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Application of Surface Water Rules in Urban Areas, The

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THE APPLICATION OF SURFACE WATER RULES IN URBAN AREAS

I. INTRODUCTION

Many lawyers may have gone through law school and years of practice without even hearing of the rules governing surface waters. But the expansion of urban areas,[1] the adoption of surface water rules requiring a factual determination of reasonableness, and the resulting increase in the number of surface water cases being litigated[2] suggest that more and more lawyers are likely to become involved in surface water problems.

The term "surface water"[3] includes the runoff from rain and melting snow which occurs in places other than defined streams or lakes or ponds. Anytime it rains or snows there exists the potential for surface water disputes. This potential is likely to develop into actual disputes, especially in newly developed urban areas which have not adequately planned for drainage. Water that once flowed harmlessly in rural or unimproved areas can cause considerable property damage in areas where houses and other structures have been constructed.

An example of a surface water case[4] may better illustrate the types of disputes likely to arise. A landowner decides to improve his property by constructing apartment units and adjacent paved parking areas. The amount of surface water runoff is increased when the improvements render impervious the previously bare ground. The adjoining landowner finds that the surface waters which formerly spread fanwise across her property now flow in a concentrated manner and in an increased volume causing damage to her property. Therefore she constructs a dam along her property line, the effect of which is to back surface waters up onto the first landowner's property, damaging that landowner's apartments and parking lot. Does either landowner have a cause of action against the other for the damage to their property? Who bears the cost of the first landowner's improvements?

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1. The term "urban areas" as used in this comment includes cities, suburbs, and the rapidly growing fringe areas near cities and suburbs which are undergoing a change from rural to urban character.

2. From 1950-1970 approximately fifteen surface water cases were reported at the appellate level in Missouri. The same number of cases were reported from 1970-1975 alone. Approximately 11 inches of the 40 inches of average annual rainfall in Missouri is runoff (surface water and groundwater). See *McGuinness*, U.S.G.S. Circ. 1800 at 457-58 (1963).

3. "Surface waters" are those which, in their natural state, occur on the surface of the earth in places other than definite streams or lakes or ponds; they may originate from any source and may be flowing vagrantly over broad lateral areas or, occasionally for brief periods, in natural depressions. *See* Oklahoma Water Resources Bd. v. Central Oklahoma Master Conservancy Dist., 464 P.2d 748, 751 (Okla. 1968).

4. Pagliotti v. Acquisitapace, 64 Cal. 2d 873, 50 Cal. Rptr. 282, 412 P.2d 538 (1966).

The answers to these questions may depend on which surface water rule is applied.

Although many property related rules date back well before urban problems demanded consideration, the development of surface water rules[5] began only in the early nineteenth century.[6] This was a period when for the first time the urban population was increasing faster than the rural population.[7] So it is not surprising that in deciding which surface water rule to adopt, many courts considered whether one rule or another was consistent with the public policy favoring land improvement and development.[8]

In deciding who would bear the cost of ridding land of surface water some courts noted that a rule which made an improving landowner liable for damage caused by any change in the flow of surface water from his land might discourage landowners from improving their land.[9] Other courts noted that a rule which held the improving landowner immune from liability would be unfair to the landowner whose property was damaged.[10] A "fair" rule, reasoned some courts, would be one that held liable the person who changed the natural flow of water.[11]

In response to the notion that public policy favored the improvement and development of land some courts adopted the common enemy rule.[12] In response to the notion that a fair rule would be one that held liable that person who changes the natural flow of water some courts adopted the civil law (or natural flow) rule.[13] Somewhat later, due to the dissatisfaction with either of these rules, the reasonable use rule was adopted.[14]

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5. In contrast to the dearth of articles on surface water disputes in urban areas, there are many articles on surface water in general. *See, e.g.*, Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891 (1940); Davis & Snodgrass, *The Law of Surface Water in Missouri*, 24 MO. L. REV. 137, 281 (1959); Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NAT. RESOURCES J. 72 (1968); Beck, *The Law of Drainage*, 5 WATER AND WATER RIGHTS (R.E. Clark, Ed., 1972).

6. Kinyon & McClure, *supra* note 5; Davis & Snodgrass, *supra* note 5, at 146-47.

7. The urban increase in population was not numerically larger than the rural until after the Civil War. Since 1860, with the exception of the 1870's, every decade has shown greater urban than rural numerical growth. R. Cook, *The World's Great Cities: Evolution or Devolution*, POPULATION BULLETIN (1960).

8. *See* Hall v. Rising, 141 Ala. 431, 37 So. 586 (1904); Levy v. Nash, 87 Ark. 41, 112 S.W. 173 (1908); Abbott v. Kansas City St. J. & C.B.R.R., 83 Mo. 271 (1884); Bowlsby v. Speer, 31 N.J.L. 351 (1865); Barkley v. Wilcox, 86 N.Y. 140 (1881); Jordan v. City of Benwood, 26 S.E. 266 (W. Va. 1896). *Cf.* Gannon v. Hargodon, 92 Mass. (10 Allen) 106 (1865).

9. Cases cited note 8 *supra*.

10. *See* Albany v. Sikes, 94 Ga. 30, 20 S.E. 257 (1894); Gillham v. Madison County R. Co., 49 Ill. 484 (1869); Beck, *The Law of Drainage*, 5 WATERS AND WATER RIGHTS, *supra* note 5, at § 452.1.

11. Albany v. Sikes, 94 Ga. 30, 20 S.E. 257 (1894); Gormley v. Sanford, 52 Ill. 158 (1869).

12. Cases cited note 8 *supra*.

13. Cases cited note 10 *supra*.

14. Swett v. Cutts, 50 N.H. 439 (1870); Bassett v. Salisbury Mfg. Co., 43 N.H. 569 (1862). *See also* Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948).

Many if not most of the recent cases involving surface water drainage have involved disputes which arose in an urban setting. This is because in and around large metropolitan centers greater building activity often results in some change in the flow of surface water causing harm to a nearby landowner. In this urban context some courts have reexamined the rules applied in their particular jurisdiction.[15] Such an examination requires a look at a number of practical and policy considerations required to develop a rule suitable to urban needs.

In choosing a rule adaptable to urban areas courts have limited themselves to three principal views: the civil law rule, the common enemy rule, and the reasonable use rule. This comment will discuss the application of each of these rules to urban areas focusing on the history, modifications, and modern status of these rules in urban areas.

II. THE CIVIL LAW RULE IN URBAN AREAS

A. *History*

The civil law rule of surface waters is that a landowner who interferes with the natural flow of surface waters is liable for any injury to other landowners. The civil law rule recognizes a servitude of natural drainage so that a lower owner must accept the surface water which drains onto his land but the upper owner has no right to alter the natural system of drainage to the detriment of the lower owner.[16] In short, each landowner's duty is to leave the natural drainage system undisturbed.

Most commentators attribute the origin of the civil law rule in this country to an 1812 Louisiana case[17] and an 1848 Pennsylvania case.[18] In these and other early cases there was no mention of the common enemy rule or the reasonable use rule, neither of which were applied until after the middle of the nineteenth century.[19] While the early cases adopting the civil law rule stated a variety of reasons for its adoption, Professors Kinyon and

15. *See, e.g.*, Keys v. Romley, 64 Cal. 2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Lunsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953); Butler v. Bruno, 341 A.2d 735 (R.I. 1975); Mulder v. Tague, 85 S.D. 544, 186 N.W.2d 884 (1971); City of Houston v. Renault, Inc., 431 S.W.2d 322 (Tex. 1968); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

16. Kinyon & McClure, *supra* note 6, at 891.

17. Orleans Navigation Co. v. New Orleans, 2 Martin 214 (La. 1812). *See also* Code Napoleon art. 640.

18. Martin v. Riddle, 26 Pa. 415 (1848).

19. The common enemy rule originated in a series of Massachusetts cases beginning in 1851: Luther v. Winnisimmet Co., 63 Mass. 171 (1851); Flagg v. Worcester, 79 Mass. 601 (1860); Gannon v. Hargadon, 92 Mass. 106 (1865). The term "common enemy" is of English origin where it was used to refer to the legal attitude toward the sea. King v. Commissioners of Sewers, 8 B. & C. 356, 108 Eng. Rep. 1075 (K.B. 1828). *See generally* Davis & Snodgrass *supra* note 5, at 149-50. The reasonable use rule originated in two New Hampshire cases. Bossett v. Salisbury Mfg. Co., 43 N.H. 569 (1862); Swett v. Cutts, 50 N.H. 439 (1870).

