958).

organized districts. The rights of landowners within the districts are governed by statutes and contracts and their rights under general surface water law are important only in regard to damages in the eminent domain proceedings.<sup>195</sup> As to landowners outside the districts, however, the organized district is a legal entity and treated much the same as an individual.<sup>196</sup> It has been held that a drainage district is a political subdivision of the state,<sup>197</sup> and while it is not liable for the negligence of its officers,<sup>198</sup> it will be liable where it violates the property rights of others.<sup>199</sup> To hold otherwise would be a denial of due process, as those landowners outside the district have had no opportunity to be heard or have their damages assessed.<sup>200</sup>

As no special rules exist governing the common law rights of these districts, the cases concerning their rights and duties will be discussed under later appropriate headings indicating the problem involved.

#### E. Statutory Private Drainage Rights

Chapter 244, Missouri Revised Statutes (1949) is entitled "Private Drainage Rights." The first legislation on that subject was passed in 1885 and was entitled "An Act to permit owners of land to construct drains for agricultural purposes." That statute provided:

. . . owners of land . . . shall be permitted to construct drains, for agricultural purposes only, into any natural water-course or any natural depression, whereby the water will be carried into any natural watercourse, for the purpose of securing proper drainage . . . without being liable in damages . . . .<sup>201</sup>

Under this act it was held that a defendant was within his rights when he dammed up a small wet weather ditch at a point where it entered his land, and from this dam then constructed an artificial ditch along his boundary to the place where the same wet weather ditch left

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195. See *State ex rel. Chariton River Drainage Dist. v. Montgomery*, 275 S.W.2d 283 (Mo. 1955).

196. *Anderson v. Inter-River Drainage Levee Dist.*, 309 Mo. 189, 274 S.W. 448 (1925).

197. *Ibid.*

198. *Arnold v. Worth Co. Drainage Dist.*, 209 Mo. App. 220, 234 S.W. 349 (K.C. Ct. App. 1921).

199. *Schalk v. Inter-River Drainage Dist.*, 226 S.W. 277 (Spr. Ct. App. 1921).

200. *Bruntmeyer v. Squaw Creek Drainage Dist. No. 1*, 196 Mo. App. 360, 194 S.W. 748 (K.C. Ct. App. 1917).

201. Mo. Laws 1885, at 157.

his property. It appeared that without the "short-cut" the surface water would have overflowed his land, and the ditch was necessary to secure proper drainage.<sup>202</sup> As the same volume of water flowed off of the land in exactly the same place, the reliance on the statute was probably unnecessary.

The act was also applied in *Gray v. Schriber*,<sup>203</sup> where a broad natural depression started on the plaintiff's farm and ran through the land of the defendant into a small stream. The plaintiff had made "ditches and drains, or water furrows," leading into the depression to assist the natural drainage, but there was nothing to indicate that the volume was increased. To keep out such drainage the defendant constructed a dam about three hundred feet long and five feet high at the boundary line of the farms, thus causing a large pond, about four feet deep and covering seven acres to form on the upper land. The petition sought to enjoin the maintenance of the dam, but the trial court ruled that there was no cause of action under the facts stated. The supreme court recognized that under the common enemy rule the defendant was permitted to ward off the surface water, but held that the statute quoted above gave the plaintiff a substantive right to discharge water into "any natural depression, whereby the water will be carried into a natural watercourse," and thereby the defendant was prohibited from obstructing the natural depression. There was some indication that the water coming through the depression did not follow a defined channel but rather spread out over the defendant's land. The court stated that if this were true, the statute would not apply as it contemplated a "depression with a continuous channel to a water course."<sup>204</sup> Subsequent sections of the statute prescribed eminent domain proceedings<sup>205</sup> should it become necessary to construct a drain across another's land in order to reach any natural watercourse. In view of these later provisions it may be questioned whether the court was correct in holding that there was a "substantive" right granted to the plaintiff to have the depression left open, without compensation, merely because it started on his own land.

In 1909 the act was amended to allow drainage for sanitary pur-

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202. *Grandstaff v. Bland*, 166 Mo. App. 41, 148 S.W. 139 (St. L. Ct. App. 1912).

203. 58 Mo. App. 173 (St. L. Ct. App. 1894).

204. *Id.* at 180.

205. For a case concerning the eminent domain proceedings provided for in the statute, see *Lile v. Gibson*, 91 Mo. App. 480 (K.C. Ct. App. 1902).

poses,<sup>206</sup> and in 1913 it was repealed and re-enacted in its present form.<sup>207</sup> The present statute is limited to "any tract or parcel of swamp, wet, flat or overflowed land" and provides eminent domain proceedings to construct ditches across "any tract or parcel of land situate between such land to be drained or protected and any lake, bayou, hollow, creek, artificial drainage ditch, river, depression or other outlet into which the waters . . . can be drained."<sup>208</sup>

In 1951 the Springfield Court of Appeals reviewed the history of the act.<sup>209</sup> It held that under the act a landowner could build a ditch from his low, swampy ground to a natural watercourse on his own land and not be liable for injury caused to a lower landowner, because of the unnatural overflow from the watercourse. From the opinion it appears that the result would have been the same even if the outlet for the ditch had been something less than a watercourse, *i.e.*, a depression or hollow. Assuming that the result would be the same, would the statute be abrogating the prohibition against collecting and discharging surface water in a body on the lower land? This question was not answered as the court expressly held that even without the statute, the defendant was within his rights under the common enemy rule as he had acted "prudently and reasonably."<sup>210</sup>

From the foregoing cases it appears that other than granting the right to build drains across a neighbor's land, under eminent domain proceedings, the statute may have the effect of preventing a lower owner from blocking off surface water and forcing it back upon the upper land, if the water is flowing through a natural depression with defined banks, and if the drainage is necessary for sanitary or agricultural purposes.

#### *F. Impounding: Liability for Backing Up and Escape of Water Incidental Thereto*

Assuming that a landowner has the right to impound surface water on his own land in ponds or reservoirs,<sup>211</sup> what is his liability for allowing this water to escape? This question immediately calls to mind the famous

206. Mo. Laws 1909, at 466.

207. Mo. Laws 1913, at 283.

208. § 244.010, RSMo 1949.

209. *Young v. Moore*, 241 Mo. App. 436, 236 S.W.2d 740 (Spr. Ct. App. 1951).

210. *Id.* at 445, 236 S.W.2d at 744.

211. Section A of this part concerns appropriation of surface water in general.

English case of *Rylands v. Fletcher*<sup>212</sup> where the defendant had constructed a reservoir on his land and the escaping water flooded the plaintiff's mine. There the doctrine was announced:

that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.<sup>213</sup>

In *Murphy v. Gillum*,<sup>214</sup> a slight depression started on the defendant's higher land and continued through the lower land of the plaintiff. The defendant maintained a dam across the depression near the property line between the premises which caused a pond to form on his own land. The plaintiff was seeking damages, claiming that there was a continuous seepage of water through the pond bank which flowed onto his land rendering it unfit for cultivation. The lower court refused to instruct that the defendant would be liable only for negligence in maintaining the pond, and the jury found for the plaintiff in the amount of twenty-five dollars. On appeal the St. Louis court reviewed many of the cases and articles bearing on the doctrine in *Rylands v. Fletcher* and concluded "that the law of that case has been modified and explained to such an extent that it is no longer an authority anywhere."<sup>215</sup> It was held that where one constructed a pond on his land he would be liable for the damage caused by the escaping water only if the injury could have been prevented by the observance of due care. This places Missouri in accord with the general view that in this situation, liability will result only from negligence.<sup>216</sup>

This requirement of negligence for liability was affirmed in *Farrar v. Shuss*,<sup>217</sup> where the first count of the plaintiff's petition alleged that the defendant had constructed a large reservoir and by reason of "insufficient embankments" the surface water collected was allowed to escape "in large quantities" upon the plaintiff's land. There was no allegation that the water was discharged in a body, or that the flow was increased,

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212. L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (E. & I. 1868).

