



Illinois Drainage Law

Including Soil Erosion
and Sedimentation Control,
Permit Requirements
for Construction in Streams
or Floodways, and Federal
Wetlands Provisions

By D. L. Uchtmann and Bernard Gehris

College of Agricultural, Consumer and Environmental Sciences
University of Illinois at Urbana-Champaign
Cooperative Extension Service • Circular 1355

The authors would like to acknowledge the assistance of attorneys Mary Perlstein, Champaign, Illinois, and David Rolf, Springfield, Illinois, for their assistance with the 1991 circular on this topic. The authors would also like to acknowledge the valuable assistance of Gene Barickman, state biologist, Natural Resources Conservation Service, regarding the discussion of wetlands.

Cover photo: A well-maintained drainage ditch.

Edited by Peggy Currid and Pam Johnson

Designed by Krista L. Sunderland

Formatted by Oneda VanDyke

Urbana, Illinois

December 1997

Issued in furtherance of Cooperative Extension Work, Acts of May 8 and June 30, 1914, in cooperation with the U.S. Department of Agriculture, Dennis R. Campion, *Interim Director*, Cooperative Extension Service, University of Illinois at Urbana-Champaign. The Illinois Cooperative Extension Service provides equal opportunities in programs and employment.

2M—12-97—UI Printing Division—PC

Printed on recycled paper.



Illinois Drainage Law

Including Soil Erosion
and Sedimentation Control,
Permit Requirements
for Construction in Streams
or Floodways, and Federal
Wetlands Provisions

This circular was written by Donald L. Uchtmann, professor of agricultural law and Extension specialist, and by Bernard Gehris, research assistant in agricultural law.

College of Agricultural, Consumer and Environmental Sciences
University of Illinois at Urbana-Champaign
Cooperative Extension Service • Circular 1355

■ Contents

Preface	v
Part I. Illinois Rules of Drainage	1
Laws of Natural Drainage	1
Statutory Enlargement of Rules of Natural Drainage	7
Part II. Illinois Laws on Drainage Districts	14
Organization of Districts	16
Organization of Outlet, Mutual, and User Districts	17
Important Rules Laid Down by the Courts	18
Powers and Duties of Commissioners	19
Drainage Record	22
Owners' and Districts' Rights and Duties Concerning Ditches and Drains	22
Part III. Drainage and the Regulation of Wetlands	25
The Wetlands Provisions of the Food Security Act of 1985, as Amended	25
Prior Converted Cropland	28
Wetland	28
Farmed Wetland	29
Converted Wetland	29
Farmed-Wetland Pasture	30
Artificial Wetland	30
Permit Requirements for Construction in Streams or Floodways	32
Part IV. Illinois Soil Erosion and Sedimentation Control	36
Soil and Water Conservation District Guidelines for Erosion and Sediment Control	36
Enforcement of the Guidelines	37
Glossary	40

■ Preface



This circular describes the drainage law that is applicable to the entire state of Illinois and to drainage districts. It also summarizes related laws, such as the guidelines for erosion and sediment control and the permit requirements for construction in streams or floodways. Its purpose is to inform landowners, drainage district commissioners, land improvement contractors, and other interested people of general legal principles related to drainage and the construction of drainage improvements. With this general information, they are better able to recognize opportunities for improving drainage or situations where their drainage rights have been unlawfully impaired. Helpful background information is also provided about drainage disputes and about the creation or activation of a drainage district; however, in these situations, the assistance of a practicing attorney will be needed.

Since the passage of the wetlands provisions of the Food Security Act of 1985, the federal government has also influenced drainage decisions. As a result of this act, landowners need to know not only which actions are permitted or precluded by state drainage law but also which actions might jeopardize their rights to participate in programs of the U.S. Department of Agriculture (USDA). The wetlands provisions in federal law and their potential impact on farm drainage activity are described in Part III of this circular.