McClure state the real reason for the rule was the idea that the least harmful way to dispose of surface waters is to enforce the natural laws of drainage.[20]

The fact that normal urban development quite often caused a change in the natural drainage system meant that improving landowners had additional costs to bear under the civil law rule. This factor influenced many courts to reject it.[21] Nevertheless, other courts still adopted the civil law rule for a number of reasons[22] including a belief that the rule did not in fact inhibit growth and development.[23] At one time or another at least 27 jurisdictions have followed the civil law rule.[24] Most of the states following the civil law rule have modified it in some way or another.[25]

B. *Modifications Aimed at Adapting the Civil Law Rule to Urban Areas*

Some jurisdictions which had adopted the civil law rule decided that instead of modifying the rule to suit urban areas, a better approach would be to adopt the common enemy or reasonable use rule for urban areas.[26] This resulted in those jurisdictions having one rule for urban areas (common enemy or reasonable use rule) and another rule for rural areas (civil law rule).

An example of this approach is found in Ohio.[27] In *Lunsford v. Stewart*[28] the defendant had raised the level of his lot, preventing surface water from draining off of plaintiff's adjoining lot. Ohio had followed the civil law rule and under this rule defendant would have been liable for preventing surface water from draining off the plaintiff's lot. However, the court refused to apply this rule to city lots. The court stated that as long as it was done in a reasonable manner the owner of a *city lot* could fill his lot and erect structures thereon without being liable to the adjoining lot owner even though such improvement diverts the natural flow of surface water.[29]

20. Kinyon & McClure, *supra* note 6, at 895; Davis & Snodgrass, *supra* note 5, at 147-48. *See also* Gormley v. Sanford, 52 Ill. 158 (1869).

21. *See* Hall v. Rising, 141 Ala. 431, 37 So. 586 (1904); Levy v. Nash, 87 Ark. 41, 112 S.W. 173 (1908); Boyd v. Conklin, 54 Mich. 583, 20 N.W. 595 (1884); Abbott v. Kansas City, St. J. & C.B.R.R., 83 Mo. 271 (1884); Bowlsby v. Speer, 31 N.J.L. 351 (1865); Barkley v. Wilcox, 86 N.Y. 140 (1881); Lunsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953); Butler v. Bruno, 341 A.2d 735 (R.I. 1975); Mulder v. Tague, 85 S.D. 544, 186 N.W.2d 884 (1971).

22. *See* Kinyon & McClure, *supra* note 6, at 895.

23. *See generally* Carland v. Aurin, 103 Tenn. 555, 53 S.W. 940 (1899).

24. *See* Beck, *supra* note 5, at § 452.2.

25. *See* text accompanying notes 26-40 *infra.*

26. Dickle v. Vann, 279 Ala. 153, 182 So. 2d 885 (1966); Lunsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953); Mulder v. Tague, 85 S.D. 544, 186 N.W.2d 884 (1971). *See also* Annot., 12 A.L.R.2d 1338, 1350 (1950).

27. Ohio follows the civil law rule as to rural land. Johnson v. Goodview Homes—1, Inc., 82 Ohio L. Abs. 526, 167 N.E.2d 132 (1960). As to urban areas it is not clear whether Ohio follows the reasonable use rule or the common enemy rule modified by reasonable use. *See* Beck, *supra* note 5, at § 456.2.

28. 95 Ohio App. 383, 120 N.E.2d 136 (1953).

29. *Id.* at 584, 120 N.E.2d at 137.

A similar approach was adopted in South Dakota. South Dakota is a civil law jurisdiction[30] but after *Mulder v. Tague*[31] the civil law rule has been applied only in rural areas. The court in *Mulder* noted that because any change in grade, level, or topography might affect natural drainage, the civil law rule cannot be strictly applied in urban areas. The South Dakota Supreme Court felt that to strictly apply the civil law rule to urban areas would prevent the proper use, development, and enjoyment of urban property.[32]

While this urban-rural "modification" of the civil law rule might more accurately be described as a rejection of the civil law rule in urban areas, the reasonable use modification to the civil law rule retains the basic notions of the civil law.[33] The leading case on the reasonable use modification to the civil law rule is *Keys v. Romley*.[34] In *Keys* the Supreme Court of California reaffirmed California's acceptance of the civil law rule for both rural and urban areas. This rule, the court observed, has the advantage of greater predictability than either the common enemy or reasonable use rule and is consistent with the expectation that buyers should take land subject to the burdens of natural drainage. On the other hand, the court noted that if strictly applied the civil law rule has some tendency to inhibit improvement of land. Because almost any use of the property is likely to cause a change in the natural drainage which may justify complaint by an adjoining landowner, the civil law rule "may be unnecessarily rigid and occasionally unjust, particularly in heavily developed areas."[35] The court decided, therefore, that the application of the civil law rule must be modified by a test of reasonableness.

This issue of reasonableness is a factual determination to be made after considering all the relevant factors. A proper consideration in determining "reasonableness" in land development problems is the relative utility of the actor's conduct as compared with the gravity of the harm caused by the alteration of surface water flow. In this balancing of interests the *Keys* court noted that if the weight is on the side of the landowner who alters the natural flow of surface waters, then he has acted reasonably and is not subject to liability. However, if the harm to the lower landowner is unreasonably severe, then the upper owner, whose development caused the damage, must bear the economic costs incident to the expulsion of surface waters. "If the facts should indicate both parties conducted themselves reasonably, then courts are bound by our well-settled civil law rule."[36] This reasonable use modification is not to be confused with the reasonable use rule.[37]

30 *See* Young v. Huffman, 77 S.D. 254, 90 N.W.2d 401 (1958).
31. 85 S.D. 544, 186 N.W.2d 884 (1971).
32. *Id.* at 552, 186 N.W.2d at 889.
33. *See* notes 35-39 and accompanying text *infra.*
34. 64 Cal. 2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966).
35. *Id.* at 407, 50 Cal. Rptr. at 279, 412 P.2d at 535.
36. *Id.* at 410, 50 Cal. Rptr. at 281, 412 P.2d at 537.
37. The "reasonable use" *modification* to both the civil law rule and the common

The following example illustrates how this modified civil law rule differs from a strict application of the civil law rule. A landowner constructs apartments on his land which change the natural flow of the surface water. The adjoining lower landowner sues for damages caused by this change in the flow of the surface waters. Under a strict application of the civil law rule the landowner who constructed the apartments would be liable for any damages caused by the change in the natural flow of the surface waters.

However, under the reasonable use modification to the civil law rule the outcome is likely to be different. If the damages to the lower owner are slight and if the upper owner has no alternative method of disposing of surface waters, except across the lower owner's property, a court is likely to find that the upper owner's conduct is reasonable and that he is not liable.[38] It is likely that a court may allow the upper owner to drain the surface water from his land across the lower owner's land. While the upper owner may be required to pay for the cost of a ditch or pipes the economic costs will probably be much less than if he were liable for damages.

One other modification of the civil law rule which has made the rule more practical in urban areas is the modification which allows a landowner to make minor alterations in the flow of surface waters.[39] Some courts in the jurisdictions following this modification have recognized that a landowner must have a privilege, under certain circumstances, "to make minor alterations in the natural flow of surface water where necessary to the normal use and improvement of his land . . . ."[40] This is a limited modification which varies from state to state.