213. L.R. 1 Ex. at 279.

214. 73 Mo. App. 487 (St. L. Ct. App. 1898).

215. *Id.* at 493. See Gladden, *The Rylands v. Fletcher Doctrine and Its Standing in Missouri*, 18 Mo. L. Rev. 53 (1953).

216. 56 Am. Jur., *Waters* § 167 (1947).

217. 221 Mo. App. 472, 282 S.W. 512 (K.C. Ct. App. 1926).

or that there was any interference with the natural drainage. The court held that if there is no concentrated discharge there must be some negligence shown in the construction or maintenance of the pond in order for the defendant to be liable.

The most recent case of impounded surface water escaping over the lower owner is *Blackburn v. Gaydou*.<sup>218</sup> There the defendant had constructed a dam at right angles to a small creek which flowed through his land, hoping to catch the overflow water during flood stages and cause the silt to deposit on his fields. The force of the water carried it along the dam away from the creek until it ran around the extreme end, and from there it raced down across the plaintiff's field in an unnatural manner, washing away his topsoil. While the court recognized the beneficial purpose of the dam, it affirmed the defendant's liability on the basis of the rule against collecting and discharging surface water in a single body. That rule, as later discussed, is concerned primarily with restricting the right to rid the land of water, but it is submitted that the correct result was reached, and if the water is discharged in a concentrated flow upon the lower lands as a direct result of the defendant's actions, the purpose for those actions should be immaterial.

From these three cases we can conclude that there is no liability for the escape of impounded surface water unless the escape is in a concentrated volume, or is the natural result of the impoundment, or unless negligence is involved.

Escape of the water upon the lower lands is not the only source of injury which may result from impounded surface water. The pond or reservoir may be of such a nature that the water is *forced back* upon the higher land. The second count of the plaintiff's petition in *Farrar v. Shuss*<sup>219</sup> presented the reverse of the first count when it was alleged that by constructing the reservoir the water was collected and "backed upon and over plaintiff's land." This, said the court, constituted a "diversion" for which the defendant would be liable. It was recognized that under the Missouri law a lower landowner could build an obstruction at his boundary and prevent surface water *from entering*, and in this manner even throw it back upon the upper owner;<sup>220</sup> however, said the court,

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218. 241 Mo. App. 917, 245 S.W.2d 161 (Spr. Ct. App. 1951).

219. 221 Mo. App. 472, 282 S.W. 512 (K.C. Ct. App. 1926).

220. See pt. IV, § G, *infra*.

"this is not that kind of a case for it alleges that the water was collected into a pool . . . This is inconsistent with the idea of warding off water coming onto defendants' land."<sup>221</sup>

The distinguishing feature does not appear to be that in the one case the water is merely trying to come on, and in the other it is already there, but rather impounding the water repudiates its status as a "common enemy." As the defendant obviously does not treat it as a thing to be shunned, then the rules of repulsion do not apply, and the law of appropriation comes into play. Something akin to the rule of *Rylands v. Fletcher* seemed to be the basis of the *Farrar* decision; i.e., the one landowner should not be allowed to gain a benefit at his neighbor's expense. Many of the cases cited in support of the *Farrar* holding are primarily concerned with collecting and discharging, or rather that is the basis upon which the decisions are founded. However in one of the cases cited, *Frick v. Kansas City*,<sup>222</sup> it did appear that the obstruction erected by the defendants was "near" the plaintiff's boundary line and the effect was to "throw back" the water. The collection of the water was merely incidental, being neither for appropriation nor drainage, but the evidence showed that the defendants had acted unreasonably in piling the dirt from a sewer excavation in front of, and to the side of, the plaintiff's lot. The court considered the rule that "surface water is a common enemy that everyone must fight as best he may," but this was held not to allow the defendants "to wantonly collect it by the aid of a dam erected upon servient property and throw it back in destructive quantities upon the dominant property."<sup>223</sup>

The decision in *Farrar v. Shuss* seems proper enough as there the defendant was utilizing the water, and certainly our conscience is not shocked by the holding in *Frick v. Kansas City* where gross negligence was involved; but it seems a fine distinction if the result of these cases is that a lower owner can back up the water without liability when he builds his dam *on the property line*, but otherwise if he drops back three feet. Under the cases in the following section, this seems to be the law.

#### G. Blocking at Upper Property Line

If the lower landowner may not collect surface water on his premises

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221. 221 Mo. App. at 478, 282 S.W. at 515.

222. 117 Mo. App. 488, 93 S.W. 351 (K.C. Ct. App. 1906).

223. *Id.* at 496, 93 S.W. at 353.

and back it upon another's higher land, we may ask to what extent may he keep the water from *ever coming on his land* by building dams at his upper property line. Since the very basis of the law in force in this state is that surface water is a "common enemy," it is no surprise to find that there is great liberality in allowing the lower owner to "ward off" such water without becoming liable for the injury caused.

Blocking the water at the property line may have two effects; the water may simply form a pond behind the embankment on the higher land, or it may continue its way along the embankment, leaving its natural course of flow, and find a new route across the lands of a third party. The courts in Missouri have made no distinction between these two situations so long as the diversion results from an attempt to ward off the water, and consequently the cases will not be separately considered.

In the early case of *Laumier v. Francis*<sup>224</sup> the court supposed a situation where a city lot was raised, thereby causing surface water to form a pond on the upper land. The upper owners' right to the natural drainage was given as an example of an easement, but that was under the civil law rule and clearly is not the law today. In fact there is no other area where the common enemy rule has been applied in such strict form as in the area of blocking. As early as 1878 in *Freudenstein v. Heine*<sup>225</sup> the St. Louis Court of Appeals stated that an owner of city land could improve his lot and not be liable for blocking off surface water.

Shortly after the readoption of the common enemy rule in Missouri, the Kansas City Court of Appeals in 1888<sup>226</sup> held that a railroad company would not be liable where its trackbed blocked the overflow from a stream, and this water, following the embankment, ran upon the lands of the plaintiff where it was not naturally wont to go. The court carefully distinguished this situation from that where the landowner collects the water falling and accumulating *on his own land*, and discharging it upon the lower owner. The court's holding in 1888 was followed in *Collier v. Chicago & A.R.R.*,<sup>227</sup> decided by the same court four years later. A judgment for the defendant railroad was affirmed although it had built

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224. 23 Mo. 181 (1856).

225. 6 Mo. App. 287 (St. L. Ct. App. 1878).

226. *Schneider v. Missouri Pac. Ry.*, 29 Mo. App. 68 (K.C. Ct. App. 1888).

227. 48 Mo. App. 398 (K.C. Ct. App. 1892).



its embankment in such a way that surface water overflowed sixty acres of the plaintiff's farm land. The court quoted with approval the following language from a Wisconsin case:

. . . if the proprietor in obstructing the flow or turning away the water which comes from the land of another, changes its direction, as in general he must, and it then runs off upon the land of a third party where before it would not run, and causes damages, no action will lie in favor of such third person for the injury.<sup>228</sup>

In *Mehorney v. Foster*,<sup>229</sup> decided in 1908, the Kansas City court reached much the same result where the land involved was city property. The defendant had raised the elevation of his lot and thus caused water which had previously run through a ditch on his lot to be diverted across the plaintiff's land. As the water was not collected on the defendant's lot and was not discharged on the lower land there was no liability for the diversion.

