SURFACE WATER: A landowner may, by the erection of a dam or embankment, keep surface water off of his land, provided he exercises reasonable care and prudence in accomplishing that object.

Roads and Bridges.

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Honorable J. Morgan Donelson
Prosecuting Attorney of Mercer County
Princeton, Missouri

Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

> "I would like to know just what authority a county court or township board would have to remedy the following situation:
>
> "A public road has been established for a number of years. Surface water flows down from upper owners of the adjoining land. The water flows to the road and passes through culverts in the road. Normally this water would flow off the right-of-way and continue its flow on the adjoining land, but the adjoining landholder has constructed levies or dikes on his property to prevent the water from flowing upon his land. The water, as a result, is forced back into the ditches of the road causing it to become soggy, etc. It would cause considerable expense to build a ditch on the right of way sufficient to remedy this situation. There are several places where the ditch would have to be from four to seven feet deep.
>
> "Does such a landholder have the right to dam against this surface water to the damage of the public road?"

In the above you have given a very clear picture of this situation. You did not specifically say so, but we assume from your letter and a common knowledge of the

construction of roads, that surface water comes down into a ditch of some depth on the side of the road, thence it flows along the ditch parallel to the road until it reaches a culvert through which it flows under the road to the opposite side, where it is balked in its course by an artificial obstruction erected by the owner of the adjacent land, and is therefore held upon the road.

We will observe, first, that the water which issues from the culverts mentioned in your letter of inquiry, is "surface water." In the case of Keyton v. Missouri-Kansas-Texas R.R., 224 S.W. 2d 616, l.c. 622, the Court stated, in part:

> "The term 'surface water' refers to that form or class of water derived from falling rain or melting snow or which rises to the surface in springs and is diffused over the surface of the ground while it remains in that state or condition and has not entered a natural water course. If overflow or flood waters becomes severed from the main current of a natural water course or leaves the same and spreads out over the lower ground (as it did in this case) it becomes and is a part of the surface water. 56 Am. Juris. Secs. 65 and 90. Schalk v. Inter-River Drainage District, Mo. App., 226 S.W. 277; Jones v. Chicago B. & Q. R. Co., 343 Mo. 1104, 125 S.W. 2d 5; Sigler v. Inter-River Drainage District, 311 Mo. 175, 279 S.W. 50; Harris v. St. Louis-San Francisco R. Co., 224 Mo. App. 455, 27 S.W. 2d 1072; Tackett v. Linnenbrink, Mo. App., 112 S.W. 2d 160; Morey v. Feltz, 187 Mo. App. 650, 173 S.W. 82."

Having determined that the water in question, at the time it leaves the culverts, is "surface water," let us next see what, if any, protection a landowner upon whose land "surface water" is about to flow, may legally take to protect his land against such flow.

In the case of Casanover v. Villanova Realty Co., 209 S.W. 2d, 556, l.c. 558,559, the Court stated, in part:

"1-3) The general topography of the two tracts of land is not in dispute and defendant's land lies higher than the plaintiffs'. The defendant could, of course, use its property in any lawful manner and for any lawful purpose, and it had the right, absent legal restrictions to the contrary, to alter the grade. It has done that and in skinning this hillside of grass, vegetation, and topsoil it has left a barren clay slope which no longer absorbs the rain that falls but lets it flow freely toward the plaintiffs' land below. This in itself does not impose any liability upon the defendant for its land is higher and is the dominant estate as to surface drainage and the plaintiffs' land being lower is the servient estate and the natural recipient of the flowing surface water. The common-law doctrine treats such water as a 'common enemy', and permits a landowner to protect his own property by whatever means he sees fit, even though he throws the water upon the land of another. Missouri has followed this doctrine with a limitation which provides that the owner of the higher land cannot collect the surface water and then cast it upon the servient estate. Our Supreme Court stated in Keener v. Sharp, 341 Mo. 1192, 111 S.W. 2d 118, loc. cit. 120: '"The law seems to be well settled in Missouri that surface water is a common enemy which every man may ward off his land and thus throw it on an adjacent or lower owner, provided he does not, in warding it off, unnecessarily collect it and discharge it to the damage of his neighbor."' Many other cases so hold. Geisert v. Chicago R. I. & P. Ry. Co., 226 Mo. App. 121, 42 S.W. 2d 954; Place et al. v. Union Township et al., Mo. App., 66 S.W. 2d 584; Vollrath v. Wabash R. Co., D.C., 65 F. Supp. 766; White v. Wabash R. Co., Mo. App., 207 S.W. 2d 505.

