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Surface Drainage

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S U R F A C E D R A I N A G E.

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SURFACE DRAINAGE.

This subject being a branch of the law of real property, it is quite probable that questions as to the rights and remedies of parties interested therein, and arising out of the subject of surface drainage, are as old as the law of real property itself. But in the earlier or more primitive stages in the development of the law of realty it can hardly be supposed that so much importance was accorded the subject as in more modern times. Without undertaking a minute or detailed examination of the processes by which it has been evolved until reaching its present status, it is perhaps sufficient to say that an examination of the authorities in the American courts will convince one that the subject is one of much importance, often litigated, and that the cases are in such a state of confusion that it would be an utter impossibility to reduce them to a state of harmony. Real property throughout this country is being rapidly and steadily developed in value and, of course, it will follow from this that those who are the owners thereof, or who have property rights therein, will

be more diligent in ascertaining and enforcing rights originating or issuing therefrom.

Perhaps it will be well, before proceeding to a discussion of the law of the subject, to make an effort to gain at least a rough idea of what is meant by the term "surface water", for laws on the subject of surface drainage would be needless unless there be something to which the laws are to be applied. In Hoyt v. Hudson (27 Wis. 656), a water course is said to be "a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides or banks, and usually discharge itself into some other stream or body of water. It must be something more than mere surface drainage over the entire surface of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, water courses." While courts cannot frame, logically, accurate definitions of the terms above referred to, yet one may

form a fair general idea of what "surface water" is, by excluding all subterranean waters, and that before referred to under the description of water courses.

One great cause of the confusion, before referred to, of the authorities in this country on the subject of surface drainage, is the fact that the doctrines both of the civil law and the common law are each relied on as the guide for the courts in expounding the rights of parties litigant ; and, as the doctrines of each system of jurisprudence are, on this point, wholly at variance, confusion cannot help but follow. Then, in other courts, it seems to have been the policy to blend or combine the principles of the common and the civil law in deciding cases of this sort. This, of course, brings another element of confusion into the cases. As to whether the policy of either system of jurisprudence will eventually prevail throughout the country on this subject, it is difficult to determine or foresee.

There is one branch of the law, which in many respects is analogous to the law of surface water, that is now pretty firmly established on a basis that seems to us would be a fair way of ruling in cases which involve questions of surface water and surface drainage. That is this : by the doctrine of

ancient lights, the owner of the servient tenement was bound to so use and improve his lands, tenements, etc., as to leave the lights, views, etc. of the dominant tenement unobstructed and unimpaired. The above doctrine has been generally repudiated in this country, the States of New York and New Jersey being perhaps the only States where the doctrine is recognized. In Stein v. Hauck, an Indiana case decided in 1878, the court, among other things, said, on the subject of ancient lights : "The owner of space may and can not know of right the internal arrangements of his neighbor's house, and may stand by while the claim which is to finally invade, if not to embarrass and destroy the usefulness of his land, is gradually accruing against him until it becomes a vested right which he cannot dispute. The boundaries of land are generally sufficient for the supply of its own light and air ; and we do not see why the owner should be allowed to go beyond them in order to supply himself with these blessings, against the rights of another, or to turn that which was granted him as a favor into an injury to the grantor. We cannot see why this rule will work injury to any one, and we think it will place these claims on a safe footing. It is very easy to reserve such an easement to the vendor or to grant it to the vendee

in the deed which conveys the land, or to create it by valid contract. Then each one knows what he sells and what he buys, and all persons are protected in their rights."

Now mere surface water, while it can be collected into a body, as ponds, cisterns and the like, yet if left to itself is of a very shifting and changeable nature, and will stay in a given place only so long as confined artificially, or until it reaches its level by the force of gravitation. And it is no more natural for light to shine through a window or water to run down hill than it is for a man to have the right to so use his own land as may please or profit him, provided he does not injure another person unnecessarily,- that is, directly and intentionally, and not remotely and consequentially,- and the terms dominant and servient tenement are of no importance in the determination of the rights of parties interested in surface drains, unless they are considered on the basis of regular easements. On the whole, it seems to us that the views of the common law in the treatment of the subject are preferable to those of the Roman law. In the case of Pettigrew v. Evansville (25 Wis. 223), Justice Dixon, delivering the opinion of the court, among other things, said : "Every owner may lawfully so improve his own land as to prevent the flow of

