

January 1949

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Recommended Citation

Robin F. Worthington, *Waters: Surface Water Drainage*, 2 Fla. L. Rev. 392 (1949).

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NOTES

WATERS: SURFACE WATER DRAINAGE

I. INTRODUCTION

The disposition and control of surface water between precipitation and collection within defined watercourses or lakes is not only a question of considerable legal complexity but also one of great importance to Florida. Florida's surface contains a relatively large proportion of water area,¹ originating mainly from draining surface and percolating rainwater, and to a lesser degree from springs. The water area of the lower half of peninsular Florida, including Lake Okeechobee, the Everglades, and all of the Kissimmee River basin, is supplied entirely by rainwater.² The rainfall is not only heavy but largely seasonal; therefore the natural and artificial drainage systems are overburdened during the rainy season, making questions of real property invasion and tort liability even more imminent in Florida than in states having less marked seasonal variations. The problem in the southern part of the state is somewhat unique because of the extreme flatness of the surface. Many states are concerned only with waters flowing in distinguishable channels, or at least in definable directions; but in some parts of South Florida the waters flow in various directions, depending upon the prevailing winds and the location of the rainfall as well as the slight natural depressions. These waters have in a sense been dealt with by statute under general and special drainage laws; but many large areas are not included within drainage districts, and the courts have not been called upon to deal directly with the rights and responsibilities of landowners in regard to these waters.

Surface water is a term commonly used by the layman to refer to all lake and river waters above the ground as distinguished from ground waters beneath the surface. This differs, however, from the legal definition, which states that surface water is derived from falling rain, melting snow, and springs that diffuse themselves over the ground, following no defined course or channel.³ Courts have generally classified as surface

¹The slightly larger state of Georgia has only one sixteenth the water area of Florida. Eight per cent of Florida's surface area is covered with water. 11 ENCYC. AMERICANA 367 (1948).

²Dr. A. P. Black, Professor of Chemistry at the University of Florida and President of the American Water Works Association.

³For a definition of surface water and a general classification of all waters see

water non-flowing marsh and swamp water,⁴ embankment seepage,⁵ flood water that has left its permanent channel,⁶ street drain water,⁷ and water on roof tops.⁸ The classifications among lake, watercourse, surface, percolating, and subterranean waters overlap in a shaded area where the division can be said to be only one of degree.

The utilization of non-surface waters by owners depends upon the application of the reasonable-use doctrine. This rule of law is more difficult to apply than to define, but it depends substantially upon two factors: the uses to which the adjoining property is put and the duty of proprietors to cooperate with one another.⁹ In contrast to the law governing the use of non-surface waters, the law of surface waters is controlled by the variations of two classical rules of law in addition to the doctrine of reasonable use.

II. THE CIVIL-LAW RULE

Under the classical civil-law rule no person has a right to interfere with the natural flow of surface water to the extent that the enjoyment of another's land is disturbed. Therefore the owner of lower land must allow drainage waters from higher land to flow uninterrupted over the servient estate as long as the water flows in its natural course and manner. On the other hand, the owner of the dominant estate is under an obligation not to increase this duty or make it more burdensome.¹⁰ Since owners hold land under titles and boundaries that do not purport to allocate drainage respon-

Tampa Waterworks Co. v. Cline, 37 Fla. 586, 593-94, 20 So. 780, 782 (1896).

⁴*Warnack v. Brownlee*, 84 Ga. 196, 10 S. E. 738 (1890); *Enderson v. Kelehan*, 226 Minn. 163, 32 N. W.2d 286 (1948); *Skinner v. Silver*, 158 Ore. 81, 75 P.2d 21 (1938); *Case v. Hoffman*, 84 Wis. 438, 54 N. W. 793 (1893).

⁵*Gray v. McWilliams*, 98 Cal. 157, 32 Pac. 976 (1893); *Curtis v. Eastern R. R.*, 98 Mass. 428 (1868).

⁶*O'Connell v. East Tennessee, V. & G. Ry.*, 87 Ga. 246, 13 S. E. 489 (1891); *Mohatt v. Olson*, 146 Neb. 764, 21 N. W.2d 516 (1946).