The St. Louis Court of Appeals made its position clear in *Walther v. City of Cape Girardeau*,<sup>230</sup> decided in 1912. There the plaintiff had filled in his city lot up to the street grade, blocking a small ravine and causing a large pool of stagnant water, three or four feet deep covering 1000 square yards, to collect immediately above his land. The defendant city requested the plaintiff to either open a ditch across his lot, or allow the city to do it. Upon the plaintiff's refusal, and over his protest, the city summarily entered and dug the ditch, laid a tile drain, and refilled the opening. The lower court's order that the city remove the drain and restore the *status quo* was affirmed on appeal. The court held that the plaintiff was not responsible for the effect of preventing the water from overflowing his land, and that his act was not unlawful in protecting himself against its flow.

In urban areas the usual blocking case results from an improvement of the land either by construction of buildings or by a change in the lot elevation. Often in these situations artificial drainage is available, such as storm sewers, and the upper owner has reasonable means at hand to get rid of the backed-up water. On the other hand the blocking cases

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228. *Pettigrew v. Village of Evansville*, 25 Wis. 223 (1870).

229. 132 Mo. App. 229, 111 S.W. 882 (K.C. Ct. App. 1908).

230. 166 Mo. App. 467, 149 S.W. 36 (St. L. Ct. App. 1912).

involving farm property most generally are on a large scale and usually result from one of two agencies; either a railroad embankment or a levee constructed by a drainage or levee district. The blocking of water on rural lands caused by these agencies may have very serious consequences to the upper owner, and further discussion seems warranted.

In *Goll v. Chicago & A. Ry.*,<sup>231</sup> decided in 1917, the supreme court gave its sanction to the rule concerning blocking being applied by the courts of appeal, and went on to allow the defendant railroad to confine the flood channel of the Missouri River in such a way that the plaintiff's farm on the *other* side of the stream was overflowed. The court refused to distinguish the floodwater which remained in the flood channel from that which spreads out over the lowlands, and treating it all as surface water applied the common enemy doctrine to its fullest extent. So long as there is no natural drainway into which the water can be drained (making it necessary to comply with the special railroad statute) a railroad can block surface water of any type with impunity.<sup>232</sup>

A great deal of litigation has also resulted from the operation of drainage and levee districts. As before stated the district is liable similarly as an individual to persons holding land outside the district.<sup>233</sup> A host of levee cases have brought before the court a problem similar to the one presented in the *Goll* case. What is the liability for building a levee along a natural watercourse, thus confining the flood channel in such a manner that during high water the overflow is forced over another's land where it did not previously run? There is no liability. A typical case is *Anderson v. Inter-River Drainage & Levee Dist.*,<sup>234</sup> a supreme court decision. The plaintiff owned lands along the east bank of the St. Francis River, and as a result of the defendant's levee which extended for about twenty-five miles along the west bank of the stream and opposite to plaintiff's land, the overflow water during floodstage was thrown over upon the plaintiff's farm in unnatural quantities. In a very informative opinion in which many related cases were cited, it was held that there could be no liability for the diversion so long as there was no interference with the actual river channel itself. The case is cited with

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231. 271 Mo. 655, 197 S.W. 244 (1917).

232. *Accord*, *Keyton v. Missouri-Kansas-Texas R.R.*, 224 S.W.2d 616 (K.C. Ct. App. 1949); *Alexander v. Wabash Ry.*, 38 S.W.2d 545 (K.C. Ct. App. 1931).

233. See pt. IV, § D, *supra*.

234. 309 Mo. 189, 274 S.W. 448 (1925).

approval in *City of Hardin v. Norborne Land Drainage Dist.*,<sup>235</sup> a 1950 decision.

This right to ward off or block surface water is an application of the common enemy rule in its strictest form. It is recognized as to both rural and urban property without distinction, and while most cases state that it must be exercised in a reasonable manner,<sup>236</sup> there seems to be little limitation except for the statutory requirements previously mentioned covering a limited field. One of these statutes prevents a railroad from blocking surface water when it can ditch it into a natural drainway sufficient for that purpose,<sup>237</sup> and another would seem to prevent a lower owner from backing water upon the upper land if the obstruction blocks a natural depression with defined banks causing the upper estate to become swampy, wet, or overflowed, and if the drainage is necessary for agricultural or sanitary purposes.<sup>238</sup>

#### H. *Privilege of the Upper Owner to Alter the Flow*

There are innumerable ways in which the upper owner can interfere with the natural flow of surface water from his land. We have seen that while he can defend his land against such water at his boundary, he may become liable if he impounds it and either forces it back upon the higher estate or allows it to escape in a body on the lower estate. This section is concerned with his liability for altering the natural flow in ridding his land of surface water which has flowed on his estate from above or which has originated there by rain or snow.

Under the rule of the civil law the dominant owner was not permitted to interfere in any material degree with the natural flow of surface water from his land.<sup>239</sup> On the other hand, a strict application of the common enemy rule would seem to allow complete freedom in this area.<sup>240</sup> This, however, has not been the case, as in almost all jurisdictions following the common enemy rule there are some restrictions on the landowner's rights in altering the natural flow.<sup>241</sup>

235. 360 Mo. 1112, 232 S.W.2d 921 (1950). See also *Drainage Dist No. 48 of Dunklin Co. v. Small*, 311 S.W.2d 29 (Spr. Ct. App. 1958).

236. See *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Ct. App. 1951) and cases therein cited.

237. See pt. IV, § C, *supra*.

238. See pt. IV, § E, *supra*.

239. See pt. II, § A, *supra*.

240. See pt. II, § B, *supra*.

241. See pt. II, § D, *supra*.

The outstanding restriction upon a proprietor in Missouri can be summarized in this stock statement taken from a recent case:

. . . the owner of a dominant estate cannot permit water to collect on his own premises and then discharge it in destructive quantities at one point in a body onto the servient estate.<sup>242</sup>

This restriction on a landowner's broad rights under the common enemy rule is as old in this state as the rule itself. In the first Missouri case which clearly stated the common enemy rule,<sup>243</sup> this prohibition against collecting and discharging was recognized. This was one of the things Judge Vories sought to enjoin in *McCormick I* when he qualified the common enemy rule by saying that every proprietor must "use his own lands in a reasonable way." For a short time following *McCormick II*<sup>244</sup> and the *Shane* case,<sup>245</sup> this restriction on the landowner's rights was not considered as a mere qualification of the common enemy rule, but rather the rule of the civil law was thought to apply where surface water had been discharged in a body on the lower lands.<sup>246</sup>

The litigation culminating in *McCormick I* and *II* grew out of injuries caused by the defendant railroad's embankment which collected surface and overflow water, and the opening through this embankment which discharged the water in a body upon the lower land. In both times at the bar the defendant's liability was recognized, the first time by applying the common enemy rule with its qualification against discharging, and the second time by applying the civil law rule. But when the common enemy rule was readopted in the *Abbott* decision<sup>247</sup> in 1884, *McCormick II* was overruled, and Judge Ray said that there should have been *no liability*. This would indicate that Judge Ray intended to drop the prohibition against collecting and discharging when he adopted the common enemy rule. That such was his intention is made clear by his dissent in a later case.<sup>248</sup>

242. *Blydenburgh v. Amelung*, 309 S.W.2d 150, 152 (K.C. Ct. App. 1958).

243. *McCormick I*.

244. 70 Mo. 359 (1879).

