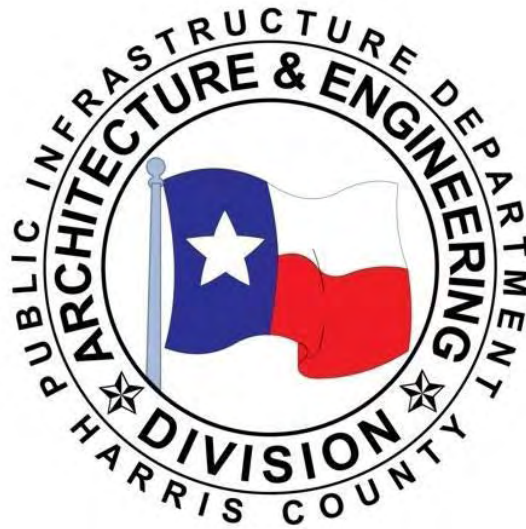


# STATE STATUTES

## SECTION 11.086 WATER RIGHTS

### FILL ON PRIVATE PROPERTY



Distributed By

**HARRIS COUNTY**  
PUBLIC INFRASTRUCTURE DEPARTMENT  
ENGINEERING DIVISION

PERMIT OFFICE  
10555 NORTHWEST FRWY, STE 120  
HOUSTON, TEXAS 77092  
(713) 956-3000

## WATER RIGHTS Ch. 11

§ 11.086

### 13. Admissibility of evidence

In suit to cancel order of Water Commission granting application for permit to divert waters, record of hearing before Commission was properly excluded. *Halsell v. Texas Water Commission* (Civ.App.1964) 380 S.W.2d 1, ref. n.r.e.

In suit to cancel order granting permit for diverting waters, alleged error in permitting Water Commission's chief engineer to answer question regarding his professional opinion as to water losses caused by phreatophytes which would be salvaged by construction of dam was harmless, where a registered professional engineer subsequently testified without objection to nature of vegetation and trees in valley involved and their water consuming capacity. *Id.*

In suit by riparian owners for damages for diversion of river, admission of map showing the area generally was not error where witness testified that he was familiar with information shown on map, that size and location of objects shown were correct, and that he had verified distances on ground with speedometer on his automobile. *Tennessee Gas Transmission Co. v. Moorehead* (Civ.App.1966) 405 S.W.2d 81, ref. n.r.e.

In suit by riparian owners for damages for diversion of river, admission of 1949 agreement in which riparian owners agreed to limited diversion of river for limited purpose of showing gas transmission company acted in good faith in diverting river in 1961-1962 to totally bypass owners' property was not error. *Tennessee Gas Transmission Co. v. Moorehead* (Civ.App.1966) 405 S.W.2d 81, ref. n.r.e.

Even if landowner were only entitled to use water from ditch for irrigation purposes, since

the charging of his well was a direct and natural result of irrigation, court properly admitted testimony to the effect that defendant river authority's diversion of water from the irrigation ditch operated to dry up owner's domestic well and cause specific monetary loss. *San Antonio River Authority v. Hunt* (Civ.App.1966) 405 S.W.2d 700, ref. n.r.e.

### 14. Judgment

1905 judgment refusing abatement of dam did not bar suit for damages caused by enlargement of original dam after May 29, 1915. *Thomas v. Bunch* (Civ.App.1931) 41 S.W.2d 359, affirmed 121 T. 225, 49 S.W.2d 421.

### 15. Appeal and review

City's appeal from order of State Board of Water Engineers denying city's application for permit to appropriate, for municipal purposes, 100,000 acre-feet of water per annum of unappropriated water to be stored in proposed river dam and reservoir did not become moot by virtue of fact that United States had entered into contract with river authority granting authority right to utilize storage space in reservoir, or fact that city's application described a dam and reservoir larger than the one finally approved by United States, or fact that city had applied for more water than was available or fact that construction of smaller dam had been started. *City of San Antonio v. Board of Water Engineers of Tex.* (Civ.App.1960) 334 S.W.2d 325, ref. n.r.e.

The decisions of Texas Water Commission in field of appropriation of unappropriated waters should have extraordinary weight with courts in passing upon their validity. *Halsell v. Texas Water Commission* (Civ.App.1964) 380 S.W.2d 1, ref. n.r.e.

## § 11.086. Overflow Caused by Diversion of Water

(a) No person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded.

(b) A person whose property is injured by an overflow of water caused by an unlawful diversion or impounding has remedies at law and in equity and may recover damages occasioned by the overflow.

(c) The prohibition of Subsection (a) of this section does not in any way affect the construction and maintenance of levees and other improvements to control floods, overflows, and freshets in rivers, creeks, and streams or the construction of canals for conveying water for irrigation or other purposes authorized by this code. However, this subsection does not authorize any

person to construct a canal, lateral canal, or ditch that obstructs a river, creek, bayou, gully, slough, ditch, or other well-defined natural drainage.

(d) Where gullies or sloughs have cut away or intersected the banks of a river or creek to allow floodwaters from the river or creek to overflow the land nearby, the owner of the flooded land may fill the mouth of the gullies or sloughs up to the height of the adjoining banks of the river or creek without liability to other property owners.

Amended by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977.

**Historical Note**

**Derivation:**

Acts 1915, 34th Leg., 1st C.S., c. 7.  
Rev.Civ.St.1911, art. 501lt.  
Acts 1927, 40th Leg., p. 80, ch. 56, § 1.

Acts 1935, 44th Leg., p. 766, ch. 334, § 1.  
Vernon's Ann.Civ.St. art. 7589a.  
Acts 1971, 62nd Leg., ch. 58, § 1.  
V.T.C.A. Water Code, former § 5.086.

**Law Review Commentaries**

Definition of surface water. 15 Baylor L.Rev. 430 (1963).

Floodlines and police power. Zygmunt J. B. Plater, 52 Texas L.Rev. 201 (1974).

General rules concerning permanent damage to land. 25 Texas Bar J. 961 (1962).

Governmental refilling of lakes and ponds and artificial maintenance of water levels:

compensation to abutting landowners. Robert E. Beck, 46 Texas L.Rev. 180 (1967).

Water law. Roger Tyler, 31 Texas Bar J. 365, 366 (1968).

Water rights: 1968 survey. 22 Southwestern L.J. 148, 152 (1968).

**Library References**

Waters and Water Courses ⇐78.  
C.J.S. Waters § 58 et seq.

**WESTLAW Electronic Research**

See WESTLAW Electronic Research Guide following the Preface.

**Notes of Decisions**

In general 2  
Accumulating or impounding surface waters 10  
Allocation of damages 45  
Amount of damages 46  
Availability of legal remedies, injunctions and equitable remedies 50  
Causation 29  
Civil law, generally 7  
Common enemy rule 8  
Common law, generally 8  
Concentrating flow of surface waters 11  
Consent of owner 27  
Construction and excavation 15, 35  
    Generally 15  
    Defenses 35  
Contributory negligence, defenses 33  
Counties 24  
Culverts and bridges 17  
Damages 40-47  
    Allocation 45

Damages—Cont'd  
    Amount 46  
    Mitigation 44  
    Permanent injuries to land 41  
    Property 42  
    Punitive 43  
    Temporary injuries to land 40  
    Waiver 47  
Dams 19  
Defenses 33-37  
    Construction and excavation 35  
    Contributory negligence 33  
    Ordinances 34  
    Rainfall 36  
    Waiver 37  
Diverting natural flow of surface waters 9  
Draining accumulated waters 13  
Eminent domain 22  
Equitable principles, injunctions and equitable remedies 48  
Excavation 15, 35

# WATER RIGHTS

## Ch. 11

|   |        |
|---|--------|
| Findings  | 61     |
| Highways and roads                                      | 16     |
| Impounding surface waters                               | 10     |
| Injunctions and equitable remedies                      | 48-53  |
| Availability of legal remedies                          | 50     |
| Equitable principles                                    | 48     |
| Injury  | 49     |
| Pleadings   | 52     |
| Public improvements                                     | 51     |
| Review  | 53     |
| Injury, injunctions and equitable remedies              | 49     |
| Instructions  | 60     |
| Intent of defendant                                     | 28     |
| Judicial notice   | 57     |
| Lateral support   | 21     |
| Levees  | 20     |
| Limitation of actions                                   | 55     |
| Mitigation of damages                                   | 44     |
| Municipalities  | 23     |
| Natural easements                                       | 7      |
| Negligence  | 30     |
| Nuisance  | 32     |
| Ordinances, defenses                                    | 34     |
| Overflow  | 5      |
| Parties   | 54     |
| Permanent injuries to land, damages                     | 41     |
| Pleadings, injunctions and equitable remedies           | 52     |
| Presumptions and burden of proof                        | 58     |
| Property damages  | 42     |
| Public improvements, injunctions and equitable remedies | 51     |
| Punitive damages  | 43     |
| Railroads   | 18     |
| Rainfall, defenses                                      | 36     |
| Remedies  | 38     |
| Repelling flow of surface waters                        | 12     |
| Retroactive application                                 | 3      |
| Review, injunctions and equitable remedies              | 53     |
| State agencies  | 26     |
| Strict liability  | 31     |
| Submission of issues                                    | 59     |
| Surface waters  | 4      |
| Temporary injuries to land, damages                     | 40     |
| Third party liability                                   | 39     |
| Title to eroded land                                    | 14     |
| Urban areas, generally                                  | 25     |
| Validity  | 1      |
| Venue   | 56     |
| Verdict   | 62     |
| Vested rights, generally                                | 6      |
| Waiver  | 37, 47 |
| Damages   | 47     |
| Defenses  | 37     |

## § 11.086

Note 3

### 1. Validity

Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), prohibiting diversion or impounding of surface waters so as to damage other lands by overflow, was constitutional. *Miller v. Letzerich* (1932) 121 T. 248, 49 S.W.2d 404.

### 2. In general

Rev.Civ.St.1911, art. 5011t (now, this section), against diversion of surface waters, was merely declaratory of common-law rights and liabilities of riparian owners. *Hagins v. Wilson* (Civ.App.1924) 262 S.W. 770, reversed on other grounds 116 T. 538, 295 S.W. 922.

Legislature manifested intent to continue protection afforded by Acts 1915, 1st C.S., ch. 7, relating to diversion of waters, by enacting Acts 1917, ch. 88, and including part thereof in Vernon's Ann.Civ.St. art. 7589 (repealed; see, now, § 11.085). *Thomas v. Bunch* (Civ.App. 1931) 41 S.W.2d 359, affirmed 121 T. 225, 49 S.W.2d 421.

Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) merely guaranteed to injured party the right to recover damages if he could show damage and right to equitable relief if he established facts which would bring him within the purview of equitable rules authorizing equitable relief. *Nolte Irr. Co. v. Willis* (Civ.App.1944) 180 S.W.2d 451, error refused.

Section 5.086 (now, this section) which prohibited the diversion of natural flow of surface water in manner damaging property of another was rule of property defining and limiting rights of property owners and, as rule of property which creates easements and limits their use, such section had no application to entities or persons who were not proprietors of land. *Kraft v. Langford* (Sup.1978) 565 S.W.2d 223.