⁷*Urse v. Maryland Casualty Co.*, 58 F. Supp. 897 (N. D. W. Va. 1945); *LeBrun v. Richards*, 210 Cal. 308, 291 Pac. 825 (1930); *Sisters of St. Joseph Corp. v. Atlas Sand, Gravel and Stone Co.*, 120 Conn. 168, 180 Atl. 303 (1935); *Poole v. Sun Underwriters Ins. Co.*, 65 S. D. 422, 274 N. W. 658 (1937).

⁸*Bringhurst v. O'Donnell*, 14 Del. Ch. 225, 124 Atl. 795 (1924); *McCullough v. Hartpence*, 141 N. J. Eq. 499, 58 A.2d 233 (1948).

⁹*Mason v. Hoyle*, 56 Conn. 255, 14 Atl. 786 (1888); *Cason v. Florida Power Co.*, 74 Fla. 1, 76 So. 535 (1917); *Meyers v. Lafayette Club*, 197 Minn. 241, 266 N. W. 861 (1936); *Nashville, C. & St. L. Ry. v. Rickert*, 19 Tenn. App. 446, 89 S. W.2d 889 (1935); *Horne v. Utah Oil Refining Co.*, 59 Utah 279, 202 Pac. 815 (1921).

¹⁰*Brumley v. Dorner*, 78 Fla. 495, 83 So. 912 (1919).

sibility, the civil-law rule recognized the equity of maintaining the advantages and inconveniences that nature has stamped on the land.¹¹ The rule was first applied in this country by the courts of Louisiana in *Orleans Navigation Co. v. New Orleans*,¹² decided in 1812. The second American jurisdiction to apply the rule clearly was Pennsylvania in *Martin v. Riddle*,¹³ decided in 1848. The latter case overlooked the several prior Louisiana decisions and derived the rule directly from the codes of European nations.¹⁴ Twenty-two states and the District of Columbia pay lip service to the rule, but none apply it without qualifications and changes.¹⁵

¹¹Gormley v. Sandford, 52 Ill. 158, 162 (1869).

¹²Martin 214 (La. 1812).

¹³26 Pa. 415, not reported until 1856.

¹⁴*Id.* at 416: "Not readily finding the subject treated of in any of our usual books of reference, I venture to extract the law from the books of a foreign origin—*Corp. Jur. Div. 39, 3, 1, and 43, 21; Code Nap. sec. 640; Poth. du Voisinage.*"