C. *Modern Status of the Civil Law Rule in Urban Areas*

Historically, the civil law rule was thought to inhibit the development and improvement of land.[41] From a historical viewpoint alone, one might

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enemy rule is not to be confused with the reasonable use rule. Under the reasonable use modification the property-related civil law and common enemy rules are still applied but they are modified by the tort concept of reasonable use. In contrast, those courts adopting the reasonable use rule, instead of using the tort concepts as an overlay to mitigate the results of the property-related doctrines, have created the standards for behavior entirely out of tort law, and abandoned the notions of servitude or absolute ownership. Butler v. Bruno, 341 A.2d 735 (R.I. 1975). *See* text accompanying notes 125-27 *infra*. Earlier cases indicate that the reasonable use rule is analogous to the same rule for watercourses (riparian rights), which is a property law rule that uses equity concepts of fairness. *See* Franklin v. Durgee, 71 N.H. 186, 51 A. 911 (1901); Swett v. Cutts, 50 N.H. 439 (1870).

38. *Cf.* Pagliotti v. Acquistapace, 64 Cal. 2d 873, 50 Cal. Rptr. 282, 412 P.2d 538 (1966).

39. *See, e.g.*, Kay-Noojin Development Co. v. Kinzer, 259 Ala. 49, 65 So. 2d 510 (1953); Hankins v. Borland, 163 Colo. 575, 431 P.2d 1007 (1967); Chappell v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963); Slatten v. Mitchell, 22 Tenn. App. 547, 124 S.W.2d 310 (1938). *See also* Annot., 59 A.L.R.2d 421 (1958).

40. Kinyon & McClure, *supra* note 6, at 920.

41. *See* text accompanying notes 21-22 *supra*.

expect that the civil law rule would have lost its vitality in this era of ever-increasing urbanization. But this has not happened. In the past twenty years very few civil law jurisdictions have been persuaded to reject the civil law rule and adopt either the common enemy or reasonable use rule.[42] Perhaps one reason for the continued vitality of the civil law rule in urban areas is the modifications to the rule.

These modifications have not completely eliminated all difficulties, however. The states that adopted either the common enemy or the reasonable use rule for surface water disputes in urban areas but retained the civil law rule for surface water disputes in rural areas face new problems. One problem is determining what constitutes an "urban area" where the civil law rule does not apply. Property has been classified as urban or rural "based on whether or not the property is within the legal city limits rather than on the probably more logical basis of whether the uses of the property, such as residential subdivision or office park, is urban as opposed to rural."[43]

Another problem with the urban-rural modification to the civil law rule has to do with the fact that the courts adopting this modification are assuming that either the common enemy or reasonable use rule work better in urban areas than does the civil law rule. As will be discussed in a later section[44] the validity of this assumption, especially in regards to the common enemy rule, is questionable.

One question that arises is how well these modifications work. Because they retain much of the basic foundation of the civil law rule alone it is appropriate to discuss first its application in urban areas without modification. Then its application as modified may be analyzed.

When looking at the application of the civil law rule to urban areas we are again faced with the historical notion that the civil law rule discourages or prohibits improvements of land. Certainly the fear expressed by some courts that the civil law rule "prohibits" improvements is not true in the overwhelming majority of cases. A mere statement of the rule makes it obvious that in the practical application of the rule improvements are not "prohibited." Landowners may still improve their land but if they interfere with the natural flow of surface waters to the *injury* of another landowner they will be liable to that other landowner. What this means is that the improving landowner must provide for a way of disposing of the surface water without injuring other landowners or he must be willing to pay for the injuries to the other landowner. The improving landowner is not "prohibited" from making improvements, but he must bear the economic costs of his improvements.[45]

42. Ohio and South Dakota are two of the few jurisdictions which in recent years have rejected the civil law rule. And these two jurisdictions rejected the rule in urban areas only. *See* Lunsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953); Mulder v. Tague, 85 S.D. 544, 186 N.W.2d 884 (1971).

43. Long & Long, *Surface Waters and the Civil Law Rule*, 23 EMORY L.J. 1015, 1029 (1974).

44. *See* text accompanying notes 109-112 *infra.*

45. *See* Comment, *California's Surface Waters*, 39 S. CAL. L. REV. 128 (1966).

Whether the civil law rule "discourages" improvements is a more difficult question. This notion is based on the fact that the person improving his land would have to bear the economic costs of his improvements. When it is said that the civil law rule discourages improvement and development of land "[t]his assumes . . . that decisions of land developers are influenced by rules of law regarding surface water disposal. The cases make no mention of empirical data which would support the assumption."[46] Furthermore, a number of highly urbanized states follow the civil law rule and their growth rate does not appear to have been discouraged by the existence of the rule.[47]

Making the developer bear the economic costs of his improvements may be an advantage of the civil law rule rather than a disadvantage:

> The fact that one may have to drain land in order to develop it, certainly does not mean that he should be able to force his neighbor to pay for it. Nor does it mean that the public should pay for it, particularly if the use to which he will put the land has no great public benefit. While in the early days of the development of this country, a presumption in favor of drainage may have been proper, the policy today probably should favor retention of as many natural areas as possible.[48]

Realizing that, as a general proposition, it cannot reasonably be said that the civil law rule "prohibits" improvement of land, and that in many cases it is not unreasonable to expect the developer to bear the economic costs of his improvements, the validity of the historical notion that the civil law rule does not work well in urban areas is questionable. The example used in the previous section[49] may better illustrate this point. In that example a landowner constructs apartments on his land which change the natural flow of the surface water. The adjoining landowner sues for damages caused by this change in the flow of the surface waters. Under a strict application of the civil law rule the landowner who constructed the apartments would be liable for any damages caused by the change in the natural flow of surface waters. However, in many instances the construction of an efficient drainage system could have avoided any damages to the lower landowner.[50] Similarly, even after the construction of the apartments and resultant injury to the lower landowner the improver can mitigate further liability by providing an

46. Hanks, *Law of Waters in New Jersey*, 22 RUTGERS L. REV. 621, 691 (1968).

47. *See, e.g.*, Keys v. Romley, 64 Cal. 2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966), where the California Supreme Court stated:

> [N]o documentation has been produced to establish that the [civil law] rule has in fact impeded urban development in the state. A number of highly urbanized states follow the rule, and California's phenomenal growth rate, to which no one can be oblivious and of which this court may take judicial notice, appears unstunted by the existence and application of the civil law rule since 1872.

Id. at 406-07, 50 Cal. Rptr. at 279, 412 P.2d at 535.

48. Beck, *supra* note 5, at 578.

49. *See* text accompanying notes 37-38 *supra.*

50. *See* Comment, *supra* note 45.

alternate means of disposing of the surface waters. But in those situations where there is no alternate means of disposing of the surface waters or where the damage to the lower owner is slight the civil law rule may be unduly harsh.[51]

When the reasonable use modification is added to the civil law rule the rule is flexible in those cases where the strict civil law rule is unduly harsh. For instance, in the above example the court would look at the utility of the actor's conduct as compared with the gravity of the harm caused by the alteration of surface water flow.[52] If the harm to the lower owner is slight and if there is no alternate means of disposing of the surface waters, the improving landowner would probably not be liable.[53] Furthermore, by balancing the utility of the actor's conduct against the gravity of the harm the courts are able to further public policy in individual cases, whether that policy is one favoring improvement and development or favoring retention of as many natural areas as possible. This flexibility, provided by the reasonable use modification, is especially needed in urban areas where the land use is varied.

While the reasonable use modification focuses on balancing the utility of the actor's conduct with the gravity of the harm, the minor alteration modification is limited to whether the flow has changed significantly or causes more harm than it would if the alteration had not occurred.[54] Thus this modification is subject to the same criticism as the strict civil law rule: it may work well in a majority of cases but in certain specific cases it is too rigid.