Technical terms and legal terms commonly encountered in drainage law are defined in the glossary for convenient reference. These terms appear in SMALL CAPS in the text.

Illinois wetland. The remaining wetlands in Illinois have important ecological and hydrologic value. Federal policy now discourages conversion of wetlands to farmland.

■ Part I

Illinois Rules of Drainage

Laws of Natural Drainage

Basic law recognizes natural differences in levels of lands.

The basic principle of the law of natural drainage is that LANDOWNERS take whatever advantages or inconveniences of drainage nature places upon their land. What these advantages or inconveniences are ultimately depends on the level of one's property in relation to the land around it.¹

A landowner must receive surface water flowing naturally from higher ground. One of the most important principles of Illinois drainage law is that the owners of lower ground, known as a SERVIENT TENEMENT, are bound to receive surface water that naturally flows onto it from higher ground, known as the DOMINANT TENEMENT (Figure 1).²

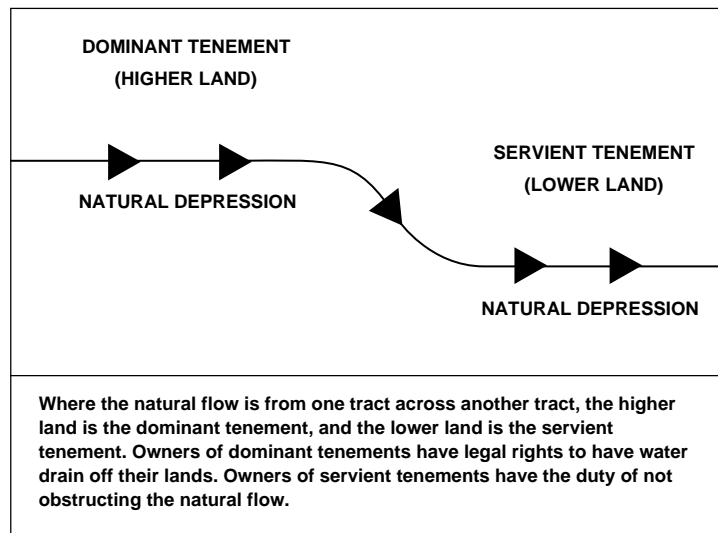


Figure 1.
Dominant and
servient
tenements.

This rule means that owners of farms that are lower than adjoining farms must take the water that flows through natural depressions onto their land. Likewise, unless a city has adopted a system of artificial drainage, owners of lots that are lower than adjoining lots must receive the water

coming from the higher lots. It also means that a railroad or a highway embankment must be built with openings of sufficient capacity and in appropriate locations to accommodate water that would naturally flow across the right-of-way in a STATE OF NATURE.

Whether or not the rule applies to diffused water, which does not flow in a defined channel, is debatable. Although it appears that the Illinois rule on natural drainage includes diffused surface water, the Illinois courts have not yet made their final determination of this question.³

A landowner may collect surface water, discharge it, and hasten its flow to lower ground. If the law had limited the right of the owner to drain higher land just as it had been drained in a state of nature, the law would have been of little real advantage, for the improvement of land necessarily changes the amount of water drained and the speed of its flow. The law, however, does not so limit the rights of landowners.

In an early case, the court held that in the interest of GOOD HUSBANDRY, landowners could drain their ponds or collect surface water that would naturally be held in pools and hasten its flow by digging artificial DITCHES.⁴ But they could do so only if the water was discharged on lower land at the place where it would have flowed if the ponds or pools had been filled with dirt and the water forced out into natural channels of drainage.

