Surface Water in Cities

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Recommended Citation
SURFACE WATER IN CITIES

THE RIGHTS AND REMEDIES ON PERMITTING, DIVERTING, INCREASING AND OBSTRUCTING THE NATURAL FLOW

Difference Between the Rules as to City and Rural Land

It is evident that no one hard and fast rule could be applied to all cases, either in city or country, without producing injustice and impolitic results. The needs and conditions in city and country are different. They usually differ widely in different parts of the same city. These considerations have induced the Supreme Court of New Hampshire to adopt the flexible rule, that: "In determining this question all the circumstances of the case would, of course, be considered; and among them the nature and importance of the improvements sought to be made, the extent of the interference with the water, and the amount of injury done to other land owners as compared with the value of such improvements, and also whether such injury could or could not have been reasonably foreseen."

That different considerations should be recognized in deciding on city and rural property has been intimated in several cases. 2

In Boyd v. Conklin (1884) 3 a judgment in favor of defendant in a suit for damages for removing a dam, by which plaintiff sought to prevent surface water flowing from defendant’s farm onto his, was affirmed, on the ground that the defendant was entitled to have the water flow unobstructed through the valley; but in the course of the opinion, Campbell, J., said: "A number of the most striking cases cited by plaintiff’s counsel in support of his appeal, as laying down the broadest doctrine, and as relied upon in a good share of his

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1 City of Franklin v. Durgee (1901), 71 N. H. 186, 51 Atl. 911, 58 L. R. A. 112, in which injunction was granted at the suit of the city to restrain defendant from filling in his city lot over which surface water from the city streets had been accustomed to flow, thereby preventing the drainage of the street.

2 Different Considerations in City and Country: Hall v. Rising (1904), 141 Ala. 431, 37 So. 586, holding defendants not liable for filling their city lots so as to stop a drain, and saying the rule is inapplicable in cities; Crabtree v. Baker (1882), 75 Ala. 94, 51 Am. Rep. 424; Farris v. Dudley (1884), 28 Ala. 126, 56 Am. Rep. 24; Freesburg v. Davenport (1884), 63 Iowa 119, 18 N. W. 705, holding the city not liable for water running from the street onto lots below grade, and intimating that the rules as to city and rural property are different; Franklin v. Durgee (1901), 71 N. H. 186, 189, 51 Atl. 911, 58 L. R. A. 112; Vanderwiele v. Taylor (1879), 65 N. Y. 347, 346.

In Gormley v. Sanford (1869), 52 Ill. 136, 162, the court said: "It is urged, however, that this rule, even if justly applicable to agricultural lands, should not be applied to city lots. Where a city has established an artificial sewerage of which property owners can reasonably avail themselves, we should probably hold that it was their duty to do so, and so the court substantially instructed in the present case. But this was not the state of facts in reference to this property."

other citations, were cases where the lands were in towns and cities, and the erections or acts in litigation referred to the uses of that class of property. And in relying on these it was claimed that there was no substantial foundation for any distinction between urban and rural property. There is no question but that such a distinction is recognized in the civil law authorities referred to in the argument, as well as in several of the cases cited. The distinction is one of substance and not arbitrary. As already suggested, the adjoining owners owe mutual duties,—the one to receive the natural flow, and the other not to materially change its conditions. It is obvious that the laying out of town streets and the multiplication of buildings cannot avoid making serious changes in the surface of the ground and in the condition of surface water. Grades must usually be established for streets and sidewalks and pavements, and other surface changes are usual in addition to the walls of buildings, which, with their embankments, must obstruct or change the drainage. It is almost universally expected and provided that sewerage and drainage shall be regulated by some municipal standard. There cannot be towns without changing the face of the land materially."

In one old Pennsylvania case, Bentz v. Armstrong (1844), an action by the owner of the upper part of a city lot against the lower for damages from water set back by an embankment built by the lower proprietor merely to stop the water, was held not maintainable. The court said: "In the argument, something was said about the natural formation of the surface of the ground of the two lots, and that, according to it, the water as it fell in rain was naturally inclined to run off from the lot of the plaintiff onto that of the defendant below, and the latter was therefore bound to submit to it. This, however, I take to be a non sequitur; for in the purchase of lots of ground laid out and sold for the purpose of building up towns and cities thereon, it has ever been understood, and such has been the practice and usage too, that the natural formation of the surface will, and indeed must, necessarily undergo a change in the construction of the buildings and other improvements that are designed and intended to be made. In doing this it would seem to be right that the common benefit and convenience of the respective owners of adjoining lots should be consulted and attended to; but certainly no one ought to be restrained from improving his lot in such a manner as to make it answer the purpose for which it was laid out, sold and purchased, if practicable without overreaching upon his neighbor's lot. He ought to be permitted to form and regulate the surface of

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it as he pleases, either by excavation or filling up, as may be requisite to the convenient enjoyment of it; taking care, however, not to produce any detriment or injury to his neighbor in the occupation or enjoyment of his adjoining lot. It is of great importance that the water upon each lot, arising from rain or other cause, should be conducted by the owner or occupier thereof, if he wishes to have it removed, directly from it to a sewer or other place appropriated for the receipt and discharge of the same, and not to be turned or led onto an adjoining lot without the consent of the owner; and it appears to me to be the duty of the owner of each lot, if he improves it, to do it in such a way, if practicable, as to lead and conduct the water which happens to fall or be on it, off in the way just mentioned, without regard to the original formation of the surface of his lot. But in a later case the same court affirmed a judgment for damages in favor of the owner of an outlying lot in Allegheny against the owner of a lower tract for flooding plaintiff's land by building a dam to protect defendant's land from water naturally flowing from plaintiff's lot and elsewhere, though increased by ditches.