245. 71 Mo. 237 (1879).

246. See *Benson v. Chicago & A.R.R.*, 78 Mo. 504 (1883); *Stewart v. City of Clinton*, 79 Mo. 603 (1883).

247. *Abbott v. Kansas City, St. J. & C.B.R.R.*, 83 Mo. 271 (1884).

248. *Rychlicke v. City of St. Louis*, 98 Mo. 497, 502, 11 S.W. 1001, 1002 (1889).

Judge Hough dissented in both *McCormick II* and the *Shane* case insisting that the common enemy rule was the law of Missouri; his vote to affirm the judgment for the defendant in *McCormick II* would indicate that he, too, did not intend to include the rule against collecting and discharging as part of the law.

Just one year following the *Abbott* case the common enemy rule was seemingly approved without qualification by the St. Louis Court of Appeals in *Hoester v. Hemsath*.<sup>240</sup> That case held that there was no liability where the defendant collected run-off water in a ditch and discharged it into a marsh which extended onto the plaintiff's land. It seems, however, that the enlargement of the marsh may have been the result of sedimentary deposit and not the result of collecting and discharging the water through the ditch so the case has little significance.

A short time after that decision by the St. Louis court a case involving collection and discharge came before the court of appeals at Kansas City,<sup>250</sup> and it was there stated:

. . . under neither [the common enemy nor civil law] 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.<sup>251</sup>

The court reasoned that such a right was not given by any interpretation of the common enemy rule, and to allow such a right would be "so iniquitous and unjust as to be abhorrent to the sense of justice of every intelligent mind."<sup>252</sup>

This holding of the Kansas City court was adopted by the supreme court as the law of Missouri one year later in *Rychlicke v. City of St. Louis*,<sup>253</sup> and with some alteration<sup>254</sup> has remained a part of our surface water law since that time.

As this prohibition against collecting and discharging surface water in a body appears to be the only recognized restriction upon the landowner's privilege of altering the natural flow, we will turn now to its practical effect. Any alteration of the natural flow will usually result in either discharging the water upon the lower land at a *different place*, or in an *increased volume*, or *both*. If the restriction is interpreted as applying to all three of these possible results, then it is submitted that

249. 16 Mo. App. 485 (St. L. Ct. App. 1885).

250. *Schneider v. Missouri Pac. Ry.*, 29 Mo. App. 68 (K.C. Ct. App. 1888). *Caveat*, see *Haferkamp v. City of Rock Hill*, 316 S.W.2d 620 (Mo. 1958).

251. *Id.* at 74.

252. The quoted material which met with court approval was taken from *Pettigrew v. Village of Evansville*, 25 Wis. 223, 237-38 (1870).

253. 98 Mo. 497, 11 S.W. 1001 (1889).

254. See *Haferkamp v. City of Rock Hill*, 316 S.W.2d 620 (Mo. 1958).

the effect of our law would be merely to enforce the "natural flow" theory of the civil law rule in this area. Except for the abstract statement of law embodied in the general rule, the cases do not permit a clear-cut rule showing the extent to which an owner can go in ridding his land of surface water. The remainder of this section will be devoted to application of that general rule.

It was early decided that this restriction upon a landowner against discharging water in a concentrated stream does not apply where the interference with the natural flow has resulted from the incidental improvement of the land. In *Thompson v. Chicago, M. & St. P. Ry.*<sup>255</sup> the railroad company had improved its city land with a freight depot and switch tracks in such a manner that surface water was collected and discharged against the plaintiff's building with such force that the wall collapsed. The company was not liable for the damage. The court said:

The rule that forbids the dominant proprietor from draining his land by collecting the surface water into a body and precipitating it on the servient land does not apply to cases where the diversion results, not from such wanton or reckless act [digging a ditch]; but is merely incidental to the improvement of the premises in a proper manner.<sup>256</sup>

This exception of "incidental collection" is recognized in some later cases,<sup>257</sup> but the writer has found no later fact situation coming exactly within its scope. It appears that by allowing the landowner to collect and discharge the water when such "is merely incidental to the improvement of the premises," the court had in mind the changes necessitated by constructing buildings upon urban property and may not have meant to include the improvement of rural land, where such collecting and discharging would be part of the normal improvement, such as terracing.

In *Grant v. St. Louis, I. Mt. & So. Ry.*<sup>258</sup> it was held that where a railroad company had constructed a ditch for the "express purpose" of collecting the water which had previously overflowed its tracks and conveyed it to a culvert through the roadbed from which it was discharged on the plaintiff's field, such accumulation was not a mere inci-

255. 137 Mo. App. 62, 119 S.W. 509 (K.C. Ct. App. 1909).

256. *Id.* at 69, 119 S.W. at 512.

257. *Belveal v. H.B.C. Development Co.*, 279 S.W.2d 545 (K.C. Ct. App. 1955); *Sandy v. City of St. Joseph*, 142 Mo. App. 330, 126 S.W. 989 (K.C. Ct. App. 1910).

258. 149 Mo. App. 306, 130 S.W. 80 (Spr. Ct. App. 1910).

dent to the improvement of the defendant's property so as to bring it within the "incidental" rule of the *Thompson* decision.

Aside from this one exception where the collection is incidental, the courts have consistently applied the restriction against collecting and discharging, and recent cases have been concerned with this situation more than any other. There was some confusion in the beginning concerning the basis of the rule. In 1890, one year after this restriction was expressly adopted by the supreme court as a qualification of the common enemy doctrine,<sup>259</sup> the much cited case of *Paddock v. Somes*<sup>260</sup> was decided. There the defendant was perpetually enjoined from maintaining a drain pipe which carried surface water and sewerage from his own lot across a city street and discharged it on the land of the plaintiff. The drain so constructed was found to constitute a *nuisance*, and under the rule of nuisance, the court stated it would be no defense that the plaintiff could have protected himself even with slight expense. However in *Tucker v. Hagan*,<sup>261</sup> a case where the defendant had constructed a ditch on his own land which discharged water onto the plaintiff's field damaging his crops, the court did not talk in terms of nuisance but said:

. . . we concede that he [the plaintiff] was doubtless obligated to use reasonable means to avert and avoid such damage, if he could do so within a reasonable time, and with a reasonable amount of labor and expense.<sup>262</sup>

Error was also alleged for the lower court's refusal to instruct that there would be liability only if the "ditch had been negligently constructed and maintained." This contention was held to be without merit because the gist of the action was not the defendant's *negligence* in making a lawful attempt to improve and reclaim his land, but was rather his *wrongful act* in discharging the water upon the plaintiff.

This problem of "contributory negligence" on the part of the plaintiff came up again in *Kiger v. Sanko*.<sup>263</sup> There the plaintiff had constructed a wall across the upper part of his lot to ward off drainage, but because of the increased flow resulting from a ditch built by the defendant the wall collapsed. The defendant argued that if the wall had been properly built the injury would not have occurred. To this the

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259. *Rychlicke v. City of St. Louis*, *supra* note 253.

260. 102 Mo. 226, 14 S.W. 746 (1890).

261. 300 S.W. 301 (St. L. Ct. App. 1927).

262. *Id.* at 305.

263. 1 S.W.2d 218 (K.C. Ct. App. 1927).

court replied: "While plaintiffs were entitled to protect their land by warding off the water they were not required to build an embankment of the character that would protect their land in any event."<sup>264</sup> Thus the gist of the plaintiff's case is not nuisance or negligence but purely the defendant's wrongful act in discharging the water in a body.