All lands lying within a natural BASIN, therefore, may be drained into a watercourse—whether a stream or a mere depression—that drains this basin, and the owners of lower lands cannot object to this increased flow. The water can be carried by artificial ditches or by tile lines,⁵ but either must drain only the natural basin,⁶ and the water must enter the lower land where it would have in a state of nature.⁷ The courts have also held that the substitution of tile for surface drainage does not amount to an abandonment of natural drainage rights on the part of the owner.⁸

2 In one court case, the natural course of drainage through land that drained onto the right-of-way of a railroad was an

“oxbow loop.”⁹ When it rained, the water entered through a rocky gorge and deposited sand and debris on a farmer’s land at the end of a long meander. The landowner proposed cutting a ditch straight through the loop and discharging the water on the railroad’s right-of-way at the same point where the loop had discharged the water. The effect of the shortcut was to hasten greatly the speed of the flow against the railroad embankment and to cast sand and debris on it. The Illinois Supreme Court held that the landowner had a right to improve drainage by straightening the “oxbow” in these circumstances. But if the flow is increased unreasonably by changes unrelated to good husbandry, the owner of the higher ground may be liable for damage to lower land.¹⁰

A landowner may drain surface waters into watercourses.

Owners of higher ground can drain their land within a natural basin into a natural watercourse flowing through this land. As a practical matter, their right to drain into a stream is not often questioned, because draining into a creek or stream with ample banks does no actual harm. But even if such drainage does damage to lower ground, owners of higher ground have a legal right to drain into the stream so long as they do not cut through a natural divide but simply hasten the flow of water from the basin into the creek.

According to this rule, overflow waters from a creek or small stream are surface waters; therefore, owners of lower land are bound to receive them. Furthermore, owners of a stream bank have the right to improve it,¹¹ so long as the improvements do not impair drainage.

Urban landowners cannot increase drainage flows unreasonably. As the emphasis in Illinois shifted from agricultural to urban development, the good-husbandry doctrine was applied to situations in which land was not to be used for agricultural development. Unfortunately, this nineteenth-century doctrine was not easily adapted to urban applications. In response to this defect, in 1974 the Illinois Supreme Court adopted a limitation for REASONABLE USE, which was the first significant modification of Illinois natural drainage law since the nineteenth century.

In the case of *Templeton v. Huss*, the defendants owned the dominant estate, which they subdivided and developed.¹² The plaintiff owned the servient estate, a parcel of farmland. Recognizing that natural drainage could be substantially altered by urban development, the court held that the developer of the subdivision was liable for damages to the lower land if the houses and streets interfered so much with natural seepage that the amount and velocity of water running off the developer's land were *unreasonably* increased.

Although this case involved a drainage problem created by urbanization, the court's reasoning could easily be applied to future controversies over rural drainage: increased flow has to be consistent with the policy of reasonableness of use, which led initially to the good-husbandry exception.¹³

However, the criteria of the good-husbandry exception still appear to be applicable in agricultural situations.¹⁴ Courts have not expressly indicated that the *Templeton* case altered the good-husbandry exception, and if it has not, all the prior good-husbandry case law still applies. The importance of this interpretation is that in a rural setting, diversion from another watershed or discharge other than at the point of natural drainage may be essential for a servient landowner to recover damages or obtain other relief.

A landowner has no right to obstruct the flow of surface water. The owner of lower land obviously has no right to build a dam, levee, or other artificial structure that will interfere with the drainage of higher land, according to the CIVIL LAW as it is applied in Illinois. An amendment to the drainage code provides that willful and intentional interference by an owner of lower land is considered a petty offense and is subject to a fine.¹⁵ The construction of artificial impoundments or the temporary interruption of the flow of water by such impoundments is permitted.¹⁶ But the owner of higher land cannot compel the owner of lower ground to remove natural obstructions, such as shrubs, weeds, brushwood, cornstalks, or other crop residues, that may accumulate and impair natural drainage. However, in some circumstances the owner of the higher land has the right to enter the servient tract to make reasonable repairs and clean out

the watercourse.¹⁷ Before resorting to such self-help, the landowner should seek legal counsel.

