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From Good Husbandry to Reasonable Use: Illlinois Surface Water Drainage Law Evolves in Subdivision Case

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FROM GOOD HUSBANDRY TO REASONABLE USE: ILLINOIS SURFACE WATER DRAINAGE LAW EVOLVES IN SUBDIVISION CASE.

The drainage of unwanted surface water is a persistent problem in Illinois as housing construction and rural alterations of land continue to be necessary to meet current social needs. In the course of land development, changes in natural drainage patterns of surface waters may cause flooding onto neighboring lands. The resulting disputes are governed by the law of surface waters, an amalgam of property rules and tort principles. During the last century, Illinois surface water drainage cases have adhered to inflexible rules which were designed to facilitate agricultural development. In urban areas, however, population density and the number of valuable structures concentrated on small parcels of land increase the potential for high monetary damages in surface water flooding cases. To the extent that rules developed to meet simpler situations are insufficient to weigh the complexities of urban development, a need for an alteration of surface water rules is apparent. Recently, Illinois surface water law departed from the form it had followed since the mid-19th century.

In *Templeton v. Huss*,[1] the Illinois Supreme Court sidestepped an opportunity to adhere to the established natural flow rule and held that a reasonable use rule was to be applied instead. As will be seen, the court's use of ambiguous language left the dimensions of the change in the law unclear. An evaluation of *Huss* will be implemented by a brief introduction to the factual setting of a typical surface water suit and by a survey of the dominant principles of drainage law in Illinois and other states. After a summary of the *Huss* opinion, five plausible interpretations of the decision will be examined in order to determine the probable impact of *Huss* on future litigation. The five part analysis will consider the fact paterns likely to be governed by *Huss* and the test intended by the court for future use in implementing its announced policy of reasonableness.

Introduction to Surface Water Drainage Law

Surface waters accumulate on land from rain, springs, and melting snows and then "diffuse themselves over the surface of the ground and seek a lower level by force of gravity."[2] Surface waters do not regularly flow in defined channels as do rivers or streams.[3] The inability of surface waters to maintain

1. 57 Ill. 2d 134, 311 N.E.2d 141 (1974), *rev'g* 9 Ill. App. 3d 828, 292 N.E.2d 530 (1973).

2. Midgett v. North Carolina State Highway Comm'n, 260 N.C. 241, 244, 132 S.E.2d 599, 604 (1963). *See* Dayton v. Drainage Comm'rs, 128 Ill. 271, 21 N.E. 198 (1889); Groff v. Ankenbrandt, 124 Ill. 51, 15 N.E. 40 (1888); Peck v. Herrington, 109 Ill. 611, 616-17 (1884). Flood waters which overflow stream banks are also classified as surface waters. Chicago, P. & St. L. Ry. v. Reuter, 223 Ill. 387, 79 N.E. 166 (1906).

3. Village of Crossville v. Stuart, 77 Ill. App. 513 (1898).

an identity or to exist as a body of water marks the difference between surface waters and lakes or ponds. Litigation arises when the acts of one owner interfere with the natural drainage pattern to the injury of the other. As a general rule, the parties to surface water disputes are an owner or user of higher land, the defendant, and a neighboring lower landowner, the plaintiff. In Illinois, a central issue in drainage suits has been whether the defendant has diverted waters from the natural course of drainage. When Illinois courts speak of a natural course of drainage, they mean the natural *direction* of drainage across the lands in question.[4] The course of drainage concept also refers to the precise location on the boundary between adjoining tracts where surface waters would naturally drain onto the lower land—the natural drainage outlet.[5] Therefore, *diversion* of the natural drainage course occurs when one owner taps into waters naturally draining in another direction or discharges surface water onto lower land at a point different than the natural drainage outlet.

American surface water drainage law falls into four distinct categories: the common enemy rule, the civil law or natural flow rule, a reasonable use modification of the civil law rule, and a reasonable use rule. Under the early common enemy rule, landowners could treat surface waters as a common enemy.[6] Each had a right incident to his ownership to fend off surface waters without incurring liability for injury to adjoining property. Owners of adjacent land could take defensive measures and repel the waters flowing onto their lands.[7] The common enemy rule has been modified so that a landowner may rightfully obstruct surface water "only so long as such obstruction . . . is incident to ordinary use, improvement, or protection of his land, and is done without malice or negligence."[8] In 1869, the common enemy rule was expressly rejected in Illinois in favor of the civil law rule.[9]

4. *See* Fenton & Thompson R.R. v. Adams, 221 Ill. 201, 211, 77 N.E. 531, 534 (1906); Dayton v. Drainage Comm'rs, 128 Ill. 271, 276, 21 N.E. 198, 199 (1889); Peck v. Herrington, 109 Ill. 611 (1884); Mello v. Lepisto, 77 Ill. App. 2d 399, 403, 222 N.E.2d 543, 545 (1966) (complaint which alleged that defendant had violated natural patterns of drainage held legally insufficient because no allegation as to the direction of natural drainage had been made).

5. Montgomery v. Downey, 17 Ill. 2d 451, 162 N.E.2d 6 (1959); Fenton & Thompson R.R. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906); Daum v. Cooper, 208 Ill. 391, 70 N.E. 339 (1904); Bundy v. City of Sullivan, 1 Ill. App. 2d 212, 117 N.E.2d 302 (1954); Town of Saratoga v. Jacobson, 193 Ill. App. 110 (1914).

6. "[The common enemy] rule of surface waters is, in substance that a possessor of land has an unlimited and unrestricted legal privilege to deal with surface water on his land as he pleases, regardless of the harm which he may thereby cause to others." Kinyon & McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 898 (1940).

