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I. INTRODUCTION

A small draw runs through the Smith farm, over the land of Jones, and eventually into the Platte River. Jones would like to cultivate the draw so he constructs a dam near the upper end of his farm to catch the Smith runoff. After a heavy rain Smith finds that ten acres of his hay meadow is flooded by water backed up from the Jones dam. Smith wants the dam removed.

Davis, a progressive farmer, discovers that part of his land could be enhanced in value if it were properly drained. As a result he constructs small ditches in appropriate locations, all of which drain into a draw near the lower end of his farm. This concentrated volume of water then crosses a road and flows onto Johnson's hay meadow. A gully begins to erode. Johnson wants Davis to refill his ditches.

The above basic situations, with varying modifications, have been a fertile subject of litigation in Nebraska. Nearly one hundred such cases have been adjudicated by the Nebraska Supreme Court over the past seventy years.¹

II. DEFINITION

Diffused surface water has been defined as "that [water] which is diffused over the surface of the ground, derived from falling rain or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does

¹ From a standpoint of quantity, the Nebraska cases form a strange pattern. There was virtually no litigation prior to 1890. But the period from 1890 to 1920 was an era of controversy in surface water law. This was followed by a period of calm until 1940, with the scale of litigation gradually increasing since that time.

It should be noted that the law in this area is almost entirely court made.

In recent years, the control of diffused surface water has been affected by the rules and activities of such institutions as soil conservation, irrigation, watershed, and drainage districts. These agencies have undoubtedly resolved many water problems which might otherwise have terminated in litigation. On the other hand, their primary objective is to in some manner adjust and control the movement of water. This often fosters litigation. So the net effect of such institutional activity on the amount of surface water controversy in Nebraska is problematical.
flow with other waters." This is in contrast to a "watercourse," which is defined by statute in Nebraska as "any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook." Diffused surface water must also be contrasted with "ground water," which is surface water that has percolated through the earth's surface, and with "underground watercourses," which are streams flowing beneath the surface of the earth.

III. SURFACE WATER DOCTRINES

Three theories of surface water law have been recognized in the United States—the civil law rule, the reasonable use rule, and the common enemy rule.

(1) The Civil Law Rule. In its most simplified form this doctrine provides that a lower proprietor cannot obstruct the flow of surface water from the land above; nor can the upper proprietor increase the natural flow of surface water onto the land below.

The rule is supposedly based on the maximum *aqua currit, det debet currere.* It has gained support in many states because it is extremely easy to apply, and because it prohibits any possibility of interference with surface water by one landowner to the detriment of another. On the other hand, it is not adaptable to urban development since every change in the grade of a city lot, and every structure erected thereon, would in some manner interfere with the natural flow of surface water. Because of these factors the rule has been either greatly modified or entirely discarded in urban areas. Furthermore, the rule may no longer command the approval of the agricultural populace. It would seem to be the antithesis of soil and water conservation practices which are essential to the long term preservation of American agriculture. This is particularly true in Nebraska, a non-humid state, which can afford to lose neither its soil nor its water.

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4 For purposes of convenience, "surface water" will hereinafter be substituted for the term "diffused surface water."
6 Water runs and ought to run as it is accustomed to run.
7 See discussion in Kinyon & McClure, *Interferences with Surface Waters,* 24 Minn. L. Rev. 891, 931 (1940).
8 Despite this, the civil law rule may be in effect in Nebraska today.
The Reasonable Use Rule. As might be expected, this rule is analogous to the "reasonable man" concept used in many areas of tort law. A landowner may use his property reasonably, and such use may include the alteration of surface water flow. The alteration or diversion may cause some harm to adjoining landowners but, so long as the interference is not unreasonable, no liability is incurred.9

The issue of reasonableness is a question of fact to be determined in the light of all the circumstances. This element of the doctrine has been criticized as being vague and indefinite, thus failing to provide guidance for future disputes. But, where used, the rule has successfully mitigated much of the harshness and unfairness of the other more rigid and inflexible doctrines. It is a major departure from the older property concepts of rights, servitudes, and easements which have been used in deciding most surface water cases in this country. Although the doctrine has received favorable comment from many legal writers,10 and has been adopted by the RESTATEMENT OF TORTS,11 it has been openly applied in only a few jurisdictions.12

The Common Enemy Rule. This is also known as the "common law" rule, since it is supposedly adopted from the English common law. However, numerous writers contend that the English cases do not support the doctrine.13 Some even assert that the civil law rule prevailed at the time this country adopted the English common law. Many Nebraska cases use the terms "common enemy" and "common law" interchangeably.14 But, notwithstanding

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9 See Kinyon & McClure, Interferences with Surfaces with Surface Waters, 24 MNN. L. REV. 891, 904 (1940).
10 See, e.g., Davis, The Law of Surface Water in Missouri, 24 Mo. L. REV. 137 (1959); Kinyon & McClure, Interferences with Surface Waters, 24 MNN. L. REV. 891 (1940); Note, Surface Water Law in Virginia, 44 VA. L. REV. 135 (1958) (rules very similar to Nebraska).
11 RESTATEMENT, TORTS § 833 (1939).
12 Included are: New Hampshire, Minnesota, and New Jersey. Illustrative cases from these respective jurisdictions are: City of Franklin v. Durgee, 71 N.H. 186, 51 Atl. 911 (1901); Johnson v. Agerbeck, 247 Minn. 432, 77 N.W.2d 539 (1956); Hopler v. Morris Hills Regional Dist., 45 N.J. Super. 409, 133 A.2d 336 (App. Div. 1957).
13 See 3 FARNHAM, LAW OF WATERS AND WATER RIGHTS § 889b (1904); Thomson, Surface Waters, 23 AM. L. REV. 372, 387-91 (1889); Rood, Surface Waters in Cities, 6 MICH. L. REV. 448, 451-53 (1908).
14 E.g., Todd v. York County, 72 Neb. 207, 100 N.W. 299 (1904), and Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N.W.2d 576 (1942) use the term
ing the confusion in terminology, it is uniformly agreed that the rule is based primarily on the 1865 Massachusetts case, Gannon v. Hargadon.15 The court there expressed the common enemy rule as a praiseworthy method of preserving property rights.16

[To whomsoever the soil belongs, he owns also to the sky and to the depths] is a general rule, applicable to the use and enjoyment 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 restrained by any considerations of injury to others which may be occasioned by the flow of mere surface water in consequence of the lawful appropriation of land by its owner to a particular use or mode of enjoyment. Nor is it . . . material . . . whether a party obstructs or changes the direction and flow of surface water by preventing it from coming within the limits of his 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.

In its barest form this rule tells the possessor of land that surface water is his enemy, and that he may do anything to get it off his premises. If a neighbor is injured in the process, that injury is damnum absque injuria.

In contrast, the civil law rule (in its barest form) allows the possessor of land to do nothing to interfere with the flow of surface water.

The common enemy rule is particularly desirable in urban areas since it does not impede development. However, the "neighbor beware" philosophy expressed in the Gannon case could hardly be expected to survive in a civilized society, and numerous modifications of the doctrine have been required. These modifications, coupled with similar alterations of the civil law rule, have brought the two conflicting legal theories much closer together—and much closer to the reasonable use doctrine.