Section 5.086 (now, this section) which provided that no person could divert or impound natural flow of surface water in manner damaging property of another recognized civil law rule of natural easements. *Kraft v. Langford* (Sup.1978) 565 S.W.2d 223.

### 3. Retroactive application

In action for diverting natural flow of water and impounding it on plaintiff's land by construction or repairs to levees, plaintiff was restricted to damages after the passage of Acts 1915, 34th Leg., 1st C.S., c. 7. *Gaertner v. Stolle* (Civ.App.1922) 238 S.W. 252.

Acts 1915, 34th Leg., 1st C.S., c. 7, providing that hereafter it would be unlawful for any person to divert the natural flow of surface water or to permit a diversion thereof caused by him to continue, in so far as the act sought

See, also, Notes of Decisions under § 11.085.

### Note 3

to compel one who had heretofore constructed a levee in which he had a vested property to remove same, was retroactive and violated Const. Art. 1, § 16, as retroactive. *Gaertner v. Stolle* (Civ.App.1922) 238 S.W. 252.

Acts 1915, 34th Leg., 1st C.S., c. 7, prohibiting diversion of natural flow of surface waters, or the impounding thereof in such manner as to damage property of another, was void as retroactive law in so far as it applied to structures erected prior to and in existence at time act went into effect. *North Texas Compress & Warehouse Co. v. Howard* (Civ.App.1924) 265 S.W. 1067.

In so far as Acts 1915, 34th Leg., 1st C.S., ch. 7, § 1, making landowners liable for diversion of surface waters applied to structures lawfully erected prior to and in existence at effective date of act, it was unconstitutional. *North Texas Compress & Warehouse Co. v. Howard* (Civ.App.1925) 267 S.W. 1026.

Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), forbidding diversion or impounding of surface waters so as to damage another's land by overflow, was applicable both to constructions made before and after enactment. *International-Great Northern R. Co. v. Reagan* (1932) 121 T. 233, 49 S.W.2d 414.

#### 4. Surface waters

Under Texas law, if liability was based on violation of former § 5.086 (now, this section), alleged damage must have been actually done by surface water as strictly defined, but when waters were impounded and subsequently intentionally released, liability did not hinge upon whether impounded water was surface water or a watercourse. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 449 F.2d 400.

"Surface waters" within Rev.Civ.St.1911, art. 5011t (now, this section), prohibiting diversion of surface waters, included flood waters of a creek or such waters as during rains flow through any gully, slough, ditch, or any well-defined natural drainage. *Hagins v. Wilson* (Civ.App.1924) 262 S.W. 770, overruled on other grounds 116 T. 538, 295 S.W. 922.

Waters flowing from creek over flood channel or plain thereof when it overflowed its banks were waters of creek, not surface waters against which riparian owners could erect levees. *Bass v. Taylor* (1936) 126 T. 522, 90 S.W.2d 811.

"Surface waters," the damaging diversion of which was made actionable by Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) were those which were diffused overground from falling rain or melting snows and water continued to be such until it reached some bed

or channel in which water was accustomed to flow and ceased to be such when it entered watercourse in which it was accustomed to flow. *Stoner v. City of Dallas* (Civ.App.1965) 392 S.W.2d 910, ref. n.r.e.

Waters which flowed upon homeowner's property because of overflow of creek following rain were not "surface waters" within Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), making damaging diversion of such actionable, and city was not liable even if overflow occurred because of its actions in widening, deepening and straightening creek channel. *Id.*

#### 5. Overflow

Word "overflow," as used in Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), meant to flow over; to cover with or as with water or other fluid; to spread over, to inundate. *Miller v. Letzerich*, 121 T. 248 (1932) 49 S.W.2d 404.

#### 6. Vested rights, generally

Proprietors under grants of land made since 1840 have no vested right in rule of decision prescribed by adoption of common law, as regards surface waters due to precipitation. *Miller v. Letzerich* (1932) 121 T. 248, 49 S.W.2d 404.

Even if property owner could not trace his title to a grant from Spain or Mexico, so as to establish vested right under such a grant to have surface waters pass in natural condition onto lands of lower estate, he enjoyed the same property rights under subsec. (a) of this section. *Bily v. Omni Equities, Inc.* (App. 14 Dist.1987) 731 S.W.2d 606, ref. n.r.e.

#### 7. Civil law, generally

Under civil law rule that was applicable to lands granted by governments of Spain and Mexico, landowner could not burden adjacent lands with surface water he accumulated or discharged except in same manner in which it would naturally flow. *Kraft v. Langford* (Sup. 1978) 565 S.W.2d 223.

Under civil law rule applicable to lands granted by Spain and Mexico, natural easement was imposed on land of those adjacent to surface water owner; however, extent of easement ran only to natural flow of surface water and servient estate was under no obligation to receive different flow of greater quantities of water than would be natural. *Kraft v. Langford* (Sup.1978) 565 S.W.2d 223.

#### 8. Common law, generally

Under the common-law rule which prevailed in Texas prior to Acts 1915, 34th Leg., 1st C.S., c. 7 (now, this section), the proprietor of land

## WATER RIGHTS Ch. 11

Improving the same might lawfully repel surface water and turn the flow back on other lands without liability. *Walenta v. Wolter* (Civ.App.1916) 186 S.W. 873, error refused.

The common-law rule that the owner of land may for his own protection divert natural surface water, although it resulted in injury to land of his neighbor, was changed by Acts 1915, 34th Leg., 1st C.S., c. 7 (Rev.Civ.St.1911, art. 5011t; now, this section). *Hester v. McAdams* (Civ.App.1918) 203 S.W. 121, error refused.

Under the "common enemy rule" that was applicable to lands granted by republic and State of Texas, water was seen as natural enemy of all property holders and each proprietor was free to fend it off without regard to rights of surrounding landowners; no natural easement existed and every landowner had right to burden neighbor's land with overflow of surface water created by his acts of diversion or impoundment. *Kraft v. Langford* (Sup.1978) 565 S.W.2d 223.

### 9. Diverting natural flow of surface waters

Owner of land is forbidden to protect his own land from damage by construction of dikes or embankments which divert surface waters to damage of adjoining landowner. *Bunch v. Thomas* (Civ.App.1927) 290 S.W. 569.

Property owner may not for own protection divert natural flow of surface water to damage of neighbor. *Kahn v. Bauch Leather Co.* (Civ.App.1929) 17 S.W.2d 187.

Wrongfully diverting from natural course surface water due to precipitation, and causing it to flow over another's land, causing damage, was prohibited by Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section). *Miller v. Letzerich* (1932) 121 T. 248, 49 S.W.2d 404.

Capturing, in ditch and along levee, surface water due to precipitation, and thus directing it onto neighbor's land, was unlawful. *Id.*

Landowner could not lawfully divert surface waters by erection of terraces or other artificial means so as to overflow and damage land of another. *Roby v. Hawthorne* (Civ.App.1935) 77 S.W.2d 923.

Landowner, whose diversion of surface waters by erection of terraces caused overflow onto land of another, was liable for damages to such other land, growing crops or other appurtenances to such land as result of rainfall, not of unprecedented nature. *Roby v. Hawthorne* (Civ.App.1935) 77 S.W.2d 923.

A landowner has no right to capture, concentrate, and discharge surface waters with impunity, even on his own land, and thereby divert waters from their natural flow so as to cause

## § 11.086

### Note 11

injury to lower riparian proprietors. *Coleman v. Wright* (Civ.App.1941) 155 S.W.2d 382.

### 10. Accumulating or impounding surface waters

Since Acts 1915, 34th Leg., 1st C.S., c. 7, § 1 (now, this section) not only made it unlawful to impound surface water so it would back upon and injure property of another, but unlawful to impound such water so it would escape and overflow and thereby cause injury to another, in action for injuries to crop from overflow of water impounded by dams, it was error to apply the common-law rule by a charge that there could be no recovery unless defendant was guilty of negligence, which was proximate cause of damage either in the way it constructed the dam or the way it maintained it. *Anderson v. Highland Lake Co.* (Civ.App.1924) 258 S.W. 218.

Landowner was liable for damage caused by seepage into adjoining building of rain water which landowner had permitted to accumulate on his property. *Burbridge v. Rich Properties, Inc.* (Civ.App.1963) 365 S.W.2d 657.

Finding that construction of reservoir caused repeated increased flooding on land constituted finding that improvements amounted to at least some interference with property rights, but, standing alone, was not sufficient, as matter of law, to establish owners' right to recover damages. *Ansley v. Tarrant County Water Control and Imp. Dist. No. One* (Civ.App.1973) 498 S.W.2d 469, ref. n.r.e.

### 11. Concentrating flow of surface waters

A landowner has a right to collect surface water and natural drainage of his land into ditches, drains, or artificial streams and discharge such waters into a natural water course on his land, where this constitutes a natural outlet of the water so collected, if the discharge is not beyond the natural capacity of the water course. *Coleman v. Wright* (Civ.App.1941) 155 S.W.2d 382.

Where surface waters did not reach ditch on owner's land in diffused state but were diverted and concentrated by man-made ditches, embankments and culverts in area, owner was entitled to resort to self-help to prevent damage to land and place a caliche block in drainage ditch on his land to block the unnatural and concentrated flow of waters onto his land from his neighbors. *Leber v. Adams* (Civ.App.1963) 370 S.W.2d 243, ref. n.r.e.

Where real estate developers increased both the quantity and the velocity of the runoff water and caused it to pass off onto adjoining lands in increased quantities, in a different state and in a manner which would erode and damage the adjoining land, the developers'

## § 11.086

### Note 11

construction of storm sewer system so as to cause entire surface rainfall to be concentrated into one system of pipes from which it was discharged in a concentrated mass on the adjoining land violated former § 5.086 (now, this section) prohibiting the diversion or impounding of natural flow of surface waters in a manner that damages the property of another. *Langford v. Kraft* (Civ.App.1973) 498 S.W.2d 42, ref. n.r.e.

Where adjoining landowner established probable injury from real estate development storm sewer system which caused entire surface rainfall to be concentrated into one system of pipes in which it was discharged in a concentrated mass with great force upon owner's land and he established his cause of action against developers, trial court did not abuse its discretion in granting temporary mandatory injunction which required developers to close the discharge opening in the storm sewer system. *Langford v. Kraft* (Civ.App.1973) 498 S.W.2d 42, ref. n.r.e.

Runoff of surface waters from upper estate to lower estate was concentrated and accelerated by construction of parking lots and buildings by owner of upper estate, so that action of owner of lower estate in building and maintaining retaining wall did not violate this section. *Bishop v. Harris* (App. 12 Dist.1984) 669 S.W.2d 859, error dismissed.

### 12. Repelling flow of surface waters

Land is subject to no servitude to receive water; the natural flow of which has been diverted to it. *Higgins v. Spear* (1929) 118 T. 310, 15 S.W.2d 1010; *Langford v. Kraft* (Civ.App.1973) 498 S.W.2d 42, ref. n.r.e.