7. *E.g.*, Greeley v. Maine Central R.R., 53 Me. 200 (1865) (railroad embankment obstructed drainage); Gibson v. Sharp, 277 S.W.2d 672 (Mo. Ct. App. 1955) (ditch filled in by lower owner).

8. Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NATURAL RESOURCES J. 72, 79 (1968). *See generally* Dobbins, *Surface Water Drainage*, 36 NOTRE DAME LAWYER 518, 523-24 (1961); Annot., 59 A.L.R.2d 421, 437-38 (1958).

Jurisdictions following common enemy rules include: Alabama, Arizona, Arkansas, Connecticut, District of Columbia, Indiana, Kansas, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Virginia, Washington, West Virginia, and Wisconsin. 5 R. CLARK, WATERS AND WATER RIGHTS § 451.2, at 490 (R. Beck 1972) [hereinafter cited as CLARK].

9. Gillham v. Madison County R.R., 49 Ill. 484, 485-86 (1869).

The Illinois civil law or natural flow rule, in its purest form, provided that one was strictly liable for interfering with the natural flow of surface waters to the injury of another's "interests in the use and enjoyment of his land."[10] Under this early rule, the lower tract was burdened by a natural drainage servitude.[11] The upper owner's easement was limited since he could not alter the natural flow to increase the burden on the land below.[12] The early rule inhibited land development. Since *all* interference with natural drainage was prohibited, higher lands could not be improved and tilled. To facilitate agricultural development, Illinois courts declared a good husbandry exception to the natural flow rule.[13] Under this modification, the owner of the dominant estate could make drains on his own land as required by good husbandry and thereby *increase* the flow of surface waters onto lower lands. As seen in the leading good husbandry case,[14] courts have opined that the upper owner should not be required to leave his land marshy and untillable merely because drainage would cause damage below. However, the upper owner's drainage privilege was not unrestricted. A quantitative limit to permissible drainage was recognized in cases holding that a large pond could not be drained to the destruction of the usefulness of the lower land.[15] At first glance, such limitation is consistent with a policy determination that the burden on the lower land outweighed the benefit of draining the upper tract. However, since the exception was formed to assist development, the upper limit of acceptable drainage was high. A survey of Illinois Supreme Court decisions discloses only one case[16] where no diversion was proved and the lower owner recovered. In that case, the threatened drainage would have destroyed plaintiff's land for farming and habitation. Therefore, as a practical matter, under the good husbandry exception proof of diversion has been required in Illinois for injuries caused by less than totally destructive increases in drainage flow. The good husbandry exception did not alter the cardinal natural flow rule that prohibited diversion.[17] A user or occupier of land still could not

10. Templeton v. Huss, 57 Ill. 2d 134, 137, 311 N.E.2d 141, 143 (1974). The characterization of the rule as a civil law rule stems from the rule's American origin in Louisiana. *See* Orleans Navig. Co. v. Mayor of New Orleans, 1 La. 73 (1812).

11. Gillham v. Madison County R.R., 49 Ill. 484, 487 (1869). The court drew the easement analysis from E. WASHBURNE, TREATISE OF THE AMERICAN LAW OF EASEMENTS AND SERVITUDES 355 (2d ed. 1867). Gillham, *supra* at 487. *See also* Ribordy v. Murray, 177 Ill. 134, 52 N.E. 325 (1898); Totel v. Bonnefoy, 123 Ill. 653, 657-58, 14 N.E. 687, 689 (1888).

12. Templeton v. Huss, 57 Ill. 2d 134, 137, 311 N.E.2d 141, 143 (1974).

13. *See* cases collected, Templeton v. Huss, 9 Ill. App. 3d 828, 838, 292 N.E.2d 530, 537 (1973).

14. Peck v. Herrington, 109 Ill. 611, 620 (1884).

15. Hicks v. Silliman, 93 Ill. 255 (1879); Wiese v. Mieher, 14 Ill. App. 2d 126, 143 N.E.2d 404 (1957) (abstract only published).

16. Hicks v. Silliman, 93 Ill. 255 (1879).

17. *See* Adams v. Abel, 290 Ill. 496, 125 N.E. 320 (1919); Broadwell Special Drainage Dist. No. 1 v. Lawrence, 231 Ill. 86, 83 N.E. 104 (1907); Daum v. Cooper, 208 Ill. 391, 70 N.E. 339 (1904); Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53 (1893); Wilson v. Bondurant, 142 Ill. 645, 32 N.E. 498 (1892); Dayton v. Drainage Comm'rs, 128 Ill. 271, 21 N.E. 198 (1889); Anderson v. Henderson, 124 Ill. 164, 16 N.E. 232 (1888); Peck v. Herrington, 109 Ill. 611 (1884).

divert the natural course of drainage even though he was exercising good husbandry.[18] Proof of diversion has also been held to be essential to recovery in non-agricultural drainage cases.[19] Therefore, under the Illinois civil law rule as modified, recovery for harm caused by an increased flow of surface waters has required proof of diversion from the natural course of drainage.[20]

To prevent the possibly harsh results of a strict application of the natural flow rule, some states[21] have adopted a reasonable use modification.[22] A

The rule of Peck v. Herrington was codified by The Farm Drainage Act, Ill. Laws 1885, § 4 at 77. The good husbandry rule survives in the current Illinois Drainage Code, ILL. REV. STAT. ch. 42, § 2-1 (1973), which provides that:

> Land may be drained in the general course of natural drainage by either open or covered drains. When such a drain is entirely upon the land of the owner constructing the drain, he shall not be liable in damages therefore.