Mr. Washburn, writing on Easements in 1863, said that it would seem that the natural right of drainage from the upper to the lower land, where recognized, had no application to land in cities, and this declaration has been reiterated by several writers and courts since. There is little or nothing to justify the statement. Wherever the civil law rule has been recognized, the right of surface drainage has been recognized, in the cities as much as in the country, due allowance being made for change of circumstances; and in states claiming to follow the so-called common law rule, so far as they have admitted a right to drainage of surface water at all, as in ravines, the right has been protected as to city property as much as in its application to rural land. The only authority cited by Mr. Washburn to support his statement was Bentz v. Armstrong, quoted above; and yet before his book was published the existence of the right and its application to city property had been recognized by several courts. The Court

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6 Ch. III, p. 556.
7 Hall v. Rising (1905), 141 Ala. 431, 37 So. 586; Lampe v. San Francisco (1899), 124 Cal. 546, 57 Pac. 461; Los Angeles Cemetery Ass'n v. Los Angeles (1894), 103 Cal. 461, 37 Pac. 375, in which the city was held not liable for making a culvert under a street too small, because the damage resulted from an extraordinary flood; and yet it was said by the court that since the water flowed in a natural depression or valley the city would have been liable if it had not made such provision as it could anticipate need of.
8 ante p. 449.
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of Errors and Appeals of New Jersey, speaking of the subject in 1856, said: "It is insisted that the law, as to running water, does not apply to building lots in a city or large towns. I cannot see why it does not," etc. Where it has been held that the owner of a lot in town may obstruct or divert the natural flow of surface water with impunity, the same is held with regard to drainage of rural land.

The Massachusetts or So-Called Common Law Rule

The whole law of surface water rights has been embarrassed by calling the doctrine that there is no right of drainage for surface waters outside of grant or prescription the common law rule. Many persons, including several eminent courts, have been misled thereby into supposing that such was the common law in England. That such was not the common law of England, and that the notion originated so near at hand as in the state of Massachusetts in the

11 That diverting or obstructing the flow of surface-water in the country gives no cause for action was held in the following cases:

Indiana: Cairo & V. Ry. Co. v. Stevens (1881), 73 Ind. 278, 38 Am. Rep. 139, denying damages for land flooded by railway roadbed stopping natural flow; Benthal v. Seifert (1883), 77 Ind. 203, reversing judgment for plaintiff for damages for damming up a ravine through which surface water had always flowed.

Kansas: Mo. Pac. Ry. Co. v. Keys (1893), 55 Kan. 205, 218, 40 Pac. 275, 49 Am. St. Rep. 249, embankment built by railway company to protect itself from surface water, held not to give cause for action to one on whose land the water was restrained.

Maine: Murphy v. Kelley (1878), 68 Me. 521, in which an action of case for obstructing the sewer draining plaintiff's cellar was held not maintainable; on the ground that, though used 13 years, no right by grant or prescription was shown; and defendant may erect structures on his own land to prevent surface water flowing from any other land onto his regardless of how it may affect others.

Massachusetts: Bates v. Smith (1868), 100 Mass. 181, affirming judgment against the members of the parish committee for damages for entering plaintiff's land and breaking an embankment erected by him at the upper line of his land to prevent water flowing from a valley through defendant's cemetery onto his land, though the embankment had raised the water in the cemetery so high it was about to flow into several tombs in which dead bodies were awaiting burial; Franklin v. Fisk (1868), 95 Mass. 271, 90 Am. Dec. 194, denying injunction at the suit of the town to restrain defendant from maintaining a dam on his land to prevent surface water flowing onto it from the road and through a culvert recently made by the public authorities to drain the highway onto his land; Cassidy v. Old Colony R. Co. (1886), 141 Mass. 174, 5 N. E. 144, denying damages for water set back by defendant's roadbed onto plaintiff's land.


Texas: Barnett v. Matagorda R. & I. Co. (1904), 98 Texas 355, 63 S. W. 501, holding an irrigation company not liable for water set back by the dikes along its canal.


year A. D. 1857, in the case of Parks v. Newburyport,\textsuperscript{12} seems pretty clear.

The decisions on the question of surface water rights in England are not numerous, because the early establishment of their drainage commission prevented such questions getting into court. The following cases are given as indicating the attitude of the English judges, to show that the so-called common law doctrine is opposed to the views expressed whenever the question came before an English court. The earliest case found in the effort to trace the history of the English law came before the English King's Bench in the year A. D. 1344. A man brought a writ of nuisance in respect of a house erected to the nuisance of his freehold, and counted that, whereas he had his house and below his house a piece of ground containing so much in length and so much in breadth, by which the water was wont to flow down from his house, and discharge, etc., the defendant had erected a house adjoining his house and higher, so that the water and the drops of rain could not flow down as they were wont to do, but fell upon the walls of his house, by reason wherof the timber of his house rotted, etc. Exception to the count for non-pursuance was held not well taken. Though of his own wrong the defendant was granted the view. The final disposition of the case is not given, but it seems taken for granted on all hands that to set back the water would be an actionable wrong.\textsuperscript{13}

In the year A. D. 1338, J. was attached to answer W. in a plea wherefore upon his wall at E., near a certain house of the said W. there, he placed stones of such width that the rain falling on these stones comes down on the said house so that the walls and timbers of the said house have become decayed and rotten, etc. But what was thought of the case does not appear further than that the defendant joined issue. The decision is not stated.\textsuperscript{14}

In the year A. D. 1468, in a case in which the main question was how one should plead a prescription for an easement, it was said by Danby, J., "If water runs over the land of M., and M. stops the water in its course so that it floods my land, I may well abate the dam, and for my entry he shall not have an action, for stopping the water was his own act."\textsuperscript{15}

In the year A. D. 1521, on trespass quare clausum by Sir Simon Harcourt against one Spicer, the defendant pleaded in justification of the alleged trespass that the place, etc., contained twenty acres of

\textsuperscript{12} 76 Mass. (10 Gray) 28.
\textsuperscript{14} Yearbooks (Pike), 11 & 12, Edw. I., p. 468.
\textsuperscript{15} Yearbook, 8 Ed. IV., 5, pl. 14.
land in which the tenants of D., of which he was one, were entitled to common; that it was each year flooded with water, and he made a ditch to avoid the water. The principal question discussed was whether a commoner has sufficient estate to justify such an act. In the course of the argument Brudnel said: "If I have an acre adjoining your acre, and my acre is flooded, I may make a ditch for the water to escape, and though this floods your acre I shall not be punished; for it is lawful for me to make this ditch in my own land; and the water is an element that naturally descends; and then you may make a ditch to avoid it, and so on till it comes to a river or ditch. And so it is lawful for anyone who has an interest in any land to avoid the water and all other things that do him damage."  

From these cases it would seem that the English doctrine was even broader than the civil law rule; for one burdened with surface water had not only a right of action against anyone below for stopping the flow, but he might increase and accelerate the flow with impunity for his own relief, though it caused injury to his neighbor below, which the civil law rule does not permit.

