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Boundaries--"Thread of the Stream"--The Kentucky Rule

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RECENT CASES

BOUNDARIES—"THREAD OF THE STREAM"—THE KENTUCKY RULE—Pursuant to Kentucky Revised Statutes sec. 56.220,¹ Trimble County, Kentucky, leased to the defendant company part of the bed of the Ohio River "north of the thread of the stream" for dredging sand and gravel. In the ensuing operation the defendant dredged north of the *center of the main channel* but south of the *center of the river*. The plaintiff claimed the stream bed north to the center of the river by virtue of owning the south bank at that point. He recovered a judgment for the value of the materials taken from the river south of its center and north of the center of the main channel. *Held*: Affirmed. The Court held that the "thread of the stream", or *filum aquae*, "as applied to the Ohio River means the middle line of the river as measured from the State's northern boundary, the low water mark on the northern . . . shore, [to] the corresponding low water mark on the southern . . . shore". *Louisville Sand & Gravel Co. v. Ralston*, 266 S.W. 2d 119 (Ky. 1954).

By definitively locating the *filum aquae*, or middle thread of the stream, at the center of the river, this decision brings the Kentucky rule in accord with the view of virtually all other jurisdictions and authorities on this particular point.² The case overrules *Berry v. Snyder*³ and that line of Kentucky cases following it which held the *filum aquae* to be the center of the main channel.

In England, according to the common law, the beds of tidal streams belonged to the crown as far upstream as the tides had effect, and riparian owners held, in most cases, only to the high water mark. On the other hand, riparian owners along non-tidal or fresh streams owned the beds of the streams *ad medium filum aquae*, including, of course, that area between the high and low water marks.⁴ When these rules

¹ KY. REV. STAT. Sec. 56.220 (1953) provides:

All that portion of the bed of the Ohio River, lying north of the thread of the stream, except accretions to islands privately owned, is declared to be vacant and unappropriated land, and the county court of each county bordering on the Ohio River may use or lease the river bed for county purposes. . . .

² 3 KENT'S COMMENTARIES, sec. 427, page 658 (14th ed. 1896); 3 AMERICAN LAW OF PROPERTY 247 (1952); 1 TIFFANY, REAL PROPERTY 1016 (1936); 11 C.J.S. 578-9. See cases cited under the above authorities.

³ 66 Ky. 266, 96 Am. Dec. 219 (1866).

⁴ Cases and authorities both in England and America are not clear as to the importance of navigability as a factor in determining ownership of stream beds. The statement in the text appears to the writer to be the actual result of English

were applied in America, it was found that the greater portion of navigable streams were non-tidal, whereas virtually all navigable streams in England were tidal. Emphasizing the virtual identity of tidal and navigable qualities in English streams, many American courts held, with respect to navigable streams, that the property of riparian owners stopped at either the high or low water mark.⁵ They argued, however, that the property line on non-navigable streams extended to the *filum aquae*.⁶ A minority of American jurisdictions held that the boundary of riparian owners extended to the *filum aquae* on all non-tidal, fresh streams regardless of navigability.⁷ After a few cases to the contrary,⁸ Kentucky joined the minority in *Berry v. Snyder* and adopted the correct English common law rule.

Three points were decided in the *Berry* case: (1) ownership of the bed of all non-tidal streams is in the riparian owners, (2) title of the riparian owners extends to the *filum aquae*, or thread of the stream, and (3) *the filum aquae* is located at the center of the *main channel* of the stream. The decision has never been questioned on the first and second points but it is difficult to understand how the Court could have reached the conclusion it did on the third point. The principal authority relied on and quoted at length was 3 *Kent's Commentaries* sec. 427.⁹ The particular section, however, plainly refers to the *center of the stream* and makes no reference to the main channel. Perhaps the point was given little consideration because either construction would have led to the same result in the particular case since the property in dispute was south both of the center of the stream and the main channel. The error was pointed out but not dwelt on in a dissenting opinion by Robertson, J.,¹⁰ who advanced the theory that riparian rights stop at the low water mark and consequently the entire bed of the stream *prima facie* belongs to the state.

common law although there is respectable and well based authority otherwise. The question is too involved for discussion here beyond pointing out the problem and stating the assumption on which this article rests in part. Attention is directed to 3 *KENT'S COMMENTARIES* secs. 425-432, particularly the latter section; 1 *TIFFANY, REAL PROPERTY* 1007, 1012; and 33 *HALSBURY'S LAWS OF ENGLAND* 953(1) (2d ed. 1939).