III. COMMON ENEMY RULE IN URBAN AREAS

A. *History*

Stated in its simplest form, the common enemy rule is that each landowner has an unlimited and unqualified right to deal with the surface water on his land as he sees fit, regardless of the harm which this may cause to others.[55]

The development of the common enemy rule took place at approxi-

51. The improving landowner may also be liable for injury caused by actions of the lower landowner that increase the damages, even if those actions are unreasonable. Sheffet v. County of Los Angeles, 3 Cal. App. 3d 720, 84 Cal. Rptr. 11 (1970).

52. This balancing concept would also affect liability for the lower landowner's conduct. Keys v. Romley, 64 Cal. 2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966); Klutey v. Commonwealth, 428 S.W.2d 766 (Ky. 1967); Baer v. Board of County Comm'rs, 255 Md. 163, 257 A.2d 201 (1969).

53. *See* Pagliotti v. Acquistapace, 64 Cal. 2d 873, 50 Cal. Rptr. 282, 412 P.2d 538 (1966).

54. *See* Hankins v. Borland, 163 Colo. 575, 431 P.2d 1007 (1967); Chappell v. Winslow, 258 N.C. 617, 129 S.E.2d 101 (1963). *See also* Beck, *supra* note 5, at 506-07.

55. Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 898-99 (1940); Davis & Snodgrass, *supra* note 5, at 151; 78 AM. JUR. 2d *Waters* § 120 (1975).

mately the same time as the civil law rule.[56] Kinyon and McClure state three reasons why courts adopted the common enemy rule.[57] One reason was the traditional concept of land ownership that landowners should be able to do as they please with their land.[58] Other courts adopted the rule because, in their opinion, it represented the "common law" view.[59] Still others adopted this rule on the ground that it is consistent with the public policy favoring land improvement and development.[60]

Most, if not all, courts agree that the first two reasons given for adopting the common enemy rule no longer retain the vitality they once had.[61] Only the third reason, that society has an interest in developing land, remains of substantial importance. Many courts, from the beginning of the development of the common enemy rule until today, have accepted this notion that the common enemy rule furthers the policy of development and improvement of land.[62] As a consequence it is often stated that for urban areas the common enemy rule is preferable to the civil law rule.[63] As was observed earlier, some civil law jurisdictions even went so far as to adopt the common enemy rule for urban areas.[64]

Many states were first faced with deciding which surface water rule to adopt at a time when urban population was beginning to grow rapidly and development and expansion was emphasized.[65] The reasonable use rule had only been accepted by one jurisdiction[66] at this time and was not considered, by most courts, as an alternative to the civil law or common enemy rule. So, as to choosing a rule that promoted the improvement and development of land, courts limited themselves to the civil law and common enemy rule.

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56. The first case to adopt the common enemy rule was Luther v. Winnisimmet Co., 63 Mass. 171 (1851). *See* cases cited note 19, *supra.*

57. Kinyon & McClure, *supra* note 55, at 898-99.

58. *See Id.*; Davis & Snodgrass, *The Law of Surface Water in Missouri*, 24 MO. L. REV. 137, 151, 163-64 (1959). *See also* State v. Deetz, 66 Wis. 2d 1, 14-15, 224 N.W.2d 407, 414-15 (1974).

59. *See* Grant v. Allen, 41 Conn. 156 (1874); Goodale v. Tuttle, 29 N.Y. 459 (1864).

60. *See, e.g.*, Edwards v. Charlotte, C. & A.R.R., 39 S.C. 472, 18 S.E. 58 (1893).

61. *See, e.g.*, Abbott v. Kansas City, St. J. & C.B.R.R., 83 Mo. 271 (1884); Bowlsby v. Speer, 31 N.J.L. 351 (1865); Barkley v. Wilcox, 86 N.Y. 140 (1881).

62. *See, e.g.*, Dekle v. Vann, 279 Ala. 153, 182 So. 2d 885 (1966); Levy v. Nash, 87 Ark. 41, 112 S.W. 173, 174 (1908); Abbott v. Kansas City, St. J. & C.B.R.R., 83 Mo. 271, 286 (1884); Barkley v. Wilcox, 86 N.Y. 140, 148 (1881); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407, 415 (1975) (abandoning common enemy rule). *Cf.* Keys v. Romley, 64 Cal. 2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4, 10 (1956).

63. *See* Hall v. Rising, 141 Ala. 431, 37 So. 586 (1904); Levy v. Nash, 87 Ark. 41, 112 S.W. 173 (1908); Abbott v. Kansas City St. J. & C.B.R.R., 83 Mo. 271 (1884); Bowlsby v. Speer, 31 N.J.L. 351 (1865); Jordan v. City of Benwood, 26 S.E. 266 (W. Va. 1896). *Cf.* Gannon v. Hargodon, 92 Mass. (10 Allen) 106 (1865).

64. *See* text accompanying notes 26-32 *supra.*

65. Most courts decided which surface water rule to apply in their jurisdiction between the years of 1860-1900. *See generally* Kinyon & McClure, *supra* note 55.

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

It is not clear from those cases where the common enemy rule was adopted for the reason that it promotes development and improvement of land whether the courts were more convinced that the common enemy rule promoted the improvement of land than they were with the belief that the civil law rule hindered the improvement of land.[67] As a result, the opinions were often couched in conclusory terms.[68]

For example, in *Barkley v. Wilcox*[69] surface water flowed naturally from the plaintiff's lot over a depression across defendant's lot. The defendant thereafter built a house on his lot, filled in the lot and graded up the sidewalk in front of it. When it rained, surface water backed up onto the plaintiff's lot and into his basement. In an action to recover damages the court held for the defendant. The court stated that it is "for the public interest that improvements shall be made, and that towns and cities shall be built."[70] The court reasoned that if it adopted the civil law rule "which will impose upon them [the lower owners] a perpetual servitude, for the purpose of drainage, for the benefit of upper proprietors," the lower owners' lots "must remain unimproved."[71] In adopting the common enemy rule the court stated that it is better "to establish a rule which will permit the reclamation and improvement of low and waste lands."[72]

In adopting the common enemy rule this court, as did other courts,[73] made the following assumptions: (1) if the civil law rule is adopted the lower owners' lots "must remain unimproved;" and (2) the common enemy rule promotes development and improvement of land. As previously discussed,[74] the first assumption is not necessarily true, and in the following section it will be seen that the second assumption is also questionable.

B. *Modifications Aimed at Adapting The Common Enemy Rule to Urban Areas*

1. In General

Just as the civil law rule has been modified in most states so has the common enemy rule.[75] In certain modifications aimed at adapting the civil law rule to urban areas some courts stated that these modifications were

67. *See* cases cited note 63 *supra. Cf.* Taylor v. Fickas, 64 Ind. 167, 175-76 (1878); Morrison v. Bucksport & B.R.R., 67 Me. 353, 356 (1877); Henderson v. Hines, 183 N.W. 531, 534 (N.D. 1921).

68. *See* cases cited note 67 *supra.*

69. 86 N.Y. 140 (1881).

70. Barkley v. Wilcox, 86 N.Y. 140, 148 (1881).

71. *Id.*

72. *Id.*

73. *See, e.g.*, Abbott v. Kansas City, St. J. & C.B.R.R., 83 Mo. 271, 286 (1884).

74. *See* text accompanying notes 46-47 *supra.*

75. *See* Beck, *The Law of Drainage*, 5 WATERS AND WATER RIGHTS, (R.E. Clark, Ed., 1972), at 491-98; Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NAT. RESOURCES J. 72, 81-94 (1968); Kinyon & McClure, *supra* note 55, at 913-35.

necessary to make the civil law rule workable in urban areas.[76] However, in modifying the common enemy rule, few cases can be found which state that the rule is being modified to make it more workable in urban areas.

Perhaps the reason that few courts state they are modifying the rule to make it more workable in urban areas is the historical notion that the common enemy rule promotes development and improvement of land. Because the common enemy rule was thought to work well in urban areas perhaps the courts did not find it necessary to state the modifications of the rule in terms of adapting the rule to urban areas.