18. Diversion has been held to be wrongful per se. *See, e.g.*, Mellor v. Pilgrim, 7 Ill. App. 306, 310-11 (1880) (diversion a wrongful act for which plaintiff could recover nominal damages; proof of actual damage unnecessary to prevent ripening of prescriptive right).

19. *See* People *ex rel.* Speck v. Peeler, 290 Ill. 451, 125 N.E. 306 (1919) (right of upper owner to increase flow without liability to lower owner, provided natural drainage course followed, is the same whether the higher land is a farm or public highway); Smith v. City of Woodstock, 17 Ill. App. 3d 951, 309 N.E.2d 45 (1974) (city enjoined from constructing storm drain which would have collected waters from another watershed. Construction of portion of storm drain which conformed to natural course of drainage not enjoined even though flow increased); City of Peru v. City of LaSalle, 119 Ill. App. 2d 211, 220, 255 N.E.2d 502, 506 (1970) (dictum) (surface waters may be gathered in municipal areas including subdivisions improved by houses and streets and, as long as collected waters are drained into their natural outlet, the lower owner may not complain); Mello v. Lepisto, 77 Ill. App. 2d 399, 403, 222 N.E.2d 543, 545 (1966) (diversion must be alleged to state cause of action and must be proved to recover in urban drainage case. Court expressly declared civil law rule, not reasonable use rule, to be Illinois law regardless of degree of development); Bundy v. City of Sullivan, 1 Ill. App. 2d 212, 117 N.E.2d 302 (1954) (city constructed ditch which drained surface waters from city streets onto plaintiffs' lands. Plaintiffs claimed that surface waters could not be lawfully drained through artificial channels. Complaint held fatally defective for failure to allege that ditch was not in general course of natural drainage).

Surface water drainage suits involving agricultural lands have greatly outnumbered urban drainage cases. The disparity may be explained by the fact that surface drainage problems are prevented by municipal drainage systems, constructed under statutory authorization. *See* ILL. REV. STAT. ch. 24, §§ 9-3-1, 9-3-2, 11-109-1, 11-110-1 (1973). *See generally* Dobbins, *Relationships Between Drainage Districts And Other Municipal Entities Exercising Storm Drainage Powers* 1960 U. ILL. L.F. 294.

20. *But see* Comment, *Illinois Drainage Law*, 63 ILL. BAR J. 466 (1975). The Illinois civil law rule also prohibits the lower owner's obstruction of the natural course of drainage to the injury of higher lands. *See* Geis v. Rohrer, 12 Ill. 2d 133, 145 N.E.2d 596 (1957); Gough v. Goble, 2 Ill. 2d 577, 119 N.E.2d 252 (1954); Druce v. Blanchard, 338 Ill. 211, 170 N.E. 260 (1930); Town of Nameoki v. Buenger, 275 Ill. 423, 114 N.E. 129 (1916).

In Pinkstaff v. Steffy, 216 Ill. 406, 413, 75 N.E. 163, 165 (1905), the court held that the lower owner was not entitled to obstruct the natural flow even though in so doing he was exercising good husbandry. *But cf.* Mauvaisterre Drainage & Levee Dist. v. Wabash Ry., 299 Ill. 299, 132 N.E. 559 (1921); Wills v. Babb, 222 Ill. 95, 78 N.E. 42 (1906) (lower owner may obstruct surface waters flowing onto his land as a result of the upper owner's diversion from the natural drainage course).

21. This modification is followed in California and Maryland. *See* Keys v. Romley, 64 Cal. 2d 396, 409, 412 P.2d 529, 537, 50 Cal. Rptr. 273, 281 (1966); Sainato v. Potter, 222 Md. 263, 267-68, 159 A.2d 632, 634 (1960); *see generally* Note, *Drainage of Surface Waters Under the Civil Law Rule As Applied in Maryland*, 11 MD. L. REV. 58 (1950). Language in the decisions of Kentucky, Delaware, and Florida suggests reasonable use modifications. *See* Klutey

balancing test is applied to gauge the reasonableness of the parties' conduct. Factors weighed include: the gravity of the harm; the utility of the actor's conduct; the foreseeability of the harm; and the motive of the actor.[23] When both parties have acted reasonably, liability falls upon the one who altered the natural flow, in accordance with the civil law principle which prohibits all interference with the natural course of drainage.[24]

A fourth drainage doctrine, distinct from the common enemy and civil law rules and their modifications, is the reasonable use rule. In some states, a rule of reasonable use alone controls surface water drainage disputes.[25] Courts following this rule adhere generally to the *Restatement of Torts* elements of liability governing non-trespassory invasions of the interest in the private use of land.[26] Liability for intentional invasions depends on whether the actor's conduct was unreasonable and liability for unintentional invasions does not attach unless the actor was negligent or reckless.[27] The test applied by courts in implementing this rule closely resembles the one used where the civil law rule is modified by a reasonable use standard. At least one commentator has suggested that no substantial difference exists between the reasonable use modification and the reasonable use rule itself.[28]

NINETEENTH CENTURY RULE YIELDS TO TWENTIETH CENTURY PROBLEMS

In *Templeton v. Huss*,[29] the Illinois Supreme Court held that a policy of reasonable use is to be applied to to the issue of the liability of the owner of higher land for injury to property caused by the increased flow of surface water onto lower land when the upper owner has interfered with the natural drainage pattern of surface waters through construction of a residential subdivision. The plaintiff, Templeton, owned farmland adjacent to defendants'

v. Commonwealth Dep't of Highways, 428 S.W.2d 766, 769 (Ky. 1967); Burkshire Terrace, Inc. v. Schroerlucke, 467 S.W.2d 770 (Ky. Ct. App. 1971); E. J. Hollingsworth Co. v. Jardel Co., 40 Del. Ch. 196, 201, 178 A.2d 307, 310 (Ct. Ch. 1962); Brumley v. Dorner, 78 Fla. 495, 503, 83 So. 912, 914 (1919).