⁵ 3 *WASHBURN, REAL PROPERTY* 398 (6th ed. 1902).

⁶ Cases on this point are assembled in 45 *CORPUS JURIS, Navigable Waters* secs. 3, 4, and 5.

⁷ 1 *TIFFANY, REAL PROPERTY* 1012 (1936) et seq.

⁸ *Hogan v. McMurtry*, 21 Ky. (5 Mon.) 181 (1827).

⁹ It is interesting to note that the Court in the *Berry* opinion stated the probable English common law, unconfused by questions of navigability, in that portion of the opinion which precedes the quotation from Kent. It is apparently that quotation which injected the navigability issue into Kentucky decisions. That the portion from Kent lends no support to the idea of locating the *filum aquae* at the center of the main channel is apparent from reading it. See 66 Ky. at 278 et seq.

¹⁰ *Id.* at 287.

Since the *Berry* case, Kentucky decisions involving location of the *filum aquae* have been unbelievably confused.¹¹ About half the cases have located it at the center of the stream and the other half have located it at the center of the main channel. Surprisingly enough, most of the cases purport to follow the *Berry* decision on the point!¹² Perhaps the failure of the Court to establish clearly and explain the basis for its decision in this landmark case contributed to the subsequent confusion. The Court seemed to identify navigability with tidal waters, falling into the error of nearly all American courts and authorities, and reached the conclusion that riparian owners could not *prima facie* own the beds of navigable streams.¹³ In order to uphold this theory and still preserve riparian ownership of stream beds, it became necessary in a subsequent decision for the Court to

¹¹ For example, *Wilson v. Watson*, 141 Ky. 324, 132 S.W. 563 (1910), holds the *filum aquae* to be the middle of the main channel and cites *Stonestreet v. Jacobs*, 118 Ky. 745, 82 S.W. 363 (1904) as authority, but *Stonestreet* holds the *filum aquae* to be the center of the river and cites the *Berry* case as its authority! The *Berry* case, of course, held just the opposite but the authority quoted in *Stonestreet* from *Berry* was part of the quotation from Kent set forth in Note 10 *Supra*! And to carry the farce one more step, the Kent citation in the *Berry* case regarding location of the *filum aquae* supported the opposite conclusion reached as to the issue by the *Berry* decision. See also Note 15 *Infra*.