Nevertheless there have been two modifications made to the common enemy rule in a substantial number of jurisdictions. Although these two modifications have seldom been *expressly* adopted for the purpose of adapting the common enemy rule to urban areas, they will be discussed as a possible method of accomplishing that result. These two modifications to the common enemy rule are the "collection and discharge"[77] modification and the "due care" modification.[78]

Under the "collection and discharge" modification a landowner may not collect large amounts of surface water on his land and then discharge it onto adjoining land to its injury. This modification alone does not impose liability on a landowner who dams surface water to the injury of another, or who changes the course of, or increases the flow of, surface waters to the injury of another.[79] Generally, the collection and discharge modification is only useful in imposing liability on a landowner who uses sewers or gutters to collect and discharge surface waters on an adjoining landowner to his injury.[80]

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76. *See* text accompanying notes 26-32 *supra.*

77. All common enemy jurisdictions have adopted some form of the "collection and discharge" modification. For some different formulations of this modification see Miller v. Darby, 336 Mass. 243, 143 N.E.2d 816 (1957); Haferkamp v. City of Rock Hill, 316 S.W.2d 620 (Mo. 1958); Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195 (1962); Buffalo Sewer Authority v. Town of Cheektowaga, 20 N.Y.2d 47, 281 N.Y.S.2d 326, 228 N.E.2d 386 (1967); Gregory v. Bogdanoff, 307 P.2d 841 (Okla. 1957). *See also* Beck, *supra* note 75, at 491-92; Davis & Snodgrass, *supra* note 58, at 151.

78. In over half the jurisdictions that follow the common enemy rule some form of the "due care" modification has been adopted. For some different formulations of this modification, see Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195, 199 (1962) ("without negligently or unnecessarily injuring another"); Kossoff v. Rathgeb-Walsh Inc., 3 N.Y.2d 583, 170 N.Y.S.2d 789, 148 N.E.2d 132, 135 (1958) ("[P]rovided . . . that the improvements are made in good faith to fit the property to some rational use to which it is adapted. . ."); Yenchko v. Grontkowski, 385 Pa. 272, 122 A.2d 705 (1956) ("due care"). *See also* Beck, *supra* note 75, at 493-94; Davis & Snodgrass, *supra* note 58, at 152-54.

79. *See generally* Maloney & Plager, *supra* note 75; Kinyon & McClure, *supra* note 55; Davis & Snodgrass, *supra* note 58.

80. *Cf.* Kapayanis v. Fishbein, 344 Mass. 86, 181 N.E.2d 653 (1962); Buffalo Sewer Authority v. Town of Cheektowaga, 20 N.Y.2d 47, 281 N.Y.S.2d 326, 228 N.E.2d 386 (1967); Seifert v. Sound Beach Property Owners Assn., 60 Misc. 2d 300,

Under the due care modification, the court's determination is limited to whether a landowner used "due care"[81] or "reasonable care"[82] or was "without negligence"[83] in improving his land. Absent negligence or lack of due care the common enemy rule is applied.[84] If the due care modification to the common enemy rule was the equivalent of the reasonable use modification to the civil law rule discussed earlier,[85] the common enemy rule would be a more practical rule for urban areas. But few if any common enemy jurisdictions[86] applying the due care modification have gone so far as to apply a reasonable use modification which considers the utility of the actor's conduct as compared with the gravity of the harm caused by the alteration of surface water flow.

Thus, even when the due care modification is consistently applied it only mitigates the harshness of the common enemy rule when the improving landowner is negligent. The utility of the actor's conduct and the gravity of the harm caused by such conduct are not usually considered. Consequently, in many situations under the due care modification adjoining landowners must bear the cost of another's improvements, and all the criticisms made of the common enemy rule apply.[87] The due care modification, like the collection and discharge modification, is of limited value in adapting the common enemy rule to urban areas.

2. The Missouri Approach

a. "Due Care" Modification

Missouri is one state that has adopted some form of both modifications of the common enemy rule. With numerous cases on this subject,[88] Missouri

303 N.Y.S.2d 85 (1969). In some states a landowner, if he meets certain requirements may still be privileged to collect and discharge surface waters. *See* text accompanying notes 104-08 *infra*; Borgman v. Florissant Development Co., 515 S.W.2d 189 (Mo. App., D. St. L. 1974).

81. Yenchko v. Grontkowski, 385 Pa. 272, 122 A.2d 705 (1956).

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

83. Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195, 199 (1962).

84. Butler v. Bruno, 341 A.2d 735, 740 (R.I. 1975).

85. *See* text accompanying notes 33-36 *supra.*

86. If Ohio is still considered a common enemy jurisdiction as to urban lands, then it may be one of the few common enemy jurisdictions to adopt a reasonable use modification to the common enemy rule. *Compare* Lunsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953) *with* Johnson v. Goodview Homes—1, Inc., 82 Ohio L. Abs. 526, 167 N.E.2d 132 (1960).

87. For criticisms of the common enemy rule, see text accompanying notes 110-24 *infra.*

88. Some of the more recent Missouri cases are Hawkins v. Burlington No. Inc., 514 S.W.2d 593 (Mo. En Banc 1974); Miller Land Co. v. Liberty Township, 510 S.W.2d 473 (Mo. En Banc 1974); Wells v. State Highway Comm'n, 503 S.W.2d 689 (Mo. 1973); Fisher v. Kansas City, 518 S.W.2d 138 (Mo. App., D.K.C. 1975); Borgman v. Florissant Dev. Co., 515 S.W.2d 189 (Mo. App., D. St. L. 1974); Eilers v. Kodner Dev. Corp., 513 S.W.2d 663 (Mo. App., D. St. L. 1974); Camden Special Road Dist. v. Taylor, 495 S.W.2d 93 (Mo. App., D.K.C. 1973); Spain v. City of Cape

is a good example of the results reached under the "due care" modification and the "collection and discharge" modification. Missouri has followed the common enemy rule since *Abbott v. Kansas City St. J. & C. B. R.R.*[89] was decided in 1884. Before this decision Missouri had followed the civil law rule[90] and before that the common enemy rule.[91]

The court in *Abbott* gave a traditional reason for adopting the common enemy rule: "[I]t permits and encourages public and private improvements . . . ."[92] However, *Abbott* cited with approval an earlier Missouri case which said: "[P]ersons exercising this right to improve and ameliorate the condition of their own land, must exercise it in a careful and prudent way."[93] The *Abbott* court cited another case which said: "[I]n the case of surface water which is regarded as a common enemy, he is at liberty to guard against it or divert it from his premises, provided he exercises reasonable care and prudence in accomplishing that object."[94] And in stating its reason for adopting the rule the Missouri Supreme Court said: "[I]t permits and encourages public and private improvements, and at the same time restrains those engaged in such enterprises from *unnecessarily or carelessly injuring another.*"[95]

The language used in *Abbott* is typical of that used in the "due care" modification of the common enemy rule.[96] However, the Missouri courts have been reluctant to expand this reasonable care language. In fact, in *Camden Special Road Dist. v. Taylor*[97] this language was given a restricted reading. In that case the lower landowners constructed a levee running east and west across the north boundary of their land, thereby blocking the natural flow of surface water from the north to the south, causing the water to back up onto and across a public road. The water standing on the road prevented the public from using the road. The special road district sought a mandatory injunction compelling the lower landowners to remove the levee and to permanently enjoin them from constructing a levy which would bar or impede the flow of surface water in the area of the road. The court held that the lower landowners' action, although it forced surface water onto a

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Girardeau, 484 S.W.2d 498 (Mo. App., D. St. L. 1972); Skaggs v. City of Cape Girardeau, 472 S.W.2d 870 (St. L. Mo. App. 1971); Minton v. Steakley, 466 S.W.2d 441 (Spr. Mo. App. 1971).

89. 83 Mo. 271 (1884).