¹⁵Tennessee A. & G. Ry. v. Cardon, 27 Ala. 585, 177 So. 171 (1937); *Shahan v. Brown*, 179 Ala. 425, 60 So. 891 (1913); *Turner v. Hopper*, 83 Cal. App.2d 215, 188 P.2d 257 (1948); *Archer v. Los Angeles*, 47 Cal. App.2d 68, 119 P.2d 1 (1941); *Debevtz v. New Brantner Ext. Ditch Co.*, 78 Colo. 396, 241 Pac. 1111 (1925); *City of Boulder v. Boulder & W. R. Ditch & Res. Co.*, 73 Colo. 426, 216 Pac. 553 (1923); *Shorman v. Queen Anne's R. R.*, 3 Penne. 407, 54 Atl. 687 (1901); *Floyd County v. Fincher*, 169 Ga. 460, 150 S. E. 577 (1929); *Farkas v. Towns*, 103 Ga. 150, 29 S. E. 700 (1897); *Loosli v. Heseman*, 66 Idaho 469, 162 P.2d 393 (1945); *Logsdon v. Anderson*, 30 N. W.2d 787 (Iowa 1948); *Nixon v. Welch*, 238 Iowa 34, 24 N. W.2d 476 (1946); *Schmahl v. Ackerson*, 332 Ill. App. 278, 74 N. E.2d 614 (1947); *Bruce v. Blanchard*, 338 Ill. 211, 170 N. E. 260 (1930); *Bolinger v. Moorhouse*, 154 Kan. 124, 114 P.2d 853 (1941); *Dyer v. Stahlhut*, 147 Kan. 767, 78 P.2d 900 (1938); *Gott v. Franklin*, 307 Ky. 466, 211 S. W.2d 680 (1948); *Board v. Schneider*, 301 Ky. 289, 191 S. W.2d 418 (1945); *Brown v. Blankenship*, 28 So.2d 496 (La. 1946); *Caldwell v. Gore*, 175 La. 501, 143 So. 387 (1932); *Miskotten v. Drenten*, 318 Mich. 538, 29 N. W.2d 91 (1947); *Ruehs v. Schantz*, 309 Mich. 245, 15 N. W.2d 148 (1944); *Johnston v. Rosaschi*, 44 Nev. 386, 194 Pac. 1063 (1921); *Boynton v. Longley*, 19 Nev. 69, 6 Pac. 437 (1885); *Davis v. Atlantic C. L. R. R.*, 227 N. C. 561, 42 S. E.2d 905 (1947); *Holton v. Northwestern Oil Co.*, 201 N. C. 744, 161 S. E. 391 (1931); *Larson v. Remeikis*, 76 N. E.2d 922 (Ohio 1946); *Henicle v. Pennsylvania R. R.*, 49 Ohio App. 477, 197 N. E. 360 (1934); *Beals v. Robertson*, 356 Pa. 348, 52 A.2d 316 (1947); *Lehigh & W. B. Coal Mining Co. v. Pittston Coal Mining Co.*, 289 Pa. 492, 137 Atl. 672 (1927); *Greene v. Gertz*, 36 R. I. 105, 89 Atl. 16 (1913); *Johnson v. White*, 26 R. I. 207, 58 Atl. 658 (1904); *Faris v. Moore*, 26 N. W.2d 130 (S. D. 1947); *Johnson v. Metropolitan Life Ins. Co.*, 22 N. W.2d 737 (S. D. 1946); *Dixon v. Nashville*, 213 S. W.2d 178 (Tenn. 1946); *Wilson v. Louisville & N. R. R.*, 12 Tenn. App. 327 (1930); *Müller v. Letzerich*, 121 Tex. 248, 49 S. W.2d 404 (1932) (Civil-law rule applies to Mexican grant land—by statute, VERNON'S ANN. CIV. STAT. art. 759a, common-enemy doctrine applies to all other lands); *Nolte Irr. Co. v. Willis*, 180 S. W.2d

III. THE COMMON-ENEMY OR COMMON-LAW RULE

The second classical rule is the common-enemy rule. Under this doctrine, water that falls on land is a common enemy, with which any proprietor has an unlimited and unrestricted legal right to deal as he pleases, notwithstanding harm resulting to neighboring landowners.¹⁶ Thus an owner may refuse to receive surface water and may divert it at will. One court has justified the rule on the ground of complete land ownership and enjoyment,¹⁷ and at least two others upon the mistaken belief that it represents the rule at the English common law;¹⁸ but most adopt the rule as one that encourages land improvement and cultivation.¹⁹

Since this rule is sometimes improperly called the common-law rule and Florida is a "common-law" state, it is of interest to review the historical background of this doctrine. Most writers have now agreed that the term "common-law rule" is a misnomer and that the real English rule is more similar to the civil-law doctrine.²⁰ Since in England such controversies are handled by administrative agencies of the government,²¹ English reports deal far less frequently with the problem than would be expected. As early as 1427, statutes established administrative procedures with respect to land drainage and protection against sea and flood.²² Before the King's Bench in 1344, however, a plaintiff complained that "the defendant

451 (Tex. 1944); *Rich v. Stephens*, 79 Utah 411, 11 P.2d 295 (1932) (lower building owner owed duty to carry off upper owner's water on ground of estoppel); *Perkins v. Vermont Hydro-Electric Corp.*, 106 Vt. 367, 177 Atl. 631 (1934) (damage liability for negligent handling); *White River Chair Co. v. Connecticut River Power Co.*, 105 Vt. 24, 162 Atl. 859 (1932); *Fire Dist. No. 1 v. Graniteville Spring Water Co.*, 103 Vt. 89, 152 Atl. 42 (1930). Vermont makes no such classification as surface water except in the lay sense of being ground water. Surface water is included within the class of percolating water, which is governed by the English rule of absolute ownership, as in *Acton v. Blundell*, 12 M. & W. 324 (1843).

¹⁶*Brumley v. Dorner*, 78 Fla. 495, 83 So. 912 (1919).

¹⁷*Grant v. Allen*, 41 Conn. 156 (1874).