So far as I have been able to ascertain, the question in America first came before a court of last resort in A. D. 1812 in Louisiana, where the civil law always prevailed. In the first case the right of the upper owner to unobstructed natural drainage had been asserted according to the civil law, 17 but it would seem that the question was first squarely presented in Martin v. Jett (1838), 18 in which the plaintiff sued for damages, alleging that the defendant illegally erected a dam on his own land adjoining the plaintiff's, whereby the natural flow of the water was obstructed and plaintiff's land flooded, to his injury. The court reviewed the Louisiana Code, the Code Napoleon, and the civil law texts, and held that defendant was liable. This decision was followed in other cases on the same question shortly afterward coming before the same court. 19

It is believed that the question next arose in Pennsylvania in Bentz v. Armstrong (1844), 20 already cited and quoted at length, 21 in which the natural right of flowage was recognized without question,

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18 Yearbook, 12 Hen. VIII., p. 2.
17 Orleans Navigation Co. v. Mayor of New Orleans (1812), 2 Martin (La.) 215, 232.
19 12 La. 301, 52 Am. Dec. 120.
20 Lattimore v. Davis (1839), 14 La. 161, 33 Am. Dec. 581, holding defendant liable for concentrating all the water of his plantation augmenting the flow and casting it onto plaintiff's land at one point, but the servitude on the lower estate to receive the natural flow is affirmed; Hays v. Hays (1841), 19 La. 351, holding the lower proprietor liable in damages and decreeing that he remove the obstructions by him placed in the drains.
21 Ante p. 449.
but was held not applicable to the facts of the particular case of city property.

The next court to consider the question was in Massachusetts. In Luther v. Winnisimmet Co. (1851)\(^{22}\) the plaintiff alleged that the defendant obstructed an ancient water-course running through the land of both parties: the defendant pleaded the general issue; and the proof was that the plaintiff's land was low and sloped gradually down to the defendant's land, and that in times of melting snow or heavy rains water ran in no defined course from it onto the defendant's land, where part of it remained stagnant in a pond and the rest flowed on to the Mystic river and so to the sea, until the board of health of Chelsea directed the defendant to abate the pond as a nuisance, whereupon he filled it up and so occasioned the alleged stoppage of water. The court directed the jury that if they found no water-course the plaintiff could not claim a right of drainage merely because his land was higher than the defendant's and sloped towards it, so that surface water would naturally run in that direction. The jury found for the defendant, and, on exceptions taken, the court, without saying more, approved the instructions and overruled the exceptions. Here is evidently the germ of the so-called common law rule. Yet the decision seems to be correct because of the fatal variance between the allegation and proof. When the trial court on similar pleadings and proofs instructed the jury that they might find for the plaintiff though there was no stream, and the jury found for the plaintiff, exceptions were sustained on the authority of this case, two years later, the court saying: "He had averred no such right [to surface drainage], and if he proved it, it was an entire variance between his allegation and proof, and established a case different from that set out by him in his declaration, and one which the defendants were not bound to meet. Nor was the variance by any means immaterial. A mere right of drainage over the general surface of the ground is very different from the right to the flow of a stream or brook."\(^{23}\) From the last remark one might very naturally infer that there is a common law "right of drainage over the general surface of the ground"; and perhaps the plaintiff acted on this assumption in bringing the action of Parks v. Newburyport (1857).\(^{24}\) In that case it was alleged that there was a passage way for water over defendant's land, which he had a right to have kept open, and which the defendant had closed, to his damage. The proofs were that Newburyport owned a lot on which it had a school-

\(^{22}\) 63 Mass. (9 Cush.) 171.
\(^{23}\) Ashley v. Wolcott (1853), 65 Mass. (11 Cush.) 192.
house; that Parks owned the adjoining lot; that surface water had been accustomed to flow over the school-house lot from the rear in times of high water; that the city built an engine-house on the school-house lot on the side next to the Parks lot, and used the dirt from the foundation to shore up the wall and fill the lot; and that when the next heavy rain came the filling prevented it from running off as it had done before, and caused it to flow over Parks's lot. The defendant contended that the plaintiff had proved no cause of action; but the trial court instructed the jury, that if, for a period of twenty years prior to the act complained of, the water accumulating on the land in the rear of the lots in question had been accustomed to find an outlet over the land of the defendant, who had since obstructed it, occasioning substantial injury to the plaintiff by turning the water onto his lot, the defendant was liable. Observe that the instruction places the right on the ground of prescription. The jury found for the plaintiff, and the defendant excepted. The following is the entire opinion of the court, Per Curiam: "The declaration is for obstructing a water-course, and the instruction allowed the jury to find for the plaintiff, although there was no water-course. No action lies for the interruption of mere surface drainage. Luther v. Winnisimmet Co., 9 Cush. 171; Ashley v. Wolcott, 11 Cush. 192. Exceptions sustained." Here then we have for the first time a positive assertion of the new heresy destined soon to gain repute as the common law rule.

Strangely enough the question was considered for the first time by the courts of last resort in three different states only the year before, namely, New Jersey, Missouri, and Virginia, and in each of these courts the true common law and civil law rule, always before unquestioned, was approved and applied.25