surface water thereon from the land of his neighbor. And, so too, if the running of surface water from one man's land, when in a state of nature or otherwise, off on to or over the land of another, is such as to be beneficial to the latter, still he cannot claim it as a legal right or prescribe for it after any length of time. The first proprietor may so provide, by suitable erections or appliances on his own land, as to retain the water or cause it to flow in another direction. It is the duty of every owner of land, if he wishes to carry off the surface water from his own lands, to do so without material injury or detriment to the lands of his neighbors ; and if he cannot do so, he must suffer the inconvenience arising from its presence, and he cannot complain that others refuse to allow its passage over their lands. Such is the sound and wholesome doctrine of the law on this subject ; and although it does not go so far as to require the owner to resort to artificial means to prevent the surface water from his land flowing on to the land of another, when such flowing is produced by natural causes, yet it will prevent him from using such means for the purpose of making it flow there whenever the same would be materially injurious to the proprietor thereof. And it is also true, as stated in the books, that con-

siderable latitude is left to the owners of estates as to the manner in which they will improve and cultivate them ; and in so doing they may undoubtedly somewhat change the course and flow of the surface water, so as in a measure to increase the quantity which would otherwise pass upon the lands of others. They may also fill up low or wet places, so as to render them arable or fit for crops, thus causing the water which previously settled in them to spread and pass upon the lands of others, doing no perceptible injury thereto. But the extent to which any proprietor may go, in these and other ways, in turning the surface water of his own land off on to the lands of others must, in each case, we think, be determined by the degree of injury which it will produce. Very slight damage will not, perhaps, be regarded ; but, if the injury be immediate, and such as to perceptibly and naturally impair the value or destroy the usefulness of the adjoining estate, we apprehend that the law will not permit it to be done ; and certainly we know of no adjudged case where it has been held that the waters of a natural pond or reservoir upon the land of one person may be drained by him directly upon the land of another greatly to his injury ; nor where one owner has been allowed, by means of a ditch, trench, sewer or the

like, to gather the surface water from his own land and throw it upon the land of another so as materially to lessen its value and produce injury to the owner. Such a proceeding would be contrary to natural right and justice, and the law does not sanction it. If the owner of land has the right, by artificial means, to prevent the flowing thereon of surface water from the land of another, which in a natural state would flow there, it follows a fortiori that no owner may with impunity turn the surface water from his land upon the land of another, to the injury of the latter, when, without the employment of artificial means for that purpose, the same never would have flowed there at all. The two rights would be entirely inconsistent with each other --- the right in one owner to undo or totally defeat what the other had rightfully done."

To the same point is Washburne on Easements (226, 353, 355), where he says : "The owner of an upper field cannot construct drains or excavations so as to form new channels on to the lower field of another, nor can he collect the waters of several channels and discharge them on the lower field so as to increase the wash upon the same."

The doctrine of the Massachusetts courts on this subject is stated by Mr. Angell on Water Courses (Sec. 108 a), where

he says : "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface, or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface, or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands, or pass on to or over the same in greater quantities or in other directions than they were accustomed to flow. Where there is no water course by grant or prescription, and no stipulation exists between contermi-nous proprietors of land concerning the mode in which their respective parcels shall be occupied and improved, no right to regulate the surface drainage of water can be asserted by the owner of one lot over that of his neighbor. Cujus est solum, ejus est usque ad coelum, is a general rule applicable to the use and enjoyments of real property, and the right of a party to the free and unfettered control of his own land above, upon and beneath the surface cannot be interfered with or re-

strained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular mode of use or enjoyment. Nor is it at all material, in the application of this principle of law, whether a party obstructs or changes the flow of surface water by preventing it from coming within the limits of his own land, or by erecting barriers or changing the level of the soil so as to turn it off in a new course after it has come within his boundaries, and cause it to flow in a new direction on the land of a conterminous proprietor where it had not previously been accustomed to flow. The obstruction of surface water, or an alteration in the flow of it, affords no cause of action in behalf of any person who may suffer loss or detriment therefrom against one who does not act inconsistent with the due exercise of dominion over his own soil. A party may improve any portion of his land, although he may thereby cause the surface water flowing thereon, whencesoever it may come, to pass off in a different direction and in larger quantities than previously. If such an act causes damage to adjacent land, it is <u>damnum absque injuria</u>. It makes no difference in the application of this rule that the land is naturally wet and

swampy. A conterminous proprietor may change the situation or surface of his land by raising or filling it to a higher grade, by the construction of dykes, the erection of structures or by improvements which cause water to accumulate from natural causes on adjacent land and prevent it from passing off over the surface. Such consequences are the natural result of the lawful appropriation of land, whatever may be it its nature, and although they may cause detriment and loss to others."

The doctrine of the New York, New Hampshire and Rhode Island courts is to the same effect, and in stating the New York view it was said, in respect to the running off of surface water caused by rain or snow, that "no principle on which the decisions of their courts were based would prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well settled rule that the owner of land has full dominion over the whole space above and below the surface." (Angell on Water Courses, Sec. 108 b.)