¹⁸*Abbott v. Kansas City, St. J. & C. B. Ry.*, 83 Mo. 271, 53 Am. Rep. 581 (1884); *Edwards v. Charlotte, C. & A. R. R.*, 39 S. C. 472, 18 S. E. 58 (1893).

¹⁹*Bowlsby v. Speer*, 31 N. J. L. 351, 86 Am. Dec. 216 (1865); *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 519 (1887).

²⁰*Boyd v. Conklin*, 54 Mich. 583, 20 N. W. 595 (1884); *Miller v. Letzerich*, 121 Tex. 248, 49 S. W.2d 404 (1932).

²¹See Note, 24 MINN. L. REV. 891, 899 (1940).

²²6 HEN. VI, c. 5 (1427); 8 HEN. VI, c. 3 (1429); 18 HEN. VI, c. 10 (1439); 23 HEN. VI, c. 8 (1444); 12 EDW. IV, c. 6 (1472); 4 HEN. VII, c. 1 (1487); 23 HEN. VIII, c. 4 (1531); 25 HEN. VIII, c. 10 (1533).

had erected a house adjoining his house and higher, so that the water and drops of rain could not flow down as they were wont to do, but fell upon the walls of his house, by reason whereof the timber of his house rotted."²³ This was held an actionable wrong.

In 1851 the court said, in respect to yearly floods, that each man could ditch his land to the adjoining lower land and so on down the line until the water came to a river or ditch.²⁴ This is even broader than the civil-law rule, since it allows accumulation and dumping. In the British Empire, although New Zealand²⁵ and some Canadian states²⁶ apply the common-enemy doctrine, the civil-law rule has been generally adopted.²⁷

The name "common enemy" was first used in connection with surface waters in *Town of Union v. Durkes*²⁸ in 1875, when attention was drawn to the coinage of the term by Lord Tenterden in the case of *King v. Commissioners of Sewers for Paghham*, which dealt, however, with sea and not surface waters.²⁹ Therefore there was confusion as to the naming as well as the origin of the rule. In clear form the doctrine appears in the leading Massachusetts case of *Gannon v. Hargadon*.³⁰ At present twenty-two states and the District of Columbia give some notice to the doctrine.³¹

²³Y. B. Pike 18 Edw. III, p. 210 (1344).

²⁴Harcourt v. Spicer, Y. B. 12 Hen. VIII, p. 2 (1521).

²⁵Black & White Cabs, Ltd. v. Tonks, 47 N. Z. L. R. 590 (1928).

²⁶In 1934 the Supreme Court of Canada in the case of Rural Municipality of Scott v. Edwards, S. C. Rep. 332, adopted the common-enemy rule for all Canadian provinces except possibly Quebec, which follows more closely the French civil law.

²⁷See Note, 24 MINN. L. REV. 891, 901 (1940).

²⁸38 N. J. L. 21 (1875).

²⁹8 B. & C. 355, 108 Eng. Rep. 1075 (1828). Sea water has been held in Florida to be a common enemy. *Paty v. Palm Beach*, 158 Fla. 575, 29 So.2d 363 (1947).

³⁰10 Allen 106 (Mass. 1865).

³¹*Walker v. Southern Pac. R. R.*, 165 U. S. 593 (1897); *Pearce v. Scott*, 29 F.2d 630 (App. D. C. 1928); *Southern Pac. Co. v. Proebstel*, 61 Ariz. 412, 150 P.2d 81 (1944); *Roosevelt Irr. Dist. v. Beardsley L. & I. Co.*, 36 Ariz. 65, 282 Pac. 937 (1929); *Brasko v. Prislowsky*, 207 Ark. 1034, 183 S. W.2d 925 (1944); *Leader v. Matthews*, 192 Ark. 1049, 95 S. W.2d 1138 (1936); *Tidewater O. S. Corp. v. Shimelman*, 114 Conn. 182, 158 Atl. 229 (1932); *Grant v. Allen*, 41 Conn. 156 (1874); *Baltimore & O. R. R. v. Thomas*, 37 App. D. C. 255 (1911); *State v. Chaus*, 223 Ind. 629, 63 N. E.2d 199 (1945); *Ramsey v. Ketcham*, 73 Ind. App. 200, 127 N. E. 204 (1920); *Murphy v. Kelly*, 68 Me. 521 (1878); *Morrison v. Bucksport & B. R. R.*, 67 Me. 353 (1877); *Maddock v. Springfield*, 281 Mass. 103, 183 N. E. 148 (1932); *Belcastro v. Norris*, 261 Mass. 174, 158 N. E. 535 (1927); *Miller v. Ervin*, 192 Miss. 712, 6 So.2d 910 (1942); *Columbus & G. Ry. v. Taylor*, 149 Miss. 269, 115 So. 200 (1928); *Casanover v. Villanova Realty Co.*, 209 S. W.2d 556 (Mo. 1948); *White v. Wabash R. R.*, 207 S. W.2d 505 (Mo. 1947); *LeMunyon v. Gallatin Valley Ry.*, 60 Mont. 517, 199 Pac. 915 (1921) (generally no sin of mishandling too much but keeping too much); *Jor-*