A railroad company could not, in view of Rev.Civ.St.1911, art. 5011t (now, this section), divert a water course which drained plaintiff's land in such a manner as to impound surplus waters on plaintiff's property. *McAmis v. Gulf, C. & S.F. Ry. Co.* (Civ.App.1916) 184 S.W. 331.

Under Rev.Civ.St.1911, art. 5011t (now, this section), and Vernon's Ann.Civ.St. art. 7589 (repealed; see, now, § 11.085), landowner may recover damages caused by adjoining owner extending and enlarging embankment on land so as to increase volume of impounded water after enactment of said statutes prohibiting such act. *Bunch v. Thomas* (Civ.App.1927) 290 S.W. 569.

Defendants causing overflow of plaintiffs' land by constructing embankment to protect their lands from flooding caused by third persons' diversion of natural water flow were not liable for damage to crops. *Higgins v. Spear* (1929) 118 T. 310, 15 S.W.2d 1010.

## WATER RIGHTS

### Title 2

Defendants constructing embankment to protect their lands from flooding, caused by diversion of natural flow of waters by construction of ditches and embankments on others' lands, were not liable for damage to crops as result of water thus impounded backing up on plaintiffs' land. *Higgins v. Spear* (1929), 118 T. 310, 15 S.W.2d 1010.

Vernon's Ann.Civ.St. art. 7589 (repealed; see, now, § 11.085) did not prohibit landowners from maintaining dam to protect lands from floods and accumulated waters arising from and caused by acts or constructions of other persons. *Thomas v. Bunch* (Civ.App.1931) 41 S.W.2d 359, affirmed 121 T. 225, 49 S.W.2d 421.

Lower estate need not receive surface water from upper lands, except in natural condition, untouched by human hands. *Bunch v. Thomas* (1932) 121 T. 225, 49 S.W.2d 421; *Langford v. Kraft* (Civ.App.1973) 498 S.W.2d 42, ref. n.r.e.

Landowner was entitled to maintain and enlarge dam, so far as reasonably necessary to protect lands from surface waters flowing from upper lands and artificially accumulated by acts and constructions of others. *Bunch v. Thomas* (1932) 121 T. 225, 49 S.W.2d 421.

Proprietor of higher land is entitled to have surface water flow to lower land, so long as water follows its usual course and runs in its natural quantities. *Samples v. Buckman* (Civ.App.1951) 246 S.W.2d 283, error refused; *Langford v. Kraft* (Civ.App.1973) 498 S.W.2d 42, ref. n.r.e.

If owner of lower property obstructs or repels water flowing from higher land along usual course and in natural quantities, he is responsible for any injury that may result from his action. *Samples v. Buckman* (Civ.App. 1952) 246 S.W.2d 283, error refused.

Denial of injunction by which city sought to require landowner to receive what would naturally flow into his lake was not bar to subsequent suit by city to prevent landowner from violating Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) and diverting natural flow of surface water. *Cone v. City of Lubbock* (Civ.App.1965) 395 S.W.2d 651, ref. n.r.e.

Finding in response to special issues that dike constructed on builder's land along common boundary with adjoining land did not obstruct natural flow of surface water from adjoining land in such manner as to impound it was supported by sufficient evidence, though dike did change course which such water would otherwise follow to ultimate destination in lake and ditch at either end of dike and did detain some water on adjoining land for short

## WATER RIGHTS Ch. 11

time following heavy rainfall. *Cabla v. Shockley* (Civ.App.1966) 402 S.W.2d 289, ref. n.r.e.

Lands lower than coterminous estate owe service to receive burden of surface waters flowing from higher estate onto lower so long as surface water from dominant estate reaches borders of servient one untouched by hands of man. *Cone v. City of Lubbock* (Civ.App.1968) 431 S.W.2d 639, ref. n.r.e.

If owner of upper land blocked his property so as to change natural flow of water, lower land was not subject to any servitude to receive water, the natural flow of which had been diverted thereto. *Cone v. City of Lubbock* (Civ.App.1968) 431 S.W.2d 639, ref. n.r.e.

Water flowing onto adjacent property owner's property from a subdivision was not entering onto his land in its natural diffused state, but was instead being directed onto his property at a higher rate and in substantially greater amount than water would have flowed without a drainage system of streets, ditches, and culverts in subdivision; therefore, under subsection (a) of this section, adjacent property owner was not liable to property owners when he filled in his property resulting in flooding of property owners' land. *Mitchell v. Blomdahl* (App. 3 Dist.1987) 730 S.W.2d 791, ref. n.r.e.

### 13. Draining accumulated waters

Landowner was not prohibited from draining lake by ditch into a well-defined water course. *Johnson v. McMahon* (1929) 118 T. 633, 15 S.W.2d 1023.

Landowners could not alter embankment of road near adjoining land and cut through or dynamite dam on adjoining land to relieve occasional accumulation of surface waters. *Thomas v. Bunch* (Civ.App.1931) 41 S.W.2d 359, affirmed 121 T. 225, 49 S.W.2d 421.

### 14. Title to eroded land

Title to land eroded away by encroachment of waters of lake was lost by owners to state, and title to later man-made island at same location was vested in state. *Lakefront Trust, Inc. v. City of Port Arthur* (Civ.App.1974) 505 S.W.2d 606, ref. n.r.e.

### 15. Construction and excavation generally

That erection of building, or excavation therefor, may divert slightly water falling on lot or lots to be used in connection with building, does not constitute diversion of natural flow of surface water as prohibited by Rev.Civ. St.1911, art. 50111 (now, this section). *Shamburger v. Scheurrer* (Civ.App.1918) 198 S.W. 1069.

In suit for injury to land caused by diversion of surface water from its natural flow by artificial

barrier damages could be recovered whether or not artificial barrier used as means of diverting water was negligently constructed. *Roby v. Hawthorne* (Civ.App.1935) 77 S.W.2d 923, error dismissed.

Where continued construction of residential subdivision would result in damage to neighboring landowner's property by erosion in the future from diverted surface waters, neighboring landowner was entitled to injunctive relief with respect to continued construction. *Scott v. King* (App.1983) 647 S.W.2d 394.

### 16. Highways and roads

Granting of mandatory injunctive relief to plaintiff restraining Falls County from maintaining without a culvert, a public road along western side of plaintiff's farm which obstructed natural passage of surface water from plaintiff's farm was discretionary where resulting wrongful impounding of surface waters furnished a breeding place for insects such as to create an injurious nuisance in close proximity to plaintiff's home. *Falls County v. Kluck* (Civ. App.1947) 199 S.W.2d 704.

Plaintiff owner of property near which county had created an injurious nuisance by maintaining a public road along one side of plaintiff's property without a culvert so as to obstruct natural flow of surface water from plaintiff's land to other side of road and impound the water creating a breeding place for insects was entitled to mandatory injunction directing construction of a proper culvert, notwithstanding objection of owner of part of land on other side of road. *Falls County v. Kluck* (Civ.App.1947) 199 S.W.2d 704.

In constructing roads, the county may, if necessary, cast surface waters on adjoining land by paying the owners thereof for taking their property for a public purpose. *Soule v. Galveston County* (Civ.App.1952) 246 S.W.2d 491, error refused.

Landowners had no right to divert the natural flow of surface waters so as to cause or threaten irreparable damage to adjoining county roads. *Soule v. Galveston County* (Civ.App. 1952) 246 S.W.2d 491, error refused.

County was entitled to a mandatory injunction to prevent defendants from so diverting the natural flow of surface waters across their land as to cause or threaten irreparable damage to adjacent county roads, where defendants had persisted in filling in a swale on their land despite warning by county engineer and by expenditure of about \$700 the water could be allowed to drain so as not to endanger the roads. *Soule v. Galveston County* (Civ.App. 1952) 246 S.W.2d 491, error refused.

§ 11.086

Note 16

## § 11.086

### Note 16

In action by county for injunction commanding landowner to remove levee which diverted surface water from culverts county had built under road and caused water to overflow the road, burden of proof was on landowner to establish that placing of culverts turned flow of water so that it damaged his land and that neighbor had changed topography of his land and drilled irrigation wells so that levee was necessary to protect landowner's property from overflow of water. *Brittian v. Hale County* (Civ.App.1957) 297 S.W.2d 721.

County which sued for injunction to require defendant to remove dam or levee which allegedly caused water to flood road was not required to plead or prove specific damage; moreover, pleading that road was inundated and could not be used by public for considerable time and that damage resulted to road, and defendants' admission of damage, satisfied any requirement of pleading and proof. *Marek v. Baylor County* (Civ.App.1968) 430 S.W.2d 220.

Although evidence in suit for permanent injunction to restrain county from cutting a barrow ditch to a level which would allegedly divert natural flow of runoff water so as to cause flooding of plaintiffs' land showed a diversion of water from its natural course by county, where it did not show more than a minimal probability of injury pending final determination of case, denial of motion for temporary mandatory injunction requiring county to partially fill in ditch pending final judgment was not an abuse of discretion. *Thomas v. Hale County* (Civ.App.1975) 531 S.W.2d 213.

### 17. Culverts and bridges

If landowner's construction of ditch across road was tort against lower landowner, fact that bridge was constructed under direction of county commissioners would not relieve upper owner from liability for tort. *Bunch v. Thomas* (1932) 121 T. 225, 49 S.W.2d 421.

Where county placed culvert under road and caused concentrated force of water to flow from low point of higher estate on one side of road onto property of owner of lower lying land, owner of lower lying land acted within his legal rights in constructing dam to protect his property, and was not restricted to suit for damages, in absence of easement for a drainway over his property. *Willacy County v. Oakes* (Civ.App.1951) 239 S.W.2d 692, error refused.

Where culvert which was maintained by city was in existence before landowner bought land, and where city did nothing to change natural flow of surface waters in vicinity, city was not responsible for, or required to correct, flow of floodwaters over landowner's property.

## WATER RIGHTS

### Title

*City of Dallas v. Winans* (Civ.App.1954) 2 S.W.2d 256.

Where culvert which was maintained by city was in existence before landowner bought land, and where city did nothing to change natural flow of surface waters in vicinity, city was not responsible for, or required to correct, flow of floodwaters over landowner's property. *City of Dallas v. Winans* (Civ.App.1953) 2 S.W.2d 256.

### 18. Railroads

Railroad's duty to make adequate provision to make certain that the natural flow of surface waters is not interfered with is a continuing one at least to the extent that once having constructed adequate drainage means those means must be kept operative. *Chicago, R.I. P.R. Co. v. Goodson, Trinity Universal Ins. Co. Intervener* (C.A.1957) 242 F.2d 203.

Railroad digging drainage ditches across yards did not divert or impound surface water. *Ainsworth v. Texas & N.O.R. Co.* (Civ.A. 1927) 288 S.W. 481.

Railroad so constructing embankment as to cause surface waters to inundate upper landowner liable under civil law if construction and property damaged were on Mexican grant, and any event under Vernon's Ann.Civ.St. 7589a (repealed; now, this section). *International-Great Northern R. Co. v. Reagan* (1915) 121 T. 223, 49 S.W.2d 414.