Easements of drainage or of obstruction. When landowners are harmed by other owners and fail to enforce their rights, the harmful practices may themselves become rights, known as easements. An EASEMENT is an acquired right to cross or to use another's property. For example, if owners of higher ground fail to take action when owners of lower land dam or obstruct the flow of surface water, the owners of the lower ground may acquire a right to maintain the dam or obstruction by what is known as PRESCRIPTION OR PRESCRIPTIVE USE. The period of use recognized in Illinois is 20 years.¹⁸ The owners of lower land may also acquire the right to have no surface water drain on their land from higher ground when the water has been diverted from the lower ground for the prescriptive period.

By this same process, owners of higher ground may acquire the right to change the place where their surface water enters lower ground or to maintain other artificial conditions not permitted under the rules of natural drainage.¹⁹

Whether an owner has acquired such a right is a difficult question. Any right to drainage so acquired may be less desirable than drainage through a natural channel. In theory, those who hold an easement are strictly limited to the benefits they had while they were acquiring the easement, whereas drainage through a natural depression or channel may be materially improved within interpretations placed on the civil-law rule by Illinois courts.

Drainage easements cannot be acquired against the public; for example, they cannot be acquired against a highway or school district.²⁰

Summary of the rules of natural drainage. Under Illinois law, private landowners have certain rights to improve the drainage on their land. They can

- widen, deepen, and clean natural depressions that carry their surface water;

- straighten out channels on their own property and accelerate the movement of surface water so long as they do not change the natural point of entry on lower land or unreasonably increase the flow onto servient tenements;
- drain ponds or standing water in the direction of their overflow;
- fill up ponds or low places where water may stand, and force water out into natural drainage channels;
- tile their property to expedite the flow of water so long as they do not unreasonably increase the flow, change the point of entry on lower land, bring in water from another watershed, or connect their tile to the tile of other owners without consent;
- expedite the flow of surface waters through natural lines of drainage by either open or closed DRAINS into a water-course or stream; and
- construct grass waterways, check dams, terraces, or other soil-conservation structures, so long as their drainage waters still come within the rules explained earlier and in the discussion of the statutory enlargement of the rules of natural drainage on pages 7 to 12.

Public highway authorities have the same rights and duties as private owners. They may, in addition, change the natural drainage when the change is necessary and in the public interest and when compensation is made for any taken or damaged property.²¹

Because of the effect on surrounding lands, landowners must not

- dam or obstruct a natural channel so that the escape of surface water from higher land is retarded or so that the channel is shifted;
- divert water to lands that do not naturally receive this drainage;
- change the point of entry of surface water on lower land;
- bring in water from another watershed that would not have flowed across lower land in a state of nature;

- pollute any waters that pass from their land through the property of others—whether surface or underground waters, streams, or diffused waters;
- connect their own tile with another owner's tile lines or with highway tile lines without consent;
- dam up or impound large bodies of water that escape and cause serious damage to lower lands owned by others, even though such waters may escape through natural channels; or
- accelerate the flow of water unreasonably, or with malicious intent to the material damage of lower land owned by others, even though the flow is accelerated through natural channels.



Installing drainage tile. Drainage tile is used extensively in central Illinois to remove excess water from farmland.

Statutory Enlargement of Rules of Natural Drainage

Right to extend a tile drain across the land of others.

Besides codifying the rules of natural drainage, the Illinois Drainage Code provides that owners may extend their tile drains across the land of others when this extension is necessary to perfect their drainage and when it meets certain conditions imposed by law.²² It also sets up the court procedure for securing this drainage.²³

The procedure is predicated on the assumption that the following conditions have been met.

- Other owners have refused consent.
- Owners seeking to extend their drainage will do so at their own expense.
- The extension is needed for a proper outlet.
- The water carried by the drain will empty into a natural watercourse, highway ditch, or other outlet that the owner has a right to use.
- The highway commissioners have consented if a highway drain is to be used.
- The constructed extension will be an ample and properly made covered drain.
- Damages incurred by owners across whose property the extension is constructed are paid.
- A bond with approved security, covering costs and damages, is filed.
- A plat showing the course of the proposed construction and where it will discharge is filed.