The *Kiger* case is important in two other aspects. It was there held that liability would result from discharging surface water onto the adjoining land even if the natural drainage was *toward* such land; and furthermore, it is not a requirement for liability that the ditch carrying the water lead directly up to the boundary line, so long as the water runs "in a body" upon the adjoining land.

Under the general rule in Missouri that all flood water is treated as surface water,<sup>265</sup> it has been held that flood water cannot be collected and discharged in a body upon lower lands,<sup>266</sup> but in *Hutchings v. Wabash Ry.*<sup>267</sup> a judgment for the defendant railroad was affirmed where in building its embankment the defendant had intercepted flood water and forced it back into the main channel against the natural current so that the current was diverted and thus caused to cut away and flood the plaintiff's farm in an unnatural manner. The court held that the waters were not collected but rather merely warded off, and the fact that the current was diverted was an incidental result for which there could be no recovery.<sup>268</sup>

In a federal district court case, *Vollrath v. Wabash R.R.*,<sup>269</sup> similar facts were presented where the railroad embankment intercepted flood waters; however there, instead of letting the water run along the obstruction and back into the stream, as in the previous case, a culvert was cut through the roadbed allowing the *discharge* onto lower lands. Judge Collet made an extensive review of the case law in Missouri and concluded that the railroad certainly was not *required* to maintain the embankment for the protection of the lower owner, and yet it would be

264. *Id.* at 222.

265. See pt. I, § B, *supra*.

266. *Blackburn v. Gaydou*, 241 Mo. App. 917, 245 S.W.2d 161 (Spr. Ct. App. 1951).

267. 224 Mo. App. 1124, 33 S.W.2d 147 (K.C. Ct. App. 1930).

268. While a railroad company is ordinarily not liable for the overflow of flood-water onto lands adjoining its embankments, yet if the company obstructs the channel of the stream and *causes* it to overflow, it will be liable. See *Hoelscher v. Missouri, K. & T. Ry.*, 182 S.W. 1078 (St. L. Ct. App. 1916); *Standley v. Atchison, T. & S.F.R.R.*, 121 Mo. App. 537, 97 S.W. 244 (K.C. Ct. App. 1906); *McKee v. St. Louis, K. & N.W. R.R.*, 49 Mo. App. 174 (St. L. Ct. App. 1892).

269. 65 F. Supp. 766 (W.D. Mo. 1946).



responsible if it collected the water and cast it in a concentrated stream upon his land. Following this view of the law the judge reasoned

... that the defendant is liable for the damage to the plaintiffs' estate which results from the *concentrated* flow of surface water upon that estate caused by the artificial condition created by defendant, and is not liable for any damage to the estate caused by such overflow as would occur absent the embankment.<sup>270</sup> (Emphasis added.)

If the analysis of the Missouri cases by the federal judge in the *Vollrath* case was correct, we may infer that the liability for collecting and discharging arises not from artificially collecting the water and increasing the volume but rather from discharging this increased volume in a *concentrated flow* onto the lower land. Such an inference is substantiated to some extent by *White v. Wabash R.R.*<sup>271</sup> where the evidence showed that the defendant had collected the water by ditches and discharged it upon the plaintiff's field. The water entered the field at the *same point*, in the *same channel*, and through the *same culvert* as did the surface water draining onto the field before the defendant's ditches were built; there was, however, a substantial increase in the *volume* of water coming through the culvert. In reversing a judgment for the plaintiff the Kansas City Court of Appeals based its decision on three theories: *first*, the language of the old *Abbott* decision to the effect that an owner can divert surface water from his premises "provided he exercises reasonable care and prudence";<sup>272</sup> *second*, a supreme court decision which stated that every man may throw off surface water provided he does not "*unnecessarily* collect it and discharge it to the damage of his neighbor"<sup>273</sup> (emphasis added); and *third*, the statute previously discussed<sup>274</sup> which gives a railroad a right to drain surface water into existing drainways. The statute alone would probably be basis enough for the decision, but the court indicated that merely increasing the flow of water through the pre-existing ditch would not be an "unreasonable" exercise of care, and in this instance at least it was not "unnecessary." The Springfield Court of Appeals reached the same result on similar facts in the 1951 case of *Young v. Moore*.<sup>275</sup> Although the special statute

270. *Id.* at 773.

271. 240 Mo. App. 344, 207 S.W.2d 505 (K.C. Ct. App. 1947).

272. 83 Mo. at 233 (1884).

273. *Keener v. Sharp*, 341 Mo. 1192, 1195, 111 S.W.2d 118, 120 (1937).

274. See pt. IV, § C, *supra*.

275. 241 Mo. App. 436, 236 S.W.2d 740 (Spr. Ct. App. 1951).

pertaining to railroads did not apply in the *Young* case, the special agricultural drainage act was involved.<sup>276</sup> The defendant sought to drain his land more efficiently by widening a ditch on his land through which surface water normally drained from his property to that of the plaintiff's. The widening resulted in increasing the volume and rate of flow through the ditch to the plaintiff's injury. The old case of *Gray v. Schriber*<sup>277</sup> had many years previous held that the agricultural drainage statute gave the upper owner a substantive right to drainage through the natural depression, thus preventing the lower owner from damming off the ditch. It was but one more step for the Springfield court to say that there would be no liability for merely increasing the volume and rate of flow. The court expressly stated that the defendant had not gone beyond his rights under the common enemy rule as he had acted "prudently and reasonably." While it is no doubt desirable that agricultural land be properly drained, anyone familiar with soil erosion can appreciate the problem of the lower landowner. Also, as the natural drainway had its beginning on the upper land being drained, then the provision in the special statute for private condemnation and payment of damages did not apply.

Both cases, *White v. Wabash R.R.* and *Young v. Moore*, deal with rural land and both involve special statutes, but a look at some recent cases arising from urban development will show that there is little, if any, difference in the treatment of the two types of land.

The first such case to be discussed is a 1948 court of appeals decision, *Casonaver v. Villanova Realty Co.*,<sup>278</sup> which holds that there is no liability for merely increasing the volume of water flowing upon the servient estate over a broad area. The realty company had purchased a large tract of vacant land for development as a subdivision. The natural slope of the land was toward the adjoining lots of the plaintiffs, but a ravine had carried much of the drainage into a sewer, and a mound of dirt had protected the plaintiff's lots from the remainder. In the course of developing the land the defendant graded off the mound of dirt and filled up the ravine. Although the grade of the defendant's land was raised, the total area drained remained the same. All the vegetation and topsoil

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276. 244.010, RSMo 1949. See pt. IV, § E, *supra*.

277. 58 Mo. App. 173 (St. L. Ct. App. 1894).