22. *See generally* CLARK, *supra* note 8, § 452.2(C), at 508-11; Note, *Law of Water in New Jersey*, 22 RUTGERS L. REV. 621, 688-90 (1968); Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431, 449-53 (1969).

23. *See* Keys v. Romley, 64 Cal. 2d 396, 410, 412 P.2d 529, 537, 50 Cal. Rptr. 273, 281 (1966); RESTATEMENT OF TORTS §§ 822-33 (1939); CLARK, *supra* note 8, § 452.2(C), at 509; Battisto v. Perkins, 210 Md. 542, 124 A.2d 288 (1956).

24. *See* Sheffet v. County of Los Angeles, 3 Cal. App. 3d 720, 730, 84 Cal. Rptr. 11, 17 (1970); Burrows v. State, 260 Cal. App. 2d 29, 32-33, 66 Cal. Rptr. 868, 871 (1968).

25. Alaska, Hawaii, Minnesota, New Hampshire, New Jersey, North Dakota, and Utah have adopted this rule. *See* CLARK, *supra* note 8, § 453.2, at 515-17; Annot., 59 A.L.R.2d 421, 434-37 (1958).

26. *E.g.*, Armstrong v. Francis, 20 N.J. 320, 120 A.2d 4 (1956); Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948).

27. RESTATEMENT OF TORTS § 833, comment *a* at 270 (1939).

28. CLARK, *supra* note 8, § 453.3, at 518. The civil law rule provides that an upper owner may not interfere with the natural flow and the modification adds: unless the owner acts reasonably. The reasonable use rule states that surface water may or may not be interfered with, depending on whether the conduct is or is not reasonable. *Id.*

29. 57 Ill. 2d 134, 141, 311 N.E.2d 141, 145-46 (1974).

tract. Huss' subdivision construction interfered with the seepage of surface water into the soil and an increased amount of water flooded the plaintiff's land to the injury of crops. Templeton's suit was filed against Huss and the Village of Oreana. The plaintiff claimed that the developer had altered the natural course of surface drainage by diverting water from a different watershed. At trial, Templeton was unable to prove diversion and judgment was entered for defendants on that claim. The complaint also included an allegation that the developers "by converting their parcel . . . into a residential subdivision had increased both the amount and rate of surface water runoff flowing onto the plaintiff's land."[30] Before trial, this claim was dismissed as legally insufficient because it included no allegation of diversion from another watershed. Templeton appealed the judgment and the dismissal of the count alleging injurious increase of flow.

The appellate court affirmed,[31] holding that the lower court's conclusion that no diversion had been proved was not against the manifest weight of the evidence. In addition, the dismissal of the allegation of increased flow was upheld on the ground that an actionable violation of the Illinois natural flow rule required an allegation that defendants had diverted the natural course of drainage.

Plaintiff appealed the dismissal of the increased flow allegation and the Illinois Supreme Court framed the issue as whether an upper owner's liability for damage inflicted on lower lands by an increased flow of surface water is "limited to that caused by diversion from another watershed."[32] The upper owner's liability was held to be not so limited. The court reviewed the cases preceding the adoption of the Illinois natural flow rule. The first Illinois surface water case to announce the natural flow rule[33] was said to have recognized a fundamental riparian rights principle which the *Huss* court quoted. "[A]nd although the act of the one person may be in itself lawful, yet, if in its consequences it necessarily damages the property of another, the party occasioning the damage is liable to make reparation."[34] In continuing its survey of the early natural flow rule, the *Huss* court referred to language in an Illinois Supreme Court case[35] which indicated "an inclination to rely upon the law of watercourses[36] which has long been essentially one of reasonable use, for analogies in cases of appropriation of surface waters . . . and a willingness

30. *Id.* at 136, 311 N.E.2d at 143.

31. Templeton v. Huss, 9 Ill. App. 3d 828, 842, 292 N.E.2d 530, 539 (1973).

32. Templeton v. Huss, 57 Ill. 2d 134, 137, 311 N.E.2d 141, 143 (1974).

33. Gillham v. Madison County R.R., 49 Ill. 484 (1869) (lower owner liable for obstruction of natural flow of surface waters).

34. Templeton v. Huss, 57 Ill. 2d 134, 138, 311 N.E.2d 141, 144 (1974), quoting Stout v. McAdams, 3 Ill. 68, 69, 2 Scam. 67, 69 (1839) (early riparian rights case).

The quoted language illustrates the concept of the correlative rights and duties of riparian landowners. The principle of correlative rights governs riparian water law. *See infra* notes 54-58 and accompanying text.

35. Gormley v. Sanford, 52 Ill. 158, 162-63 (1869).

36. That is, the law of flowing rivers and streams. *Id.* at 162.

to alter the [civil law] rule, or abandon it altogether in the case of city lots provided with a reasonable alternative means of drainage."[37] Given this background, the good husbandry exception was cited as the first modification of the civil law rule. As noted earlier,[38] this exception permits the upper owner to "make such drains, for agricultural purposes, on his own land, as may be required by good husbandry, although by so doing the flow may be increased."[39]

In weighing the merits of the appeal, the court considered the issue of liability for harmful interference with natural seepage to be a matter of first impression in Illinois.[40] Referring to the natural flow rule and its good husbandry modification, the supreme court stated that the principle which prevents unreasonable agricultural development applies to substantial alteration of natural drainage by "surface and subsurface changes which interfere with the natural seepage of water into the soil of the dominant estate."[41] In reversing the appellate court, the supreme court held:

> The question . . . is whether the increased flow of surface waters from the land of defendants . . . regardless of whether it was caused by diversion from another watershed . . . the grading and paving of streets, or the construction of houses . . . was beyond a range consistent with the policy of reasonableness of use which led initially to the good-husbandry exception.[42]

The court did not prescribe the test to be used in applying its reasonable use policy. Thus, the value of the decision as Illinois precedent depends on further analysis.