15 92 Mass. (10 Allen) 106 (1865).
IV. BASIC SURFACE WATER RULES IN NEBRASKA

Although the Nebraska court has occasionally made overtures toward the civil law rule, it has through the years paid principal attention to the common enemy rule. Since *Morrissey v. Chicago, B. & Q. R.R.*, decided in 1893, Nebraska has been recognized as a "common enemy" state. In the *Morrissey* case the defendant railroad built an embankment which obstructed surface water flowing toward the Nemaha River, and diverted that flow toward Yankee Creek. The increased volume of water in the creek caused the plaintiff's land to be flooded. A culvert in the embankment would have prevented the problem, but no culvert was used. Nevertheless, the court held for the defendant, citing the *Gannon* case as authority. It also quoted with approval the following language of the Maine Supreme Court in *Morrison v. Bucksport & B. R.R.*:

"[I]t is well established that any proprietor of land may control the flow of mere surface water over his own premises, according to his own wants and interests, without obligation to any proprietor either above or below." This language was toned down by the Nebraska Supreme Court, however, because it actually held that the defendant must be presumed to have constructed its embankment in a proper manner.

In 1894, the *Gannon* doctrine was modified considerably by the Nebraska Supreme Court when it decided *Anheuser-Busch Brewing Ass'n v. Peterson*. The defendant had hauled in dirt to fill a city lot. This caused surface water to run into an ice house on the plaintiff's adjoining property. The court, in awarding damages, stated:

"[E]very proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless he is guilty of some act of negligence in the manner of its execution, he

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17 The earliest was Davis v. Londgreen, 8 Neb. 43 (1878); the strongest, Leaders v. Sarpy County, 134 Neb. 817, 279 N.W. 809 (1938); and the most recent, Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195 (1962).

In addition, it should be noted that reasonable use concepts permeate nearly all the decisions, even though "common enemy" terminology is used by the court.

18 38 Neb. 406, 56 N.W. 946 (1893).

19 This, however, was altered by Nichol v. Yocum, 173 Neb. 298, 113 N.W.2d 195 (1962). Discussion of the Nichol case is deferred until section X, infra.

20 67 Me. 353, 355 (1877).


22 41 Neb. 897, 60 N.W. 373 (1894).
will not be answerable to his neighbor, although he may thereby cause the surface water to flow upon the premises of the latter to his damage."23

This discussion of reasonableness and negligence shows that the court was already beginning to move from property to tort concepts.

_Bunderson v. Burlington & Mo. R. R.R._,24 an 1895 decision, appeared to be a regression to the _Morrissey_ theory, but during the same year the court clarified its position in _Lincoln & B. H. R.R. v. Sutherland_,25 when it held for a plaintiff in a similar situation wherein the defendant's embankment caused water to back up over the plaintiff's land destroying his crops. _Morrissey_ was distinguished on the absence of negligence; and _Bunderson_ was distinguished because the overflow was not attributable to the embankment.26 The _Anheuser-Busch_ reasoning was followed and applied.

Prior to the _Sutherland_ case the only negligence recognized as creating liability was negligence in construction, but _Sutherland_ extended liability to the negligent injury of another's property.27 More succinctly, this meant that though the construction might be flawless, a defendant would be liable for damages if such construction unreasonably and negligently resulted in damage to an adjoining landowner.28

The _Anheuser-Busch_ and _Sutherland_ cases became the cornerstone of Nebraska surface water law, and forty-five years later the court was still citing them as authority. For instance, in 1950 the court used the above _Anheuser-Busch_ quote in _Schomberg v. Kuther_,29 and followed with the _Sutherland_ extension of the rule

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23 Id. at 904, 60 N.W. at 375-76.
24 43 Neb. 545, 61 N.W. 721 (1895).
26 Both cases were also distinguished (and for the same reasons) in Jacobson v. Van Boening, 48 Neb. 80, 66 N.W. 993 (1896). In the Jacobson case, the court added that if a culvert had been used in the _Bunderson_ situation, surface water would have been discharged in volume on the lands of the inferior proprietor.
27 See discussion of this development in Snyder v. Platte Valley Public Power & Irrigation Dist., 144 Neb. 308, 13 N.W.2d 160 (1944). The _Sutherland_ rule was later followed in: Jorgenson v. Stephens, 143 Neb. 528, 10 N.W.2d 137 (1943); Shavlik v. Walla, 86 Neb. 788, 126 N.W. 376 (1910); Todd v. York County, 72 Neb. 207, 100 N.W. 299 (1904); and numerous other cases.
28 This is merely an application of the maxim _sic utere tuo ut alienum non laedas_, which has often been used in other jurisdictions as a modification of the common enemy rule.
29 153 Neb. 413, 45 N.W.2d 129 (1950).
when it further stated, "However, the foregoing rule is a general one and subject to another common-law rule that a proprietor must so use his property as not to unnecessarily and negligently injure his neighbor."

V. INTERFERENCE WITH FLOW BY USE OF ARTIFICIAL STRUCTURES

Nearly all jurisdictions which embrace the common enemy rule have qualified it by prohibiting the discharge upon adjoining land, by artificial means, of large quantities of surface water in a concentrated flow. This issue was litigated in Nebraska even before the Morrissey case, which firmly established the common enemy rule as the foundation of Nebraska’s diffused surface water law. In *Fremont, E. & Mo. v. R.R. v. Marley*, the defendant railroad constructed ditches alongside an embankment to drain its track and right of way. The court enjoined these activities because the surface water was collected and concentrated so as to discharge in volume onto the plaintiff’s property.

*Bunderson v. Burlington & Mo. R. R.R.* and *Churchill v. Beethe* seem contra to the Marley case, but are distinguishable because the overflow in the Bunderson case was not attributable to the defendant’s embankment, and the Churchill defendants were public officials from whom damages could have been recovered in an earlier eminent domain action.

In *Roe v. Howard County* the defendant altered the flow of water in a draw, changing its natural course. In holding for the plaintiff the court said, “While one may fight surface water and protect his premises against it by the use of reasonable means, he cannot collect it in a large body and flow it onto the land of a lower proprietor to his injury.”

It is not necessary that the artificial structure be a ditch, as shown by *Keifer v. Shambaugh* where the defendant was held

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30 Id. at 426, 45 N.W.2d at 137.
33 43 Neb. 545, 61 N.W. 721 (1899).
34 48 Neb. 87, 66 N.W. 992 (1896).
35 75 Neb. 448, 106 N.W. 587 (1906).
36 Id. at 456, 106 N.W. at 591. The court cited Todd v. York County, 72 Neb. 207, 100 N.W. 299 (1904), and Chicago, R. I. & P. R.R. v. Shaw, 63 Neb. 380, 88 N.W. 508 (1901).
liable when his dam obstructed a drainageway, causing surface water to flow, in concentrated form, onto a neighboring farm. 38

In *Hengelfelt v. Ehrmann* 39 the court appeared to extend the rule when it asserted, "[T]he upper proprietor may not accumulate surface waters into a ditch, or drain, and thereby increase the flow, and discharge them in volume on the servient estate, and cannot divert them so they go in a different direction." The prohibition against diversion in a different direction, if followed literally, would be extremely restrictive. 40 But, in *Clare v. County of Lancaster* 41 the court said that for liability to occur the diversion must injure another, 42 and it was pointed out that even though the *Ehrmann*, 43 *Schomberg*, 44 and *Kraus* 45 opinions did not contain the element of injury in their statements of the rule, it is an essential element and is implicit in the language of those cases.