If railroad company failed to construct proper culverts, sluices or ditches necessary to divert off surface water by the way it flowed before railroad was built, railroad was responsible for damages arising from such neglect. *Atchafalaya T. & S.F. Ry. Co. v. Porter* (Civ.App.1967) S.W.2d 615.

### 19. Dams

Power company's release of flood waters through dam did not constitute violation of former § 5.086 (now, this section), nuisance or unconstitutional taking. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 499 S.W.2d 400.

Power company which created, maintained and operated dam and was in effect a master of flood waters and whose employees could accurately determine amount of water which was and would be flowing through reservoir and down creek had duty to give warning, of possible flooding, to owner of property below dam as ordinarily prudent person would, and duty was even more demanding to such owner who actively sought but denied information from power company. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 499 F.2d 400.

## WATER RIGHTS Ch. 11

§ 11.086  
Note 20

Landowners had right to enlarge dam constructed in 1905 so far as reasonably necessary to protect lands from accumulated waters caused by acts and constructions of others. *Thomas v. Bunch* (Civ.App.1931) 41 S.W.2d 359, affirmed 121 T. 225, 49 S.W.2d 421.

Landowner erecting dam to protect land in 1905 acquired vested right to maintain dam as originally constructed. *Thomas v. Bunch* (Civ.App.1931) 41 S.W.2d 359, affirmed 121 T. 225, 49 S.W.2d 421.

State reclamation engineer's permission did not authorize private dam, without due compensation, to benefit owners' land to detriment of that of others, even if former's benefit exceeded latter's detriment. *Bass v. Taylor* (Civ.App.1932) 50 S.W.2d 853, reversed on other grounds 126 T. 522, 90 S.W.2d 811.

The fact that defendant impounded surface waters without permit from board of water engineers and injury resulted to levees and flume of plaintiff's irrigation canal did not entitle plaintiff to permanent mandatory injunction requiring defendant to remove the dams and embankments or to make and maintain adequate spillways, where court found that injury was slight and was measurable in money. *Nolte Irr. Co. v. Willis* (Civ.App.1944) 180 S.W.2d 451, error refused.

Where defendant violated plaintiff's statutory right under Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) by impounding surface waters, but plaintiff failed to establish that his damage was serious or would be serious, refusing to grant permanent mandatory injunction requiring defendant to remove dams and embankments or to make and maintain adequate spillways was not an abuse of discretion. *Nolte Irr. Co. v. Willis* (Civ.App.1944) 180 S.W.2d 451, error refused.

Though a riparian owner or another with proper authority may construct dams in streams to make reservoirs, in doing so he is not permitted to flood lands of other riparian owners, or to back the water past line of other riparian owners, and, if he does so, other riparian owners may seek aid of courts for redress, whether or not there has been a direct injury to them. *Red Lake Fishing & Hunting Club v. Burleson* (Civ.App.1949) 219 S.W.2d 115, error refused.

Upstream owner of barges and logs who did not establish when or how barges and timber broke loose and were destroyed or damaged during hurricane could not recover from defendant valley authority for such damage on theory that authority's construction of salt water dam across navigable stream caused water to flood his property. *Schull v. Lower Neches*

Val. Authority (Civ.App.1967) 416 S.W.2d 505, ref. n.r.e.

Where jury found that plaintiff violated Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), which makes it unlawful to divert natural flow of surface waters in such manner as to damage property of another, and such finding covered all elements of the article necessary for the defendant, as injured party, to be entitled to relief and evidence would support finding of damage to defendant's land or finding that dam would in the future continue to cause accumulation of water on defendant's land, if such issues were required, they would be deemed as found by the trial court in such manner as to warrant issuance of mandatory injunction which directed plaintiff to remove a dam along fence line between the parties and to allow surface waters to follow natural watercourse. *Nichols v. Culver* (Civ.App.1971) 466 S.W.2d 671, ref. n.r.e.

Defendant's answer was sufficient to state cause of action or cross action for mandatory injunction to direct plaintiff to remove a dam along fence line between the parties' property and to allow surface waters to follow the natural course. *Nichols v. Culver* (Civ.App.1971) 466 S.W.2d 671.

### 20. Levees

An order in suit to enjoin construction of a levee, as diverting surface water, to plaintiff's injury, permitting a different levee, without pleading or evidence to support it, is improper. *Beyers v. Hughes* (Civ.App.1917) 195 S.W. 651, error refused.

Riparian owner could lawfully erect levee on his own land to control overflows and freshets in view of Rev.Civ.St.1911, art. 5011t (now, this section); riparian owner could not erect levee to control overflows, if construction at particular place would cause waters in time of ordinary overflow to unnaturally overflow and injure ground of opposite owner. *Jackson v. Knight* (Civ.App.1925) 268 S.W. 773.

Riparian owner has no right to construct embankment along normal bank of stream to protect his land from overflow when such embankment would cause waters of stream to damage others' lands in times of ordinary floods. *Bass v. Taylor* (1936) 126 T. 522, 90 S.W.2d 811.

Riparian owners were entitled to construct levees sufficient to hold back additional water thrown on their lands from creek because of levees constructed by other landowners, but not levee which would divert overflow water largely exceeding amount against which they may lawfully defend. *Bass v. Taylor* (1936) 126 T. 522, 90 S.W.2d 811.

## § 11.086

### Note 20

Riparian owners were authorized to construct levee to repel increase of ordinary flood water diverted by complaining riparian owners' levees. *Bass v. Taylor* (Civ.App.1932) 50 S.W.2d 853, reversed on other grounds 126 T. 522, 90 S.W.2d 811.

### 21. Lateral support

Where plaintiffs' and defendants' adjoining lots were not in natural state as when purchased and it was the filling of lake by Trinity River Authority and wave action which brought about need for lateral support which did not exist before, and defendants built retaining wall which abutted plaintiffs' retaining wall and wave action caused defendants' retaining wall to fall causing damage to plaintiffs' retaining wall, plaintiffs had no cause of action based upon lateral support, and their recourse, if any, must be based upon common-law doctrine that there are mutual and reciprocal duties on part of adjoining landowners requiring that each use his land in reasonable manner with due regard to rights and interests of others. *Carpentier v. Ellis* (Civ.App.1972) 489 S.W.2d 388, ref. n.r.e.

An adjoining landowner's right to lateral support, limited to the soil itself, apart from buildings thereon is absolute, and not subordinate to any right of adjoining proprietor to repel the surface water from his land. *Carpentier v. Ellis* (Civ.App.1972) 489 S.W.2d 388, ref. n.r.e.

A landowner's right to lateral support of soil does not depend on the question of negligence, which may become a factor, where it is sought to recover damages to improvements which have been placed on the land deprived of such support. *Id.*

### 22. Eminent domain

Under Texas law, ordinary concept of negligence is not critical factor in assessing liability for water damage where a defendant's actions result in taking or destruction by a public body of a person's property without adequate compensation, in violation of Constitution. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A. 1974) 499 F.2d 400.

Since city through manner in which it maintained road culvert caused surface waters to back up on premises leased to store plaintiffs' automobiles, was found not guilty of any negligence with respect to the ensuing water damage to the automobiles, the automobiles were not "damaged for public use" within meaning of Const. art. 1, § 17. *City of Houston v. Renault, Inc.* (Sup.1968) 431 S.W.2d 322.

## WATER RIGHTS

### Title 2

### 23. Municipalities

Vernon's Ann.Civ.St. art. 7589a (repealed; now this section), prohibiting diversion and impounding of surface waters, so as to damage another's property by "any person, firm or private corporation," applied to municipality. *City of Brady v. Cox* (Civ.App.1932) 48 S.W.2d 511.

Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), declaring unlawful the diverting by any person of the natural flow of surface waters or impounding the same in such manner as to damage the property of another and providing that injured party should have remedies both at law and in equity, was applicable to municipalities as well as to private corporations. *Falls County v. Kluck* (Civ.App.1947) 199 S.W.2d 704.

Provisions of Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) were declaratory of common law, and were applicable to municipalities as well as to private corporations and individuals. *Meier v. Thompson* (Civ.App. 1952) 248 S.W.2d 493, ref. n.r.e.

Where floodwaters flowed through culvert onto property holder's land, mandatory injunction did not lie against city to abate nuisance, since construction, demolition, and alteration of public improvements are matters of policy which come within the discretionary powers of city council, and with which, except in cases of fraud or arbitrary capricious acts, courts will not interfere. *City of Dallas v. Winans* (Civ. App.1953) 262 S.W.2d 256.

Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section); making it unlawful for any person, firm or private corporation to divert natural flow of surface waters or impound same in such manner as to damage property of another did not apply to municipal corporations. *City of Houston v. Renault, Inc.* (Sup. 1968) 431 S.W.2d 322.

City's allegations that property owner diverted surface waters contrary to laws of state did not make action one involving governmental activity. *Cone v. City of Lubbock* (Civ.App. 1968) 431 S.W.2d 639, ref. n.r.e.

Mere filing by city of amendment alleging that owner's use of property constituted public nuisance did not make action in which city sought injunction against owner's changing contours of his land one involving governmental activity in absence of actual litigation of such issue. *Cone v. Lubbock* (Civ.App.1968) 431 S.W.2d 639, ref. n.r.e.

Action by city against property owner to enjoin him from changing contours of his land on ground that owner was interfering with natural flow of waters was litigation involving

## WATER RIGHTS Ch. 11

§ 11.086  
Note 29

proprietary activity from which city did not enjoy immunity. *Cone v. City of Lubbock* (Civ.App.1968) 431 S.W.2d 639, ref. n.r.e.

Operation and maintenance by city of storm sewers is proprietary activity. *Cone v. City of Lubbock* (Civ.App.1968) 431 S.W.2d 639, ref. n.r.e.

In order for plaintiff landowners, suing for damages caused by diversion of natural flow of water by adjoining landowners, to recover against city, they had burden of proving that city's acts in approving plat dedicating streets in subdivision resulting in diversion of water upon plaintiffs was intentional and unreasonable. *Carter v. Lee* (Civ.App.1973) 502 S.W.2d 925, ref. n.r.e.

Municipality has exclusive right to control drainage of surface waters within its city limits, but in exercising that right it is incumbent on city to use ordinary care to avoid injuring property of its citizens, providing that drainage is not type of governmental function in which a municipality is exempt from liability. *Carter v. Lee* (Civ.App.1973) 502 S.W.2d 925, ref. n.r.e.

Under subsec. (a) of this section, providing that no person may permit diversion or impounding of surface water to continue in manner that damages property of another by overflow, "person" includes municipalities. *Abbott v. City of Princeton, Tex.* (App. 5 Dist.1986) 721 S.W.2d 872, ref. n.r.e.

### 24. Counties

County was not a "person, firm or private corporation" within provision of Vernon's Ann. Civ.St. art. 7589a (repealed; now, this section), prohibiting any person, firm or private corporation from diverting natural flow of surface waters in such manner as to damage property of another. *Messer v. Refugio County* (Civ. App.1968) 435 S.W.2d 220, ref. n.r.e.

### 25. Urban areas, generally

In suit for damages caused by diversion of surface waters, it is normal or natural flow of surface water at time of diversion that should determine rights of parties in urban area. *Muzquiz v. R. M. Mayfield and Co.* (Civ.App. 1979) 590 S.W.2d 742.