Huss AS PRECEDENT: FIVE INTERPRETATIONS

The *Huss* decision will have a substantial effect on Illinois surface water law since, contrary to prior cases, diversion from the natural course of

37. Templeton v. Huss, 57 Ill. 2d 134, 138, 311 N.E.2d 141, 144 (1974). The quoted passage is the *Huss* court's characterization of Gormley v. Sanford, 52 Ill. 158, 162-63 (1869). The reference to "cases of *appropriation* of surface waters," *Huss, supra* at 138, 311 N.E.2d at 144 (emphasis added), is misleading since Illinois surface water disputes involve the *disposal* of unwanted waters. *Gormley, supra*, was not an appropriation case but was a suit to remedy damage to the upper owner's orchard caused by the lower owner's obstruction of a drainage ditch.

The characterization of *Gormley, supra*, in *Huss, supra* at 138, 311 N.E.2d at 144, was broad and not fully supported by *Gormley, supra* at 162-66. *See infra* notes 49-51 and accompanying text.

38. *See supra* note 13.

39. Peck v. Herrington, 109 Ill. 611, 619 (1884).

40. Prior to *Huss*, Illinois surface water cases were involved with lateral drainage flow, that is, waters draining across the surface. Seepage is an element of natural drainage. As waters diffuse across land, they soak into the ground. Logically, digging ditches to increase the drainage flow of surface waters would result in an interference with natural seepage because waters which would have soaked into the soil instead flow through the ditch onto the lower land. An early appellate court opinion recognized this effect. Town of Saratoga v. Jacobson, 193 Ill. App. 110, 116 (1914). However, before *Huss*, Illinois courts have not singled out wrongful interference with natural seepage as a sole basis of liability for damaging increases in the quantity of water drained.

41. Templeton v. Huss, 57 Ill. 2d 134, 141, 311 N.E.2d 141, 145 (1974).

42. *Id.* at 141, 311 N.E.2d at 146.

drainage was not considered essential to the legal sufficiency of plaintiff's complaint.[43] However, *Huss'* precise impact is yet uncertain because the meaning of the announced reasonable use rule is unclear. In evaluating the practical meaning of *Huss*, two areas of primary concern to the practitioner will be the factual situations covered by the new rule, and the actual working test intended by the court to implement its reasonable use rule. Accordingly, this inquiry will first consider whether the decision should be confined to its facts or whether the court intended a rule of broader application.

Since the court used the term reasonableness of use without defining an implementing test, implications drawn from the language of the opinion and the drainage law of other jurisdictions must be analyzed in assessing the court's probable intentions. Four plausible interpretations of the new test will be discussed. 1) The court may have intended to apply a reasonable use test to residential construction analogous to the good husbandry exception. 2) Because the court cited a decision suggesting an analogy between surface water cases involving city lots and the riparian rule of reasonable use, the new test may correspond to the riparian test. 3) Common meaning and usage of the term reasonable use in the water law of other jurisdictions cannot be overlooked as a possible key to the court's intentions in *Huss*. Therefore, the court may have meant to adopt an urban reasonable use modification of the Illinois natural flow rule as seen in the drainage law of some states. 4) Finally, similar to the law of other states, a full reasonable use test applicable to all Illinois surface water drainage cases may have been indicated.

Factual Settings Governed by Huss Rule

Before analyzing the dimensions of the *Huss* test, the scope of the rule's factual application must be examined. The court in *Huss* focused on unreasonable interferences with natural seepage as actionable under what it referred to as the reasonable agricultural development policy previously applied to lateral drainage. The injury Templeton sought to remedy was water damage caused by the construction of a housing development with paved streets and driveways. Residential construction of this type renders the surface of land impervious to seepage of surface water.[44] The court's extension of the agricultural development rule to natural seepage must be considered in connection with the case's facts. Limited to its facts, *Huss* may be read as applying a reasonable use test to non-agricultural development

43. *Contra*, Hicks v. Silliman, 93 Ill. 255 (1879) (upper owner attempted to drain large pond and was enjoined because quantity of flow would have been "undue and unnatural." *Id.* at 264); Wiese v. Mieher, 14 Ill. App. 2d 126, 143 N.E.2d 404 (1957) (cited rule nearly identical to *Hicks, supra*, but case has minimal value as authority because only published in abstract form).

44. *E.g.*, extensive paving and grading of streets and driveways prevents water from soaking into the soil. *See* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966) (construction of building and parking lot); Battisto v. Perkins, 210 Md. 542, 124 A.2d 288 (1956) (grading in housing development); Armstrong v. Francis, 20 N.J. 320, 120 A.2d 4 (1956) (construction of subdivision).

which prevents natural seepage and causes a materially increased flow of surface water to the injury of adjacent lower lands. Under this reading of *Huss*, the modified natural flow rule would apply in agricultural situations, while a reasonable use test would be used to decide cases involving interferences with natural seepage caused by grading, paving, and the like. However, the *Huss* opinion suggests a more general rule which does not limit the reasonable use policy to natural seepage cases.