The *Ehrmann* holding was not even discussed in *Gable v. Pathfinder Irrigation Dist.* 46 where the defendant maintained certain ditches and structures which changed the natural flow of surface water, causing plaintiff's lands to be flooded. Instead the following rule was applied: "It is the duty of one who constructs an artificial drain with structures therein changing the natural flow of surface water to use reasonable care to maintain it or them so that water will not be collected and thrown on another to his damage." 47 This discussion of "reasonable care" again evinces the degree to which the common enemy rule has been modified by the court to approach the reasonable use rule.

Although the series of cases just discussed all dealt with the discharge of relatively large quantities of water upon the plaintiff's property, the court has recognized that the rule would be

39 *141 Neb. 322, 327, 3 N.W.2d 576, 579* (1942).
40 This same language, however, was quoted in *Bussell v. McClellan*, 155 Neb. 875, 54 N.W.2d 81 (1952).
41 *160 Neb. 622, 71 N.W.2d 190* (1955).
42 *Citing Keim v. Downing*, 157 Neb. 481, 59 N.W.2d 602 (1953); *Bussell v. McClellan*, 155 Neb. 875, 54 N.W.2d 81 (1952); and *Todd v. York County*, 72 Neb. 207, 100 N.W. 299 (1904).
44 *Schomberg v. Kuther*, 153 Neb. 413, 45 N.W.2d 129 (1950).
46 *159 Neb. 778, 68 N.W.2d 500* (1955).
47 *Id.* at 783-84, 68 N.W.2d at 504.
unjustly harsh if the artificial structures used by a defendant only slightly increased the quantity and velocity of flow.\textsuperscript{48} For example, \textit{Flesner v. Steinbruck}\textsuperscript{49} presented an unusual situation in which the litigation was initiated by the owner of the artificial structure. The plaintiff had constructed a diversion ditch; the defendant retorted by damming it. The ditch caused only a minimal increase in acceleration and volume of flow and, therefore, the court enjoined the defendant's interference. It was also pointed out that the water was flowing in a course of natural drainage before it reached the defendant's property.\textsuperscript{50}

In \textit{Perry v. Clark}\textsuperscript{51} the court upheld a defendant's tile drainage project. In so doing it cited with approval \textit{Dorr v. Simerson},\textsuperscript{52} an Iowa case, in which it was said: "[W]e are quite ready to hold that the owner of the dominant estate has the right . . . to drain his own land into the natural . . . channels which nature has provided, even though the quantity of water cast upon the servient estate may be somewhat increased."

In \textit{Steiner v. Steiner}\textsuperscript{53} the defendant constructed a ditch to straighten a winding natural drainageway. The evidence indicated that the quantity of flow onto the plaintiff's lands might be somewhat increased. But the plaintiff's objections were overruled, again on the basis of the \textit{Dorr} case. The straightened ditch also would have accelerated the surface water flow. But the court found that the defendant's actions were reasonable and concluded: "A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface water in the natural course

\textsuperscript{48} If, however, that slight increase caused tremendous damage, the basic rule should not be modified. For example, the plaintiff's dam might be filled almost to capacity. If the defendant were then to add only a small amount to the flow, it might be sufficient to wash out the dam.

\textsuperscript{49} 89 Neb. 129, 130 N.W. 1040 (1911).

\textsuperscript{50} In all these cases it is evident that the landowner who utilizes artificial structures will have a much better chance of upholding such use if he can divert the water into a natural drainageway on his own farm. Here, of course, he has the support of \textit{Neb. Rev. Stat.} § 31-201 (Reissue 1960). If the discharge is into a public road ditch and then onto a neighbor's property, or if it is directly onto the neighbor's land, he will nearly always lose the litigation. See e.g., Rudolf v. Atkinson, 156 Neb. 804, 58 N.W.2d 216 (1953); Bures v. Stephens, 122 Neb. 751, 241 N.W. 542 (1932); Perry v. Clark, 89 Neb. 812, 132 N.W. 388 (1911); and Conn v. Chicago, B. & Q. R.R., 88 Neb. 732, 130 N.W. 563 (1911).

\textsuperscript{51} 89 Neb. 812, 132 N.W. 388 (1911).

\textsuperscript{52} 127 Iowa 551, 554, 103 N.W. 806, 807 (1905).

\textsuperscript{53} 97 Neb. 449, 150 N.W. 205 (1914).
of drainage without liability to the lower proprietor."54

When the artificial structure litigation is analyzed, it becomes apparent that a defendant is held liable when the court uses such phrases as "discharge in volume" or "concentrated flow." A defendant will not be held liable when the acceleration or quantity increase is related to "good husbandry." Obviously these cases have been decided on the basis of equities prevailing in the individual fact situation.55

VI. DRAINING PONDS

This problem is closely related to that of using artificial structures to increase surface water flow onto a neighbor's property. It differs only in that the water drained normally would never have reached the lower proprietor's premises, but rather would have been retained on the property of the upper landowner until lost through percolation and evaporation. The question has been litigated so frequently in Nebraska that it deserves specific attention.

If ponds can be drained, the farm operator is provided with additional acres of exceptionally fertile soil. But the drainage must usually be accomplished by ditching, which increases the quantity and velocity of surface water flow onto a neighbor.

This dilemma first reached the Nebraska court in Davis v. Londgreen57 where the plaintiff was awarded an injunction against such drainage on the ground that it constituted a private nuisance. This holding was followed in Jacobson v. Van Boening.58 But an opposite trend was initiated by the court in Todd v. York County59 where an injunction to restrain a defendant from connecting cer-

54 Id. at 451, 150 N.W. at 205. In support the court cited Perry v. Clark, 89 Neb. 812, 132 N.W. 388 (1911); Arthur v. Glover, 82 Neb. 528, 118 N.W. 111 (1908); Aldritt v. Fleischauer, 74 Neb. 66, 103 N.W. 1084 (1905); and Todd v. York County, 72 Neb. 207, 100 N.W. 299 (1904).

55 And, just as obviously, this is the "reasonable use rule," although it is not so designated.

56 Ponds or lagoons are considered to be surface water. Permanent lakes, however, are considered to be in the watercourse category. See Davis v. Beem, 115 Neb. 697, 214 N.W. 633 (1927), where a defendant was prohibited from draining what the court considered to be lakes in his hay meadow. Accord, Block v. Franzen, 163 Neb. 270, 79 N.W.2d 446 (1957); Lackaff v. Bogue, 158 Neb. 174, 82 N.W.2d 889 (1954).

57 8 Neb. 43 (1878).

58 48 Neb. 80, 66 N.W. 993 (1896).