### 26. State agencies

Section 5.086(a) (now subsec. (a) of this section) generally prohibited any diversion or impounding of the natural flow of surface water in such a way that the overflow damages the property of another, but the injurious diversion of water by agencies of the state was not governed by said section. *Gorelick v. State of Tex.* (D.C.1983) 572 F.Supp. 301.

### 27. Consent of owner

Under Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), to constitute an offense, it is not required that surface water be diverted without consent of damaged landowner. *Samples v. Buckman* (Civ.App.1952) 246 S.W.2d 283, error refused.

### 28. Intent of defendant

Under Texas law, in determining whether invasion of land of another by interference with flow of water was intentional or unintentional, determinative factor is knowledge which actor had at time of event; invasion is not intentional merely because defendant realizes or should realize that his conduct involves serious risk or likelihood of causing such invasion, and it must appear that he acted for purpose of causing such invasion or knew that it was resulting or was substantially certain to result from his conduct. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 499 F.2d 400.

Under Texas law, where substantial invasion of land of another by interference with flow of surface water is intentional, liability depends on whether the invasion is unreasonable. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 499 F.2d 400.

Where, in action for personal property damage resulting from power company's release of flood waters through dam, evidence mademissible issues on theory of liability for intentional act, under Texas law, and where plaintiff's contentions and requests encompassed such theory, court's failure to give any instructions on such theory of case and basic theories of liability encompassed was reversible error. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 499 F.2d 400.

In action for personal property damage resulting from power company's release of flood waters through dam, evidence mademissible issues on theory of liability for intentional act, under Texas law. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 499 F.2d 400.

In absence of statute governing rights and obligations of parties, liability of one who causes unintentional but substantial invasion of land of another by interfering with flow of surface water depends on whether his conduct was negligent, reckless or ultrahazardous; and where the invasion is intentional, liability depends on whether the invasion was unreasonable. *City of Houston v. Renault, Inc.* (Sup. 1968) 431 S.W.2d 322.

### 29. Causation

Negligence is not essential element of suit for damage caused by unlawful diverting or impounding of surface waters, but showing

## § 11.086

Note 29

that the unlawful act caused damage which would not have resulted but for such act is essential to recovery. *Benavides v. Gonzalez* (Civ.App.1965) 396 S.W.2d 512.

Where court expressly instructed jury that there might be more than one proximate cause, and where there was no instruction and no issue as to sole proximate cause, use of the word "the" in special issue requiring jury to determine whether water from ditch which flowed into basement by subsoil drains was "the" proximate cause of damage was not equivalent to the submission of sole proximate cause. *Bock Const. Co. v. Dallas Power & Light Co.* (Civ.App.1967) 415 S.W.2d 227.

Evidence including fact that plaintiff construction company was itself guilty of primary negligence in failing to plug pipe in wall of basement of church sanctuary under construction and in failing to have sump pumps adequate to prevent flooding of the basement during heavy rain storm, supported finding, in suit by construction company against power company for alleged negligence of power company in leaving power line ditch uncovered during rain storm with result that water was channeled into basement, that construction company had suffered no damage as proximate result of flow of water from ditch into church basement. *Bock Const. Co. v. Dallas Power & Light Co.* (Civ.App.1967) 415 S.W.2d 227.

### 30. Negligence

Under Texas law, ordinary concept of negligence is not critical factor in assessing liability for water damage where defendant creates nuisance or where there has been violation of former § 5.086 (now, this section), with a diversion of surface water from its place of natural flow, resulting in injury to owner of lower estate. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 499 F.2d 400.

Construction company which was itself guilty of primary negligence proximately causing rain water to flow into and damage equipment in basement of church which company was constructing could not recover against power company for damage to the equipment, even if power company had also been guilty of negligence as matter of law by violating Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), prohibiting the diversion of surface water so as to damage property of another. *Bock Const. Co. v. Dallas Power & Light Co.* (Civ.App.1967) 415 S.W.2d 227.

Violation of Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) is negligence per se. *Id.*

## WATER RIGHTS

Title 2

### 31. Strict liability

Construction of barrow ditches by side of roads put in by oil companies before construction of dragline ditch by drainage district which caused flooding of plaintiff's land was not proximate cause of diversion of waters over land and did not relieve drainage district of liability for damage to plaintiff's rice crop. *Phelps v. Drainage Dist. No. 1 of Chambers County* (Civ.App.1949) 216 S.W.2d 842, error ref. n.r.e.

Where housing development company dammed a natural drainway by constructing dam on its own property and water backed up on that portion of drainway on lands of an individual and a cattle company, and boy drowned in the body of water thus created on latter land, attractive nuisance doctrine was inapplicable and the individual and cattle company were not liable for death of boy in absence of a showing as to expense of filling that portion of ravine on their property. *Hooper v. M. M. Cattle Co.* (Civ.App.1955) 278 S.W.2d 170, ref. n.r.e.

Rule of strict liability did not apply in application of Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), providing that it shall be unlawful for any person, firm or private corporation to divert natural flow of surface waters. *Bock Const. Co. v. Dallas Power & Light Co.* (Civ.App.1967) 415 S.W.2d 227.

Error in submitted special issue, requiring jury to determine whether failure of construction company to plug pipe in east wall of basement was negligence, in assuming that construction company failed to plug said pipe, was immaterial in view of jury's finding that plaintiff construction company was primarily negligent in other respects. *Bock Const. Co. v. Dallas Power & Light Co.* (Civ.App.1967) 415 S.W.2d 227.

Professional engineer working for developers could be held strictly liable for wrongful diversion of surface water onto property owner's lands. *Langford v. Kraft* (Civ.App.1977) 551 S.W.2d 392, affirmed 565 S.W.2d 223.

### 32. Nuisance

Under Texas law, ordinary concept of negligence is not critical factor in assessing liability for water damage where defendant creates nuisance. *Ford Motor Co. v. Dallas Power & Light Co.* (C.A.1974) 499 F.2d 400.

Where plaintiffs constructed a basement apartment at time when natural drainage of rain water from defendant's lot did not damage or inconvenience apartment, and subsequently defendant filled in his lot, thereby raising ground level, and built retaining wall not as high as raised ground level and rain water

**WATER RIGHTS**  
**Ch. 11**

**§ 11.086**  
**Note 36**

thereafter flowed from defendant's lot toward apartment and damaged apartment, diversion of water into plaintiffs' apartment was an invasion of plaintiffs' rights just as if their property had been taken, and defendant, having created a nuisance which was the proximate cause of the damages, was liable to plaintiffs without any proof of negligence on part of defendant. *Blocher v. McArthur* (Civ.App.1957) 303 S.W.2d 529, ref. n.r.e.

**33. Defenses—Contributory negligence**

Plaintiff who notified drainage district of danger to his crop from flooding as result of its excavating a dragline ditch up to plow ditch on land he was cultivating so as to create a bottleneck was not guilty of contributory negligence as a matter of law in going ahead and preparing land for rice crop. *Phelps v. Drainage Dist. No. 1 of Chambers County* (Civ.App.1949) 216 S.W.2d 842, ref. n.r.e.

In action for damages caused to basement apartment of plaintiffs by the diversion of surface waters by defendant who filled in his lot, findings of jury that plaintiffs could have lessened their damage from surface water by use of ordinary care and the expenditure of \$40 in construction of a concrete trench were not sufficient to defeat plaintiffs' right to recovery to some extent, in absence of a finding that ditch would have so diverted the accumulated surface waters so as not to injure plaintiffs' land, and in absence of a finding of how much, if any, plaintiffs' damage was enhanced by their failure to use ordinary care. *Blocher v. McArthur* (Civ.App.1957) 303 S.W.2d 529, ref. n.r.e.

**34. — Ordinances, defenses**

City ordinance requiring grading of lots from back to front did not preclude recovery against developer whose grading of lots to comply with ordinance caused impoundment of water on adjoining property, in violation of subsec. (a) of this section, where developer could have complied with both the statute and city ordinances either by designing its street differently, by installing a drain at the rear of adjoining owner's property, or by cutting swales. *Bily v. Omni Equities, Inc.* (App. 14 Dist. 1987) 731 S.W.2d 606, ref. n.r.e.

Even if plaintiff property owner's failing to grade his lot so as to drain from back to front as generally required by city ordinance amounted to negligence per se, this would not bar him from his cause of action under this section against owner of adjoining property to the rear when fill added to the adjoining property blocked the flow of surface waters so that they were impounded on the rear of plaintiff's lot. *Bily v. Omni Equities, Inc.* (App. 14 Dist. 1987) 731 S.W.2d 606, ref. n.r.e.

**35. — Construction and excavation, defenses**

Where plaintiffs constructed a basement apartment at time when natural drainage of rain water from defendant's lot did not damage or inconvenience apartment, and subsequently defendant filled in his lot, thereby raising ground level, and built retaining wall not as high as raised ground level, and rain water thereafter flowed from defendant's lot toward apartment and damaged apartment, jury's findings which supported plaintiffs' cause of action were not destroyed by jury's finding that the use made by defendant of the retaining wall was reasonable. *Blocher v. McArthur* (Civ. App.1957) 303 S.W.2d 529, ref. n.r.e.

Where plaintiffs constructed basement apartment when natural drainage of rain water from defendant's lot did not damage apartment, and subsequently defendant filled in his lot, thereby raising ground level, and built retaining wall, and rain water thereafter flowed from defendant's lot toward apartment and damaged apartment, and defendant increased height of retaining wall at request of plaintiffs, and water thereafter seeped into plaintiffs' apartment, and in action for damages there was no finding that it could have been reasonably anticipated by plaintiffs that increased height of wall would cause water to seep into the apartment, plaintiffs were not estopped to recover damages because retaining wall was increased in height at request of plaintiffs. *Blocher v. McArthur*, (Civ.App.1957), 303 S.W.2d 529, ref. n.r.e.

Where plaintiffs constructed a basement apartment at time when natural drainage of rain water from defendant's lot did not damage or inconvenience apartment, and subsequently defendant filled in his lot, thereby raising ground level, and built retaining wall not as high as raised ground level, and rain water thereafter flowed from defendant's lot toward apartment and damaged apartment, manner of construction of the apartment was not a defense to action for damage to apartment, since plaintiffs in construction of the apartment were governed by conditions as they then existed and not in anticipation of an unlawful act on part of defendant. *Blocher v. McArthur* (Civ.App.1957) 303 S.W.2d 529, ref. n.r.e.

**36. — Rainfall, defenses**

Unprecedented rainfall in watershed of creek and its tributary with resulting damage to owner of land adjoining that on which reservoir allegedly had been constructed in violation of Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) established valid defense to action for damage to adjoining owner's land and destruction of 2500 feet of fence line allegedly as result of breaking away of

## § 11.086

### Note 36

reservoir because of some defect. *Benavides v. Gonzalez* (Civ.App.1965) 396 S.W.2d 512.