In concluding *Huss*, the supreme court stated, regardless whether the increased flow was caused by septic tank installation, paving, home construction, or *diversion from another watershed,* the issue of liability depended on whether the conduct was reasonable.[45] The court's listing of grading, paving, and home construction is consistent with a rule limited to natural seepage cases. However, the inclusion of diversion from another watershed may be a signpost left to indicate the court's inclination toward a broader adoption of the reasonable use rule when properly put at issue in future cases. Because it was not proved at trial, diversion was factually irrelevant to the appeal. Yet, the court included diversion as an example of the causes of increased flow which are subject to the reasonable use policy. Since diversion from another watershed is an interference with the lateral drainage flow, the case suggests that the declared policy of reasonable use is not limited to obstruction of natural seepage—vertical drainage. Therefore, *Huss* may be interpreted as having declared a reasonable use rule applicable to urban development which interferes with natural seepage *or* which diverts the natural course of drainage. Contrary to the long standing natural flow rule, diversion would no longer be actionable per se.[46] The developer's conduct would be gauged by a standard of reasonableness which the court left undefined. The practical meaning of the *Huss* reasonable use test may be gleaned from four possible interpretations of the case.

Good Husbandry Analogy

Language in *Huss* suggests an analogy between the announced reasonable use test and the good husbandry exception. The court characterized good husbandry cases as having followed a rule of reasonable agricultural development.[47] The test adopted by *Huss* was expressed in the question whether the increased flow was "beyond a range consistent with the policy of reasonableness of use which led initially to the good husbandry exception."[48]

The good husbandry exception, however, does not provide a workable reasonable use test. As originally framed, the exception favored development and permitted the increased flow of waters short of the destruction of the

45. 57 Ill. 2d 134, 141, 311 N.E.2d 141, 146 (1974).
46. *See supra* notes 17, 18 and accompanying text.
47. Templeton v. Huss, 57 Ill. 2d 134, 141, 311 N.E.2d 141, 145 (1974) (by implication).
48. *Id.* at 141, 311 N.E.2d at 146.

lower land's usefulness. The range of permissible injury was broad, and research has uncovered no cases holding that a less than destructive flow was actionable because the upper owner had exercised "bad husbandry." In practical effect, the good husbandry exception provides no well defined test balancing the benefit to the actor with the burden on the individual harmed. Further, diversion from the natural course of drainage is uniformly proscribed by good husbandry cases, while *Huss* provided that the reasonable use rule was to apply regardless that the increased flow was caused by diversion. Therefore, an analogy between the *Huss* rule and the good husbandry exception yields no satisfactory test for the implementation of *Huss* in future cases.

Riparian Reasonable Use Test

In tracing the history of the Illinois natural flow rule, the *Huss* court said that in *Gormley v. Sanford*[49] the Illinois Supreme Court showed an inclination to rely on riparian law "which has long been essentially one of reasonable use"[50] as analogous to surface water cases. The language in *Huss* left the impression that the analogy found in *Gormley* was based on the riparian reasonable use rule. Notably, this impression is unsupported by *Gormley*, where the court applied the riparian natural flow principle that an upper owner has a right to the unobstructed flow of streamwater to a case involving a lower owner's obstruction of surface water.[51] The *Gormley* court did not indicate that the rights of riparian owners to make a reasonable use of flowing waters applied to surface water drainage disputes. Seemingly, in *Huss*, *Gormley* was expanded beyond its boundaries to highlight a relationship between surface water cases and the riparian reasonable use rule. The supreme court's efforts to underscore the analogy are also seen in the fact that the analogy excerpted from *Gormley* was drawn from language unnecessary to the opinion,[52] language which was never incorporated into Illinois decisions. In pointing to an analogy between surface water cases and the riparian reasonable use rule, the *Huss* court may have indicated that riparian law principles are to be read into its holding.

The rights of Illinois riparian owners are governed by the law of natural watercourses, including rivers, flowing streams, and lakes.[53] As a basic principle, riparian owners have a shared, correlative right to make reasonable and beneficial uses of the water flowing across their lands.[54] The riparian rule

49. 52 Ill. 158 (1869).
50. Templeton v. Huss, 57 Ill. 2d 134, 138, 311 N.E.2d 141, 144 (1974).
51. 52 Ill. 158, 162-63 (1869).
52. *See supra* note 36.
53. *See generally* Cribbet, *Water As A Species of Private Property*, 47 ILL. BAR J. 449, 461 (1959).
54. *See generally* Ratcliff, *Private Rights Under Illinois Drainage Law*, 1960 U. ILL. L.F. 198, 199. The recognition of correlative rights is grounded on two facts. First, habitually flowing waters are useful for domestic, agricultural, and industrial purposes. Such domestic and productive needs may be common to all riparian owners. Second, since natural watercourses flow

of reasonable use developed as a means of balancing the right of one owner to make a particular use of flowing waters with the rights of other owners adversely affected by that use.[55] In applying the riparian reasonable use rule, Illinois courts have weighed the purpose and extent of the use at issue with the actual injury caused,[56] have balanced the respective requirements of the parties, leaving to the jury the question whether the defendant had used more than his reasonable share,[57] and have weighed the social utility of the actor's conduct with the impact of the action on private rights.[58]

The *Huss* court's reference to an analogy between riparian principles and surface water cases suggests a new emphasis on the correlative rights of landowners. While prior Illinois surface water cases focused on the relative locations of land in determining the fixed privileges of upper and lower owners, the riparian cases look to the conduct of the actor under the circumstances. Under rules analogous to riparian law, a landowner could rid his land of surface waters without liability, provided that he did not unreasonably interfere with the rights of others to use and enjoy their lands. A burden/benefit balancing test including considerations of social utility and the extent of the actual harm would also seem to be indicated.