59 72 Neb. 207, 100 N.W. 299 (1904).
tain low land with a draw was denied. The court found the improvement to be reasonable, practical, and natural. It logically rationalized that good husbandry was promoted by the reclamation of waste land. Recognizing that the defendant had created an artificial channel, the court emphasized that the channel drained into a natural drainageway (the draw) on the defendant's own property.\(^6^0\) The *Davis* case was distinguished on the ground that there the increased flow had rendered several acres of the plaintiff's land unfit, and had begun to cut a gully.\(^6^1\) Also distinguished was the *Jacobson* case, which had held a reclamation plan to be unreasonable and impractical in that it unnecessarily burdened the plaintiff's land.\(^6^2\)

The *Todd* decision was followed for more than twenty years.\(^6^3\) But then, during 1926, in *Graham v. Pantel Realty Co.*,\(^6^4\) the court enjoined the use of certain ditches to drain lagoons when the additional flow damaged the plaintiff's hay lands. In what appeared to be more of a cost-benefit analysis\(^6^5\) than application of the common enemy doctrine, the court said: "It is perfectly apparent that defendant's gain from its drainage system is so vastly less than the gross injury which it has inflicted upon plaintiff as to be almost negligible."\(^6^6\) This holding was essentially based on the prevalent facts and equities. It is an ideal example of the advantages of the reasonable use rule, but is inconsistent with the rigid concepts of the common enemy doctrine.

In 1929 the drainage question was resolved by one of the few Nebraska statutes applicable to surface water:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is

\(^{60}\) *Id.* at 214, 100 N.W. at 302.

\(^{61}\) The *Davis* case was also distinguished in *Aldritt v. Fleischauer*, 74 Neb. 66, 103 N.W. 1084 (1905), on the ground that in *Davis* the water was discharged directly onto the plaintiff's land.

\(^{62}\) The court seemed to be utilizing the reasonable use philosophy in seeking to obtain a proper balance of the competing interests.

\(^{63}\) See, e.g., *Steiner v. Steiner*, 97 Neb. 449, 150 N.W. 205 (1914); *Arthur v. Glover*, 82 Neb. 528, 118 N.W. 111 (1908); *Aldritt v. Fleischauer*, 74 Neb. 66, 103 N.W. 1084 (1905).

\(^{64}\) 114 Neb. 397, 207 N.W. 680 (1926).

\(^{65}\) Or "reasonable use" theory again.

wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.67

This legislation was first interpreted in Warner v. Berggren82 where the defendant drained a pond into a highway ditch so that the water flowed through a culvert onto the plaintiff's land. In holding for the plaintiff, the court concluded that the defendant did not discharge the water into a natural watercourse on his own property. In Skolil v. Kokes85 the court held there was no drainage into a natural watercourse where the water would have had to be several feet deep on the plaintiff's property before it could have flowed on toward a river. Rudolf v. Atkinson70 involved drainage by means of a ditch which was entirely on the defendant's land. Because the runoff flowed over a flat area before it finally reached the plaintiff's slough, the court again held that this was not drainage into a natural watercourse.71

VII. OBSTRUCTION OF DRAINAGE FROM HIGHER LAND

This is the exact converse of the situations described in section V. There the general rule was stated to be that an upper landowner "cannot collect surface water in a large body and flow it onto the land of a lower proprietor to his injury."72 To protect the upper landowner the courts have developed a concomitant rule that a lower proprietor cannot collect surface water in a large body by means of a dam, and flow it back onto the land of the upper proprietor to his injury.73

This latter rule has been extended through the years, until today the lower landowner cannot interfere with the flow of water in any natural drainageway, whether it be a draw, slough, ditch,

67 NEB. REV. STAT. § 31-201 (Reissue 1960).
68 122 Neb. 86, 239 N.W. 473 (1931).
69 151 Neb. 392, 37 N.W.2d 616 (1949).
70 156 Neb. 804, 58 N.W.2d 216 (1953).
71 Id. at 811, 58 N.W.2d at 220.
73 See the excellent summary of the Nebraska law on this point in Town of Everett v. Teigel, 162 Neb. 769, 778-80, 77 N.W.2d 467, 472-74 (1955). Among the cases cited are: County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N.W.2d 507 (1955); Purdy v. County of Madison, 156 Neb. 212, 55 N.W.2d 617 (1952); Schomberg v. Kuther, 153 Neb. 413, 45 N.W.2d 129 (1950); and Pospisil v. Jessen, 153 Neb. 346, 44 N.W.2d 600 (1950).
or swale. These natural drainageways are similar to watercourses, but are not large enough to meet the statutory definition of "watercourse." Therefore, the flow is still considered to be surface water, and the above rule (which might be called the "little watercourse" doctrine) applies.

The natural drainageway cases prior to 1900 dealt almost exclusively with railroad embankments. Typical allegations would be either that the defendant railroad failed to provide a culvert or bridge, or that the outlet, if provided, was inadequate. Not until the turn of the century was a rule of any precision developed. Prior to that time the court struggled with the distasteful philosophy of the original common enemy rule—finally adding the requirement of reasonableness to that rule. A cursory examination of the earlier decisions would indicate that they are inconsistent, but closer examination reveals that the cases are virtually all distinguishable either because of the presence or absence of negligence, the initial limitation of negligence to construction alone, the negligence not being the proximate cause of the injury, or unusual rainfall conditions.

In 1901, the court finally assembled some specific rules for the embankment problems in *Chicago, R. I. & P. R.R. v. Shaw* when it said:

> No one has the right to collect surface water upon his premises and flood it back upon his neighbor, or, after being collected in large quantities, to discharge it upon the adjoining estate to the injury of the latter. He may dike his own premises against its flow thereon. He may use such reasonable means as are necessary to retain it upon his premises, if he so desires; but he can not use his own premises to accumulate it in large quantities, and then flow it down upon his neighbor, causing to the latter damage and injury.

In the *Shaw* case, the defendant railroad had installed a thirty-six inch pipe through an embankment. It was insufficient and washed out. The railroad then installed a bridge. It was improperly located and water backed up onto the plaintiff's land. Liability was imposed on the defendant because of its negligence in constructing an embankment across a ravine without providing adequate means for the flow of water.

74 Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897, 60 N.W. 373 (1894).
During the following year the court was faced with a similar fact situation and, for the first time, required the defendant to provide for discharge of water "as it naturally flows."\(^7\)

Several years later a defendant railroad introduced a new argument when it contended that it should not be liable for flood damages when rainfall is unusually heavy. The court rejected this argument, holding that the defendant should have made reasonable provision for the consequences that will result from "such extraordinary rainfalls as experience shows are likely to recur."\(^7\)

As mechanization in agriculture developed, litigation increased. In the \textit{Flesner}\(^7\) case, the defendant dammed plaintiff's diversion ditch. The court held that an unqualified right to fight off surface water from one's premises no longer existed, and that a farmer must use ordinary care not to injure his neighbor unnecessarily if he takes steps to dam water which would otherwise flow onto his property.\(^8\) \textit{Bassett v. Salisbury Mfg. Co.}\(^8\) the New Hampshire case which is a landmark decision applying the reasonable use doctrine, was cited for the rule that a landowner may not interfere with natural drainage except in the reasonable use of his own property.