In Rhode Island it was said, "whether water has fallen

as rain or has come from the overflow of a pond or swamp, which sinks into the top soil and struggles through it, following no definite channel, it is deemed by the law absolutely to belong to the owner of the land upon which it is found, for the avowed purpose of enabling him to cultivate his land by controlling or draining it off in the mode most convenient to him ; and is not affected by any right in the owner of an adjoining river, pond or tank which it may chance for the time to feed, though that time be ever so long protracted. It is not water in a water course, or in an infinitesimal number of minute water courses, in the sense of being obedient to the law regulating the use of water flowing in such defined natural channels ; but is, in the eye of the law, as well as of common sense, the moisture, and a part of the soil with which it intermingles, to be there used by the owner of the soil, if to his advantage, or to be got rid of in any mode he pleases, if to his detriment." The facts which illustrate the principle under consideration in the Rhode Island case were these : There had been a grant of a certain spring or fountain of water, with the privilege of deepening it, and of making other improvements on the land and about the fountain, for the purpose of obtaining the full use and benefit of the water there-

of ; but, inasmuch as the fountain appeared to be fed by a spring which issued from beneath a rock at the bottom of the fountain, and the grant contemplated that the land on which the fountain was situated was to be used for agricultural purposes, it was held that the owner of the land was not thereby deprived of the right of properly draining his land to make it productive, even though the drainage of the land might draw off some of the surface water, which possibly would otherwise have found its way through the soil into the fountain. (Angell on Water Courses, Sec. 108 b.)

Without going further, enough has, perhaps, been said to briefly indicate the ideas of the courts that hold to the common law doctrine in relation to the subject under consideration. Brief attention will now be given to the civil law doctrine, as stated by the courts in some of the States of this country, which is to the effect that because water is descendible by nature from an upper to a lower surface, the owner of the upper land has an easement in the land of the proprietor below for the discharge of all waters which by nature rise in or flow or fall upon the land of such upper owner. And, further, where two fields adjoin, and one is lower than the other, the lower must necessarily be subject to all

the natural flow of water from the upper one. The inconvenience arises from its position, and is usually more than compensated by other circumstances. Hence, the owner of the lower ground has no right to erect embankments whereby the natural flow of water from the upper ground shall be stopped ; nor has the owner of the upper ground a right to make any excavations or drains by which the flow of water is directed from its natural channel, and a new channel made on the lower ground ; nor can he collect into one channel waters usually flowing off into his neighbor's fields by several channels, and thus increase the wash upon the lower fields. But he may, and good husbandry sometimes requires that he should, cover up and conceal the drains through his own land, keeping the place of discharge unchanged. And as he may use running streams to irrigate his lands, even though he does thereby not unreasonably diminish the supply of his neighbor, so also he may use proper means of draining his ground where it is too moist, and discharge the water through the natural channel, even though the flow of the water upon the land of his neighbor be thereby somewhat increased. If it be difficult to ascertain from the character of the surface what is the natural channel, then the course in which the water has long been

peaceably and openly permitted to run will be considered as having had a legitimate origin. (Angell on Water Courses, Sec. 108 d.)

The rule of the civil law prevails in Pennsylvania, Iowa, Illinois, Ohio, and perhaps in other States. In the case of Butler v. Peck (16 Ohio St. 334), it was said : "The principle seems to be established and indisputable, that where two parcels of land, belonging to different owners, lie adjacent to each other, and one parcel lies lower than the other, the lower one owes a servitude to the upper to receive the water which naturally runs from it, provided the industry of man has not been used to create the servitude. Or, in other words more familiar to students of the common law, the owner of the upper parcel of land has a natural easement in the lower parcel, to the extent of the natural flow of water from the upper parcel to the lower."

Perhaps enough has now been said to indicate with sufficient fullness the views of courts which hold the rule of the civil or Roman law on this subject. It will next be proper to ask, whether one may by prescription gain the right to have the water flow upon or off of his land ? The term "prescription" is in strictness applied to incorporeal heredi-

taments and not to land, and is based on the presumption of a former grant which has been lost, and that nothing can be claimed by prescription that cannot be granted ; and, by older writers, the enjoyment of the hereditament must have been time out of mind, but of later times it is generally required that the use be only for a fixed time,-- usually twenty years. It would seem that cases of this kind could not often arise, as surface water would not be likely to remain in one place long enough to give such a question a chance to arise. "The flow of water for twenty years from the eaves of a house does not give a right to the neighbor to insist that the house shall not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water for twenty years from a drain made for agricultural improvements does not give a right to the neighbor, so as to preclude the proprietor from altering the level of his drain, for the greater improvement of his land. The state of circumstances in such cases shows that the one party never intended to give, nor the other to enjoy, the use of the water as a matter of right." (Addison on Torts, Sec. 330.) And in Pettigrew v. Evansville (25 Wis. 223), it was said that "one proprietor of land has no legal right, and can acquire no