However, the riparian rule does not supply a full explanation of the test intended by the supreme court in *Huss*. The rule was not expressly incorporated into the holding. Further, riparian and surface water cases are dissimilar, since the flow of streamwater is a valuable incident of riparian ownership while surface waters are subject to no productive uses because of their diffuse and transitory nature.[59] The drainage law of other states may suggest a more complete definition of the *Huss* test.

Urban Reasonable Use Modification

In the American law of surface waters, the words "reasonable use" are terms of art with defined meanings. In *Huss*, the court's use of those words

across many separately owned lands, a substantial appropriation, pollution, or diversion by one owner could materially impair the usefulness of the water for other proprietors.

55. *Id.* at 199-200.

56. "When questions arise between riparian owners respecting the right of one to make a particular use of the water in which they have a common right, the right will generally depend on the reasonableness of the use and the extent of the detriment to the lower owner." Tetherington v. Donk Bros. Coal Co., 232 Ill. 522, 525, 83 N.E. 1048, 1049 (1908), *followed in* Sandusky Portland Cement Co. v. Dixon Pure Ice Co., 221 F. 200, 204 (7th Cir. 1915).

57. *E.g.*, Bliss v. Kennedy, 43 Ill. 67 (1867) (two factories on same stream).

58. "The law here . . . acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common use, nor into an extravagant looseness, which would destroy private rights." Evans v. Merriweather, 4 Ill. (3 Scam.) 492, 495 (1842).

59. However, a broad analogy between riparian and surface cases may be constructed. In riparian cases, the right in question is a right to the use of flowing water. The right is infringed by conduct affecting the flow, e.g., by pollution, obstruction, or consumption. The resulting injury is an interference with the right to use the stream. In surface water cases, the right in question is the landowner's right to use and enjoy his land. His right is abridged by conduct which affects his land, that is, by flooding. The resulting injury is an interference with his right of use and

with knowledge of their independent significance[60] indicates a possible key to the announced reasonable use test. In other jurisdictions, "reasonable use" either modifies another rule such as the civil law rule, or is itself the basic operating rule.[61] The law of California provides an excellent example of the reasonable use modification of the civil law rule. In New Jersey, a reasonable use rule has replaced the common enemy doctrine[62] and is the primary test.

California adopted a reasonable use modification of the civil law rule in *Keys v. Romley*.[63] In *Keys*, defendant, an upper owner, had constructed a skating rink building with gutters which discharged collected rainwater across a large, paved parking lot onto plaintiff's lower land. The court noted that the long-rooted civil law rule was based on property concepts which were not sufficiently flexible to meet the complexities of modern land development problems. Although past cases had spoken in terms of the property concepts of servitudes and easements, the court felt that the flexibility of a tort approach was more desirable because such approach would permit a consideration of the particular facts and circumstances of individual cases according to a standard of reasonableness of conduct. The *Keys* rule was applied through a balancing test in which several factors were to be weighed: the gravity of the harm; the utility of the defendant's conduct; the foreseeability of the harm; and the motive of the actor.[64]

In states following this modification, established civil law rules have been qualified to prevent the possibly harsh results of applying rigid property rules and to articulate a flexible rule of reason which recognizes the correlative rights of adjoining landowners to use and enjoy their property.[65] The underlying policy judgment has been that when unreasonable conduct results in material injury to property, the value of the civil law rule's predictability must yield to the possessor's interest in the use and enjoyment of his land.[66]

Huss can be read as having applied a similar limitation to the civil law rule. As will be recalled, prior Illinois case law showed that an upper owner

enjoyment. While riparian owners have a common right to be free of unreasonable uses of waters, landowners would have an analogous right to be free from the unreasonable disposal of surface waters.

60. *See* Brief for Appellant at 4-6, Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974) (cases following reasonable use modification of the civil law rule and the full reasonable use rule were cited to the supreme court); Brief for Illinois Agricultural Ass'n as Amicus Curiae at 14-20, Templeton v. Huss, 57 Ill. 2d 134, 311 N.E.2d 141 (1974).

61. *See supra* notes 21-28 and accompanying text.

62. Armstrong v. Francis, 20 N.J. 320, 120 A.2d 4 (1956).

63. 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966).

64. *Id.* at 409, 412 P.2d at 537, 50 Cal. Rptr. at 281, *citing* Sheehan v. Flynn, 59 Minn. 436, 61 N.W. 462 (1894); Armstrong v. Francis, 20 N.J. 320, 120 A.2d 4 (1956).

65. *See* Keys v. Romley, 64 Cal. 2d 396, 412 P.2d 529, 50 Cal. Rptr. 273 (1966); Sainato v. Potter, 222 Md. 263, 159 A.2d 632 (1960); Note, *Drainage of Surface Waters Under the Civil Law Rule As Applied in Maryland*, 11 MD. L. REV. 58, 63 (1950); Maloney & Plager, *Diffused Surface Water: Scourge or Bounty?*, 8 NATURAL RESOURCES J. 72, 77 (1968).

66. Keys v. Romley, 64 Cal. 2d 396, 409, 412 P.2d 529, 537, 50 Cal. Rptr. 273, 281 (1966).

could increase the flow by altering drainage on his property, provided that the additional water was returned to the natural drainway before it was discharged onto the lower land and that it had not been diverted from another watershed.[67] The *Huss* court, however, refused a strict application of the Illinois civil law rule as it had evolved. By implication, the court refused to apply the existing Illinois rule since to do so would permit residential developers to materially injure lower lands through the increased flow of surface waters which had not been diverted. According to *Huss*, the dominant owner's natural flow easement was not unrestricted, as defendant subdivider argued, but was limited and modified by a rule of reasonable use. Apparently, the predictability of the Illinois civil law rule was made to yield to the concept that adjoining landowners have correlative rights and duties that limit and define acceptable conduct. Therefore, *Huss* clearly suggests the application of an urban reasonable use modification to the Illinois natural flow rule and the adoption of a tort oriented balancing test to implement the new rule.

