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IRRIGATION WITH NON-RIPARIAN SURFACE WATER AND SUBTERRANEAN WATER IN KENTUCKY

Recent information compiled by the College of Agriculture and Home Economics of the University of Kentucky indicates a marked increase since 1950 in the number of Kentucky farms where water is used for the irrigation of growing crops. Prior to 1950 one hundred farmers were irrigating in this state, and in 1950 six more were added to this group. During 1951 this figure was increased by 38, and in 1952 by another 106. During 1953, prior to September 1, some 200 or more farmers had become irrigators for the first time. This surprisingly rapid increase is attributable in part to the fact that 1953 was the third successive year in which Kentucky farmers experienced a drought and also to the fact that irrigation of certain crops increases the income per acre quite substantially. For instance, a survey made during 1951 and 1952 revealed that the irrigation of tobacco in this state resulted in an average increase in income per acre of $438.37; and this statistic alone suggests that the increased use of irrigation is a permanent trend in Kentucky.

The current agricultural practice is to irrigate initially an area covering 15 acres and to use either portable or permanent type sprinklers spaced about 50 feet apart. Under this method the farmer uses water at the rate of six acre inches per year, which for a 15-acre tract amounts to 407,310 gallons annually. The method is used to supplement rainfall rather than to replace it so that unusual amounts of water for irrigation are needed only during dry periods.

At the present time the water source is rather evenly divided between impounded non riparian surface water and water taken directly from surface riparian streams or from percolating waters, although there seems to be a trend toward using impounded non riparian surface water as the primary source.[1]

Since the law of water rights in this state is based on common law concepts, and since there is no previous local experience with agricultural irrigation similar to that which has occurred in many of the western states, it is quite probable that legal conflicts will arise in the near future between irrigating land owners. A note published in the *Kentucky Law Journal* two years ago summarized the legal rights of Kentucky land owners who irrigate from riparian surface streams,[2]

[1] The statistical data and other information concerning irrigation practices used here was obtained in a personal interview with Earl G. Welch, Extension Agriculture Engineer, Agriculture Engineering Dept., College of Agriculture, University of Kentucky, October, 1953.

[2] Note, 40 KY., L. J. 423 (1952).

and it is the purpose of this note to outline the principles of law which govern the use of water for irrigation purposes derived from sources *other* than a riparian surface stream. The usual definition of a riparian stream is one flowing in a natural bed or channel, with defined banks, and permanent sources of supply, although in times of drought the flow may be diminished or suspended.[3] Under this definition, if the water is diffused over the land, or merely drains through natural depressions in the land, such as gulleys and low places, it is non riparian surface water.

Subterranean Waters

Subterranean waters, at the common law, were classified according to the method of transmission through the ground. Underground currents of water flowing in known, defined channels or water courses were defined as subsurface riparian streams; and water passing through the ground beneath the surface in undefined and unknown channels were known as percolating waters. The land owner's right to use water of the first class was governed by the same principles applicable to riparian surface streams. Basically, this riparian right was one of qualified use, and mere ownership of the land through which or under which the riparian stream flowed conferred no absolute rights of ownership in the water itself.[4] Thus, even at the common law, the extent of the right to use water from a surface or subsurface stream was measured in relation to the right of use in other riparian land owners. As has been previously summarized elsewhere,[5] the Kentucky Court has applied the common law doctrine of riparian rights in such a way as to define a permitted use in terms of a "natural flow" theory and a "reasonable use" theory. The former emphasizes the fact that one owner cannot exercise his right of use in such a way as to interfere with the natural flow of the riparian stream if this will prevent the lower riparian owner from exercising his right to use the water which flows naturally in a stream abutting his property. The latter centers the test on the nature of the use rather than the flow of the stream and requires the upper owner to confine his use to a reasonable one; that is, a use which does not interfere with reasonable use by the lower owner. As a practical matter, however, the Kentucky Court seems to make very little distinction between the two theories. As has been pointed out in discussing this precise point,[6] the court has said, in supposedly interpreting the natural flow theory:

[3] TIFFANY, REAL PROPERTY (Abridged Ed.) 503 (1940).
[4] Nourse *et al* v. *Andrews et al.*, 200 Ky., 467 at 472, 255 S.W. 84 (1923).
[5] *Supra* note 2 at 430.
[6] *Supra* note 2.