90. McCormick v. Kansas City, St. J. & C.B.R.R., 70 Mo. 359 (1870); Shane v. Kansas City, St. J. & C.B.R.R., 71 Mo. 237 (1879).

91. Imler v. City of Springfield, 55 Mo. 119 (1874). For a discussion of the history of surface water law in Missouri, see Davis & Snodgrass, *supra* note 58, at 281.

92. 83 Mo. at 286.

93. McCormick v. Kansas City, St. J. & C.B.R.R., 57 Mo. 433, 437 (1874), *quoted in* Abbott v. Kansas City, St. J. & C.B.R.R., 83 Mo. 271, 283 (1884).

94. Hosher v. Kansas City, St. J. & C.B.R.R., 60 Mo. 329, 333 (1875), *quoted in* Abbott v. Kansas City, St. J. & C.B.R.R., 83 Mo. 271, 284 (1884).

95. 83 Mo. at 286 (emphasis added).

96. *See* text accompanying note 78 *supra.*

97. 495 S.W.2d 93 (Mo. App., D.K.C. 1973).

public road, was "cloaked with legal immunity by virtue of the 'common enemy doctrine'."[98] The court stated:

> [T]he proviso attached to guarding against or diverting surface water . . . does not, in any way modify or limit the basic and inherent right constituting the heart and core of the "common enemy doctrine" that a landowner may ward off surface water even though in doing so he damages his neighbor. The proviso, that one "exercises reasonable care and prudence" in doing so lends itself solely to and prohibits unnecessary collecting and discharging surface water to the damage of an adjoining owner.[99]

The language of *Camden* suggests that Missouri follows only the "collecting and discharging" modification and not the "reasonable care" or "due care" modification. But two Missouri Supreme Court decisions after *Camden* indicate that Missouri still follows both modifications to the common enemy rule. In *Wells v. State Highway Comm'n*[100] the court said that one must act within reasonable limits and not recklessly before he is given the benefit of the common enemy rule.[101] And in *Miller Land Co. v. Liberty Township*,[102] where there was no evidence that defendants had unnecessarily "collected" and "discharged" water on the lower landowner, the court again stated that rights given under the common enemy rule must be exercised within reasonable limits.

b. "Collection and Discharge" Modification

A recent Missouri case is a good example of how this modification is applied. In *Borgman v. Florissant Dev. Co.*[103] the defendants developed an apartment complex on land abutting a tract of land belonging to plaintiffs. The development included various storm sewers, drains, and swales for the collection and diversion of surface waters. These waters were drained through a concrete catch basin and a 10-foot weir situated on defendants' property adjacent to the common boundary line with plaintiffs' land. The surface waters were discharged onto plaintiffs' land from the weir. Plaintiffs sought to enjoin defendants from collecting and discharging surface water onto plaintiffs' land.

From a general statement of the collection and discharge modification it would seem that the plaintiffs would be entitled to an injunction. Clearly the defendants "collected" and "discharged" surface water onto the plaintiffs' lands. However, an injunction was denied.[104] While Missouri follows the "collection and discharge" modification, the courts distinguish between the collection and discharge of surface water into a natural

98. *Id.* at 98.
99. *Id.* (citations omitted).
100. 503 S.W.2d 689 (Mo. 1973).
101. *Id.* at 692.
102. 510 S.W.2d 473 (Mo. En Banc 1974).
103. 515 S.W.2d 189 (Mo. App., D. St. L. 1974).
104. *Id.* at 191.

drainway on the landowners' property, "where it would have gone anyway, and the discharge of surface water on neighboring land where it would not naturally have drained."[105] A landowner may artificially collect surface water by using sewers, gutters, and other artificial water channels and discharge it on the neighboring lands provided he does so through a natural drainway, without negligence, and provided further that he does not exceed the natural capacity of the drainway to the damage of adjoining land.[106] Because the defendants in *Borgman* collected and discharged surface water into a natural drainway without exceeding the natural capacity of that drainway their conduct was privileged.[107]

C. *Modern Status of Common Enemy Rule in Urban Areas*

Because the common enemy rule was historically applied by those courts concerned with development in urban areas, one might expect that it would have continued vitality in this era of ever-increasing urbanization. However, the trend is otherwise. While many states still follow the common enemy rule in one form or another, there is a definite trend towards rejecting the rule.[108]

The following three propositions may account for this trend: (1) the common enemy rule does not always encourage development and improvement of land;[109] (2) public policy has begun to change from favoring the developer to favoring the individual landowner and retaining as many natural areas as possible;[110] and (3) there never was much concern about adapting the common enemy rule to urban areas. Consequently, even the modified versions of the rule have become out-moded when applied in certain factual situations in urban areas.[111] The first two propositions need some explanation.[112]

1. Encouraging Improvement of Land

When courts said the common enemy rule promotes improvement of land and the civil law rule hinders improvement of land one assumption

105. Haferkamp v. City of Rock Hill, 316 S.W.2d 620, 627 (Mo. 1958).

106. *Id.* at 625-26.

107. Borgman v. Florissant Development Co., 515 S.W.2d 189, 191 (Mo. App., D. St. L. 1974).

108. The following jurisdictions have rejected the common enemy rule in favor of the reasonable use rule: Hawaii: Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Minnesota: Enderson v. Kelchan, 226 Minn. 163, 32 N.W.2d 286 (1948); New Jersey: Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); North Dakota: Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967); Rhode Island: Butler v. Bruno, 341 A.2d 735 (R.I. 1975); Texas: City of Houston v. Renault, Inc., 431 S.W.2d 322 (Tex. 1968); Wisconsin: State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

109. *See* text accompanying notes 113-20 *infra.*

110. *See* text accompanying notes 121-33 *infra.*

111. *See* text accompanying notes 81-87 *supra,* where it is noted that the "due care" and "collection and discharge" modifications apply only in limited situations.

112. The third proposition is discussed at text accompanying notes 82-88 *supra.*

that was being made was that people would be less likely to improve their land if they had to bear the economic costs of ridding their land of surface waters. Under the civil law rule the improver must bear the costs of ridding his land of surface water.[113] Under the common enemy rule the notion was that the improver did not have to bear those economic costs.[114]

The following example from a case[115] involving railroads illustrates how the common enemy rule *may* encourage improvement of land. When road beds were constructed, the natural flows of surface waters were often obstructed thereby injuring adjoining landowners. If the civil law rule had been strictly applied, the railroad would have had to bear the added expense of making sure the surface water did not injure nearby landowners. However, under the common enemy rule the railroad did not have to worry about surface waters. Adjoining landowners who were injured had to bear the expense of ridding their land of the surface water. The court may have correctly concluded that under the common enemy rule the railroad would be encouraged to make further improvements because it did not have to bear the cost of any surface water damage.[116]

This reasoning, however, ignored the landowners bordering the railroad whose land may have been flooded. Did flooding their land encourage them to make improvements to *their* land? If the adjoining landowners did not intend to improve their land, which may have been the case in rural areas, the common enemy rule may have had the effect of "encouraging" the improvement of land. However, this analysis is likely to be different if the adjoining landowners had already improved or intended to improve their land.