Heavy rainfall which continued for a day and a half causing creek watersheds for several miles to flood constituted "unprecedented flood" relieving defendants from liability to plaintiffs when defendants' dam broke during flood damaging plaintiffs' property. *Duke v. Reily* (Civ.App.1968) 431 S.W.2d 769.

#### 37. — Waiver, defenses

Where landowners sued adjoining landowner for damage to property allegedly caused by adjoining landowner's unlawful diversion of surface waters, and adjoining landowner alleged in defense that negligent design of drainage system by engineering firm was sole cause of damage, but requested no issue on that pleaded defense, it waived defense. *Reid v. El Paso Const. Co.* (Sup.1973) 498 S.W.2d 923.

#### 38. Remedies

Where defendant wrongfully diverted surface water to plaintiff's damage, and if such diversion were not prevented, it would inflict additional damage upon plaintiff in the future, plaintiff was entitled to damages for permanent injury to his land to date of trial and to injunctive relief to prevent future damage. *Jones v. Rainey* (Civ.App.1943) 168 S.W.2d 507, error refused.

A plaintiff in a surface water diversion suit cannot recover past and future damages from the same source of diversion and secure equitable relief preventing such diversion and future damages. *Jones v. Rainey*, (Civ.App.1943) 168 S.W.2d 507, error refused.

Former § 5.086 (now, this section) which prohibited the diversion of natural flow of surface water in manner damaging property of another did not establish exclusive remedy but remedy it provided was additional to common-law remedies for interference with interests in real property. *Kraft v. Langford* (Sup.1978) 565 S.W.2d 223.

Elements of cause of action under § 5.086 (now, this section) prohibiting diversion of natural flow of surface water were a diversion or impairment of surface water which causes damages to property of plaintiff landowner. *Kraft v. Langford* (Sup.1978) 565 S.W.2d 223.

Elements of cause of action under this section in favor of property owners whose property has been damaged by an overflow of surface waters caused by diversion of their natural flow are a diversion of surface water which causes damage to property of complaining party. *Scott v. King* (App.1983) 647 S.W.2d 394.

Though action based on subsec. (a) of this section can only be brought against the owner

## WATER RIGHTS

### Title 2

of the coterminous estate, the statutory remedy is not exclusive and property owner could also maintain a common-law cause of action against officer and owner of corporation which owned coterminous estate, as parties who caused impoundment. *Bily v. Omni Equities, Inc.* (App. 14 Dist.1987) 731 S.W.2d 606, ref. n.r.e.

#### 39. Third party liability

Where purchasers sued seller and neighboring landowner jointly for unlawful diversion of surface water resulting in damage to purchasers' property, and where neighboring landowner sued engineering firm as third-party defendant alleging negligence in firm's design of drainage system, neighboring landowner's recovery against engineering firm would not have absolved neighboring landowner from liability to purchasers, and trial court's erroneous determination that neighboring landowner's claim against engineering firm was barred by limitations did not necessitate reversal of purchasers' recovery against neighboring landowner and seller, against whom purchasers' claim had been fully tried. *Reid v. El Paso Const. Co.* (Sup.1973) 498 S.W.2d 923.

#### 40. Damages—Temporary injuries to land

In action for damages to farm land and growing crops from defendants' diversion of natural flow of surface waters, in which jury found that plaintiff's land had not been permanently injured and that it could be restored to its former condition at a reasonable cost of \$150, provision of verdict awarding plaintiff \$750 as the difference between market value of land before and after construction of the ditches and levees was erroneous. *Coleman v. Wright* (Civ.App.1941) 155 S.W.2d 382.

The measure of damages for temporary injury to land which had been rented by plaintiff for farming purposes, caused by overflow waters which prevented planting of crops for the season, was reasonable rental value of land and reasonable value of any work that plaintiff might have performed in preparing land for plaintiff before the damage occurred. *Willacy County Water Control & Improvement Dist. No. 1 v. Cantrell* (Civ.App.1943) 169 S.W.2d 203, error dismissed 141 T. 335, 172 S.W.2d 294.

Instruction that measure of damages for injury to land which had been rented by plaintiff for farming purposes, caused by overflow waters which prevented planting of crops, was reasonable market value of crops that would have been produced and harvested, less cost of preparing land and producing and harvesting crops, was erroneous. *Id.*

**WATER RIGHTS**  
**Ch. 11**

**§ 11.086**  
**Note 45**

Measure of damages for temporary injury to land caused by overflow waters which prevent planting of crop for a particular season is the reasonable rental value of the land and not the probable value of unplanted crops less cost of cultivation. *Id.*

Where wrongful diversion of surface water onto property owner's lands caused temporary damages only, charge to jury as to what sum of money would properly compensate property owner for permanent damage to his land constituted reversible error. *Langford v. Kraft (Civ.App.1977) 551 S.W.2d 392, affirmed 565 S.W.2d 223.*

In suit for the unlawful diversion of waters onto plaintiff's land, a question of temporary damage to the land was raised by the evidence, and the proper measure of damages was the amount necessary to place plaintiff in the same position she occupied prior to the injury; accordingly, the trial court erred in asking the jury to determine the reasonable cost of remedial repairs made by an ordinarily prudent owner. *Planet Plows, Inc. v. Evans (Civ.App. 1980) 600 S.W.2d 874.*

**41. — Permanent injuries to land, damages**

Permanent damages to land result from an activity which is of such character and existing under such circumstances that it will be presumed to continue indefinitely, i.e., the injury must be constant and continuous, not occasional, intermittent or recurrent, and temporary damages to land may be found where injury is not continuous but is sporadic and contingent upon some irregular force such as rain. *Langford v. Kraft (Civ.App.1977) 551 S.W.2d 392, affirmed 565 S.W.2d 223.*

Where flow of surface water through storm drainage system which discharged water onto plaintiff's land depended upon fortuitous event of rain and was not continuous, injuries allegedly sustained by plaintiff possessed only characteristics of temporary injuries and none of characteristics of permanent harm; thus, trial court erred in submitting issue of permanent damages. *Kraft v. Langford (Sup.1978) 565 S.W.2d 223.*

**42. — Property damages**

Liability under Rev.Civ.St.1911, art. 5011t (now, this section), for permitting surface waters to overflow, or for the impounding thereof, was limited to property damage caused by the overflow. *North Texas Compress & Warehouse Co. v. Howard (Civ.App.1924) 265 S.W. 1067.*

Acts 1915, 34th Leg., 1st C.S., c. 7, § 1 (now, this section), making landowners liable for diversion of surface waters, by its express lan-

guage only inhibited impounding or diversion of surface water in such manner as to damage property of another by overflow, and recovery was limited to property damage caused by overflow. *North Texas Compress & Warehouse Co. v. Howard (Civ.App.1925) 267 S.W. 1026.*

**43. — Punitive damages**

There was sufficient evidence to support finding that adjoining property owner and its president and principal owner acted with conscious indifference to rights of plaintiff with respect to impoundment of natural flow of surface waters on plaintiff's property, so as to be liable for punitive damages, even if they did not originally intend that their actions result in impounding of water on plaintiff's land, where there was no real dispute that they intentionally permitted the impounding to continue and made no effort to correct problem other than to file criminal complaints against plaintiff after temporary injunction had been granted. *Bily v. Omni Equities, Inc. (App. 14 Dist.1987) 731 S.W.2d 606, ref. n.r.e.*

**44. — Mitigation of damages**

In action for damages to farm land, and growing crops resulting from defendants' diversion of natural flow of surface waters by ditches and levees, in which jury found that plaintiff could have prevented damages by opening a ditch across his own land at cost of \$30, plaintiff's right to recovery would not be restricted to such sum where there was no pleading, evidence, or finding that such a ditch could have been opened without injury to lower riparian owners. *Coleman v. Wright (Civ. App.1941) 155 S.W.2d 382.*

In action for damage to land caused by dyke erected by defendant railroad, the railroad was entitled to show any facts in connection with the injury complained of which tended to reduce or mitigate the damages and the amount of compensation to which landowners might be entitled. *Panhandle & S.F. Ry. Co. v. Wiggins (Civ.App.1942) 161 S.W.2d 501, error refused.*

In view of fact that land had always been subject to flooding, jury which found that property had become subject to repeated increased flooding as result of construction of reservoir was authorized to find there was no difference in the "before" and "after" market value of land. *Ansley v. Tarrant County Water Control and Imp. Dist. No. One (Civ.App.1973) 498 S.W.2d 469, ref. n.r.e.*

**45. — Allocation of damages**

In action to recover for injuries to crops from overflow of water impounded by dams, recovery against owner of one of the dams was

## § 11.086

Note 45

limited to proportionate part of the sum representing entire damage as quantity of water impounded by it and which flowed over land bore to quantity impounded by other and which also flowed over it. *Anderson v. Highland Lake Co.* (Civ.App.1924) 258 S.W. 218.

A defendant who wrongfully diverts surface water is not relieved of all liability to a plaintiff who also diverts such water, when water diverted by each unites in causing an overflow which damages the plaintiff, but in such a case the defendant is liable for a proportionate part of the damages suffered by plaintiff. *Rainey v. Jones* (Civ.App.1941) 146 S.W.2d 794, error dismissed, judgment correct.

In landowners' action for damage to land caused by dyke constructed by defendant railroad, where evidence showed that damage resulted from erosion and that the erosion resulted from various causes, for some of which the railroad could not be held responsible, and where evidence did not show the portion of damages which resulted from the various causes, the evidence was insufficient to sustain the judgment for landowners. *Panhandle & S.F. Ry. Co. v. Wiggins* (Civ.App.1942) 161 S.W.2d 501, error refused.

Where plaintiff's land was damaged by overflow of surface water independently diverted by defendant's terraces, plaintiff's terraces, dams and ditches, a second adjoining landowner's levees and dams, and a culvert across an adjoining public road, defendant was liable for that portion only of the damages caused by his terraces. *Jones v. Rainey* (Civ.App.1943) 168 S.W.2d 507, error refused.

In suit by purchasers against seller of land and neighboring property owner for unlawful diversion of surface water from natural course, court properly entered joint and several judgment against both defendants after jury found that both had caused diversion of water and had refused to find that neighboring landowner's diversion was sole proximate cause of damage to plaintiffs' land. *Reid v. El Paso Const. Co.* (Sup.1973) 498 S.W.2d 923.

In suit for the unlawful diversion of waters onto plaintiff's land, under the evidence of record, the court should have drafted the damage issue so as to direct the jury to apportion from the evidence the part or percentage of damages found to have been caused by the acts of defendant and by other sources or, alternatively, should have told the jury not to include damages caused by any other source. *Planet Plows, Inc. v. Evans* (Civ.App.1980) 600 S.W.2d 874.

## WATER RIGHTS

### Title 2

#### 46. — Amount of damages

All damages, present and prospective, for permanent injury to land resulting from a diversion of surface waters may be recovered in one action, and the measure of damages for such injury is the difference between the reasonable market value of the land immediately before and immediately after the injury. *Coleman v. Wright* (Civ.App.1941) 155 S.W.2d 382.