25 New Jersey: On bill for injunction to restrain defendant from permitting a certain brook or creek over the lots of both parties in Elizabeth City to remain obstructed on defendant's lot so as to flood complainant's lot, the defendant denied that there was any brook, answering that the natural face of the ground is such that in heavy rains the water naturally flows from complainant's across defendant's lot. On the pleadings and proof taken the court decreed that the defendant remove the obstruction, saying: "The answer does not deny the material allegations of the bill, that the water has flowed in this same course from time immemorial. The defendants put themselves upon the ground that, while this is the natural outlet for the water, the complainant in her bill has wrongly dignified it with the appellation of a stream or natural water-course. The answer calls it a ditch, and an affidavit in the answer says that the said channel is not a water-course, but merely an upland drain, and yet the answer does not say that it is an artificial ditch, but expressly affirms that it was made by the water received from the complainant's land. * * * If, as far back as the memory of man runs, that flow of water produced a natural channel through the defendant's land where such accumulated surplus water has always been accustomed to run, the right of the complainant to have the water discharged in the same channel for the relief of her land is so clear that a court of equity would not refuse to protect her
The Massachusetts rule being thus promulgated, was reiterated two years later in Flagg v. Worcester (1859),\textsuperscript{26} in which the city was sued for laying out and grading a street without providing a culvert across it, so as to permit the escape of the surface water as it had before flowed, and setting it back onto the plaintiff's lot. It was alleged that a water-course had been stopped. It was found that there was no water-course; but in addition the court said the city, like any other owner, might build on its land as it would, and was not liable for obstructing the flow of mere surface water. Four years later a similar opinion was expressed on a like case in Dickinson v. Worcester (1863);\textsuperscript{27} and the same year, on the authority of the Massachusetts cases, the doctrine was approved in the state of Maine, in Bangor v. Lansil (1863);\textsuperscript{28} and two years later it was approved by the New Jersey Supreme Court in denying damages caused by building a stable in a depression so as to set back onto plaintiff's land the water accustomed to flow down the ravine or right from the mere consideration that the complainant, in stating her case in her bill, has made use of technical terms not the most appropriate to meet the exigencies of her case. * * * It is insisted that in consequence of the small quantity of water running, the complainant can, at small expense, cut a drain or outlet for the water before it reaches the defendant's premises, and discharge it in Jersey street. This defense admits the injury. * * * It is insisted that the law as to running water does not apply to building lots in a city or large towns. I cannot see why it does not. Here is a body of water which must be discharged, either over the building lot of the complainant or over the building lot of the defendants. It is true, it is injurious to the lot of the defendants to have it discharged over it, but then it is a right which the neighboring lot enjoys to have it discharged. There is a right and an obligation, as between the two lots, which has been acquired by prescription." Earl v. De Hart (1856), 12 New J. Eq. (1 Beas.) 280, 72 Am. Dec. 385.

Missouri: It appears that the plaintiff built on his own lot in the city, and then sued his neighbor for the damage caused by water standing on defendant's lot to the injury of plaintiff's house, and by the building of plaintiff's house prevented from escaping in its accustomed course. The court declared that the plaintiff suffered from his own wrong, because he was bound to permit the water to flow from the higher lot over his own, as it had always done. Laumier v. Francis (1856), 23 Mo. 181.

Virginia: Surface water had been accustomed to flow over the lot of the defendant in the city of Wheeling from the street by the natural lay of the ground. The city constructed a fill and culvert in the street which discharged the water over the defendant's lot at a different point. The work was done under the superintendence of the plaintiff as city street commissioner. The defendant then filled up the ravine on his lot so as to stop the mouth of the culvert and throw the water back onto the lot of the plaintiff where it remained stagnant. * For this tort an action on the case was brought. The court said that in the absence of any authority clearly justifying the defendant's act he must be held liable, and reversed the judgment of the court below for error in charging the jury that by the unauthorized diversion of the flow the defendant was justified in erecting any obstruction necessary to protect his own property, though the result was to cast the water onto the land of third parties. Amick v. Tharp (1856), 13 Grat. 564, 67 Am. Dec. 787.

\textsuperscript{26} 13 Gray (79 Mass.) 601.
\textsuperscript{27} 89 Mass. (7 Allen) 19, but in this case the old culvert was stopped.
\textsuperscript{28} 51 Me. 521, denying recovery by the city for the cost of constructing a sewer stopped by defendant filling his lot where the water had formerly run.
depression. The same year, 1865, the case came before the Massachusetts court, which has generally been referred to since as the leading case on the Massachusetts doctrine. The case referred to is Gannon v. Hargadon (1865), in which an action was held not maintainable by one on whom defendant had cast surface water by placing sods in the ruts in his drive on his own lot, through which the water was running, whereby it was caused to flow onto plaintiff's lot, onto which such water had never before flowed. In this case a general declaration of the doctrine is made, and the point of the prior Massachusetts decisions above referred to is declared to be that: "The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing onto it over the surface of adjoining lots, either to stand in unusual quantities on other adjacent lands, or pass into and over the same in greater quantities, or in other directions than they were accustomed to flow." This doctrine, in its statement and application, is inconsistent with the doctrine, nowhere denied and enforced in Massachusetts, that a man is liable for casting water from his roof so that it runs onto his neighbor's land, though the eaves do not overhang. It is believed also to be contrary to the spirit of the common law in refusing to arbitrate and leaving the result to the law of force; moreover, if one may build a dike, so may another, and he will succeed who can build the highest one; and meanwhile the whole basin is inundated, to the great prejudice of the common good, in order that the small lot of one of these contestants may be relieved of the inconvenience of the passing water. This doctrine has found acceptance in several other state courts, in several merely because it was called the common law doctrine, and the further history of it may be sufficiently seen hereafter in reviewing the decisions on the right to obstruct the flow of surface water.

Rights and Remedies if Flow is Restrained

Passing now from the rise of the Massachusetts or so-called common law rule to the present state of the law, we find that a

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number of courts that have adopted this rule have held that the owner of city property might build upon it or fill and grade it up to improve it, without liability or regard for the injury it caused others by stopping the natural flow of surface water. In South Carolina a railway company was held not liable to the owner of a city lot for damages caused by the building of an embankment by the railway company to protect its tracks from washout, thereby casting the water back onto the plaintiff's lot; and this decision was based on the provision in the state constitution that the common law of England, except as modified by statute or inapplicable to local conditions, was the law of the state, and the erroneous supposition of the court that the so-called common law rule was the law in England.

No Right of Drainage by Natural Course in Cities.—Connecticut: Chaddeyne v. Robinson (1887), 55 Conn. 345, 3 Am. St. Rep. 55, 11 Atl. 592, holding owner of town lot not liable for building a fence obstructing the flow of surface water from the adjoining lot.

Kansas: Bryant v. Merritt (1905), 81 Kan. 272, 80 Pac. 600, foundry lot filled in so as to flood greenhouse lot.


Maine: Bangor v. Lansil (1863), 51 Me. 521, holding the city not entitled under the statute to recover of defendant the cost of relaying a drain through his lot where he had stopped the former drain by filling his lot, because there was no obligation on his part to allow the water to continue to flow over his land; Morrison v. Bucksport & B. Ry. Co. (1877), 67 Me. 353, holding the railway company not liable for turning surface water into plaintiff's cellar by building its roadbed through a depression without providing for the escape of water accustomed to flow there, though the franchise from the village required the company to provide drainage.