The case of *Watters v. National Drive-In, Inc.*[117] further illustrates this point. In *Watters* the defendant built a drive-in theater next to plaintiffs' property. Defendant changed the grade of the land, filled up natural potholes, and prevented, by grading and gravelling, the natural absorption of surface water into the soil. This resulted in a large amount of water being drained onto the plaintiffs' land. Because of the water some areas of plaintiffs' land could not be used and some improvements plaintiffs had made were damaged. In applying the common enemy rule, the Wisconsin Supreme Court stated that the plaintiffs had no cause of action for damages caused by the surface water.[118]

This result may have "encouraged" the defendants to improve their land, but it certainly did not so encourage the plaintiffs. Ironically the

113. *See* Comment, *California's Surface Waters*, 39 S. CAL. L. REV. 128 (1966).
114. *Cf.* Abbott v. Kansas City, St. J. & C.B.R.R., 83 Mo. 271 (1884); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Barkley v. Wilcox, 86 N.Y. 140 (1881).
115. Abbott v. Kansas City, St. J. & C.B.R.R., 83 Mo. 271 (1884).
116. *Id.*
117. 266 Wis. 432, 63 N.W.2d 708 (1954).
118. *Id.* at 437, 63 N.W.2d at 711.

common enemy rule may have encouraged the defendant to destroy or damage other landowners' improvements. It is clear, therefore, that the notion that the common enemy rule encourages improvement of land is not always correct.[119] The harsh results reached under the common enemy rule in cases such as *Watters* have led some courts to reject the common enemy rule.[120]

2. A Change in Public Policy

Some courts[121] have begun to question whether the need to favor land development is as great as it once was. In addition, it is being recognized that the needs of urban and suburban areas involve more than the need to improve and develop. Among other things, people in these areas are demanding that parks, lakes, and natural areas be retained. The policy of favoring the developer may be proper at some times in some communities, but at other times the policy favoring retention of as many natural areas as possible is preferable.

Several courts have also questioned the value of making adjoining landowners bear the costs of improvements made by another. In *Armstrong v. Francis Corp.*[122] the New Jersey Supreme Court said:

> [W]hile today's mass home building projects . . . are assuredly in the social good, no reason suggests itself why, in justice, the economic costs incident to the expulsion of surface waters in the transformation of the rural or semi-rural areas . . . into urban or suburban communities should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit.[123]

Because of the varied land uses in urban areas, a rule which makes each adjoining landowner bear the costs of another's improvement is too rigid. Few landowners would be happy to learn that they must bear the cost of ridding their land of surface waters which were cast upon them when a massage parlor was built next door. But such would be the result under the common enemy rule. This rule, in attempting to promote the policy of favoring land development, conflicts with many other valid policies. If the common enemy rule conflicts with other public policy, if the need for development is no longer as great, and if the rule may only under certain circumstances promote improvement and development, then the argument for the common enemy rule in urban areas loses much of its vitality.

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119. *See* Maloney & Plager, *supra* note 75, at 78; Hanks, *Law of Waters in New Jersey*, 22 RUTGERS L. REV. 621, 690 (1968).

120. Wisconsin rejected the common enemy rule and expressly overruled *Watters* in *State v. Deetz*, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

121. *See, e.g.*, Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

122. *Id.*

123. *Id.* at 10.

IV. REASONABLE USE RULE IN URBAN AREAS

A. *History*

Under the reasonable use rule a landowner's liability turns on a determination of the reasonableness of his actions. That is, a landowner who interferes with the flow of surface water is liable only when such interference is unreasonable. The issue of reasonableness is a question of fact to be determined upon considering all the relevant circumstances.[124] Some of these circumstances were stated in *Swett v. Cutts*[125] in 1870:

> In determining this question all the circumstances of the case would of course be considered; and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to the other landowners as compared with the value of such improvements.[126]

By including these factors the court foreclosed, at an early point in the history of the rule, any argument that the reasonable use rule would prohibit or discourage improvement of land. Before 1956 only two jurisdictions had adopted the reasonable use rule.[127] Since that time at least ten other jurisdictions have adopted this rule, eight of them in the past ten years.[128]

Some states whch had followed the civil law or common enemy rule modified these rules to such an extent that they "evolved" into the reasonable use rule.[129] Kinyon and McClure point out that in Minnesota the process was as follows: "First, the unqualified common enemy rule; then specific exceptions; then the 'qualified' common enemy rule; and finally,

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124. Kinyon & McClure, *Interference with Surface Waters*, 24 MINN. L. REV. 891, 904 (1940); Davis & Snodgrass, *supra* note 91, at 152.

125. 50 N.H. 439 (1870).

126. *Id.* at 446.

127. New Hampshire: Swett v. Cutts, 50 N.H. 439 (1870); and Minnesota: Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948).

128. Alaska: Weinberg v. Northern Alaska Development Corp., 384 P.2d 450 (Alaska 1963); Hawaii: Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Kentucky: Klutey v. Commonwealth, Dept. of Highways, 428 S.W.2d 766 (Ky. 1967) (may have merely adopted a reasonable use modification to the civil law rule); New Jersey: Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); North Dakota: Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967); Rhode Island: Butler v. Bruno, 341 A.2d 735 (R.I. 1975); South Dakota: Mulder v. Tague, 85 S.D. 544, 186 N.W.2d 884 (1971) (as to urban lands); Texas: City of Houston v. Renault, Inc., 431 S.W.2d 322 (Tex. 1968) (as to urban lands); Utah: Sanford v. University of Utah, 26 Utah 2d 285, 488 P.2d 741 (1971); Wisconsin: State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

In addition the reasonable use rule may be in effect in Ohio as to urban lands, Lunsford v. Stewart, 95 Ohio App. 383, 120 N.E.2d 136 (1953), and in Delaware generally, E.J. Hollingsworth Co. v. Jardel Co., 40 Del. Ch. 196, 178 A.2d 307 (1962).

129. *Cf.* Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970); Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967).

the gradual adoption of the reasonable use principle as the sole test."[130] Consequently, when Minnesota finally adopted the full reasonable use rule it was not a complete rejection of the rule, which the Minnesota courts had been applying.[131] Instead, the adoption of the reasonable use rule was the last step towards developing a rule adaptable to modern society.

The increased number of disputes arising in urban areas may have precipitated this evolutionary process in some states.[132] However, other states such as Missouri have reached the "qualified" common enemy stage, but have been reluctant to take the next step of adopting the reasonable use principle as the sole test.[133] Still other states have rejected an express attempt to have a reasonable use test applied to urban areas.[134]

B. *Modifications Aimed at Adapting the Reasonable Use Rule to Urban Areas*

While the common enemy rule and civil law rule have undergone various modifications, the reasonable use rule has remained substantially the same.[135] This does not necessarily mean, however, that the results reached under the reasonable use rule have remained the same. Changes in public policy may be reflected in a court's decision, for under the reasonable use rule courts balance the utility of the use against the gravity of the harm. Because society's concept of a certain use changes, the rule remains current. Whether the rule is applied in cities, suburbs, or rural areas, by balancing the utility of use against the gravity of harm, different policy considerations for different areas are given weight in reaching a result.

The jurisdictions which have adopted the reasonable use rule have set forth different formulations for determining liability.[136] However, because the results reached under one formulation will probably not differ from results reached under another formulation, it may be helpful to set forth one of these formulations to illustrate the factors involved.

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130. Kinyon & McClure, *supra* note 124, at 935.

131. *See* Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948); Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462 (1894).

132. Rhode Island and Wisconsin are examples of jurisdictions which made a complete break from their previous rules, instead of evolving their rules through a process of modifications into the reasonable use rule. *See* Butler v. Bruno, 341 A.2d 735 (R.I. 1975) and State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

133. *Cf.* Miller Land Co. v. Liberty Township, 510 S.W.2d 473 (Mo. En Banc 1974); Wells v. State Highway Comm'n, 503 S.W.2d 689 (Mo. 1973); Camden Special Rd. Dist. v. Taylor, 495 S.W.2d 93 (Mo. App., D.K.C. 1973).

134. Mello v. Lepisto, 77 Ill. App. 2d 399, 222 N.E.2d 543 (1966).

135. *Compare* Swett v. Cutts, 50 N.H. 439 (1870) *with* Butler v. Bruno, 341 A.2d 735 (R.I. 1975).