The language of the pre-1930 cases could quite easily convince a reader that a lower proprietor could not interfere with natural drainage from the land of an upper proprietor.\(^8\) The Nebraska court, however, dispelled this notion when it decided \textit{Muhleisen v. Krueger}.\(^8\) The defendant farmer, not wishing to receive surface water runoff from his neighbor, threshed a straw pile on the boundary line between their property to stop the natural drainage. The trial judge apparently thought that the supreme court had been


\(^{79}\) \textit{Flesner v. Steinbruck}, 89 Neb. 129, 130 N.W. 1040 (1911).

\(^{80}\) \textit{Id.} at 131, 130 N.W. at 1041; \textit{accord}, \textit{Mapes v. Bolton}, 89 Neb. 815, 132 N.W. 386 (1911).

\(^{81}\) 43 N.H. 569 (1862).


\(^{83}\) 120 Neb. 380, 232 N.W. 735 (1930).
applying the civil law rule in such circumstances, and as a consequence he held for the plaintiff. The supreme court reversed, holding that the defendant had not obstructed a natural drainage-way. The court stated: "[N]o natural servitude exists in favor of the . . . higher land as to surface water. . . . Therefore, the owner of the lower tenement may lawfully obstruct or hinder the flow of this water and in so doing hold it back or turn it off of his own land without liability therefor."88

The Muhleisen case is probably still authoritative today.86 It clearly indicates that a lower proprietor is granted much broader rights so far as interference with ordinary surface flow is concerned than he is when surface flow is concentrated in a "natural drainageway." The choice of words in the above quotation from Muhleisen was, however, unfortunate. The court appears to have said that the lower proprietor may turn back the flow of all "surface water." The logical inference to be drawn would be that the non-interference rule is limited to "watercourses."87 Yet, in many subsequent cases, the court has held that a lower proprietor cannot obstruct the flow of such natural drainageways as draws, swales, or sloughs, which certainly do not qualify as watercourses.88 Therefore, it must be concluded that, in the Muhleisen case, the court had in mind the obstruction of surface waters flowing over a relatively broad, flat area which would not be encompassed by the ordinary meaning of "natural drainageway."

Leaders v. Sarpy County89 succinctly disposes of any controversy on this point. The court there held: "Where surface water . . . flows in a well-defined course, whether it be a ditch, swale,

84 The pre-1930 cases would certainly support this view.
88 It was later followed in Mader v. Mettenbrink, 159 Neb. 118, 65 N.W.2d 334 (1954); Courter v. Maloley, 152 Neb. 476, 41 N.W.2d 732 (1950); Robinson v. Central Neb. Public Power & Irrigation Dist., 146 Neb. 534, 20 N.W.2d 509 (1945); Jorgenson v. Stephens, 143 Neb. 528, 10 N.W.2d 337 (1943).
87 As defined in Neb. Rev. Stat. § 31-202 (Reissue 1960). "Natural drainageways" include draws, sloughs, etc. which do not meet the statutory definition of a watercourse.
89 This indicates that, although such flow is considered as surface water, it is subject to a set of rules all its own.
89 134 Neb. 817, 279 N.W. 809 (1938).
or draw in its primitive condition, its flow cannot be arrested or interfered with by a landowner to the injury of neighboring proprietors."

In *Snyder v. Platte Valley Public Power & Irrigation Dist.* the court noted that the *Leaders* case appeared to extend the "little watercourse" rule to all surface waters (the opposite extreme from *Muhleisen*). But the court felt that, notwithstanding the broad statement of the rule, it should be limited to watercourses since the subject matter of the action in *Leaders* was a watercourse.

*Faught v. Dawson County Irrigation Co.* held: "[T]he duty of those who build structures across natural drainways to provide for the natural passage through such obstruction of all waters which may be reasonably anticipated to drain there. This is a continuing duty." The same legal philosophy was expressed in a slightly different manner in the recent case, *Walla v. Oak Creek Township*, where the court refused to enjoin township officers from constructing a culvert across a highway. The township has a duty, said the court, to provide for the flow of water coming down the swale "as it was wont to flow in the course of nature."

**VIII. MISCELLANEOUS SURFACE WATER ISSUES**

(1) *Floodwater*. There is some disagreement among the various states concerning the legal treatment to be accorded the overflow from streams in times of heavy rainfall. The issue was

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90 Id. at 821, 279 N.W. at 811. This is actually only a reiteration of the rule which had existed prior to, but had been misstated in, *Muhleisen v. Kruegar*, 120 Neb. 380, 232 N.W. 735 (1930). See *Roe v. Howard County*, 75 Neb. 448, 106 N.W. 587 (1906) (cited in the *Leaders* case).

91 144 Neb. 308, 13 N.W.2d 160 (1944).

92 146 Neb. 274, 278, 19 N.W.2d 358, 361 (1945).

93 The reasoning of these cases has been frequently and consistently applied by the Nebraska court. See *Town of Everett v. Teigeler*, 162 Neb. 769, 77 N.W.2d 467 (1956); *Bahm v. Raikes*, 160 Neb. 503, 70 N.W.2d 507 (1955); *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954); *Ricenbaw v. Kraus*, 157 Neb. 723, 61 N.W.2d 350 (1953); *McGill v. Card-Adams Co.*, 154 Neb. 332, 47 N.W.2d 912 (1951).


96 Missouri, *e.g.*, considers all such overflow to be diffused surface water and subject to the legal rules which apply thereto. See *Davis, The Law of Surface Water in Missouri*, 24 Mo. L. Rsv. 137, 143 (1959).
first faced in Nebraska in the *Morrissey* case\(^9\) where the defendant's embankment diverted surface waters into Yankee Creek, causing it to overflow. The rule applied by the Nebraska court provides, in essence, that if flood water becomes severed from the main current, or if it leaves the stream never to return and spreads out over the land, it has become surface water. But if it still forms a continuous body, and still flows in its ordinary (but now enlarged) channel, it continues as part of the stream. In addition, if it departs from the ordinary channel *animo revertendi*, and will presently return to the stream (such as by recession of the waters), it is considered to be part of that stream. In the latter instances the law of surface water would not be applicable.\(^9\)

The definition was further clarified in *Brinegar v. Copass*\(^9\) where the court stated:

> When [the flood water] has spread over the adjoining country, settled in low places, and become stagnant, it can no longer be treated as a part of the stream, and the rules with respect to watercourses can then no longer be applied. But overflow waters . . . do not cease to be part of the stream . . . until separated therefrom so as to prevent their return to its channel.\(^10\)

Flood waters are subject to the same rules as other surface water flowing in a natural drainageway, i.e., the proprietor is entitled to have such water run as it was wont to run according to natural drainage. No one can divert or obstruct such water to the damage of another.\(^10\)

(2) *Appropriation.* It is universally recognized that a landowner may appropriate all surface water which is found on his property. It is immaterial whether that water appears on his soil by virtue of rain or snow falling thereon, or whether it flows onto the premises from the land of a neighbor. The rule, as stated in the *Ehrmann* case,\(^10\) is that: "Surface waters may be controlled by the owner of the land on which they fall or originate or over which they flow. He may appropriate to his own use all that falls or comes on his land."\(^10\)

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\(^9\) For the Nebraska law relative to watercourses, see Doyle, *Water Rights in Nebraska*, 20 Neb. L. Rev. 1 (1941), and 29 Neb. L. Rev. 385 (1950).