278. 209 S.W.2d 556 (St. L. Ct. App. 1948).

were removed leaving a barren clay slope which, instead of absorbing the rainfall, allowed it to flow freely onto the plaintiff's lower lots, carrying with it the mud and silt picked up in its course. The plaintiffs' petition seeking to enjoin the defendant from permitting the flowage was denied by the circuit court and this was affirmed on appeal. The St. Louis Court of Appeals held that as the plaintiffs' land was lower, it was the natural recipient of the water, and while the volume may have been increased, the defendant had not collected the water in any fashion. As the upper landowner had the right to alter and change the surface of his property in any way he saw fit he could not be charged with negligence in doing that which the law permitted him to do. As to the mud and silt, the court held that this was *part* of the surface water, reasoning that "overflow water is surface water and it is common knowledge that it is laden with silt and the off-scourings of land."<sup>279</sup>

Notwithstanding the broad application of the common enemy rule by the St. Louis Court of Appeals in the *Casanover* case, only one year later, in 1949, the same court handed down an opinion tinged with the "natural flow" doctrine. In *Polich v. Hermann*<sup>280</sup> the plaintiffs and defendants were adjoining city lot owners sharing a "common" driveway between them. The driveway was seven and one-half feet on each lot, and the evidence showed that before the acts occurred which brought about the litigation, it was level "all the way across." The evidence also showed that the defendants had placed about three loads of dirt on their side of the driveway in such a manner as to make it slope downward to the plaintiff's side. During heavy rains the surface water ran from the defendants' lot, across the driveway and into the plaintiffs' basement carrying dirt and debris. The plaintiffs were seeking a mandatory injunction forcing the removal of the dirt from the defendants' half of the driveway, the bill alleging that the dirt caused the surface water to accumulate and be discharged in abnormally large quantities upon the lower lot. It appears that the water actually was collected upon the higher ground, especially by the defendants' drainpipe which emptied onto the defendants' lot directly above the driveway, but this water was discharged in a body upon the lower land only to the extent that it flowed across the driveway in a broad sheet. Notwithstanding the lack

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279. *Id.* at 559.

280. 219 S.W.2d 849 (St. L. Ct. App. 1949).

of a concentrated stream of water coming from the upper land, the court granted the injunction. The basis of the decision is not altogether clear and could not be misleading were the law in this state is not quite so well settled. The only recent surface water case relied upon was *Keener v. Sharp*.<sup>281</sup> The dictum of that case was quoted which forbids a landowner from unnecessarily collecting and discharging water.<sup>282</sup> Judge McCullen of the St. Louis court said the evidence:

shows actions and conduct and things done by defendants in connection with the maintenance of their side of the driveway which changed the natural 'lay of the land' and caused surface water to overflow in abnormally large quantities from defendants' side of the driveway onto plaintiffs' side.<sup>283</sup>

The *Keener* case was then cited as authority for holding such conduct of the defendants unlawful. The judge approved language to the effect that it is unlawful to discharge surface water in a body even though it may be no greater in amount than would naturally flow upon the property in a diffused condition. This is no doubt the law of this state and has a sound basis

for it is evident that while a given piece of land may receive a large amount of surface water without injury thereto when it flows thereon from natural causes, yet when collected and discharged in considerable volume at a given point, it may become very destructive and injurious.<sup>284</sup>

Aside from this, however, the following language was also approved:

[A]n upper owner has no right to increase materially the quantity or volume of water discharged upon the lower estate; nor may the upper owner discharge water in a different manner than it would usually and ordinarily have gone in the *natural course of drainage* . . . the upper owner may not accelerate the flow where it results in injury to the lower proprietor.<sup>285</sup> (Emphasis added.)

For this statement of law the opinion cites as dubious authority the 1903 case of *Ready v. Missouri Pacific Ry.*<sup>286</sup> where there was clearly a

281. 341 Mo. 1192, 111 S.W.2d 118 (1937).

282. The *Keener* case was concerned with liability for blocking what was determined to be a natural watercourse.

281. 219 S.W.2d at 854.

284. *Id.* at 855.

285. *Ibid.*

286. 98 Mo. App. 467, 72 S.W. 142 (K.C. Ct. App. 1903).

matter of collecting the water. Lastly the *Polich* opinion refers to *Bielman v. City of St. Joseph*,<sup>287</sup> a 1924 decision. In this case a landowner was held liable for injuries sustained by the plaintiff who had slipped upon ice which resulted from water collected upon the landowner's walkway and from there discharged on the public walk where it froze.

On those facts Judge McCullen concluded that the case held:

. . . that if an upper owner causes water flowing on his land to discharge on the lower estate at a point not its natural destination, to the lower owner's injury, the former is liable for the damage.<sup>288</sup>

While this conclusion is not entirely correct, it states a greater restriction on the upper owner than the Missouri cases ordinarily hold, and the loose language includes many terms of the civil law rule.<sup>289</sup>

*Polich v. Hermann* is the last word of the St. Louis court concerning the privilege of the upper owner to change the flow of surface water, but any restrictions seemingly added by that decision have been wiped away by more recent supreme court cases. The Kansas City court also has been recently confronted with a case of collection and discharge of surface water. In *Belveal v. H.B.C. Development Co.*,<sup>290</sup> a situation similar to the *Casanover* case was presented to that court. There, also, the land was stripped of vegetation and graded, and a small ravine was filled with dirt. Unlike the *Casanover* case, however, there were no heavy rains during the development stage and the defendant company finished the grading, erected houses, sodded in the yards, and constructed a fifty-foot macadamized street with concrete curbs down the center of the subdivision. The lots were so graded that the front part of each one sloped downward to the street; the street sloped from each end toward the middle, and the entire run-off of surface water flowed into a catch basin at the low point. From the catch basin this water ran through a pipe and was discharged into a ditch on the defendant's land which previous to construction had carried most of the surface run-off, and which led directly into a small fish pond on the plaintiffs' land. After a heavy rain the small pond was flooded and filled with mud and silt

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287. 260 S.W. 529 (K.C. Ct. App. 1924).

288. 219 S.W.2d at 856.

289. In another decision by the St. Louis Court of Appeals, *Grandstaff v. Bland*, 166 Mo. App. 41, 148 S.W. 139 (1912), there is also language which would seem to prohibit any alteration of the natural flow from the upper land.

290. 279 S.W.2d 545 (K.C. Ct. App. 1955).

making it a mere "mudhole." It was the contention of the defendant that there was no increase in the total volume of water entering the plaintiffs' land as the acreage draining into the pond was still the same and there was no new point of discharge. There was some evidence, however, that part of the water had previously entered the plaintiff's land in a diffused manner and not through the ditch, and of course the construction of the street and houses would lesser the area in which the water could be absorbed. The Kansas City court merely held "a jury could reasonably find that defendant collected surface water on its land and discharged the water in a concentrated volume onto the plaintiffs' land."<sup>291</sup> If these same facts were to come before that court today, very likely the holding would be different in light of a recent supreme court decision presently to be discussed.

Two decisions handed down by our supreme court during 1958 deal directly with the collection of surface water. Both concern city property. The first, *Blydenburgh v. Amelung*,<sup>292</sup> added very little toward further development of the law in this area, and the opinion was couched in general terms, but the most recent case, *Haferkamp v. City of Rock Hill*,<sup>293</sup> concerns the question of one's right to increase the volume and rate of flow through a pre-existing ditch, and makes specific application of many general expressions found in earlier cases. The answer to this question has already been indicated by *White v. Wabash R.R.*<sup>294</sup> and *Young v. Moore*<sup>295</sup> where no liability was found, but in those cases special statutes were involved. *Haferkamp* is another subdivision development case, decided purely on common law principles, and the factual situation is almost identical with that of *Belveal v. H.B.C. Development Co.*<sup>296</sup> Like the *Belveal* case, the subdivision had neared completion before the rains came. In *Haferkamp*, three streets were built and about sixty-five dwelling constructed, all within an area which previously had been "rolling" ground covered with grass, pasture and a few trees. The surface

291. *Id.* at 553.

In *Anderson v. City of Jefferson*, 262 S.W.2d 169 (K.C. Ct. App. 1953), there was liability where the volume of surface water coming through a culvert onto the plaintiff's land was increased because of the development of a subdivision; however, the acreage may have been increased.

292. 309 S.W.2d 150 (Mo. 1958).

293. 316 S.W.2d 620 (Mo. 1958).

294. 240 Mo. App. 344, 207 S.W.2d 505 (K.C. Ct. App. 1947).