IV. MODIFICATIONS AND EXCEPTIONS

It is important to recognize that, although most jurisdictions may claim to follow either the common-enemy or the civil-law rule, neither of these rules is followed in any jurisdiction without some modification. The most important modification is the curtailment of the common-enemy rule as regards the unlimited right to discharge water onto neighboring land regardless of the resulting damage.³² The limitations of different common-enemy states take various forms. For example, in *Casanover v. Villanova Realty Co.*³³ the Missouri Court allowed the damming of water back onto higher land but not an unnecessary collection and casting onto lower property. The Arkansas qualification on unlimited rights to turn back or dump surface water is a test of whether such an act was done in good faith.³⁴ However phrased, these courts point to the application of a reasonable-use doctrine.

The logical conclusion of the civil law is that an upper proprietor cannot change the amount or direction of water flowing onto lower land; yet it is widely held under this rule that in the interest of good husbandry there is a limited right to collect and discharge larger amounts of water

genson v. Stephens, 143 Neb. 528, 10 N. W.2d 337 (1943); Aldritt v. Fleischauer, 74 Neb. 66, 103 N. W. 1084 (1905); McCullough v. Hartpence, 141 N. J. Eq. 499, 58 A.2d 233 (1948); Zamelli v. Trost, 132 N. J. L. 388, 40 A.2d 783 (1945); Rix v. Alamo-gordo, 42 N. M. 325, 77 P.2d 765 (1938); Giovitto v. Nassau County, 63 N. Y. S.2d 864 (1946); Foster v. Webster, 44 N. Y. S.2d 153 (1943); Henderson v. Hines, 48 N. D. 130, 183 N. W. 529 (1921); Hatmaker v. Gripe, 184 Okla. 26, 84 P.2d 418 (1937); Taylor v. Shriver, 82 Okla. 11, 198 Pac. 329 (1921); see Morton v. Oregon Short Line Ry., 48 Ore. 444, 87 Pac. 161 (1906), citing improperly Price v. Oregon R. R., 47 Ore. 350, 83 Pac. 843 (1906); Milhous v. State Highway Dept., 194 S. C. 33, 8 S. E.2d 852 (1940); Fairey v. Southern Ry., 162 S. C. 129, 160 S. E. 274 (1931); Third Buckingham Community v. Anderson, 178 Va. 478, 17 S. E.2d 433 (1941); Raleigh Court Corp. v. Faucett, 140 Va. 126, 124 S. E. 433 (1924); De Ruwe v. Morrison, 28 Wash.2d 797, 184 P.2d 273 (1947); Morton v. Hines, 112 Wash. 612, 192 Pac. 1016 (1920); Lindamood v. Board of Education, 92 W. Va. 387, 114 S. E. 800 (1922); Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. 266 (1896); Chicago B. & Q. R. R. v. Railroad Commission, 199 Wis. 342, 226 N. W. 286 (1929); Vick v. Strehmel, 197 Wis. 366, 222 N. W. 307 (1928); Binning v. Miller, 55 Wyo. 451, 102 P.2d 54 (1940); State v. Hiber, 48 Wyo. 172, 44 P.2d 1005 (1935).

³²Note, 24 MINN. L. REV. 891, 917-919 (1940), lists cases from 19 common-enemy states so holding.

³³209 S. W.2d 556 (Mo. 1948).

³⁴Brasko v. Prislowsky, 207 Ark. 1034, 183 S. W.2d 925 (1944).

