OPINION
46-312

April 10, 1946 (OPINION)

WATER CONSERVATION

RE: Commission - Powers - Counties

This office is in receipt of your letter of April 8, 1946, and a copy of a letter addressed to the state water conservation commission by William W. Felson of Cavalier, North Dakota.

Mr. Felson desires to be informed as to whether or not landowners, or officials, of Cavalier County, have the legal right to divert surface waters by artificial ditches or drains into Pembina County and thus flood the lands of Pembina County farmers. In his letter, Mr. Felson says:

> Have the farmers, or officials, of Cavalier County the right to divert their water into Pembina County by artificial ditches. That is have they right to dig drainage ditches, place highway obstructions along boundary line between Pembina and Cavalier County, thence place culverts in such road embankment so as to divert water from natural watercourses, place such culverts at points which result in injury to farms on the Pembina County side."

I beg to advise you that a landowner, municipal corporation, drainage district, or public official, does not have the legal right to divert surface water by artificial ditches unto anyone's land. A proper outlet must be provided for water collected in an artificial drain. A landowner may ditch the water on his land into a nature watercourse provided he does not thereby flood lands not owned by him. Anyone who drains his land by collecting the water thereon in constructed ditches, and casts the water upon other lands, will be responsible in damages for the injury sustained by the owners of such lands. A landowner, drainage district, or municipal corporation may in a court action be enjoined from artificially flooding lands.

It does not appear that North Dakota has definitely adopted either the common law rule, with reference to surface waters, which holds that surface water is a common enemy and that a proprietor may by embankment, or dike, or otherwise defend himself against its encroachments, nor the civil law rule which holds that the lower estate (land) is subject to a natural servitude and is bound to take the natural flow from the higher grounds. The Supreme Court of this state has in each case brought before it considered the facts and circumstances, and has, in effect, decided each such case on its individual merits. The court has, especially in its later decisions, applied the equitable maximum, "one must use his own rights as not to infringe upon the rights of another." (Subsection 5, section 31-1105, Revised Code of 1943.)

The owner of the higher land cannot, in my opinion, legally collect the surface water thereon and cause it to flow on the land of the

lower proprietor in a different manner from which it flowed by nature nor may he materially increase the quantity thereof to the injury of the lower land. The following cases sustain this view:

Wirds v. Vierkant, 131 Iowa, 108 N.W. 108.

Cranson v. Snyder, 137 Mich. 340, 100 N.W. 674.

Todd v. York County, 72 Neb.207, 100 N.W. 299, 69 L.R.A. 561.

In the case of Baker v. Incorporated Town of Akron (a municipal corporation), 145 Iowa, 485, 122 N.W. 926, 30 L.R.A. (N.S.) 619, the Supreme Court of Iowa held:

> The owner of higher land has no right, even in the course of the use and improvement of his property, to collect the surface water on his land into a drain or ditch, increased in quantity or in a manner different from the natural flow, and divert it on the land of another, to the injury of such land."

The Supreme Court of the state of South Dakota which has adopted the civil law rule as to surface waters holding that the proprietor of higher land has an easement or servitude--that is to say--the right to have the surface waters of his land flow over the lower land, held in the case of Bailey v. Chicago St. P.M. & O. Ry. Co., 25 S.D. 200, 126 N.W. 268, that "it is an actionable wrong to collect surface water and discharge it in unusual and unnatural quantities upon the land of another."

It, therefore, follows that a landowner cannot legally build ditches and convey the surface water on his land unto and upon the land of his neighbors, and that no municipality or drainage district can legally construct a drain, for the purpose of drainage, unless the water is conveyed into a natural watercourse capable of taking the water without damaging anyone.

An artificial drain must, as stated, have a suitable outlet. Nor can a landowner or a municipality artificially drain water into the drain of a drainage district without paying for the privilege.

Therefore, the appropriate remedy for the condition described in Mr. Felson's letter is the joint construction of a drain by the boards of drainage commissioners of Cavalier and Pembina Counties, under the provisions of sections 61-2160 and 61-2161 of the 1943 Revised Code.

In his letter, Mr. Felson also asks what authority the state water conservation commission has with reference to drainage. The commissioner was primarily created to conserve water and to provide for its utilization in stabilizing agricultural production. But the last five years have created a need for the services of the commission in aiding Red River Valley counties in solving their drainage problems. The commission has the authority to investigate and study the drainage problem in Pembina and Cavalier Counties. In my opinion, the commission should authorize an investigation by its engineers. Recommendations based on such investigation should be submitted to the county commissioners and drainage commissioners of Pembina and Cavalier Counties.

NELS G. JOHNSON

Attorney General