Massachusetts: Parks v. Newburyport (1857), 76 Mass. (10 Gray) 28, holding there was no right of action for filling so as to stop surface water accustomed to flow over defendant's school house lot next to plaintiff's lot in Newburyport.


Texas: Gross v. Lampasas (1889), 74 Tex. 195, 11 S. W. 1086, holding the city liable for negligent construction of a ditch along a street to the injury of the plaintiff's land, though plaintiff had built a stone wall which shut out surface water flowing down the street from crossing his land as wont, for he had a right to do so.

Wisconsin: Johnson v. Chicago St. P. M. & O. Ry. Co. (1897), 80 Wis. 641, 50 N. W. 771, 27 Am. St. Rep. 76, 14 L. R. A. 495: But in Borchsenius v. Chicago St. P. M. & O. Ry. Co. (1897), 96 Wis. 448, 71 N. W. 884, a railway company was held liable for casting surface water onto another's land, the court saying that one might prevent the surface water getting onto his land if he could, but if it got there he must keep it, leave it undisturbed or turn it into a water course.
or was of English origin. A like decision was rendered on like facts in a Wisconsin case, in which the court said: "The doctrine here sanctioned is that one proprietor may turn and divert the surface water from his own land onto the land of his adjoining neighbor, and so on. Each proprietor may thus pass on surface water, and there is no remedy except in doing so." According to this case the proprietor above has no right to have the water flow on in the natural descent, nor the proprietor at the side any cause for complaint that water never before flowing to his land is artificially and intentionally cast upon him. By such a series of dikes we would hope to get the water passed up to the hill tops, but the further disposition of it the jurists declaring this rule have not provided for. The upshot of this rule is that the owner above may artificially cast water on the owner below with impunity, and the owner below may retaliate by damming it back and making a pond of the land above; and the law will refuse to intervene on the complaint of either, leaving them to fight it out among themselves, according to the good old rule that might makes right, and in the wager of battle God will decide.

But a number of courts claiming to follow the so-called common law rule refuse to follow it to its logical conclusion in such cases. In Iowa the common law rule, so-called, prevails, and yet a bill for injunction by the city to restrain a lot owner from filling a ravine known as "Dry-run," through which water had been accustomed to flow in times of flood and freshet, was sustained, and the defendant was required to remove the obstructions from the run so that the surface water could pass through it freely, the run being deemed a water-course, though no water flowed in it except in time of rains. The court said: "Where surface water has a fixed and certain course, as a swail, though it may be narrow or broad, its flow cannot be interrupted, to the injury of an adjoining proprietor."

In New Jersey the common law rule prevails, that the owner of land has the right to shut out water and stop the flow unless it is a water-course; but where there was a well defined course in which

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33 Johnson v. Chicago St. P. M. & O. Ry. Co. (1891), 80 Wis. 641, 50 N. W. 771, 27 Am. St. Rep. 76, 14 L. R. A. 495. But in Borchienius v. Chicago St. P. M. & O. Ry. Co. (1897), 96 Wis. 448, 71 N. W. 884, a railway company was held liable for casting surface water onto another's land, the court saying that one might prevent the surface water getting onto his land if he could, but if it got there he must keep it, leave it undisturbed or turn it into a water course.

34 Modified Drainage Right Recognized.—City of Waverly v. Page, 105 Iowa 225, 74 N. W. 968, 40 L. R. A. 465.
water from a vast tract of country had from time immemorial been accustomed to flow in time of rains over defendant's lot in the city of Elizabeth, a bill by an adjoining lot owner to enjoin the maintenance of a dam on defendant's land and require its abatement was sustained, and the dam abated, because it unlawfully set the water onto the plaintiff's lot. "There is no reason why the court should not exercise the power to abate as well as prevent the erection of nuisances."8

In Texas, where the common law rule also prevails, it was held that when an owner of a lot in the city of Victoria filled up a natural depression through his lot, in which surface water had always been accustomed to flow, and caused such water to flow over the higher lot of his neighbor, such neighbor was entitled to recover from him the damages thereby caused, though no action would lie for diversion of mere surface water not running in a definite channel. Gramann v. Eicholtz (1904).8

In New Hampshire a peculiar rule prevails, half-way between the so-called common law rule and the civil law rule; and there a bill in equity by the city against a lot owner to enjoin him from filling a natural depression in his lot through which water from the street had been accustomed to flow, was sustained, on the ground that the stoppage of surface water was an unreasonable use, more injurious to the neighbors and the city than it was beneficial to the defendant.37

In nearly all the cases in which the question has arisen in a court not committed to the Massachusetts rule, it has been held that the owner of city property who erects a dike to protect it from surface water,8 or who grades up or builds on his lot in such a way as to obstruct the natural flow of surface water,89 is liable in damages

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8 Earl v. DeHart, 12 N. J. Eq. (1 Beasley's Ch.) 280, 72 Am. Dec. 395, with note as to power of equity to abate nuisance; Priest v. Maxwell, 127 Iowa 744, 104 N. W. 344.
37 City of Franklin v. Durgee (1901), 71 N. Hamp. 186, 51 Atl. 611, 58 L. R. A. 112.
38 Dams in Cities to Stop Surface Water Not Allowed.—Gormley v. Sanford (1869), 52 Ill. 158, in which one grading his land in the suburbs so as to obstruct the natural drainage of a vineyard above to the injury of the owner was held liable; Earl v. De Hart (1856), 12 N. J. Eq. 280, 72 Am. Dec. 385, enjoining continuance of the dam. But this decision seems to be discredited by Bowlsby v. Speer (1865), 31 N. J. L. [Vroom] 351, 86 Am. Dec. 216; Amick v. Tharp (1856), 12 Grat. (Va.) 364, 67 Am. Dec. 787, though a new city culvert had cast the water onto defendant's lot at a new point.
89 City Lot May Not Be So Graded As To Obstruct Flow.—Alabama: Central Ga. Ry. Co. v. Keyton (1906; Ala.), 41 So. 918, city lot flooded by road bed, with inadequate culvert; Shahan v. Alabama G. S. R. Co. (1897), 115 Ala. 181, 22 So. 449, 67 Am. St. Rep. 20, holding it no answer to an action for damages in setting back surface water so as to flood the plaintiff's store, that the road-bed and inadequate culverts which caused the flood had been maintained for the statutory period, since it is not alleged that injury or cause for complaint by plaintiff had existed for that time; but if the spur track stopping the water was built for plaintiff's use at his request, query.
for any injury to other property on which the water is thereby set 
back, and may be enjoined to abate the obstruction as a nuisance. 
In other words, the right of the urban proprietor to obstruct the 
flow of surface water extends only to cases in which provision for 
disposition of it has been made by public drains and sewers, so that 
the obstruction will not cause injury to another; and to that extent 
obstruction and diversion would or should equally be permitted in 
the country.