\(^9\) 77 Neb. 241, 243, 109 N.W. 173 (1906).


\(^10\) *But see Kinyon & McClure, Interferences with Surface Waters*, 24 Minn. L. Rev. 891, 914-15 (1940), where the author concludes that
The above rule is in full accord with good soil and water conservation practices. Farmers should be encouraged to minimize the quantity of surface water permitted to flow onto the property of lower proprietors. This not only reduces the water problems of lower proprietors, thus cementing friendly neighborhood relationships, but it also has its aspects of selfish personal benefit. Every drop of water, and every particle of soil, maintained in its initial location, means higher crop yields in the immediate future. A number of conservation measures have been developed for this very purpose, and the law in this area commendably supports these meritorious goals.

(3) **Urban Litigation.** Since Nebraska is primarily an agricultural state, it is not surprising to find less litigation of urban surface water problems than in many other jurisdictions.

Perhaps the most comprehensive discussion of this particular question is found in *Jorgenson v. Stephens*. Surface water had drained from the eaves of plaintiff's buildings onto defendant's property. Defendant took steps to prevent the water from entering his premises. Plaintiff contended that the *Leaders* case, which appeared to follow the civil law rule, was controlling. But the court refused to enjoin the defendant's actions. In analyzing *Leaders* it said there was no intent to take away the right of a lower landowner to protect his land in a reasonable manner from surface water not flowing in a well-defined channel. To hold otherwise would be to arrest urban development.

Major departures from the above rule are unlikely to occur. Even if the civil law rule were adopted for rural cases, it is ex-

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104 For example, terracing, strip cropping, stubble mulching, and contouring.

105 See, e.g., *Young v. City of Scribner*, 171 Neb. 544, 106 N.W.2d 864 (1960); *Elsasser v. Szymanski*, 163 Neb. 65, 77 N.W.2d 815 (1956); *Jorgenson v. Stephens*, 143 Neb. 528, 10 N.W.2d 337 (1943); Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897, 60 N.W. 373 (1894); *Davis v. Sullivan*, 36 Neb. 69, 53 N.W. 1025 (1893). It is obvious that Nebraska's diffused surface water rules have really not been put to a test in urban areas.

106 *143 Neb. 528, 10 N.W.2d 337* (1943).


108 *Jorgenson v. Stephens*, 143 Neb. 528, 534, 10 N.W.2d 337, 340 (1943). This is, of course, the argument which has been used by many other courts in refusing to apply the civil rule in urban cases.
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tremely doubtful that it would be applied in urban litigation.100

(4) Damages. The measure of damages for growing crops destroyed by wrongful interference with surface water is the value of the crops at the time of destruction.110 Such damages are considered analogous to lost profits, and recovery, therefore, is precluded if the damage is too uncertain or remote.111 Normally, however, if similar crops are grown under similar conditions on adjoining lands, an estimate of damages based on the yield of those crops at maturity should be sufficient to counter any argument of uncertainty. Other factors which should be considered include: the kind of crop, nature of the land, the crop's stage of development at time of injury, the stand and appearance of the crop at time of injury, the recovery potential of the crop, market value at time of injury, the expense which would have been required to fit for market the portion of the probable crop which was destroyed, growing season conditions and any other circumstances indicative of value.112

The measure of damages for a permanent or perennial crop, such as alfalfa, is the difference between the value of the land before and after destruction of the crop.113

Damages may be caused by the negligence of more than one defendant, or by a combination of a defendant's negligence and an act of God.114 If the damages are separable they must be properly allocated so that any one defendant is required to pay only his share.115 It is incumbent upon the plaintiff to establish either that

109 Urban cases are more likely to be successful if based on a nuisance theory. See e.g., Young v. City of Scribner, 171 Neb. 544, 106 N.W.2d 864 (1960).


115 Faught v. Dawson County Irrigation Co., 146 Neb. 274, 279, 19 N.W.2d 358, 361 (1945), with numerous citations.

However, where an act of God combines with the defendant's
all his damages would have occurred because of the defendant's act regardless of outside influences, or to establish the amount of his damage that is due to the negligence of each defendant.  

IX. THE INFLUENCE OF THE CIVIL LAW RULE IN NEBRASKA

Nearly every surface water case decided in this state has included statements to the effect that such water is regarded as a common enemy. Nevertheless, subtle references to the civil law rule can occasionally be found. They are usually made with reference to some action taken by a lower proprietor to stop the flow of water onto his land, and particularly when he has obstructed a "natural drainageway." The court has given little efficacy to the common enemy rule in such situations.

However, the first apparent influence of the civil law rule in Nebraska is found in Davis v. Londgreen where an upper landowner was enjoined from draining a pond onto the plaintiff's land. The court said: "[P]laintiff has the absolute right to occupy and use his land for such lawful purpose as he sees fit, unencumbered by the periodical floodings complained of." In later cases the court could very well have given this holding a broad interpretation; and the civil law rule might have become Nebraska's surface water doctrine. But the case was ignored, presumably because of factual distinctions, when the famous Morrissey opinion was handed down some fifteen years later. In addition, it was later distinguished in most of the cases involving similar fact situations.

negligence in causing damages, the defendant is liable in full for the injury. Cover v. Platte Valley Public Power & Irrigation Dist., 162 Neb. 146, 161, 75 N.W.2d 661, 672 (1956), citing Inland Power & Light Co. v. Grieger, 91 F.2d 811 (9th Cir. 1937).


118 8 Neb. 43 (1878). For further discussion of this case, see text accompanying note 54 supra.

119 Id. at 46.


A leading case which did so distinguish *Davis* was *Aldritt v. Fleischauer.* The defendant was permitted to drain his pond into a natural waterway on his own farm, from which it then flowed onto the plaintiff's property. The court seemed somewhat concerned about whether it was dealing with the common law (common enemy) rule or the civil law rule, but it concluded that nomenclature was immaterial so long as individual legal rights were protected.

In *Muhleisen v. Krueger* the trial judge applied the civil law rule and enjoined the defendant from interfering with the upper proprietor's natural drainage. The Nebraska Supreme Court reversed, citing the *Aldritt* case.

But then, in 1938, the court appeared to reverse its position. *Leaders v. Sarpy County* furnished the strongest civil law language ever used by the Nebraska court. In enjoining the erection and maintenance of a dam in a natural drainageway, the court cited with approval the California case, *Heier v. Krull:*

Every landowner must bear the burden of receiving upon his land the surface water naturally falling upon land above it and naturally flowing to it therefrom, and he has the corresponding right to have the surface water naturally falling upon his land or naturally coming upon it, flow freely therefrom upon the lower land adjoining, as it would flow under natural conditions.