¹² A chronological listing of the cases shows both the development and the extent of the confusion. *Miller v. Hepburn*, 71 Ky. 326 (1871) cites the *Berry* case by name and with approval to the effect that riparian owners hold beds of non-tidal streams to the *middle thereof*; *Williamsburg Boom Co. v. Smith*, 84 Ky. 372, 8 Ky. L. Rep. 369, 1 S.W. 765 (1886) cites the *Berry* case by name and is clearly, at 84 Ky. 376, identifying the thread, or *filum aquae*, with the middle or center of the river; *Kentucky Lumber Co. v. Green*, 87 Ky. 257, 10 Ky. L. Rep. 139, 8 S.W. 439 (1888) holds the middle thread of a non-tidal stream as the boundary; *Stonestreet v. Jacobs*, 118 Ky. 745, 82 S.W. 363 (1904) misquotes the *Berry* case at 118 Ky. 748, as saying “. . . it was held that the owner of land bounding on the Ohio [R]iver held to the center of the stream. . . .”; *Wilson v. Watson*, 141 Ky. 324 at 327, 132 S.W. 563 at 564 (1910) quotes the *Berry* case on the point describing the *filum aquae* as the “thread of the main channel”. This case was reversed in part on rehearing, 144 Ky. 352, 138 S.W. 283 (1911), but not on this point. *Jean v. Brentlinger*, 155 Ky. 509, 159 S.W. 1139 (1913) held the thread of the stream to be its main channel, moving about with the meanders thereof among bars and gravel beds at low water; *The Bedford-Nugent Co. v. Herndon*, 196 Ky. 477, 244 S.W. 908 (1922) is a good example of the confusion in terms, the Court approved a trial court instruction identifying the thread of the stream with the middle of the river, then, at 196 Ky. 479, 244 S.W. 909, discusses the thread of the stream in terms that can scarcely mean other than identity of the *filum aquae* with the main channel rather than the middle of the river; *City of Covington v. State Tax Commission* 231 Ky. 606, 21 S.W. 2d 1010 (1929) held land goes to the thread or physical center of the stream; *Baxter v. Davis*, 252 Ky. 525, 67 S.W. 2d 678 (1934) holds the thread and middle of the stream to be the same; *City of Princeton v. Martin*, 293 Ky. 815, 816, 170 S.W. 2d 660 (1943) said “It is well settled in this jurisdiction that, where land is granted on a fresh water stream, the line extends to the thread of the *main channel*. . . .” [Emphasis supplied] (cites *Berry*); *Whitson v. Morris*, 304 Ky. 447, 450, 201 S.W. 2d 193, 195 (1946) said, “It is the established rule, recognized by the parties . . . [that the] owner’s title extends by construction of law over the bed . . . to the middle of the stream. . . .”

¹³ Notes 2 and 4 *supra*.

take the position that all streams in Kentucky are legally non-navigable. This untenable fiction applies whether the stream is navigable in fact or not.¹⁴ If navigable in fact, the owner of the bed cannot use it so as to interfere with use of the water as a public thoroughfare.¹⁵

The decision in the principal case not only reaches the correct result but the opinion clearly shows the basis on which the decision rests and helps put to rest the error begun in the *Berry* case. The opinion suggests that the decision in the principal case is the one intended by the Court in the *Berry* case but which it failed to achieve because of the wording of that opinion. There is much to support this suggestion.

This decision keeps Kentucky in accord with the minority of states which hold title to non-tidal streams to be in the riparian owners. This is the common law view unconfused by questions of navigability originally irrelevant to ownership of stream beds. It also places Kentucky in accord with the all but universal view of locating the *filum*

¹⁴ *Wilson v. Watson*, *supra* note 13 at 141 Ky. 327, 132 S.W. 564, "In this connection we may say that the common-law rule with reference to navigable or non-navigable waters has been adopted in this State. By that rule only those waterways are deemed navigable in which the tide ebbs and flows (*sic*), and all other waters, whether navigable in fact or non-navigable, are held to be non-navigable"; *Robinson v. Wells*, 142 Ky. 800, at 804, 135 S.W. 317 at 318 (1911); "In Kentucky, all rivers are non-navigable within the meaning of that term in connection with riparian ownership." *Contra*: *Miller v. Hepburn*, *supra* note 12, held riparian owners hold the river bed of non-tidal streams regardless of navigability (the correct common law result).

¹⁵ *Brubaker v. Paul*, 37 Ky. 423, 32 Am. Dec. 111 (1838) held it unnecessary for a stream to be tidal for public to have legal right of navigation (this is probably the common law result and had it been more widely realized the difficulties pointed out in notes 4, 9, and 14 *supra* would have been avoided since they are based on the theory that owners of the beds of streams could interfere with navigation thereof); *Williamsburg Boom Co. v. Smith*, *supra* note 13, affirms "... right of the public to use as a highway. . . ."; *Kentucky Lumber Co. v. Green*, *supra* note 13, riparian owner owns the bed "... subject to the public easement of navigation."; *Goodin's Ex'rs v. Kentucky Lumber Co.*, 90 Ky. 625, 12 Ky. L. Rep. 573, 14 S.W. 775 (1890); *Warner v. Ford Lumber & Mfg. Co.*, 123 Ky. 103, 29 Ky. L. Rep. 527, 93 S.W. 650, in which the Court took judicial notice of Kentucky River *re*. right of the public to navigate; *Floyd County v. Allen*, 190 Ky. 532, 227 S.W. 994 (1921).