Notwithstanding the rule that municipal corporations are not liable 
for consequential damages resulting from authorized acts, and there-
fore are not liable for damages resulting from grading the streets 
of the city, it has been held, even by courts asserting the right of 
urban land owners to make improvements obstructing the flow of 

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In Hall v. Rising (1895), 141 Ala. 431, 37 So. 586, an action for damages for filling 
a city lot so as to obstruct the flow of a drain was held not maintainable, and the court 
said there was no proof that the filling had stopped the drain, but added that the right 
to flowage of surface water had no application to cities. 

Connecticut: In Adams v. Walker, 35 Conn. 466, 91 Am. Dec. 742, in an action for 
damages for turning surface water onto the plaintiff's city lot, by defendant grading his 
lot to prevent the water running into his well, it was held that plaintiff was entitled to 
judgment for damages, and that it was no excuse that the purpose was to improve in 
good faith the lot of the defendant. 

132, 26 L. R. A. 453, holding that the city is liable for the injury caused by surface 
water obstructed by erecting the city water-works; Farkas v. Towns (1897), 103 Ga. 159, 
29 S. E. 700, holding lot owner liable for building on it so as to set surface water back 
on lot above though building the house increased the market value of the lot; Edgar v. 
Walker (1899), 106 Ga. 454, 32 S. E. 382, holding lot owner not liable for flooding due 
to negligence of himself and plaintiff. 

Kentucky: Chesapeake & O. Ry. Co. v. Gross (1897, not officially reported), 19 Ky. 
Law R. 1926, 43 S. W. 203, holding that defendant railway company was liable for 
damages from surface water set back into plaintiff's store by a track built in the alley by 
defendant, but that the measure of damages was the present cost of providing drainage, 
not the cost of raising the store or filling in the lot to the grade of the track in the alley. 

504, 13 Ohio Dec. Reprint 1035, awarding damages for allowing embankment to form 
where stone was loaded on the cars, whereby flow of surface water was obstructed. 

Missouri: Laumier v. Francis (1856), 23 Mo. 181, denying recovery to plaintiff for 
jury caused by his building on his city lot in such a way as to hold surface water onto 
defendant's lot. 

Pennsylvania: Keating v. Pittston (1897), 8 Kulp (Pa.) 421, holding that the right of 

a landowner to fill up his lot for building purposes is subservient to the neighbor's 
right of natural drainage, and can be exercised only by making provision for the water. 

Tennessee: Louisville & N. Ry. Co. v. Mossman (1891), 90 Tenn. 157, 16 S. W. 64, 
25 Am. St. Rep. 670, holding the Ry. Co. not liable by its backing up surface water by 
its road-bed, because the bed had been maintained without suit or interruption till a right 
had accrued by prescription to maintain it; Carland v. Aurin (1899), 103 Tenn. 555, 53 
S. W. 940, 76 Am. St. Rep. 699, 48 L. R. A. 862, sustaining an action for damages by 
an owner of a city lot against the owner of the lower lot for filling it in such a way as 
to set the surface water back on plaintiff's lot. 

West Virginia: Henry v. Ohio R. R. Co. (1895), 40 W. Va. 234, 21 S. E. 863, 
action for building railway road-bed so as to stop water flowing to city sewer and so 

flooding plaintiff's lot.
surface waters, that the city would be liable to the abutting owner for obstructing the flow of surface water in a ravine or natural depression where it usually flows in times of rains and floods, by raising the grade of the street without providing adequate outlets for the water. 40

In affirming a judgment for damages against a city, resulting from inadequate provision for carrying off water stopped in a draw by grading up a street, the Nebraska supreme court said: "It [the city] had the undoubted right to fill the ditch therein and to dike or dam the draw that emptied into said ditch. In other words, it had the right to take such steps and perform such acts as in its judgment were necessary to protect its streets from surface waters; but while it had this right, it was charged with the duty of exercising it with ordinary care. It knew and was bound to know that the draw was the natural conduit from which the surface waters from a large area of surrounding country were wont to find their way to the Blue river, and when it diked this draw at Court street and filled up the ditch in said street it was charged with the duty of constructing sufficient ditches and outlets to carry the surface waters coming down said draw." 41 Where the rule of the civil law prevails the liability of the city in such cases would seem to be clear. 42 But in Massachusetts

40 Los Angeles’ Cemetery Ass’n v. Los Angeles (1894), 103 Cal. 461, 27 Pac. 375, in which judgment for the defendant city was affirmed on the ground that provision had been made for escape of all the water in any flood that the city could anticipate at the time of making the culvert; Kearney v. Themanson (1896), 48 Neb. 74, 66 N. W. 996, on the ground that though one may do as he will with his own he must so use it as not to injure others, and so the city was liable for filling the street without making a culvert for the escape of the surface water.


42 CITY LIABLE FOR OBSTRUCTING FLOW.—Alabama: Avondale v. McFarland (1893), 101 Ala. 381, 13 So. 504, holding the city liable for damages in setting surface water back on lots below street grade by building the road-bed of the street without culvert, though the only way out for the water at the other side was over other private lots.

Georgia: Maguire v. Carterville (1885), 78 Ga. 84, building street without providing culverts for escape of water stopped by making the street, held to give action against the city.

Illinois: Nevins v. Peoria (1886), 41 Ill. 502, holding the city liable for injury to a lot by a stream of mud necessarily cast on plaintiff’s lot by raising the grade of the street.

Kentucky: Kemper v. Louisville (1878), 14 Bush (Ky.) 87, reversing judgment for the city in an action for damages for making a new street without culvert for the escape of water that had been used to escape through a depression at that point.

Louisiana: Rice v. Mayor of Flint (1887), 67 Mich. 401, 34 N. W. 719, affirming a judgment against the city for damages for so grading the street that water could not flow down the gutter and flowed off over plaintiff’s lot, following Ashley v. Port Huron (1879), 35 Mich. 296, 20 Am. Rep. 629.