136. For three somewhat different approaches see Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

Several jurisdictions follow the formulation adopted by Minnesota in *Enderson v. Kelehan.*[137] In *Enderson* the court considered the following factors:

(1) Is there a reasonable necessity for such drainage?
(2) Has reasonable care been taken to avoid unnecessary injury to the land receiving the water?
(3) Does the benefit accruing to the land drained reasonably outweigh the resulting harm?
(4) When practicable, is the diversion accomplished by reasonably improving the normal and natural system of drainage, or if such a procedure is not practicable, has a reasonable and feasible artifical drainage system been installed?[138]

Since the reasonable use rule was first adopted, the third factor listed above has been a key factor in determining liability.[139] Whether this factor is expressd as weighing the benefit to the land with the resulting harm or balancing the utility of the use with the gravity of the harm, it is basic to all the formulations of the reasonable use rule.[140]

C. *Modern Status of Reasonable Use Rule in Urban Areas*

With approximately twelve jurisdictions following the full reasonable use rule[141] and almost the same number of jurisdictions having modified the civil law or common enemy rule by a test of reasonable use or reasonable care,[142] it is clear that many courts favor the basic philosophy of reasonableness in deciding surface water disputes. The increased number of surface water disputes arising in urban areas where land use is varied has been one impetus towards acceptance of the reasonable use rule.

Probably the one advantage of the reasonable use rule to which courts most often refer is its flexibility.[143] Consider the flexibility of the rule in regard to the notion that it is in the public's interest to encourage improvement and development of land. While as a general proposition it may be in the public's interest to encourage improvement and development

137. 226 Minn. 163, 32 N.W.2d 286 (1948).

138. *Id.* at 289, 32 N.W.2d at 289. *See also* Butler v. Bruno, 341 A.2d 735, 740 (R.I. 1975).

139. *See, e.g.*, Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948); Swett v. Cutts, 50 N.H. 439 (1870); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Butler v. Bruno, 341 A.2d 735 (R.I. 1975); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

140. *See* cases cited note 136 *supra.*

141. *See* cases cited note 127, 128 *supra.*

142. California and Maryland have modified their civil law rules by a test of reasonable use. Keys v. Romley, 64 Cal. 2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966); Baer v. Board of County Comm'rs, 255 Md. 163, 257 A.2d 201 (1969). Washington is an example of a common enemy jurisdiction which has adopted a reasonable use modification. Morris v. McNicol, 83 Wash. 2d 491, 519 P.2d 7 (1974).

143. *See, e.g.*, Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956). *See also* 5 R.R. POWELL, REAL PROPERTY § 731 (1962).

of land, in specific cases the public's interest may be otherwise. One person's "improvement" may be another's nuisance. Under the common enemy rule the "improver" in constructing a nuisance is privileged to rid his land of surface waters even if it causes damage to an adjoining landowner.[144] However, under the reasonable use rule, it is likely that the "improving" landowner, in this situation, would be liable for the resulting harm to adjoining landowners.[145] Where the common enemy rule is supposed to encourage *any* "improvement" and the civil law rule to discourage *any* "improvement," the reasonable use rule, because of its flexibility, is not so limited.

Whereas some courts thought that the common enemy rule worked well in urban areas and the civil law rule in rural areas,[146] the reasonable use rule is not so limited. The flexibility of the reasonable use rule makes it a practical rule for both urban and rural areas. By balancing the utility of use against the gravity of harm, the different policy considerations for the different areas are given weight in finding a result. There is no need to restrict the rule to certain areas within a single state.

Still another advantage of the reasonable use rule is that, unlike the common enemy rule, it does not attempt to promote any single policy considerations such as improvement of land. In adopting the reasonable use rule, several jurisdictions have indicated that although it is still true that the policy of promoting improvement of land is important, it is only one of the many factors which should be considered in determining whether the utility of the actor's conduct outweighs the gravity of harm to others.[147]

The major criticism of the reasonable use rule is that the rule lacks predictability because reasonableness is a question of fact to be determined on a case by case approach.[148] The proponents of the civil law rule and the common enemy rule argue that those rules are advantageous in that they give to a concerned landowner the advantage of predictability.[149] Certainly it is true that the reasonable use rule lacks predictability but, as the Supreme Court of Rhode Island recently stated:

> [A] desire for certainty of liability should not and must not serve as a judicial pardon for the unreasonable conduct which has been manifested by any landowner in our modern society.[150]

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144. *See* text accompanying note 58 *supra.*

145. *Cf.* Sachs v. Chiat, 281 Minn. 540, 162 N.W.2d 243 (1868); RESTATEMENT (SECOND) OF TORTS §§ 826-27 (Tentative Draft No. 18, 1972).

146. *See* text accompanying notes 25-31 *supra.*

147. Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); State v. Deetz, 66 Wis. 2d 1, 224 N.W.2d 407 (1974).

148. *See* Keys v. Romley, 64 Cal. 2d 396, 50 Cal. Rptr. 273, 412 P.2d 529 (1966).

149. *Id. Cf.* Butler v. Bruno, 341 A.2d 735 (R.I. 1975).

150. Butler v. Bruno, 341 A.2d 735, 741 (R.I. 1975).

Moreover, the civil law rule and common enemy rule no longer have the predictability they once might have had.[151] In many jurisdictions the civil law rule and common enemy rule have been modified by various exceptions that lead to lack of predictability. Furthermore, it is likely that the civil law rule and common enemy rule will become more uncertain, especially in urban areas where many of the "hard" cases are decided. The attempt to make these rules more adaptable to urban areas without adopting some form of the rule of reasonableness requires a court to modify these rules and add even more uncertainty to them.

Because the reasonable use rule is flexible, adaptable to cities and suburbs, is not limited to promoting any single policy consideration, and allows a court to reach a fair result in individual cases, it is a practical rule for areas where land use is varied and disputes are likely to occur. The "benefits" of the rule clearly outweigh any "harm" caused by its lack of predictability.

V. CONCLUSION

When the surface water rules were being developed, it was often stated that the common enemy rule was the most practical rule for urban areas and the civil law rule the least practical. This conclusion was reached by focusing only on the issue of development and improvement of land.

While many cases still conclude that the civil law rule is the least desirable rule for urban areas, it is this writer's opinion that the civil law rule is neither the least nor the most desirable of the rules. The least desirable rule for urban areas is the common enemy rule. The most desirable rule is the unreasonable use rule.

The common enemy rule is the least desirable rule because in attempting to promote the policy consideration of improvement of land, the rule conflicts with other policy considerations and makes adjoining landowners bear the cost of another's "improvement". Moreover, one landowner who is "encouraged" to make improvements may at the same time be "encouraged" to damage his neighbor's improvements. In most states the modifications to the rule have gone far enough to make the rule a practical one for urban areas.

Simply because the civil law rule makes the improver bear the cost of his improvements does not make the rule an undesirable one for urban areas. A closer analysis of the fact that the improver must bear the cost of his improvements shows that the rule has not hindered improvement and development in urban areas. However, the civil law rule does not normally consider the reasonableness of the landowner's behavior. Consequently, the

151. Beck, *The Law of Drainage*, 5 WATERS AND WATER RIGHTS (R.E. Clark, Ed., 1972) at 578.

rule is not the most desirable one for urban areas because it lacks the flexibility which is needed in an area where land use is varied and different policy considerations come into conflict.[152] However, the reasonable use modification to the civil law rule provides this needed flexibility and is a rule which is adaptable to urban needs.

Because of its flexibility, the reasonable use rule is the most desirable rule for urban areas. The flexibility of the rule allows a court to reach a fair result whether the dispute arose in a city, suburb, or rural area. The rule is not limited to promoting any single policy consideration, remains current without the need for various modifications and, by its very nature, is adaptable to urban needs.

CHARLES E. BRIDGES

152. Another problem with the civil law rule, which is especially evident in urban areas, is that it is often difficult to determine what the natural conditions were or would be if not altered. *See* City of Houston v. Renault, Inc., 431 S.W.2d 322 (Tex. 1968), where the Texas Supreme Court stated that it preferred the reasonable use rule "at least with respect to urban property where conditions are constantly changing and it is generally difficult or even impossible to establish how surface water flowed 'when untouched and undirected by the hand of man'." *Id.* at 325. *See also* Keys v. Romley, 64 Cal. 2d 396, 406, 50 Cal. Rptr. 273, 289, 412 P.2d 529, 536 (1966).