Had the court followed this dicta in later cases it would have sounded the death knell of the common enemy rule in Nebraska.

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122 74 Neb. 66, 103 N.W. 1084 (1905).
123 Id. at 72, 103 N.W. at 1086. Such a result, although just, destroys the predictability advantage of the common enemy rule. The court was once again applying the reasonable use rule—this time without giving it any kind of name.
124 120 Neb. 380, 232 N.W. 735 (1930).
125 Id. at 383, 232 N.W. at 736.
126 134 Neb. 817, 279 N.W. 809 (1938).
127 California is recognized as a civil law jurisdiction.
128 160 Cal. 441, 117 Pac. 530 (1911).
129 The *Leaders* case appeared to extend the "obstruction of natural drainageway" rule to all surface water. Had that been the court's actual intent, Nebraska clearly would have become a civil law state—at least in so far as lower proprietors are concerned. Under such an extension of the rule, a lower landowner would have been permitted to do little, if anything, to interfere with surface water flowing onto his premises from property above.

This was a substantial departure from the trend of development in Nebraska's surface water law, and the court found it necessary to backtrack a few years later.
But five years later, in *Jorgenson v. Stephens*, the Leaders holding was interpreted to mean only that the lower proprietor could not interfere with surface waters flowing in a well-defined channel or watercourse—the same rule that had been applied in many prior decisions.

In 1955, the Leaders case was revitalized for a brief period. *Clare v. County of Lancaster* was an injunction action brought by a lower proprietor to prevent the defendant county officials from restoring a culvert in a public road. The court cited Leaders in holding that the plaintiffs were required to bear the burden of receiving the water collected upon the upper land and naturally flowing therefrom. However, the court emphasized that the plaintiffs were unable to prove negligence or injury.

The Clare opinion is somewhat ambiguous, but *County of Scotts Bluff v. Hartwig*, decided during the same year, brought the civil law versus common enemy conflict directly to a head; and the latter rule prevailed. Plaintiff sought an injunction compelling defendants to remove certain dikes which allegedly caused surface waters to back up onto a county road. Application of the civil law rule was urged by the plaintiff. He cited the *Krull* case, as followed in Leaders. The court, however, held for the defendants, noting that there was no "well-defined watercourse" at issue, and

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131 This conclusion is certainly not compatible with the Krull doctrine, as quoted in Leaders v. Sarpy County, 134 Neb. 817, 279 N.W. 809 (1938). See text accompanying note 124 supra. Nevertheless, it can be justified on grounds of bringing consistency and predictability back into the state's surface water rules. Even though the holding in Leaders was consistent with prior cases, the civil law dicta in the Krull quote was an anomaly that could hardly be expected to survive in a "common enemy" jurisdiction.

The "natural drainageway" or "little watercourse" rule, even in its restricted form as exemplified in the Jorgenson case, is still a mutation of the common enemy doctrine. See the full discussion of this point in section X infra.


136 Id. at 828, 71 N.W.2d at 511.
that there was no evidence of negligence. The common enemy rule, with its reasonableness modification, was explicitly applied.

X. NICHOL V. YOCUM

This 1962 case attempt to consolidate Nebraska's diffused surface water rules into a condensed and understandable body of law, and to realign and correct terminology which had been misapplied during past years. The holding itself is not unusual or unexpected; the discussion in the opinion is.

_Nichol v. Yocum_ was an action to compel defendants to remove a dam which allegedly obstructed the natural flow of surface waters. The court held for the plaintiffs, finding that the water flowed into a natural depression or drainway. It applied the same rule which had been used many times in previous years, but expressly recognized that this rule did not fit the common enemy doctrine. Under the old common enemy rule a lower proprietor supposedly could fend off surface waters with any means at his disposal. And even under the so-called "modified common enemy" rule he could fend off such water if his actions were reasonable. Yet, time and again the court had held that he could not obstruct a "natural drainageway"—whether the action was reasonable or not. The apparent inconsistency is reconcilable in so far as the obstruction of surface water spread over a broad, flat area is concerned. Under those conditions the court has permitted reasonable stoppage and diversion. It is only for the "little water-course" situations that the rule differs.

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137 Id. at 830-32, 71 N.W.2d at 512-13.
138 In support the court cited Schomberg v. Kuther, 153 Neb. 413, 45 N.W. 2d 129 (1950); Courter v. Maloley, 152 Neb. 476, 41 N.W.2d 732 (1950); Snyder v. Platte Valley Public Power & Irrigation Dist., 144 Neb. 308, 13 N.W.2d 160 (1944); Jorgenson v. Stephens, 143 Neb. 528, 10 N.W.2d 337 (1943).
139 173 Neb. 298, 113 N.W.2d 195 (1962).
141 Anheuser-Busch Brewing Ass'n v. Peterson, 41 Neb. 897, 60 N.W. 373 (1894), as extended in Lincoln & B. H. R.R. v. Sutherland, 44 Neb. 526, 62 N.W. 859 (1895).
143 See Walla v. Oak Creek Township, 167 Neb. 225, 92 N.W.2d 542 (1956); Faught v. Dawson County Irrigation Co., 146 Neb. 274, 19 N.W.2d
Obviously the natural drainageway problems are a special category. Although the flow meets the definition of diffused surface water, it so nearly approximates a stream that the ordinary surface water rules have not been applied.\(^{144}\) From a surface water standpoint, the cases would have to be considered as applications of the civil law rule. But the court, in the past, endeavored to pay lip service to the common enemy rule by labeling such holdings as modifications of that rule.

In *Nichol v. Yocum* the Nebraska court conceded that both the “common law”\(^ {145}\) and “modified common law” rules permit a landowner to defend himself against surface water.\(^ {146}\) But the court also emphasized that the common law rule recognized that lower lands are under a natural servitude to receive the surface water of higher lands flowing along natural drainways. These waters cannot be dammed, repelled, or diverted without liability.\(^ {147}\)

The court then said that the common enemy doctrine originated in Massachusetts\(^ {148}\) that it is sometimes referred to in the Nebraska cases as the common-law rule, but that it actually has no relation thereto.\(^ {149}\) Although granting that several Nebraska cases have stated that surface waters are a common enemy,\(^ {150}\) the court could find no case specifically adopting the common enemy doctrine as the law of the state.\(^ {151}\) This led to the following statement: “We now hold that the common enemy doctrine is not the law of this

\(^{358}\) (1945); Flesner v. Steinbruck, 89 Neb. 129, 130 N.W. 1040 (1911); and many others.

These holdings have generally succeeded in properly balancing the equities of the individual problem situations despite the doctrinal and terminological barriers.

\(^{144}\) Even though the flow does not meet the statutory definition of a watercourse as provided by *NEB. REV. STAT.* § 31-202 (Reissue 1960).

\(^{145}\) Note that the term “common law,” rather than “common enemy,” was used.


\(^{147}\) Id. at 304, 113 N.W.2d at 199.

\(^{148}\) It is generally agreed that Luther v. Winnissimmet Co., 63 Mass. (9 Cush.) 171 (1851) was the first case to adopt the common enemy rule in this country. The later case of Gannon v. Hargadon, 92 Mass. (10 Allen) 106 (1865), however, became the leading opinion representing the rule.