\$250 damages for damage to plaintiff's property for maintenance by county of a public road without a culvert for six years so as to obstruct the natural flow of surface waters from plaintiff's land and create an injurious nuisance in the proximity of plaintiff's home was not excessive. *Falls County v. Kluck* (Civ.App.1947) 199 S.W.2d 704.

In action for damages against county for maintaining a public road without a culvert for six years so as to obstruct the natural flow of surface waters from plaintiff's land and create an injurious nuisance, calculations of damages were required to be predicated upon amount of money which would reasonably compensate plaintiff for six years including interest on plaintiff's losses. *Falls County v. Kluck* (Civ.App.1947) 199 S.W.2d 704.

In suit brought by landowner who alleged that defendant violated this section by diverting the natural flow of surface waters onto, and impounding the waters on, her property, the finding of \$3,000 actual damages was not supported by the evidence. *Planet Plows, Inc. v. Evans* (Civ.App.1980) 600 S.W.2d 874.

#### 47. — Waiver, damages

Landowner's waiver by failure to request submission of issue of damages on first trial of suit to enjoin diversion of surface water did not bar his claim for damages upon a second trial of the suit. *Jones v. Rainey* (Civ.App.1943) 168 S.W.2d 507, error refused.

#### 48. Injunctions and equitable remedies—Equitable principles

Rule of balancing equities was inapplicable in controversy between riparian owners constructing levee to divert ordinary flood waters, and riparian owners thereby damaged. *Bass v. Taylor* (Civ.App.1932) 50 S.W.2d 853, reversed on other grounds 126 T. 522, 90 S.W.2d 811.

Under Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) the remedy in equity must be granted only on equitable principles. *Nolte Irr. Co. v. Willis* (Civ.App.1944) 180 S.W.2d 451, error refused.

Where defendant by impounding surface waters was violating statutory right of plaintiff under Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), the rule for bal-

ancing equities was inapplicable in determining whether plaintiff was entitled to permanent mandatory injunction. *Noite Irr. Co. v. Willis* (Civ.App.1944) 180 S.W.2d 451, error refused.

In case of violation of Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), relating to the diversion or impounding of surface waters so as to damage property of another, rule of balancing equities had no application. *Red Lake Fishing & Hunting Club v. Burleson* (Civ.App.1949) 219 S.W.2d 115, error refused.

Under Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), providing remedies both at law and in equity for party injured by unlawful diversion of natural flow or impounding of surface water, the remedy in equity must be granted only upon equitable principles. *Cabla v. Shockley* (Civ.App.1966) 402 S.W.2d 289, ref. n.r.e.

Once a violation was shown of former § 5.086 (now, this section), prohibiting the diversion or impounding of natural flow of surface waters in a manner that damages the property of another by the overflow of the water diverted or impounded, the doctrine of "balancing of equities" was inapplicable in the determination of whether to grant a temporary mandatory injunction. *Langford v. Kraft* (Civ. App.1973) 498 S.W.2d 42, ref. n.r.e.

**49. — Injury, injunctions and equitable remedies**

Plaintiff, injured by defendant's violation of Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), had to show serious injury or threatened injury before plaintiff would be entitled to extraordinary remedy of permanent mandatory injunction. *Noite Irr. Co. v. Willis* (Civ.App.1944) 180 S.W.2d 451, error refused.

Serious injury or threatened injury had to be shown in order to entitle injured party to mandatory injunctive relief, under Vernon's Ann. Civ.St. art. 7589a (repealed; now, this section), against unlawful diversion of natural flow of surface water or impounding of such water. *Cabla v. Shockley* (Civ.App.1966) 402 S.W.2d 289, ref. n.r.e.

Evidence failed to show such serious injury or threat of such injury as a result of unlawful diversion of natural flow of surface water by reason of construction of dike on defendant's land along common boundary with adjoining land as would, under Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section), entitle owner of adjoining land to mandatory injunction requiring removal of dike. *Cabla v. Shockley* (Civ.App.1966) 402 S.W.2d 289, ref. n.r.e.

The "status quo" to be preserved by temporary mandatory injunction in adjoining land-

owner's action against real estate developers was that which existed before developers had constructed the drainage system which caused flooding of adjoining landowner's lands. *Langford v. Kraft* (Civ.App.1973) 498 S.W.2d 42, ref. n.r.e.

**50. — Availability of legal remedies, injunctions and equitable remedies**

Plaintiff was not required to plead or prove that damages resulting from maintaining of a public road by Falls County without a culvert so as to obstruct natural passage of surface water from plaintiff's adjacent land were beyond the possibility of repair by monetary compensation in order to authorize granting of mandatory injunction, but showing nature of trespass, recurring injuries resulting therefrom, difficulty if not impossibility, of arriving at an actual amount of damages and necessity for resorting to a multiplicity of suits within respective periods of limitations in order to recover for such cumulative damages in the future, was sufficient. *Falls County v. Kluck* (Civ.App.1947) 199 S.W.2d 704.

Where defendants, in constructing dam, caused water to overflow three-fourths of an acre of plaintiff's 400-acre tract used as a fishing and hunting club, plaintiff was entitled to mandatory injunction commanding defendants to lower spillway so that dam would not cause water to overflow onto plaintiff's land, even though plaintiff did not plead or prove that damages from overflow were beyond possibility of repair by monetary compensation. *Red Lake Fishing & Hunting Club v. Burleson* (Civ. App.1949) 219 S.W.2d 115, error refused.

**51. — Public improvements, injunctions and equitable remedies**

Where city maintained culvert, through which floodwaters flowed onto property holder's land, property holder's remedy, if any, must be for damages, and not for mandatory injunction to abate nuisance, since public improvements are not subject to abatement. *City of Dallas v. Winans* (Civ.App.1953) 262 S.W.2d 256.

**52. — Pleadings, injunctions and equitable remedies**

Pleadings in suit to confirm judgments and for injunction restraining defendants from diverting water to which plaintiff was entitled for irrigating were sufficient to support restraining order. *Ward County Water Improvement Dist. No. 3 v. Ward County Irr. Dist. No. 1* (Civ.App.1922) 237 S.W. 584.

A bill to enjoin the diversion of the natural flow of surface water of adjacent territory by the digging, widening, deepening, or lengthening of ditches, levees, or canals on lands of

## § 11.086

Note 52

defendant, where such land was not contiguous to plaintiff's land but was separated from plaintiff's land by another tract, and there were no facts alleged showing how or in what way or manner such digging could cause damage to plaintiff's land, was insufficient. *Coleman v. Wright* (Civ.App.1940) 136 S.W.2d 270.

### 53. — Review, injunctions and equitable remedies

In reviewing order granting temporary injunction, Court of Appeals had to affirm trial court's judgment granting the temporary injunction upon theory that defendants had diverted surface water in question onto plaintiffs' property or any other theory sustained by the evidence adduced at trial. *Bishop v. Harris* (App. 12 Dist.1984) 669 S.W.2d 859, error dismissed.

### 54. Parties

Any cause of action against city for injuries caused by water flowing through culvert lies in favor of owners of injured property at time injuries first occurred, and not in favor of subsequent purchaser of the property. *City of Dallas v. Winans* (Civ.App.1953) 262 S.W.2d 256.

The county was not an indispensable party to adjoining landowner's action to enjoin real estate developers from discharging water from their storm sewer system on to owner's lands where, other than approval of plat and requirement of bond to assure completion of the improvements, the county had not taken any action toward accepting the streets in the development as part of county road system. *Langford v. Kraft* (Civ.App.1973) 498 S.W.2d 42, ref. n.r.e.

A party injured by excess overflow of surface water caused by acts of person or entity who is not proprietor of land, whether or not acting for or with knowledge and consent of other, must, as to such person or entity, look to common law for remedy and not to former § 5.086 (now, this section) prohibiting diversion of surface waters. *Kraft v. Langford* (Sup.1978) 565 S.W.2d 223.

Landowner did not have cause of action under former § 5.086 (now, this section) prohibiting diversion of natural flow of surface water in manner damaging property of another against engineer who designed storm sewer system which unlawfully discharged water from neighboring tract onto land but who owned no interest in neighboring tract; however, engineer's status did not preclude relief against him under common law. *Kraft v. Langford* (Sup.1978) 565 S.W.2d 223.

## WATER RIGHTS

### Title 2

### 55. Limitation of actions

Where purchasers could not enforce railroad's alleged promise to vendor to pay damage to land caused by dyke, purchasers' recovery, if any, was limited to that to which they might be entitled under Vernon's Ann.Civ.St. art. 7589a (repealed; now, this section) or under common law, and only damages to land accruing within two years immediately preceding the institution of the action could be recovered. *Panhandle & S.F. Ry. Co. v. Wiggins* (Civ.App.1942) 161 S.W.2d 501, error refused.

Where city, without plaintiff's permission and over his protest, unlawfully dug a ditch across his land in 1933, and constructed storm drain system which caused flood waters to be cast on his land, plaintiff's cause of action arose in 1933, and the 2-year limitation statute [Vernon's Ann.Civ.St. art. 5526 (repealed; see, now, V.T.C.A. Civil Practice & Remedies Code, § 16.003)] ran from such time and barred an action some 8 years later for damages resulting from such act, even though not fully developed within a period less than necessary to complete the bar. *Stillwell v. City of Fort Worth* (1943) 140 T. 560, 169 S.W.2d 486.

Where embankment across private roadway was first constructed by defendants in 1926, rebuilt in 1948 and raised in 1949, plaintiffs' cause of action accrued when they were injured as a result of diversion of surface water and as they pleaded they were damaged every time it rained, their suit was not barred by limitations. *Samples v. Buckman* (1952) 246 S.W.2d 283, error refused.

Where plaintiff owned land on both sides of railroad roadbed, and water which had previously been impounded by roadbed was permitted to flow through bed and onto railroad crossing approach by construction of railroad culvert in 1917 or 1918, when, despite inundation and accumulation of water from time of construction of culvert, no complaint of impassibility of approach was made for more than five years and not until change in machines transported on road rendered same impassible for such machines, action to require railroad to construct another crossing and for damages for temporary nuisance caused by improper drainage because of construction of culvert was barred by five-year statute of limitations [Vernon's Ann.Civ.St. art. 5509 (repealed; see, now, V.T.C.A. Civil Practice Remedies Code, § 16.025)]. *Meier v. Thompson* (Civ.App.1952) 248 S.W.2d 493, ref. n.r.e.

Where floodwaters flowed through culvert onto property holder's land, any action for damages against city was barred after two years from date of occurrence of injury, which was the construction of the culvert. *City of*

## WATER RIGHTS

### Ch. 11

Dallas v. Winans (Civ.App.1953) 262 S.W.2d 256.

#### 56. Venue

Where adjoining landowner alleged intentional invasion of his property by real estate developer by willful action violative of former § 5.086 (now, this section) prohibiting diversion or impounding of water to the damage of another rather than negligence on part of engineer who designed storm sewer system and owner sought joint and several judgment against engineer and the developers, the "accepted work" doctrine did not avoid engineer's liability to adjoining landowner and would not defeat venue in the county in which trespass occurred. Langford v. Kraft (Civ.App.1973) 498 S.W.2d 42, ref. n.r.e.