A landowner will need to retain legal counsel to initiate the court procedure. If the circuit court finds for the plaintiff—the owner seeking to improve drainage—and if all conditions in the law are met, the owner can proceed to construct the drain. This owner may abandon the construction of the drain even after a favorable judgment but must pay the costs of the trial. If construction is abandoned, suit for the same purpose cannot be brought until five years after the date of judgment.

Owners who build such a drain and their successors in title must keep the drain in good repair so that it will not injure the property through which it passes. To meet this obligation, the owners may enter the lands where the drains are located at any time, but the law provides triple damages for willful harm to servient lands,²⁴ for example, intentionally driving on rows of corn rather than between them to get to a repair site.

Drains constructed by mutual license or agreement. The second early law enlarging a landowner's drainage rights legalized drains constructed by mutual license, consent, or agreement. Because each drain must be a MUTUAL DRAIN constructed for the mutual benefit of all the lands affected by it (Figure 2), the CODE specifies a ditch, covered drain, or levee has been constructed by mutual license, consent, or agreement, either separately or jointly, by the owners of adjoining lands when it makes

a continuous line across the lands of such owners, or when the owner of adjoining land is permitted to connect a ditch, covered drain or levee with another already so constructed, or when the owner of lower land connects a ditch or covered drain to a ditch or covered drain constructed by the owner or owners of upperlands, or when the owner of land protected by a levee has contributed to the cost of the construction, enlargement or reconstruction of a levee upon other land.²⁵

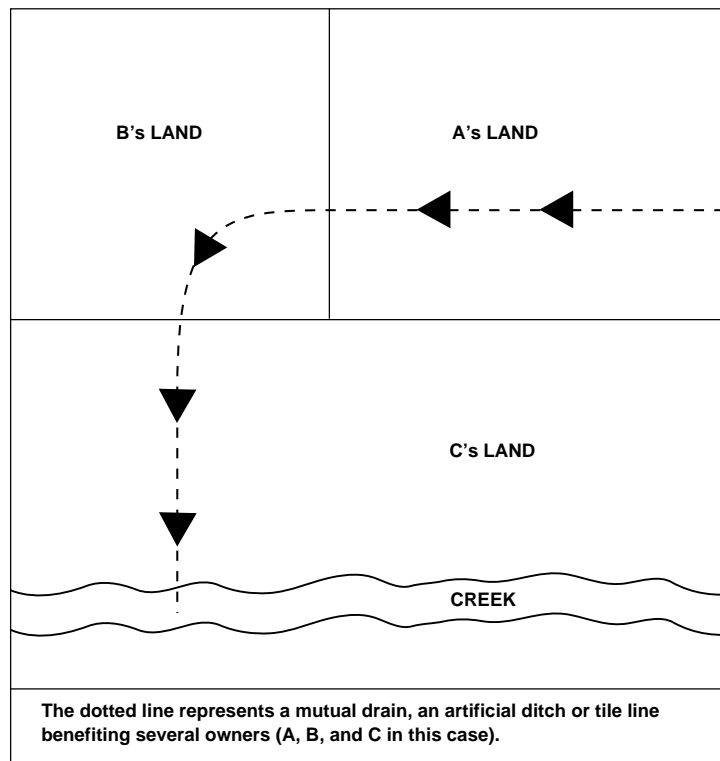


Figure 2. Mutual drain.

A mutual drain also arises when a single tract benefited by a ditch or covered drain is divided into two or more tracts.

The courts interpreting these provisions have added the following rules.