295. 241 Mo. App. 436, 236 S.W.2d 740 (Spr. Ct. App. 1951).

296. 279 S.W.2d 545 (K.C. Ct. App. 1955).

water from this area, prior to its development, had drained into a ditch about fifty feet wide and ten feet deep, which began on the defendant's land and ran from that parcel across other lots toward the land of the plaintiff where it ended just short of his property line. The water flowing through the ditch, however, continued onto the plaintiff's land and flowed into a large "sinkhole" or depression and disappeared into the ground. During the course of development of the defendant's subdivision a twenty-seven inch concrete tile was buried in the old ditch, and this tile carried the surface water collected by the houses and streets to the same place where it had previously left the defendant's land, but in a much greater quantity. The volume of water now coming onto the plaintiff's land was greater than that which could be absorbed in the sinkhole with the result that the water flooded the plaintiff's basement (it was shown that the basement had been flooded before). The evidence showed that the plaintiff had by easement allowed water from another watershed to be piped into the sinkhole, and also that he had walled off the sinkhole so that apparently no water could get into the hole except through the easement pipe. The plaintiff recovered a judgment of \$17,800 in the trial court, but the supreme court reversed and remanded because of the "mistaken legal theory" embodied in the plaintiff's verdict-directing instruction. That instruction authorized the plaintiff's recovery if the jury found that the defendant had constructed catch basins and the concrete pipe and had collected large quantities of water and discharged the water upon plaintiff's property—thereby increasing the volume and rate of flow of such surface water from what it was prior to construction. The court determined that the instruction erroneously stated the law in that there was no consideration given to the legality of the defendant's activities in developing its property, nor to the fact that the water was deposited in its natural drainway, nor was there any reference to the natural capacity of that drainway. Thereafter the court made it clear that these were factors to be considered. There was no reference to *Belveal v. H.B.C. Development Co.*,<sup>297</sup> but many of the other recent cases were cited, and the following general rule governing this particular situation was laid down:

. . . a landowner in the reasonable use and development of his land may drain it by building thereon sewers, gutters and

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297. *Ibid.*

such other artificial water channels for the purpose of carrying off the surface waters into a 'natural surface-water channel' located on his property without liability to the owner of neighboring land, even though such method of ridding his property of surface water accelerates and increases the flow thereof, provided that he acts without negligence, and provided further that he does not exceed the natural capacity of the drainway to the damage of neighboring property.<sup>298</sup>

In the mind of the court this rule was but a specific application of the general statement found in many Missouri cases that the common enemy doctrine must be exercised within reasonable limits.<sup>299</sup> In most of the cases wherein this general statement is found the acts of the upper owner have been found to be *unreasonable*, and only in three cases have his acts been found reasonable. In all three of these, merely the volume and rate of flow through a pre-existing ditch were increased. The supreme court has also said that the rule against collecting and discharging surface water in a body only prohibited the *unnecessary* collection and discharge (presumably unnecessary would be unreasonable),<sup>300</sup> yet the word unnecessary as used to qualify that rule in a jury instruction was disapproved by both the Kansas City<sup>301</sup> and Springfield<sup>302</sup> courts. The very use of the word "reasonable" in the rule stated above indicates that our courts are no longer willing to apply any rule of surface water just because it is a rule. In this area of collecting and discharging there can be no question but that the courts are leaning more and more to the Reasonable Use Rule without coming right out and calling it by name.

### I. *Terracing for Water Management*

The terrace system as a means of water management is ideally suited for the topography of Missouri land. A drive through the rolling farmlands in about any area of the state will allow one to observe the extensive use being made of terrace systems and contour farming. A terrace system is a means of soil conservation through carefully planned altera-

298. 316 S.W.2d at 625-26.

299. *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Ct. App. 1951). *Accord*, *Anderson v. City of Jefferson*, 262 S.W.2d 169 (K.C. Ct. App. 1953).

300. *Keener v. Sharp*, 341 Mo. 1192, 1195, 111 S.W.2d 118, 120 (1937).

301. *Belveal v. H.B.C. Development Co.*, 279 S.W.2d 545, 553 (K.C. Ct. App. 1955).

302. *Blackburn v. Gaydou*, 241 Mo. App. 917, 245 S.W.2d 161 (Spr. Ct. App. 1951).



tions in the natural lay of the land to reduce erosion.<sup>303</sup> Since any system of terracing must necessarily interfere with the natural flow of surface water, it seems unusual that no cases dealing directly with terracing have reached the appellate courts.<sup>304</sup> This absence of litigation may result in part from good neighborliness, and in part from the careful planning which usually precedes any terrace system. Also once a plan of terraces has been executed and expenditures made with the adjoining landowner's consent, the doctrine of estoppel may prevent any dispute as to the rights involved. Notwithstanding this complete lack of authority it may be possible to predict the outcome of any litigation arising from terracing. There is no reason to believe that the courts will apply any different principles to terracing than to any other similar surface water problems. If this is true, then we need only apply the law as found in the cases of the previous sections. There are three basic questions which arise in connection with a terrace system: *first*, to what extent must the surface water from the upper land be accepted into the system; *second*, what are the restrictions upon altering the natural flow of the water as it runs out of the system onto the land below; and *third*, what are the restrictions upon discharging the water out of the system onto lands which had not previously received it.

While the terrace system is designed primarily to carry off safely the rainwater which falls on the terraced area, it is obvious that in many instances the system will be burdened with the surface water which flows into it from the land above. The question is presented: does this water from the higher fields have to be accepted into the system or can a landowner build an embankment around his farm and keep it out altogether? As we have seen, the common enemy rule as applied in Missouri allows great freedom in blocking out surface water at the property line.<sup>305</sup> Some states have held that under that rule a lower landowner can not obstruct the flow of surface water through a well-defined ravine or gully, but in this state there would seem to be no restriction upon obstructing drainage through any type of natural depression were it not for a statutory enactment. It has been held that a

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303. See Clark & Wooley, *Terracing for Erosion Control*, U. OF MO. AG. EXP. STA. BULL. No. 507 (July 1947).

304. Many cases have come to the courts arising out of land drainage and reclamation and other means of improvement, but none has been directly concerned with the terrace system of soil conservation.

305. See pt. IV, § G, *supra*.

statute almost identical with section 244.010, Missouri Revised Statutes (1949)<sup>306</sup> granted a "substantive right" to continued drainage to an upper landowner where this drainage is through a natural depression with well-defined banks which leads to a watercourse. With this interpretation the present statute would seem to prevent the obstruction of anything like a gully or ravine if it leads into a natural stream. Beyond this, the cases seem to allow complete freedom to block out surface water at the property line even if it means ponding it back on the upper land.

Assume however that the entire volume of water from above is accepted. In order to keep the drains and diversion terraces free of sediment and to prevent silting over the terrace outlets, it is often desirable to build silting basins to intercept the water coming into the system from above. If the silting basin dam is constructed near the upper property line it may cause the impounded water to back up over the higher ground. Normally this would be for only a short time, and if the high ground were in pasture probably no harm would result. However, inundation for only a short time may prove harmful to growing crops. Under the holding in *Farrar v. Shuss*<sup>307</sup> it would be wrongful to back the impounded water across the property line and over the upper land. It would be no defense that the upper owner could avoid the injury with small expense by cutting a drain through his own land.<sup>308</sup>

Assuming that the water is now in the terrace system, either by rainfall or by drainage from the higher land, in what manner can the natural flow onto the lower lands be altered in discharging the water out of the system. There can be no doubt but that the terrace system is a means of artificially collecting surface water, and the appropriate rules of collection and discharge, previously discussed,<sup>309</sup> would control the methods of discharge. Since collecting the water and controlling its flow is the very purpose of the system, the rule of "incidental collection" would not apply.<sup>310</sup> The terrace channels and berms in the system are so constructed that the terrace carries the water slowly around the natural slope of the field. This prevents scouring out the terrace channel and carrying away the silt. Usually the terrace will empty the water

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306. See pt. IV, § E, *supra*, for a discussion of the statute.