Full Reasonable Use Rule

Another possible approach to *Huss* is that the case signaled the adoption of a full reasonable use rule and the abandonment of the civil law rule. The reasonable use rules of other states are applied through balancing tests similar to the one outlined in the discussion of *Keys*.[68] *Basset v. Salisbury*,[69] cited as a leading reasonable use case,[70] set out the rule's principles: "The rights of each landowner being similar, and his enjoyment dependent upon the action of the other landowners, these rights must be valueless unless exercised with reference to each other, and are correlative."[71] In *Armstrong v. Francis*,[72] where New Jersey changed from a common enemy rule to a reasonable use rule, the court applied correlative rights principles to the issue of a subdivider's liability for damage from a greatly increased flow of surface water. The court's policy considerations reflected a dissatisfaction with inflexible property rules in the context of urban development:

> It is . . . true that society has a great interest that land shall be developed for the greater good. . . . But while today's mass home building projects . . . are . . . in the social good, no reason suggests itself why, in justice, the economic costs incident to the expulsion of surface waters in the transformation of the rural or semi-rural areas . . . into urban or suburban communities should be borne in every case by adjoining landowners rather than by those who engage in such projects for profit. Social progress and the common well—being are . . . better served by a just . . . balancing of the competing

67. *See supra* notes 13-20 and accompanying text.
68. *See also supra* notes 25-27 and accompanying text.
69. 43 N.H. 569 (1862).
70. Annot., 59 A.L.R.2d 421, 435 (1958).
71. 43 N.H. at 577.
72. 20 N.J. 320, 120 A.2d 4 (1956).

> interests according to the general principles of fairness and common sense which attend the application of the rule of reason.[73]

The *Huss* court's unwillingness to accept a strict reading of the civil law rule, which would have permitted subdividers to harm plaintiff's land within extreme limits, demonstrated that the court was seeking a more just definition of the legal relations of the parties. The court did not stop at a recognition of defendants' easement, but looked to the consequences of the developer's conduct in relation to an adjoining landowner. The subdivider was not prohibited from inflicting injury on lower lands by *Huss*. Such a rule would seriously impair development. The court only proscribed unreasonable development.

The *Huss* opinion, however, does not support the conclusion that the Illinois natural flow case law has been completely eclipsed by a new reasonable use rule. The court considered the series of good husbandry cases as an embodiment of a rule of reasonable agricultural development. A policy of reasonableness which led to the good husbandry exception was then stated to be applicable to defendants' non-agricultural alteration of natural drainage. Thus, the policy of reasonableness which the court extended to urban development did not supersede, but was drawn from, principles felt by the court to be implicit in agricultural drainage cases. The well-developed rules previously applicable under the good husbandry exception appeared to remain intact. Therefore, after *Huss*, agricultural drainage cases seemingly will be governed by the familiar natural flow rules generally requiring proof of diversion for recovery. A full-scale reasonable use test applicable to all Illinois drainage cases is not consistent with *Huss*.

CONCLUSION

As residential land development continues, surface water problems will persist in Illinois. As a recent supreme court decision bearing on a subdivider's liability for increased surface water flow, *Huss* will have an undeniable impact on future litigation. Attorneys for individuals harmed by surface water runoff will have to consider the practical meaning of the case in structuring their pleadings and proof. Further, the developer must evaluate his potential liability under *Huss* as a necessary element of his planning procedures.[74] The value of *Huss* as an indicator of the direction Illinois courts will follow in future cases rests on several suggested conclusions.

The decision implied a policy that recognized both the necessity for development and the harmful potential of residential construction which may cause the collection and discharge of large amounts of surface waters. This policy reflects a shift in emphasis from the good husbandry exception, which

73. *Id.* at 330, 120 A.2d at 10.

74. *See* Elliott v. Nordlof, 83 Ill. App. 2d 279, 282, 227 N.E.2d 547, 549 (1967) (subdivider who engineered streets and drainage system not relieved of liability for damages caused by diversion of surface waters even though municipality accepted subdivision plat).

favored the agricultural developer, to a rule which balances the interests of all parties involved in urban development. To be consistent with the court's policy that the developer's interest in conducting his business should be balanced with the interests of those harmed by the development, the announced reasonable use rule will probably be implemented by a balancing test. The court did not catalogue the factors to be weighed. However, the analogous riparian balancing test and the factors considered by other courts in following reasonable use rules may complement the holding in *Huss*.[75]

The *Huss* policy as implemented by a reasonable use balancing test will not be applicable in all drainage situations. The case involved a subdivider's liability and, as a holding, cannot extend to agricultural drainage. Further, the court did not indicate a willingness to extend the reasonable use rule to future agricultural drainage cases. The urban development situation presents a more complex fact pattern than that found in rural cases. A flexible rule which requires consideration of all relevant factors would seem more suited to a fair disposition of an urban drainage dispute than a rule based on rights inherent in the fixed pattern of natural drainage. Therefore, *Huss* apparently signaled the adoption of a reasonable use modification to the civil law rule in Illinois surface water drainage cases involving urban development. Given the continually expanding need for residential construction and the harmful potential of surface waters collected by subdivision roofs and streets, the change in the law declared by *Huss* is welcome as a policy decision sanctioning the prudent development of land.

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75. *See supra* notes 21-27 and accompanying text; Note, *Ohio Surface Water Rights*, 38 U. CIN. L. REV. 525, 538 (1969); RESTATEMENT OF TORTS §§ 826-28 (1939).