- This act has no relation to ditches authorized by DRAINAGE DISTRICTS (see pages 14 to 23).²⁶
- A written document is not essential for proving consent or agreement.²⁷
- Licenses revoked before this act took effect will not be revived by it, but what constitutes a revocation is not always clear.²⁸
- The intent of the act is to enlarge the natural rights of drainage between adjoining landowners and to protect the drains involved.²⁹
- Highways and highway commissioners are included in the act in the same way as are landowners.³⁰
- Owners have a right to maintain a mutual DRAINAGE SYSTEM as it was originally established.³¹
- Drains that come under this act create a perpetual easement on the premises involved.³²
- The act applies to existing and future drains that meet the criteria for mutuality, agreement, or consent.³³
- The rules of natural drainage are not affected except insofar as the mutual drain itself enlarges or alters the rights of the owners involved.³⁴

Three rules are important to mutual drains: one party to the drain cannot legally authorize connection by an outside owner unless all parties to the drain consent;³⁵ none of the interested parties can close a drain or interfere with the flow of water through it without the consent of all parties;³⁶ and an interested party may, at his or her own expense, enter the lands of others to repair the drain.³⁷

One question frequently asked is whether one or more parties to a mutual drainage system may connect additional lateral tiles on their land to it and thus increase the flow through the system. There is apparently no court case

specifically addressing this question, but the court's decision in the case of *Mackey v. Wrench* may be helpful even though that case addressed a different question.³⁸

Interpreting the mutual drainage sections of the code, the court stated:

Under these sections the owners of lands who have established and constructed a system of drainage for their mutual benefit possess a right to have such system of drainage maintained as established.

[An owner] may have the right under the doctrine announced in the case of *Peck v. Herrington* to improve and drain his own field in the course of good husbandry, even if by doing so he increases the flow of water upon his neighbor's land in a natural waterway or depression, but he has no right in doing so to disturb in any way the flow of waters which would pass off his premises through an outlet provided by a mutual system of drainage.³⁹

This language appears to preclude increasing the flow through such a system, as well as directing the flow away from the system, particularly if the increase is beyond the capacity of the present system.

If a member of a mutual drainage system wants to add lateral connections to the system, that member should secure consent from the other members. An agreement providing for the nature of and the responsibilities for the improvements should be reached in writing. Legal counsel should be consulted in the drafting of any such agreement. Any such agreement should also be recorded with the Recorder of Deeds.

Appropriate action can be taken to enforce these rules.

Court action can be maintained to compel a disconnection or the closing of the unlawful connection, and damages can be collected. A court INJUNCTION can be sought to remove the obstruction or to prevent interference when landowners enter the lands of others in order to make repairs at their own expense.

In the absence of an agreement for maintenance, an owner in a mutual drainage system may either petition for the organi-

zation of a district by USER (see page 18) or pay for the work. The mutual agreement, however, may include upkeep and maintenance responsibilities, or it may be that such a right has accrued by prescriptive use. Only the particular facts in each case determine if either condition exists.

Summary of statutory enlargements. The statutory enlargements of the civil-law rules of natural drainage may permit landowners to extend a tile drain across the property of others when the extension is necessary to secure a proper outlet if they follow the procedure and meet the conditions outlined in the statute; to connect to a drain along the highway with the consent of the highway commissioners; and to prevent owners of lower ground from interfering with the flow of water through a mutual drain, or from destroying or impairing such drains.

In addition to these specific statutory enlargements of the civil-law rules, an owner may create rights by contract or by prescriptive use. But in spite of enlargement by court interpretation, statutes, and contracts between owners, and the acquisition of rights by prescriptive use, thousands of Illinois landowners would have remained comparatively helpless in securing adequate drainage or flood control had not comprehensive drainage laws been adopted by the legislature providing for establishment of drainage districts.

Before making decisions about drainage, however, landowners should also be aware of the significant effects of the wetlands provisions of federal law. These provisions are discussed in Part III of this circular.