Ohio: Rhodes v. Cleveland (1840), 10 Ohio 159, earth washed away by water from the street.

it has been held that the city is not liable for injury to land along a street by surface water diverted onto it or obstructed by the making of streets without provision for the escape of the surface water through ravines where it had been accustomed to run.\textsuperscript{43} And this rule has been followed in New York and Wisconsin.\textsuperscript{44} To the extent of permitting the city to obstruct the drainage, the same rule has been adopted in a few other states.\textsuperscript{45}

\textbf{Rights and Remedies if Water is Cast Upon One's Land}

From the Massachusetts rule another vicious doctrine has grown, which is usually expressed in the statement that surface water is a common enemy which every man may lawfully rid himself of as best he can, without regard to the injury it may cause others.\textsuperscript{46} This


\textit{Virginia:} Smith v. Alexandria (1886), 33 Gratt. (Va.), 208, reversing a judgment for defendant in an action for damages for filling the street so that water formerly carried off in the gutters was thrown back on the lot.


\textit{Lynch v. Mayor, etc., of New York (1879), 76 N. Y. 60, 32 Am. Rep. 271, and though the street was so graded as to prevent water escaping as before and cast more water there, the action was held not maintainable; Hoyt v. Hudson (1871), 27 Wis. 656, 9 Am. Rep. 472, followed in Harp v. Baraboo (1898), 101 Wis. 368, 77 N. W. 744; Waters v. Bay View (1884), 61 Wis. 647, 21 N. W. 811; Allen v. Chippewa Falls (1881), 52 Wis. 431, 9 N. W. 284, though the sewer brought water from elsewhere onto plaintiff's land. But see Pettigrew v. Evansville (1870), 25 Wis. 223, 3 Am. Rep. 50.

\textit{Common Enemy Doctrine.}—Gannon v. Hargadon, The Leading Case (1869), 92 Mass. (10 Allen) 106, 87 Am. Dec. 624, in which defendant turned surface water away from his land onto plaintiff by putting sods in the ruts in defendant's driveway, where the water was running; Bryant v. Merritt (1905), 71 Kan. 372, 80 Pac. 600, holding defendants not liable for filling in his foundry lot so as to turn surface water onto plaintiff's lot and ruining her greenhouse; Werner v. Popp (1905), 94 Minn. 118, 521, 102 N. W. 366, 103 N. W. 164.

\textit{Limitation on Doctrine.}—But in a late case the Massachusetts rule is somewhat abridged by a decision holding the city liable for casting surface water on plaintiff's property at a point where it was liable to accumulate for want of adequate means of escape, the change in course being unreasonable and unnecessary. Daley v. Watertown (1906), 192 Mass. 116, 78 N. E. 143.

This limitation seems to have obtained generally wherever the Massachusetts doctrine is recognized. Sheehan v. Flynn (1894), 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632;
heresy finds no sanction in the civil law, by which the proprietor above was entitled to the natural flow of surface water for his relief, but could do nothing to aggravate the burden on the proprietor below; and such is the law now in the states generally, and in

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Todd v. York County (1904), 72 Neb. 207, 100 N. W. 299; Sullivan v. Browning (1904), 37 N. J. Eq. 391, 58 Atl. 302; Nicolai v. Wilkins (1899), 104 Wis. 580, 80 N. W. 939; Borchesenius v. Chicago St. P. M. & O. Ry. Co. (1897), 96 Wis. 446, 71 N. W. 884; Pettigrew v. Evansville (1870), 25 Wis. 233; 3 Am. Rep. 50, enjoining construction of ditches to throw water onto plaintiff's land.

47 Domat's Civil Law (Cushing's Ed.), p. 616, § 1583; Ugian D. 39, 31; Ware's Roman Water Law, § 110.


California: Wood v. Moulton (1903), 146 Cal. 317, 80 Pac. 92.

Delaware: Chairman v. Queen Anne's R. Co. (1901), 3 Pennewill (Del.) 407, 54 Atl. 687.

District of Columbia: Frisbie v. Cowen (1901), 18 App. D. C. 381, that a railway company is liable for emptying ditches along its tracks into a gully.


Iowa: Wirds v. VlerkKandt (1906), 131 Iowa 152, 108 N. W. 108, but declaring that the court favors a liberal policy to redeem wet lands by drainage where it can be done without substantial injury.


Nevada: Boynton v. Longley (1885), 19 Nev. 69, 6 Pac. 437, 3 Am. St. Rep. 781, seepage from irrigation.


New York: Peck v. Goodberlett (1888), 109 N. Y. 180, 26 N. E. 350, holding defendant not liable for water running in dead furrows onto plaintiff's land somewhat faster than it would without the furrows.


Ohio: Butler v. Peck (1865), 16 Ohio St. 324, 88 Am. Dec. 452, that plaintiff is entitled to damages for surface water cast onto his land by ditches in defendant's marsh.
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England. The unsoundness of this “common enemy” doctrine is demonstrated by the rule, as old as the common law, and nowhere denied, that one who builds on his own land so near the line that the drip from his eaves falling on his own ground necessarily flows onto the land of his neighbor is liable for the injury thereby caused to the neighbor. Likewise, if he paves his land so that it is


Rhode Island: Johnson v. White (1904), 26 R. I. 207, 58 Atl. 665, 65 L. R. A. 250, action against city treasurer for damages from surface water naturally flowing over plaintiff's lot but concentrated to his damage by grading the street.


Utah: North Point C. I. Co. v. Utah & Salt Lake C. Co. (1897), 16 Utah 246, 52 Pac. 168, 40 L. R. A. 891.


Washington: Noyes v. Conelman (1903), 29 Wash. 635, 70 Pac. 61, 92 Am. St. Rep. 937, enjoining making of a ditch all on defendant's land, to a point from which the water would flow onto plaintiff's land.


Contra: Kennison v. Beverly (1888), 146 Mass. 467, 16 N. E. 278, holding city not liable for water percolating into plaintiff's cellar from a catch-basin built by the city eight feet from plaintiff's house, and negligently allowed to become clogged.

40 Liable for Eaves Drift.—Arkansas: Chandler v. Lazarus (1892), 55 Ark. 312, 18 S. W. 181.

California: Armstrong v. Luco (1894), 102 Cal. 672, 36 Pac. 674.