³⁵Note, 24 MINN. L. REV. 891, 920-922 (1940), lists cases from fourteen civil-law

than would naturally flow.³⁵ Thus in the recent case of *Beals v. Robertson*³⁶ the Pennsylvania Supreme Court held that, while upper owners cannot make new channels or concentrate and increase the flow of water artificially, they may increase the flow through the natural and reasonable use of their land.

The common-enemy doctrine has been accepted by many so-called civil-law states as applicable to urban areas.³⁷ It encourages the construction of houses and buildings because it removes water damage liability from those landowners changing the land surface. In *Alabama Power Co. v. Alford*³⁸ the Court stated that the weight of civil-law authority recognizes such an exception. For the same reason, earlier decisions have held railroads not liable for obstruction to surface waters.³⁹ Such exceptions in civil-law states and the general policy in common-enemy states have been tempered by a rule of reasonableness requiring railways to avoid unnecessary and negligent damage.⁴⁰ Although there is a general disallowance of banking ordinary flood waters onto a neighbor's land,⁴¹ some civil-law states have also made an exception for flood waters, realizing that it is inequitable to restrain any lower owner from protecting his land against such unusual threats.⁴²

V. REASONABLE-USE DOCTRINE

Recognizing the faults and advantages of both classical approaches and realizing the practical effect of confusion by accepting a large number

states as so holding.

³⁵356 Pa. 348, 52 A.2d 316, 317 (1947).

³⁷*Ex parte* Tennessee Coal, Iron and R. R. Co., 206 Ala. 403, 90 So. 876 (1921); *Los Angeles Cemetery Ass'n v. Los Angeles*, 103 Cal. 461, 37 Pac. 375 (1894); *Freeburg v. Davenport*, 63 Iowa 119, 18 N. W. 705 (1884); *Boyd v. Conklin*, 54 Mich. 583, 20 N. W. 595 (1884); *Rielly v. Stephenson*, 222 Pa. St. 252, 70 Atl. 1097 (1908). *Contra*: *Goldsmith v. Elsas*, 53 Ga. 187 (1874); *Johnson v. Marcum*, 152 Ky. 629, 153 S. W. 959 (1913); *Garland v. Aurin*, 103 Tenn. 555, 53 S. W. 940 (1899).

³⁸210 Ala. 98, 97 So. 224 (1923).

³⁹*Jordan v. St. Paul, M. & M. Ry.*, 42 Minn. 172, 43 N. W. 849 (1889); *Morrison v. Bucksport & B. R. R.*, 67 Mo. 353 (1877); *Priest v. Boston & M. R. R.*, 71 N. H. 114, 51 Atl. 667 (1901).

⁴⁰*St. Louis I. M. & S. Ry. v. Stevens*, 124 Ark. 599, 186 S. W. 60 (1916); *Columbus & G. Ry. v. Taylor*, 149 Miss. 269, 115 So. 200 (1928); *Laugness v. Chicago M. & St. P. Ry.*, 40 S. D. 546, 168 N. W. 1050 (1918); *Norfolk & W. R. R. v. Carter*, 91 Va. 587, 22 S. E. 517 (1895).

⁴¹*Keck v. Venghause*, 127 Iowa 529, 103 N. W. 773 (1905); *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429 (1886).

⁴²*Mogle v. Moore*, 100 Cal. 141, 104 P.2d 785 (1940); *Mailbrot v. Pugh*, 30 La. Ann. 1359 (1878); *Blain v. Brady*, 64 Md. 373, 1 Atl. 609 (1885).

of qualifications and variations, three states have pronounced clearly their acceptance of the reasonable-use doctrine. Under that rule, liability is incurred only when interference with the flow of surface water is unreasonable. Unlike the other two rules, no specific privileges or obligations are laid down, the only test being a jury's decision of reasonableness as based on all the circumstances involved in determining the optimum enjoyment of all landowners. This doctrine is often called the New Hampshire rule, since the leading case applying the rule is *Franklin v. Durgee*,⁴³ decided in that state. New Hampshire has unfalteringly followed the rule from *Swett v. Cutts*,⁴⁴ decided in 1870, to the present time.⁴⁵