Cases holding the *filum aquae* to be the thread of the main channel are rare aside from those cited above, but see *McCullough v. Wall*, 4 Richardson's Law Rep. 68, 53 Am. Dec. 715 (S.C. 1850); *Higgins v. Adelson*, 131 Neb. 820, 270 N.W. 502 at 506 (1936); "The thread or center of a channel, as the term is above employed, must be the line which would give to the owners on either side access to the water, whatever its stage might be, and particularly at its lowest flow", affirmed in *Hardt v. Orr*, 142 Neb. 460, 6 N.W. 2d 589, 593 (1942). These cases imply concurrence with the *Berry* rule. In one state, Georgia, the *Berry* rule is reached by statute, *viz.*: *Johnson v. Watson*, 157 Ga. 349, 121 S.E. 229 (1924), followed in *Johnson v. Hume*, 163 Ga. 867, 137 S.E. 56 (1927).

The following cases involved state borders: *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N.E. 439, 5 Am. St. Rep. 545 (1888); *Bellefontaine Imp. Co. v. Niedringhaus*, 181 Ill. 426, 55 N.E. 184, 72 Am. St. Rep. 269 (1899).

aquae at the middle of the stream.¹⁶ Either view on this point would work substantial justice if strictly adhered to, but the decision reached is the better one since a boundary marked by the center of a stream is more likely to be a stable line than one dependent on location of the center of the main channel.

As to the procedure for locating the center of the stream, the instant decision places Kentucky in the minority.¹⁷ The *filum aquae* is located by measuring from *low* water mark to *low* water mark rather than by the majority rule of measuring from the water mark at the *ordinary stage*. It is submitted that the minority view is the sounder view. Since one of the reasons for giving riparian owners rights in stream beds is to establish their unquestioned right and access to the water, it is better that the *filum aquae* be reckoned from *low* rather than normal stage because if measured at normal stage, it is quite possible that at *low* water an owner on one side could be entirely cut off from the actual stream.

The sound decision reached in this case will be of future importance where the ownership of minerals lying under stream beds is involved, where accretion problems arise, where there is a question of the location of property for tax purposes, where a dispute arises as to the amount of land in a described boundary, and also where the riparian owner is required to predict how far into the stream he may take the water for his own use, such as irrigation.

JAMES FRANCIS MILLER

CONTRACTS—THIRD PARTY BENEFICIARY CONTRACT—WHEN A RIGHT VESTS IN A DONEE BENEFICIARY—In 1947, the defendant's fifty year old father, John Rhodes, entered into a five year employment pact with American Association. This arrangement provided for certain annuity payments to the defendant, a minor, in the event Rhodes died before the age of sixty-five while in the employ of the Association. The contract was to be mutually renewable and contained a clause which pro-

¹⁶ The center or thread of the stream for navigational purposes is called the thalweg. For the definition, see 3 AMERICAN LAW OF PROPERTY 247 (1952) note, Thalweg: "The thalweg is a navigational term. It is the thread or center of the main channel, the middle of the navigable channel, the deepest part of the most navigable channel, or the track taken by boats in their course downstream. It is often the boundary between states but is only occasionally a private boundary."

¹⁷ 3 AMERICAN LAW OF PROPERTY 247 (1952) *filum aquae* said to be, ". . . the geographical center line of the stream . . . [measured] at the ordinary stage of water. . . ." ; 11 C.J.S. 578 (1938); "Although there is authority that under certain circumstances the thread of the stream is midway between the shore lines when the water is at its low stage, it is generally held that the line will be so drawn when the water is at its natural stage at medium height". See cases cited.