Minnesota: Beach v. Gaylord (1890), 43 Minn. 476, 45 N. W. 1095.


Water Cut Into Street.—But in Jessup v. Bamford Bros. Silk Mfg. Co. (1902), 66 N. J. L. 641, 51 Atl. 147, 28 Am. St. Rep. 502, 58 L. R. A. 329, defendant was held not liable for building near the street and piping the water from the upper part of its lot to the street where it would naturally flow, and easing it through the wall of its building onto the sidewalk in one place where it froze and caused plaintiff to fall and be injured.
impervious to water, turns his water pipes onto it, whence the water in a heavy rain runs into his privy vaults, and, for want of adequate exit, thence overflows into plaintiff's cellar to his injury, an action lies.\textsuperscript{51}

Even a city, though empowered by law to fix street grades, and by the circumstances often bound to raise the grade, is generally held liable if water from the street is thereby cast on the adjoining lots.\textsuperscript{52}

It has also been held that one whose lot is below the grade of the street has no remedy against the city nor the owner of the adjoining lot for damages from water caused to flow onto it by improvement of the adjoining lot or street at the proper grade.\textsuperscript{53} Where the street is below the adjoining lots and the earth on the lots is washed away by water turned into the street by the city, it has been held liable for the damages.\textsuperscript{54}

But clearly the owner of a city lot is not liable to an action for damages resulting from his permitting the water to run off his lot onto that of his neighbor by the natural course of descent.\textsuperscript{55}

\textsuperscript{51} Jette v. Hughes (1876), 67 N. Y. 267.
\textsuperscript{52} City liable for casting water onto lots.—Nevins v. Peoria (1866), 42 Ill. 502; Rice v. Mayor of Flint (1887), 67 Mich. 401, 34 N. W. 719; McClure v. Red Wing (1881), 28 Minn. 186, 9 N. W. 767; Ple v. Mankato (1887), 36 Minn. 383, 31 N. W. 863.

Collecting surface water by the city into a ditch into which it was not accustomed to flow was enjoined at the suit of the owner of land through which the ditch flowed. Soule v. Passaic (1890), 47 N. J. Eq. 28, 20 Atl. 346; Miller v. Morristown (1890), 47 N. J. Eq. 62, 20 Atl. 61; West Orange v. Field (1883), 37 N. J. Eq. 660, 45 Am. Rep. 670; Field v. West Orange (1883, N. J. Ch., not officially reported), 2 Atl. 236.

\textsuperscript{54} Phillips v. Waterhouse (1886), 69 Iowa 199, N. W. 539, 38 Am. Rep. 220, holding the owner of a city lot not liable for injury to a house below the grade of the street caused by water cast from defendant's house into the alley at grade and flowing thence 160 feet to plaintiff's lot; Freberg v. Davenport (1884), 63 Iowa 119, 18 N. W. 705, holding a city not liable for surface water flowing from the street onto lots below grade, though caused by grading the street and sufficient culverts and gutters might have been provided to prevent it.

\textsuperscript{55} Podhaisky v. Cedar Rapids (1878), 106 Iowa 543, 76 N. W. 847; Rhodes v. Cleveland (1840), 10 Ohio, 159.

\textsuperscript{56} Phillips v. Waterhouse (1886), 69 Iowa 199, 28 N. W. 539, 38 Am. Rep. 220, the water running from the waterspout at the rear of defendant's house into the alley, and thence 160 feet to defendant's house, which was below the street grade; Livezey v. Schmidt (1896), 96 Ky. 442, 29 S. W. 25, alleging that water fouled by defendant's stable escaped into plaintiff's cellar; Morrill v. Hurley (1876), 120 Mass. 99; Vanderwiele v. Taylor (1875), 65 N. Y. 341, in which plaintiff asked damages for injury to the wall of his house by water naturally flowing down the hill over and from defendant's lot and unaffected by any act of his; Sowers v. Lowe (1887, Pa., not officially reported), 9 Atl. 44, though the water came from defendant's eaves-trough spouts at the back end of the lot, on the side next to plaintiff's house, and thence ran against plaintiff's cellar wall to his injury; Sentner v. Tees (1890), 132 Pa. St. 216, 18 Atl. 1114, water running from defendant's lot lying below grade, which he could drain at small expense.
a fortiori, for damages from plaintiff damming the water back onto defendant’s lot;\(^{56}\) and injunction against the upper proprietor to restrain continued flowing of water onto the lower lot has been denied except in so far as the flow was increased by artificial means.\(^{57}\) Yet injunction will be granted to restrain even the natural flow of surface water fouled on defendant’s premises.\(^{58}\) The plaintiff having wilfully and persistently fouled the surface water naturally flowing from his lot onto the defendant’s lot, it was very justly held that defendant did no wrong in obstructing its flow onto his land, and was not obliged to go to law for redress.\(^{59}\) Or if the proprietor above wrongfully augments the flow, the owner below may rightfully stop it.\(^{60}\) This, however, would be no excuse for turning it onto another.\(^{61}\) That surface water collected and standing on plaintiff’s lot was endangering the foundation of defendant’s house, who had offered to pay for the expense of removing it, was held to be no defense to an action of trespass for entering and digging in plaintiff’s lot to remove the water.\(^{62}\)

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\(^{56}\) Laumier v. Francis (1856), 23 Mo. 181.

\(^{57}\) Goldsmith v. Elas (1874), 33 Ga. 186.


\(^{60}\) Mayor of Sweetwater v. Pate (Tenn. Ch. 1900), 59 S. W. 480, denying injunction to prevent stoppage; Matteson v. Tucker (1905), 131 Iowa 511, 107 N. W. 600, denying damages for stoppage; Priest v. Maxwell (1905), 127 Iowa 744, 104 N. W. 344, allowing injunction though complainant built counter-dike. Cedar Falls v. Hansen (1897), 104 Iowa 189, 73 N. W. 585, denying injunction to restrain filling city lot to grade; Horton v. Sullivan (1893), 97 Mich. 282, 56 N. W. 552, saying that damages would not be recoverable for stoppage in such a case. But see Sharpe v. Scheible (1894), 162 Pa. St. 341, 29 Atl. 736, 42 Am. St. Rep. 838, awarding damages as to stopping water entitled to flow there.

\(^{61}\) Grant v. Allen (1874), 47 Conn. 156.

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John R. Rood.