prescriptive right, to have the surface water, accumulating on his own land by rain or melting snow, flow off on to or over the land of an adjoining proprietor, as it has been accustomed and would in the future continue to do were the land of such adjoining proprietor suffered to remain as in a state of nature ; nor can such adjoining proprietor, in case the flowing of the water off on to or over his land should be beneficial to him, claim the legal right, or acquire the privilege by prescription, of having the same continue, against the will of the owner upon whose lands the water actually falls and accumulates. And the same rule holds good when applied to sub-surface water passing through the earth by percolation."

In Missouri, by Sec. 6561, R. S. of 1889, it is declared that "the common law of England, and all statutes and acts of Parliament made prior to the fourth year of the reign of James the First, and which are of a general nature and not local to that kingdom, which common law and statutes are not repugnant to or inconsistent with the Constitution of the United States, the Constitution of this State, or the statute laws in force for the time being, shall be the rule of action and decision in this State, any law, custom or usuage to the contrary notwithstanding." There has been considerable litigation in

Missouri over the subject under consideration, but with two exceptions the common law doctrine has been followed by the Supreme Court. In McCormick v. K. C., St. J. & C. B. R. R. Co. (57 Mo. 433 - 437), the doctrine is stated, in the opinion of the court, as follows : "There is no doubt but that the authorities of towns and cities, whose duty it is to keep the streets and public ways in repair for the use of the public, may repair the same in a reasonable manner without incurring any liability to adjoining proprietors, even though said improvements may cause a change in the natural flow of surface water, to their injury. The general rule, however, is that either municipal corporations or private persons may so occupy and improve their land, and use it for such purposes as they may see fit, either by grading or filling up low places, or by erecting buildings thereon, or making any other improvements thereon to make it fit for cultivation, or any other profitable or desirable enjoyment ; and it makes no difference that the effect of such improvements is to change the flow of the surface water accumulating or falling on the surrounding country, so as to either increase or diminish the quantity of such water which had previously flowed upon the land of the adjoining proprietors, to their inconvenience or

injury. The same rule would apply to waters flowing over the country, which had escaped from the banks or the natural channel of a running stream of water, by reason of a flood in the stream, occasioned by heavy rains or the melting of snow on the surrounding country. But a person exercising this right to improve and ameliorate the condition of his own land must exercise it in a prudent and careful way. He must improve and use his own land in a reasonable way, and in so doing he may turn the course of and protect his own land from the surface water flowing there on, and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow, and for its increase upon the land of others. Each proprietor, in such case, is left to protect his own land against the common enemy of all."

The principles enunciated in the case above referred to have been adhered to in cases both before and after the rendition of this opinion. Among them are the following :

Hosher v. K. C., St. J. & C. B. R. R. Co. (60 Mo.)

Jones v. Hannovan. (55 Mo. 462.)

Imler v. City of Springfield. (55 Mo. 18.)

Benson v. C. & A. R. R. Co. (78 Mo.)

Stewart v. Clinton. (79 Mo. 603.)

Abbot v. K. C., St. J. & C. B. R. R. Co. (83 Mo. 271.)

There have been two cases in the Missouri Supreme Court holding to the civil law doctrine on this subject. That is, it was there held that "a land owner has no right, by erecting an embankment, to stop the natural flow of surface water or to direct its course so as to throw it upon the land of his neighbor. (McCormick v. K. C., St. J. & C. B. R. R. Co., 70 Mo. 359 ; Shane v. R. R. Co., 71 Mo. 237.) But in each of the cases last referred to there was a dissenting opinion, and in the case referred to in 83 Mo., the rulings in the cases of 70 and 71 Mo. were overruled. Judge Ray, delivering the opinion of the court, used this language : "With all due respect for the acknowledged ability of the distinguished jurist who wrote those opinions, we feel constrained to recognize the common law doctrine on this subject, so often and repeatedly approved by this court, without division, in all its earlier and later decisions, as still the law in this State. The rule of the common law, as expounded in the numerous decisions quoted above, we think, after all, best promotes and conserves the varied and important interests of both the public and of private individuals, incidental to and grow-

ing out of this question. It permits and encourages public and private improvements, and at the same time restrains those engaged in such enterprises from unnecessarily or carelessly injuring another. A strict and literal application of the doctrine of the civil law would, we think, in many places, and in large districts of country, materially retard if not utterly destroy many useful and profitable improvements, pursuits and enterprises."

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