"(4-5) There is no contention here that the defendant collected the surface water in any fashion, and since it had the right

> to alter and change the surface of its property in any way it saw fit it cannot be charged with negligence in doing that which the law permitted it to do. Much of the damage done to plaintiffs' land was occasioned by the mud and silt left by the water, but this came upon their property as part of the surface water. This state has held that overflow water is surface water and it is common knowledge that it is laden with silt and the off-scourings of land. Goll v. Chicago & Alton R. Co., 271 Mo. 655, 197 S.W. 244; Place et al. v. Union Township et al., Mo. App., 66 S.W. 2d 584; Keener v. Sharp, 341 Mo. 1192, 111 S.W. 2d 118."

In the case of Keener v. Sharp, 111 S.W. 2d 118, l.c. 120, the Court stated, in part:

> "'The law seems to be well settled in Missouri that surface water is a common enemy which every man may ward off his land and thus throw it on an adjacent or lower owner, provided he does not, in warding it off, unnecessarily collect it and discharge it to the damage of his neighbor. * * *'"

In the case of White v. Wabash R. Co., 207 S.W. 2d 505, l.c. 508, 509, the Court stated, in part:

> "* * * In defining the 'common law doctrine' the court quotes with approval from many prior decisions. We quote what seems to be the clearest and most concise statement of that doctrine, found 83 Mo. 271, at page 283, 53 Am. Rep. 581: 'But in the case of surface water, which is regarded as a common enemy, he is at liberty to guard against it or divert it from his premises, <u>provided he exercises reasonable care and prudence in accomplishing that object</u>. In the language of this court in a recent case, where this subject was carefully considered, the owner of the dominant or superior heritage must improve and use his own lands <u>in a reasonable way</u>, and in so doing he may

> turn the course of, and protect his own land from, the surface water flowing thereon, and he will not be liable for any incidental injury occasioned to others by the changed course in which the water may naturally flow and for its increase upon the land of others. Each proprietor, in such case, is left to protect his own lands against the common enemy of all.' (Italics supplied.)
>
> "(2) A multitude of cases, decided by the Courts of Appeals and by the Supreme Court since that time, have reaffirmed the application of the 'common law doctrine' with varying degrees of limitations and refinements. The latest definition we have been able to find is given by the Supreme Court in Keener v. Sharp, 341 Mo. 1192, 111 S.W. 2d 118, at page 120, where the court said: 'The law seems to be well settled in Missouri that surface water is a common enemy which every man may ward off his land and thus throw it on an adjacent or lower owner, provided he does not, in warding it off, unnecessarily collect it and discharge it to the damage of his neighbor.' (Citing many Missouri cases.) See, also, Goll v. Chicago & A. Railroad, Co., 271 Mo. 655, 666, 197 S.W. 244. We have no hesitancy in saying that the 'common law doctrine' is to be applied and followed in Missouri in determining the rights of property owners in fighting surface water. The 'civil law doctrine' has been repudiated in this state."

Numerous other cases of like character could be cited, but we deem it unnecessary to do so.

From the above cited cases it is our opinion that a landowner may protect his land from surface water by raising the surface of his land, by means of dikes and embankments, to keep the surface water off of his land.

Honorable J. Morgan Donelson

CONCLUSION

A landowner may, by the erection of a dam or embankment, keep surface water off of his land, provided he exercises reasonable care and prudence in accomplishing that object.

Respectfully submitted,

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APPROVED:

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