\(^{150}\) This is a definite understatement; many cases have done so explicitly, and nearly all of the remainder have done so by implication.

\(^{151}\) In Hengelfelt v. Ehrmann, 141 Neb. 322, 327, 3 N.W.2d 576, 579 (1942), the court said: “This [common enemy] rule is in force in Nebraska . . . .”
state, and that the true doctrine of the common law in regard to surface waters is as a general rule in force and controls in this state."\textsuperscript{152}

The court then explained that the common-law rule as to obstructing natural drainageways is synonymous with the civil law rule.\textsuperscript{153} It noted that such cases have, in the past, been treated as exceptions to the common enemy doctrine. But resort to such exceptions is not required, according to the court, if the true common-law rule is properly applied.

According to the Nichol opinion the common enemy doctrine is not now (and never has been) in force in Nebraska. Rather, the "common law" rule is applicable although these two terms, common enemy and common law, had previously been used interchangeably. Since they no longer have the same meaning, it might seem that a fourth surface water doctrine has evolved. On the other hand, in examining the Nichol opinion one finds that the court appears to use "common law" and "civil law" interchangeably. From this one also might assume that Nebraska is now a civil law state. The court undoubtedly realizes, however, that the civil law rule has insurmountable deficiencies when applied to urban problems. With a steadily increasing urban (and steadily decreasing rural) population, the civil law rule cannot meet this state's legal needs unless it is severely modified. Moreover, such a broad civil law interpretation would virtually destroy the entire body of surface water law that has developed in Nebraska over the past seventy years.\textsuperscript{154}

It is far more logical to interpret the Nichol decision as neither adopting the civil law rule per se nor creating a fourth common law doctrine. The court was apparently attempting to place the "little watercourse" cases in a classification of their own. This could most effectively be accomplished by taking them out of the common enemy category entirely. But it leaves as conjectural the name to be applied to the remainder of the Nebraska surface water rules. If they are still to be considered as part of the modified

\textsuperscript{152} Nichol v. Yocum, 173 Neb. 298, 306, 113 N.W.2d 195, 200 (1962) (Emphasis added). The court cited Jorgenson v. Stephens, 143 Neb. 528, 10 N.W.2d 337 (1943); Muhleisen v. Krueger, 120 Neb. 380, 232 N.W. 735 (1930); and Town v. Missouri P. Ry., 50 Neb. 768, 70 N.W. 402 (1897). These cases are of little support to the court's position since an obstruction was permitted in each instance.

\textsuperscript{153} It cited the civil law rule of Bellows v. Sackett, 15 Barb. 96 (N.Y. 1853).

\textsuperscript{154} Note that the court said, "[T]he common law ... is as a general rule in force ... in this state." Nichol v. Yocum, 173 Neb. 298, 306, 113 N.W. 2d 195, 200 (1962) (Emphasis added).
common enemy doctrine, the court will have to retreat from its statement that "the common enemy doctrine is not the law of this state." If not, then the "common law" rule is in effect for all cases, and a separate classification for the "little watercourse" situations will no longer exist.

However, if the court feels that "common law" is a more meaningful and accurate term than "common enemy," the change is probably appropriate. It does not appear, however, that the court intended to change the basic, substantive principles of surface water law in Nebraska.

XI. CONCLUSION

Most of the confusion in surface water law in Nebraska (as well as elsewhere in the United States) has been over labels. This is strikingly illustrated by the Nichol case. Fortunately, the underlying legal principles are not nearly so confusing. In fact, the basic rules are few, and clearly elucidated by the court. They have been applied so frequently that there is little question as to their validity or predictability. Only the names have been changed. Occasionally the court has strayed off course through overly broad dicta; but it has consistently returned to a path of uniformity within a few years.

Nebraska's surface water rules are sufficiently flexible to adapt to varying fact situations, and the court has used this flexibility to good advantage. In nearly every case it is apparent that the court made at least a subtle analysis of the equities involved. In doing so the court was really applying the reasonable use rule—labeled as the common enemy doctrine. Now, under Nichol, it is to be labeled as the common law rule.

It is submitted that the court should carry the changes of the Nichol case one step further, discard all labels and antiquated property concepts, and determine future surface water cases on the basis of ordinary tort principles. The "reasonable man" concept of tort law has effectively dispensed justice to thousands of parties in innumerable fact situations. There is no reason to suppose that it will be any less effective in surface water cases. Furthermore, this would serve to promote uniformity of legal theory in the tort area.

Basically, these cases should be determined by comparing the social utility of the defendant's conduct with the gravity of harm suffered by the plaintiff. More specifically the considerations should include: the extent of the harm, foreseeability of the harm, the social value attached to the use of the water (by either party), the suitability of the use to the character of the locality, and the
burden of avoiding the harm. Physical factors, such as topography and location, must also be considered. A benefit-cost type analysis should be made, using legal, social and economic factors in each case; and the court should strive, in its decision, to maximize the total socio-economic product.

In the majority of surface water cases, the plaintiff seeks either a mandatory injunction, or an injunction plus damages. But if society is receiving an over-all benefit from a dam, a drainage ditch, or any other object interfering with the flow of surface water, injunction is not an appropriate remedy. Damages alone should be awarded. To obtain an injunction, a plaintiff should have to prove not only that he has suffered injury, but that such injury exceeds the benefits to the defendant, and to society, of the defendant's conduct. If the plaintiff cannot prove this, an injunction should be denied; but he should, of course, be fully compensated in damages.

For example, if a defendant's dam increases his net income by $5,000 per year, and if this causes flood damages to the plaintiff of $500 per year, surely this $4,500 of positive benefits to both the defendant and to society should not be discarded in the wake of an injunction. However, in so far as the defendant has, by design, inflicted injury on the plaintiff, this should be considered unreasonable and negligent conduct for which the defendant must make compensation.

In many instances litigation could be entirely avoided (and

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155 See discussion in Restatement, Torts §§ 822-33 (1939).

156 As a result of additional acres of cropland placed into production, or yield increases on land already being farmed due to minimizing flood damage.

157 Nebraska's surface water law will undoubtedly have to adapt to future problems, some of which are already on the horizon. One of these is irrigation run off. The state has experienced a vast increase in both ditch and pump irrigation over the last decade. As a result, potential disputes are, of course, proportionately increased. When irrigation water reaches the end of a field, it often flows across the property line and onto a neighbor. Should the irrigator be enjoined from permitting his excess water to reach his neighbor's land? In some cases it would be virtually impossible to retain all the runoff on the irrigator's property. And in many cases the neighbor is happy to receive free water. It is only when the runoff becomes excessive and damages the neighbor's crops that he complains. Furthermore, the irrigator's land has probably doubled or tripled in value because of this supplemental water supply. This too must be considered. When these problems reach the courts, the textual analysis described above would seem to be particularly appropriate as a means of solving them.

A similar question arises as to the interference with surface waters
neighborhood relations promoted) if the potential defendant simply purchased a right of way or easement over the area to be damaged.

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