Minnesota can also be said to have adopted the reasonable-use doctrine in full.⁴⁶ The early Minnesota cases followed the common-enemy rule.⁴⁷ This rule, however, was generalized and modified until a reasonable-use doctrine was applied in *Sheehan v. Flynn*,⁴⁸ proposing that each decision should be based on the consideration of all the circumstances in each case. In 1934 the state accepted the reasonable-use doctrine in its fullest extent⁴⁹ and has applied it consistently ever since.⁵⁰ Following the lead of these two states, the former civil-law state of Maryland⁵¹ in *Whitman v. Forney*,⁵² decided in 1943, accepted the doctrine unqualifiedly. In *Biberman v. Funkhouser*,⁵³ however, the same court outlined the state's civil-law background but proceeded to add qualifications rendering the practical result, including damages, the same as in *Whitman v. Forney*.

Several other states have made running shots at the same results. The Illinois Supreme Court in 1869, in the case of *Gormley v. Sandford*,⁵⁴ clearly proposed that a reasonable-use doctrine be applied to surface waters, as did Massachusetts in 1899.⁵⁵ Although Virginia states that it follows the common-enemy rule, this view is qualified by the maxim that a proprietor must use his own property so as not to injure his neighbor's

⁴³71 N. H. 186, 51 Atl. 911 (1901).

⁴⁴50 N. H. 439 (1870).

⁴⁵*Sakansky v. Wein*, 86 N. H. 337, 169 Atl. 1 (1933).

⁴⁶Note, 24 MINN. L. REV. 891, 908 (1940).

⁴⁷*Rowe v. St. Paul, M. & M. Ry.*, 41 Minn. 384, 43 N. W. 76 (1889).

⁴⁸59 Minn. 436, 61 N. W. 462 (1894).

⁴⁹*Bush v. City of Rochester*, 191 Minn. 591, 255 N. W. 256 (1934).

⁵⁰*Anderson v. Kelehan*, 226 Minn. 163, 32 N. W.2d 286 (1948).

⁵¹*Eisenstein v. Annapolis*, 177 Md. 222, 9 A.2d 224 (1939); Philadelphia, W. & B. R. v. Davis, 68 Md. 281, 11 Atl. 822 (1888).

⁵²181 Md. 652, 31 A.2d 630 (1943).

⁵³58 A.2d 668 (Md. 1948).

⁵⁴52 Ill. 158 (1869).

⁵⁵*Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230 (1899).

property unnecessarily or negligently.⁵⁶ Throughout the entire group of western states, drainage and irrigation ditches handling surface waters must be dug and used without negligence or want of ordinary care based on an analysis of all surrounding circumstances.⁵⁷ Several common-enemy jurisdictions reach a reasonable-use result by holding that the control of surface waters should not create a nuisance.⁵⁸ Many courts recognize the correlative rights of adjoining landowners as to surface water and are slowly and tortuously catching step with the reasonable-use doctrine as applied to riparian owners.

The reasonable-use doctrine is in effect little more than a concept allowing the fact-determining body to reach an unhampered conclusion. It is a rule that is of no benefit when used alone. To be more specific, several situations demand and result in definite answers:

1. If surface water damage is proximately due to an act of God, then no recovery by the injured party is allowed.⁵⁹
2. If damage is due to an act of God and human intervention, the intervenor is liable for his share of the damage.⁶⁰
3. An actor is not liable if the damage is not substantial (*de minimus non curat lex*).⁶¹
4. An actor is not liable, even though damage is substantial, when it is prudently caused in the furtherance of a socially desirable interest or the improvement of land.⁶²

VI. FLORIDA LAW

Surface water has been defined in Florida as water, regardless of origin, that drains without any distinct or well-defined channel.⁶³ It is

⁵⁶See 15 VA. L. REV. 288 (1929).

⁵⁷See 8 ORE. L. REV. 88 (1928).

⁵⁸*Earl v. De Hart*, 12 N. J. Eq. 280 (1856); *Sweet v. Conley*, 20 R. I. 381, 39 Atl. 326 (1898); *Houston, E. & W. T. Ry. v. Reasonover*, 36 Tex. Civ. App. 274, 81 S. W. 329 (1904).

⁵⁹*E.g.*, *Oklahoma Ry. v. Boyd*, 140 Okla. 45, 282 Pac. 157 (1929).

⁶⁰*E.g.*, *Rix v. Town of Alamogordo*, 42 N. M. 325, 77 P.2d 765 (1938).