307. 221 Mo. App. 472, 282 S.W. 512 (K.C. Ct. App. 1926).

308. *Kiger v. Sanko*, 1 S.W.2d 218 (K.C. Ct. App. 1927).

309. See pt. IV, § H, *supra*.

310. *Grant v. St. Louis, I. Mt. & So. Ry.*, 149 Mo. App. 306, 130 S.W. 80 (Spr. Ct. App. 1910).

into a "terrace outlet," which is a sodded area running down the edge or center of the field to the lower elevation.

It is recommended that in planning any terrace system, if possible, the surface water carried in the system should be carried to the same point where the same acreage of water originally left the farm, and it should enter the lower land in much the same manner as it did before the system was installed. Certainly if this is done there can be no liability for interfering with the natural flow. Unfortunately, there are things to be considered in setting up the terrace system which may make it necessary to alter the natural flow to some extent.<sup>311</sup> This alteration may result in discharging the same quantity of water in a new place or different manner, or a larger quantity in the same place and same manner. It is always desirable to construct the terrace outlets in such a way that the water will flow from the upper land in a diffused condition across the greatest possible area. If before the terrace system was installed, the water ran to the lower land in this diffused manner, then it would not be permissible to collect this same amount of water into a body and discharge it in a concentrated stream. All of the cases would prohibit this. On the other hand it may be that before the system was installed the water ran from the upper farm to the lower land in a defined natural depression or ditch. As before stated, then certainly the same volume of water could be discharged from the system into that ditch without liability. It seems to go without saying, however, that the same volume, or even less, cannot be discharged in a single stream at a different single place on that landowner, and certainly not on land which had never before been burdened with the water.

The next question presents the problem which most often occurs. Is it permissible to increase the volume or quantity of water flowing onto the lower land if this increased volume enters at the same place and in the same manner? The answer to all situations is not clearly found in the cases. The increase may be in the amount of water which flows onto the lower land over a wide area and in a diffused manner, or the amount which flows through a ditch in a defined channel. Also the increase in volume may result merely from a change in conditions existing in the

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311. For example, other than the legality of the system, there are the considerations of convenient access to and from the farm in its management, and of course the economy in setting up the system.

terraced area, or it may result from draining a larger area into the particular outlet in question.

Consider first the situation where the water enters the lower land in a diffused state and the only effect of the terrace system is to increase the quantity. The basic rule in Missouri restricting the upper landowner's rights to alter the natural flow does not prohibit merely increasing the volume; there must be some collection by artificial means, and the water so collected must be cast in a *concentrated stream* onto the lower lands. As before stated, the terrace system is an intentional method of collecting the surface water and therefore not merely incidental. This would distinguish the situation from that in *Casanover v. Villanova*<sup>312</sup> where the increase in volume of water which flowed onto the plaintiffs' lots was the incidental result of stripping the defendant's land in preparation for a city subdivision. There was no liability in that case. Notwithstanding the intentional collection of the water by the terrace system there could seem to be no liability unless it is discharged upon the lower land in such a manner as to fall within the ambit of the terms "in a body" or "concentrated stream." This would seem unlikely if the water enters the lower land over a wide area the same as it did originally. In this regard the holding in *Polich v. Hermann*<sup>313</sup> should be considered. From that case it could be argued that once surface water is collected by artificial means, and the volume increased, then *any* manner of discharge will be "in a body." It is submitted that this is not true in fact, as many well planned terrace systems illustrate, and therefore should not be a legal argument. There would appear to be no liability where only the volume of water flowing onto the lower land in a broad sheet is increased.

The attitude of the courts toward the whole problem of increased volume may be revealed in three recent cases already mentioned where the amount of water flowing onto the lower land in a well-defined channel was merely increased. In both *Young v. Moore*<sup>314</sup> and *White v. Wabash R.R.*<sup>315</sup> surface water had been collected and discharged into pre-existing ditches with a resultant increase in the volume flowing through those outlets. In each instance there was no liability for this action. The decision in the *White* case could probably be based entirely

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312. 209 S.W.2d 556 (St. L. Ct. App. 1948).

313. 219 S.W.2d 849 (St. L. Ct. App. 1949).

314. 241 Mo. App. 436, 236 S.W.2d 740 (Spr. Ct. App. 1951).

315. 240 Mo. App. 344, 207 S.W.2d 505 (K.C. Ct. App. 1947).

upon a pertinent statute,<sup>316</sup> but the court also talked of non-statutory rights. In the *Young* case the Springfield Court of Appeals expressly stated that the defendant had not gone beyond his rights under the common enemy rule. The court in that case held that there would be no liability for the damage caused by the increased volume as the defendant had acted "prudently and reasonably."

Thus, while the opinion in *Polich v. Hermann* may indicate that the discharge of water out of the terrace system is always in a "concentrated" stream, for purposes of legal treatment; nevertheless, the holding in *Young v. Moore* would seem to sanction any increase in volume which is reasonable *even if the concentrated stream is a fact*. And, if the test is one of reasonableness, then any increase resulting from the mere installation of the terrace system would in most instances be permissible; an increase in volume resulting from increased acreage would be more questionable. In the latest case handed down from the supreme court, *Haferkamp v. City of Rock Hill*, it was held that an instruction was erroneous which predicated liability upon merely increasing the volume and rate of flow of surface water through a pre-existing ditch which started on defendant's land and ran onto the plaintiff's. The court stated that consideration should have been given to the natural capacity of the ditch and to the reasonableness and legality of the defendant's operations. The defendant was opening up a subdivision on his urban land, and the increased volume and accelerated flow complained of in that case were caused by the construction of streets and houses which would seem to be no more "reasonable" than farm terracing. It is doubtful if the courts would ever find it reasonable to cause a volume increase by "pulling in" water from another watershed, although practically speaking such action may seem very reasonable in the terrace development.

The discussion of the previous situations reveals the answer to the third question arising from the terrace system. What are the restrictions upon discharging the water from the system, either in a concentrated stream or in a diffused condition upon lands which were never burdened with such water previous to the system's installation. All of the cases would condemn discharging the water onto such land in a concentrated stream. If the water is discharged out of the system across a wide area

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316. See pt. IV, § C, *supra*, for a discussion of the statute and railroads in general.

in a diffused manner, it would be possible to argue that there had been no discharge "in a body," which may well be the fact; but to the knowledge of this author there has never been an instance in which the water was artificially collected that it was not held to have been discharged "in a body." Conceivably any discharge of water in any manner onto the land of a third party would be condemned.

In conclusion it should be mentioned that considering the many unanswered questions pertaining to terracing, extra precautions should be taken to insure against liability before the terrace system is installed. As before indicated, the best method of avoiding dispute and litigation is to accept the surface water from above into the terracing system and discharge it from the system in the same manner as it originally left the farm. To assert a legal right may cause immeasurable ill feeling, and social harmony is many times all important in the farming neighborhood. Should there be any doubt as to the legal right to back up or discharge surface water across a neighbor's land, it may be advisable to bargain for an express easement from the affected landowner. In most instances the consideration, if any, would be slight, and the existence of the easement could not only prevent litigation and liability, but could also avoid any breach in community relations.