Notes

¹This drainage rule, known as the civil-law principle of natural drainage, applies to all Illinois farmland, regardless of whether or not it is in a drainage district. Iowa and Kentucky, like Illinois, base their drainage laws on the civil law, but Missouri, Wisconsin, and Indiana follow another legal concept known as the common-enemy rule. Theoretically, under the common-enemy rule, water is regarded as a common enemy, and landowners are given unrestricted legal rights to deal with surface water coming onto their land. Actually, the courts that follow this concept have developed limitations and exceptions to the rule to alleviate otherwise unjust results.

²Gormley v. Sanford, 52 Ill. 158 (1869).

- ³H.P. Farnham, *The Law of Waters and Water Rights* (1904).
- ⁴Peck v. Herrington, 109 Ill. 611 (1884).
- ⁵Counties with populations over 250,000 may require that a person installing drain tile record a diagram showing the location, size, and depth of the tile with the County Recorder of Deeds. 70 Ill. Comp. Stat. 605/2-13 (1996).
- ⁶Dayton v. Rutherford, 128 Ill. 271, 21 N.E. 198 (1889).
- ⁷Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906).
- ⁸Lambert v. Alcorn, 144 Ill. 313, 33 N.E. 53 (1893).
- ⁹Fenton & Thompson R. Co. v. Adams, 221 Ill. 201, 77 N.E. 531 (1906).
- ¹⁰Templeton v. Huss, 57 Ill. 2d 134, 311 N.E. 2d 141 (1974).
- ¹¹Lambert v. Alcorn, 144 Ill. 213, 33 N.E. 53 (1893).
- ¹²Templeton v. Huss, 57 Ill. 2d 134, 311 N.E. 2d 141 (1974).
- ¹³*Id.* at 141, 311 N.E. 2d at 146.
- ¹⁴See Callahan v. Rickey, 93 Ill. App. 3d 916, 418 N.E. 2d 167 (1981).
- ¹⁵70 Ill. Comp. Stat. 605/2-12 (1996).
- ¹⁶*Id.*
- ¹⁷Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
- ¹⁸735 Ill. Comp. Stat. 5/13-101 (1996).
- ¹⁹Saelens v. Pollentier, 7 Ill. 2d 556, 131 N.E. 2d 479 (1956).
- ²⁰Clare v. Bell, 378 Ill. 128, 37 N.E. 2d 812 (1941).
- ²¹Baughman v. Heinselman, 180 Ill. 251, 54 N.E. 313 (1899).
- ²²The codification section reads: "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 [or she] shall not be liable in damages therefor." 70 Ill. Comp. Stat. 605/2-1 (1996).
- ²³70 Ill. Comp. Stat. 605/2-2 to 2-7 (1996).
- ²⁴70 Ill. Comp. Stat. 605/2-6 (1996).
- ²⁵70 Ill. Comp. Stat. 605/2-8 (1996).
- ²⁶Snyder v. Baker, 221 Ill. 608, 77 N.E. 1117 (1906).
- ²⁷Dorman v. Droll, 215 Ill. 262, 74 N.E. 152 (1905).
- ²⁸McIntyre v. Harty, 236 Ill. 629, 86 N.E. 581 (1909).
- ²⁹Cox v. Deverick, 272 Ill. 46, 111 N.E. 560 (1916).
- ³⁰Dunn v. Youmans, 224 Ill. 34, 79 N.E. 321 (1906).
- ³¹Mackey v. Wrench, 134 Ill. App. 587 (1907).
- ³²Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639 (1898).
- ³³McIntyre v. Harty, 236 Ill. 629, 86 N.E. 581 (1909).
- ³⁴Knudson v. Neal, 320 Ill. 136, 150 N.E. 626 (1926).
- ³⁵70 Ill. Comp. Stat. 605/2-9 (1996).
- ³⁶70 Ill. Comp. Stat. 605/2-10 (1996).
- ³⁷70 Ill. Comp. Stat. 605/2-11 (1996).
- ³⁸Mackey v. Wrench, 134 Ill. App. 587 (1907).
- ³⁹*Id.* at 590.