⁶¹*E.g.*, *Vick v. Strehmel*, 197 Wis. 366, 222 N. W. 307 (1928).

⁶²*King Land Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22 (1913); *Edason v. Denison*, 142 Fla. 101, 194 So. 342 (1940); *Bolinger v. Murray*, 18 La. App. 158, 137 So. 761 (1931); *Todd v. York County*, 72 Neb. 207, 100 N. W. 299 (1904); *Mason v. Fulton*, 80 Ohio St. 151, 88 N. E. 401 (1909); *Beals v. Robertson*, 356 Pa. 348, 52 A.2d 316 (1947); *Johnson v. McMahon*, 118 Tex. 633, 15 S. W.2d 1023 (1929); *McGehee v. Tidewater Ry.*, 108 Va. 508, 62 S. E. 356 (1908).

⁶³*Tampa Waterworks Co. v. Cline*, 37 Fla. 586, 20 So. 780 (1896).

generally held that a proprietor owns all the surface water that comes to his land and has an absolute right to it.⁶⁴ It appears that Florida would follow the same rule. In the case of *Tampa Waterworks Co. v. Cline*⁶⁵ the Court by way of dictum held that an owner can appropriate for any reasonable use subsurface water not flowing in a recognized channel. Although he can use the water, no owner can legally collect and cast water on the lower land in larger quantities than would normally pass.⁶⁶ No proprietor can complain if such an ordinary flow injures his property.⁶⁷ If this natural flow is not diverted, an upper owner is allowed to drain his land into any natural stream or river so long as the watercourse is not overtaxed.⁶⁸ On the other hand, a lower owner cannot neglect his duty to keep the natural watercourse free of obstruction⁶⁹ and create a nuisance by backing waters onto the land of his upper neighbor.⁷⁰

In *Edason v. Denison*⁷¹ and *Bray v. Winter Garden*⁷² the Court held that an upper owner should be permitted to ditch his land, thereby increasing the normal burden on lower proprietors, when the result would be an increased protection and improvement of the higher land. This decision can be justified by the language in *Brumley v. Dorner*,⁷³ in which the Florida Supreme Court established an important milestone in surface-water law. After recognizing and defining the two classical approaches, the Court proclaimed that both rules have been greatly modified, and stated that it is the almost unanimous conclusion that each case must stand upon its own facts.⁷⁴ Although the word "unanimous" is somewhat strong, in this case the fact is recognized that the practical effect of all the devious

⁶⁴*Pohlman v. Chicago, M. & St. P. Ry.*, 131 Iowa 89, 107 N. W. 1025 (1906); *Muhleisen v. Krueger*, 120 Neb. 380, 232 N. W. 735 (1930); *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266 (1896).

⁶⁵37 Fla. 586, 600, 20 So. 780, 784 (1896).

⁶⁶*Bray v. Winter Garden*, 40 So.2d 459 (Fla. 1949); *Panama City v. York*, 157 Fla. 425, 26 So.2d 184 (1946); *Dade County v. South Dade Farms*, 133 Fla. 288, 182 So. 858 (1938); *Brumley v. Dorner*, 78 Fla. 495, 83 So. 912 (1919).

⁶⁷*Willis v. Phillips*, 147 Fla. 368, 2 So.2d 732 (1941).

⁶⁸*Bray v. Winter Garden*, 40 So.2d 459 (Fla. 1949); *Stoer v. Ocala Mfg. Ice & Packing Co.*, 157 Fla. 4, 24 So.2d 579 (1946); *Callan v. G. M. Cypher Co.*, 71 Fla. 14, 70 So. 841 (1916).

⁶⁹*Bray v. Winter Garden*, 40 So.2d 459 (Fla. 1949); *Stoer v. Ocala Mfg. Ice & Packing Co.*, 157 Fla. 4, 24 So.2d 579 (1946).

⁷⁰*Seaboard All Florida Ry. v. Underhill*, 105 Fla. 409, 141 So. 306 (1932).

⁷¹142 Fla. 101, 194 So. 342 (1940).

⁷²40 So.2d 459 (Fla. 1949).

⁷³78 Fla. 495, 83 So. 912 (1919).

⁷⁴*Id.* at 501, 83 So. at 914.