Where adjoining landowner established that large quantities of water were gathered in drainage system designed and installed by engineer upon lands of real estate development and that the water flowed onto owner's land to his damage, there was sufficient showing of trespass by the engineer for purposes of maintenance of venue within the county of the trespass. *Id.*

Where primary and dominant purpose of adjoining landowner's suit against real estate developers and their engineer was for monetary damages as result of flooding of his land by water discharged from storm sewer system owned by developers and designed by the engineer and the landowner sought an injunction as ancillary relief, venue of the action was not governed by Vernon's Ann.Civ.St. art. 4656 (repealed; see, now, V.T.C.A. Civil Practice & Remedies Code, § 65.023) expressly prescribing venue of ordinary injunction suits. *Id.*

#### 57. Judicial notice

Courts will take judicial knowledge of general character of the country in determining whether landowner may properly drain surface waters from his land. Johnson v. McMahon (Comp.App.1929) 118 T. 633, 15 S.W.2d 1023.

#### 58. Presumptions and burden of proof

In proceeding by county for injunction commanding landowner to remove levee obstructing surface waters, the burden was upon county to establish facts entitling it to the injunctive relief sought. Brittian v. Hale County (Civ.App.1957) 297 S.W.2d 721.

In proceeding by county for injunction commanding landowner to remove levee which he had built on his land thereby allegedly causing surface water to overflow county road, where evidence and landowner's admissions conclusively revealed that landowner by construction

§ 11.086

Note 59

of levee had diverted water across road to county's damage, a prima facie case for county was established. Brittian v. Hale County (Civ.App.1957) 297 S.W.2d 721.

In action for damages caused to basement apartment of plaintiffs by the diversion of surface waters by defendant who filled in his lot, burden was on defendant to prove the extent to which damage might have been lessened by plaintiffs by construction of a concrete trench. Blocher v. McArthur (Civ.App.1957) 303 S.W.2d 529, ref. n.r.e.

Defendants who, in action to compel removal of dam or levee which backed water onto road, claimed that culvert diverted water onto their land with concentrated force had burden of proof on their defensive issue inquiring whether construction of road was such as to damage land by water flow, and defendants could not obtain reversal on claim of insufficiency or lack of evidence to sustain jury's negative answer to special issue. Marek v. Baylor County (Civ.App.1968) 430 S.W.2d 220.

#### 59. Submission of issues

Under Texas law, determination of whether intentional invasion of land of another by interference with flow of water is reasonable can be question of law for court but will ordinarily be question of fact for jury to resolve, under all facts and circumstances of case, by process of balancing conflicting interests; standard is in any event an objective one. Ford Motor Co. v. Dallas Power & Light Co. (C.A.1974) 499 F.2d 400.

In action against pipe line company for injury occasioned by overflow of water from heavy rainfall, which owner alleged resulted from negligent manner in which defendant constructed its lines across his land, notwithstanding the lines divided tract into several parcels, issue of damages to plaintiff's entire tract should be submitted as a whole. Texas Pipe Line Co. v. Higgs (Civ.App.1922) 243 S.W. 633.

In proceeding by county for injunction commanding landowner to remove levee which he had constructed on his land thereby allegedly causing surface water to overflow county road, where landowner admitted in open court he had built levee and that it caused water to overflow county road and there was other corroborative evidence of his admissions, and it further conclusively revealed damages done, it was not necessary to submit matter to jury, and court could apply law to facts thus established, although landowner joined issues with county in his pleadings. Brittian v. Hale County (Civ.App.1957) 297 S.W.2d 721.

Refusal to submit railroad's requested special issues inquiring as to whether waters

## § 11.086

Note 59

which flooded apartments had been diverted from their natural flows by manmade structures was not harmful error where railroad failed to tender issues inquiring whether such diversion, rather than railroad's failure to provide adequate sluice opening when roadbed was constructed across portion of lake, was proximate cause of flooding. *Atchison, T. & S. F. Ry. Co. v. Mahon* (Civ.App.1971) 473 S.W.2d 598, ref. n.r.e.

### 60. Instructions

Upon retrial of plaintiff landowners' action against municipality for damages because of city's approval of construction of subdivision on adjoining land resulting in diversion of natural water flow to plaintiffs' land, trial court would be required to submit explanatory instructions as to unreasonableness as would enable jury to determine question of unreasonableness of city's action. *Carter v. Lee* (Civ. App.1973) 502 S.W.2d 925, ref. n.r.e.

### 61. Findings

Jury's finding supported by evidence that defendants diverted no flood waters to plaintiffs' land was conclusive. *Wilson v. Hagins* (1927) 116 T. 538, 295 S.W. 922.

In proceeding by landowner to compel city to abate nuisance caused by discharge of storm waters through culvert under city street onto property owner's land, record failed to establish that city had ever done anything to change natural flow of water in neighborhood of property. *City of Dallas v. Winans* (Civ.App.1953) 262 S.W.2d 256.

In suit by construction company for alleged negligence of power company in leaving power line ditch uncovered during rain storm with result that water was channeled into basement under construction by plaintiff, alleged conflict between jury findings was immaterial in view of finding that plaintiff was guilty of primary negligence which proximately caused the damage. *Bock Const. Co. v. Dallas Power & Light Co.* (Civ.App.1967) 415 S.W.2d 227.

## § 11.087. Diversion of Water on International Stream

(a) When storm water or floodwater is released from a dam or reservoir on an international stream and the water is designated for use or storage downstream by a specified user who is legally entitled to receive it, no other person may store, divert, appropriate, or use the water or interfere with its passage downstream.

(b) The commission may make and enforce rules and orders to implement the provisions of this section, including rules and orders designed to:

## WATER RIGHTS

### Title 2

Jury's negative answer to special issue as to whether market value of property was decreased by reason of construction of reservoir amounted to failure or refusal by jury to find from preponderance of evidence that construction of reservoir caused plaintiffs' land to decrease in market value and meant that plaintiffs failed to discharge their burden of proof. *Ansley v. Tarrant County Water Control and Imp. Dist. No. One* (Civ.App.1973) 498 S.W.2d 469, ref. n.r.e.

Jury's finding that market value of plaintiffs' land was the same after construction of reservoir as it was before constituted finding that there had been no decrease in market value of plaintiffs' land and meant that plaintiffs sustained no damage by reason of any increased flooding resulting from reservoir. *Id.*

Failure of jury to find that action of defendant city in permitting construction of subdivision on defendant's land resulting in diversion of natural flow of water to plaintiffs' land was unreasonable was contrary to great weight and preponderance of evidence and manifestly unjust. *Carter v. Lee* (Civ.App.1973) 502 S.W.2d 925, ref. n.r.e.

Finding of jury that value of land of plaintiff was \$5,000 both before and after diversion of actual flow of water by defendant adjoining owner onto plaintiffs' land was contrary to the great weight and preponderance of evidence and was manifestly unjust in view of testimony showing that defendant diverted flow of surface water so that more drained onto plaintiffs' land than would have naturally. *Carter v. Lee* (Civ.App.1973) 502 S.W.2d 925, ref. n.r.e.

### 62. Verdict

Because of court's use of term "the property in question belonging to plaintiffs" in suit by plaintiffs for damage to land caused by defendant adjoining owner's diversion of natural flow of water the verdict was ambiguous and rendered so that it was impossible for court to be certain as to jury's intent in answering damage issue and required reversal of judgment. *Carter v. Lee* (Civ.App.1973) 502 S.W.2d 925, ref. n.r.e.

**WATER RIGHTS**  
**Ch. 11**

**§ 11.0871**

- (1) establish an orderly system for water releases and diversions in order to protect vested rights and to avoid the loss of released water;
- (2) prescribe the time that releases of water may begin and end;
- (3) determine the proportionate quantities of the released water in transit and the water that would have been flowing in the stream without the addition of the released water;
- (4) require each owner or operator of a dam or reservoir on the stream between the point of release and the point of destination to allow free passage of the released water in transit; and
- (5) establish other requirements the commission considers necessary to effectuate the purposes of this section.

(c) Orders made by the commission to effectuate its rules under this section need not be published, but the commission shall transmit a copy of every such order by certified mail to each diverter of water and to each reservoir owner on the stream between the point of release and the point of destination of the released water as shown by the records of the commission.

(d) A person who violates any provision of this section is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than \$100 or by confinement in the county jail for not more than six months or by both. A person commits a separate offense each day he continues to violate this section.

Amended by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977; Acts 1985, 69th Leg., ch. 795, § 1.007, eff. Sept. 1, 1985.

**Historical Note**

The 1985 amendment, in subsec. (b) substituted "commission" for "board" twice and in subsec. (c) substituted "its rules" for "the board's regulations" and "commission" for "department" at the end of subsec. (c).

**Derivation:**

Acts 1957, 55th Leg., p. 502, ch. 241.  
Vernon's Ann.Civ.St. art. 7550a.  
Acts 1971, 62nd Leg., ch. 58, § 1.  
V.T.C.A. Water Code, former § 5.087.

**Library References**

Navigable Waters ⇐34.  
C.J.S. Navigable Waters § 11.

**§ 11.0871. Temporary Diversion of Water on International Stream**

(a) The commission may authorize, under conditions stated in an order, a watermaster to provide for the temporary diversion and use by holders of water rights of storm water or floodwater that spills from dams and reservoirs on an international stream and otherwise would flow into the Gulf of Mexico without opportunity for beneficial use.

(b) In an order made by the commission under this section, the commission may not discriminate between holders of water rights from an international stream except to the extent necessary to protect the holders of water rights from the same source of supply.

**PERMITTEE'S ACKNOWLEDGEMENT OF DISCLAIMER REGARDING  
PLACEMENT OF FILL ON PRIVATE PROPERTY**

I, \_\_\_\_\_, the undersigned hereby acknowledges that Harris County issued a development permit to the undersigned for the placement of \_\_\_\_\_ cubic yards of fill on certain land in Harris County, Texas known as \_\_\_\_\_

**(Provide Legal Description of Property)**

---

The undersigned acknowledges that said development permit was issued by Harris County in reliance on certain facts, data, information and representations provided by the undersigned to Harris County. Any deviations from the approved drawings will negate the issuance of the development permit and will require additional review by Harris County. The undersigned further acknowledges that such representations included a representation that the undersigned would place the fill on said land in such a manner so as not to flood or otherwise damage any land adjoining or near the land in which the fill is to be placed. The undersigned further acknowledges that he or she has read Section 11.086 of the Texas Water Code Annotated and is familiar with the provisions of said statute.

The undersigned understands that Harris County has not performed any surveys or inspections of the undersigned's lands, that Harris County is relying on the facts, data, information and representations made by the undersigned and that the undersigned shall be responsible for any damage or injury caused by such fill.

\_\_\_\_\_  
Signature of Owner  
Entitled to Possession of Property

\_\_\_\_\_  
Print Name of Owner

**THE STATE OF TEXAS §**

**COUNTY OF HARRIS §**

Subscribed and sworn to be before me, this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_.

**(SEAL)**

\_\_\_\_\_  
Notary Public for the State of Texas  
My Commission Expires \_\_\_\_\_