> . . . each riparian owner is recognized as having a privilege to use the water to supply his natural wants, and extraordinary or artificial uses, so that such does not sensibly or materially affect the quantity of the water and such uses by a lower riparian owner.[7]

This would seem to be the best statement of the law in Kentucky as to riparian rights in subsurface as well as surface streams, since both are governed by the same principle.[8]

On the other hand, water of the percolating type was susceptible at the common law of final and complete ownership. The common law rule regarded percolating waters as belonging to the owner of the freehold, like the rocks, soil, and minerals found there; and such owner could (in the absence of malice) intercept, impede, and appropriate such waters while they were upon his premises. He could make whatever use of them he pleased, regardless of the fact that his use cut off the flow of such waters to adjoining land, and deprived the adjoining land owner of their use.[9] Some jurisdictions have adopted a so-called "American" rule, which bases the land owner's right, not upon an ownership theory, but rather upon a reasonable use theory.[10]

The right of land owners in Kentucky to use percolating waters is based squarely on the ownership theory. Thus, in *Nourse* v. *Andrews*[11] it was stated:

> Percolating waters are parts of the earth itself, as much as the soil and stones, with the same absolute right of use and appropriation by the owner of the land.[12]

It must be noted, however, that two definite limitations have been placed on this doctrine in Kentucky: (1) The use must not be a malicious or unnecessary one[13] and (2) An owner must not contaminate or poison the water so that it is unfit for his neighbor's use.[14] In the absence of a breach of either of these limitations, it was stated in *Long* v. *Louisville & Nashville Railway Co.*, that, "The rule is universal that the owner may dig on his own land such wells as he needs, although in doing so he may dig up his neighbor's well. . . ."[15]

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[7] City of Louisville *et al.* v. Tway *et al.*, 297 Ky. 565 at 569, 180 S.W. 2d 278 at 280 (1944).

[8] *See* Nourse *et al.* v. Andrews *et al.*, 200 Ky. 467, 255 S.W. 84, (1923).

[9] *See* Note, 55 A.L.R. 1385 at 1390 (1928).

[10] For an excellent general discussion of these two theories, see: Cross, *Ground Waters in the Southeastern States,* 5 So. CAR. L. Q. 149 (1952). See also Note, 55 A.L.R. 1385 at 1399 (1928).

[11] Nourse *et al.* v. Andrews *et al.*, 200 Ky. 467, 255 S.W. 84 (1923).

[12] *Id.* at 471.

[13] Long v. Louisville & Nashville R.R. Co., 128 Ky. 26, 107 S.W. 203 (1908).

[14] Kinnaird v. Standard Oil Co., 89 Ky. 468, 12 S.W. 937 (1890).

[15] *Supra* note 12 at 33.

Apparently there are no Kentucky cases involving directly the use of percolating waters for irrigation, but it is logical to assume that the common law rule respecting a general use of such water would be followed if the question were presented to the Kentucky Court. There is no reason to suppose that irrigation in and of itself would be classified as a malicious or unnecessary use. And so long as the water is not poisoned or contaminated for further use by neighboring owners, one who uses such water for irrigation should not be liable, even if he uses all the water[16] or if he deprives another of his previously established use of the water.[17]

Non Ripiarian Surface Water

The term "non riparian surface water" is used here to maintain the distinction already pointed out in relation to surface water in a stream. This kind of water frequently is called "surface water" by the courts, and is generally defined as a "distinct form or class of water derived from falling rain or melting snow, or which rises to the surface in springs, and is diffused over the surface of the ground, while it remains in such diffused state or condition."[18]

There are no English cases stating a general common law rule as to a land owner's rights to the *use* of surface water on his property. Historically, this kind of water was considered a burden rather than a benefit, and the only legal issue which arose was whether the land owner could prevent the water from flowing onto his land. In settling these surface water drainage issues, some courts in this country employ the so-called "common law" rule, to the effect that a land owner can use his land as he sees fit, and he can prevent the flowing of surface water onto his land if he desires.[19] The use of the term "common law" in describing this rule is a misnomer, since the few English cases which have been found on the point actually held that the owner of a lower estate is subject to the flowing of surface water onto his land.[20] This latter rule has been called the "civil law" rule, and is used by jurisdictions in this country not employing the so-called "common law" rule.[21]

The Kentucky Court has followed the "civil law" rule in the few instances when it has been called upon to decide litigation as to surface water. In Kentucky, the owner of a lower estate has no right to

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[16] *Supra* note 13.
[17] *Supra* note 12.
[18] 56 AM. JUR. 547 (1947).
[19] 1 TIFFANY, REAL PROPERTY sec. 341 (2d ed. 1920).
[20] 6 MICH. L. REV. 448 at 451, et seq. (1908).
[21] 1 TIFFANY, REAL PROPERTY, 1167 et seq. (2d. ed. 1920).

create obstructions interfering with the natural flow of surface water onto his land,[22] and the lower lands are subject to the servitude of receiving the ordinary and natural flow of surface water.[23] The upper land owner's right is restricted, however, in that he cannot collect surface water and then release it in a huge volume;[24] nor can he make excavations or drains upon his ground by which the flow of surface water is diverted from its natural course and disposition and thereby cast upon the lower estate in an unnatural volume.[25]

In conclusion nothing has been found in the Kentucky cases dealing with percolating or surface water to suggest that our court would hold that riparian rights exist in such water. In fact, the only affirmative judicial statement on the point which the writer has been able to find stated that riparian rights will not arise in surface water unless it flows in a water course or stream,[26] and the Court of Appeals of Kentucky has said that there are no riparian rights in percolating water.[27] Since the question of limiting the use of water in Kentucky seems in the past to have depended on establishing riparian rights in it, the logical conclusion is that one should be able to use all of his percolating water and surface water. At least both kinds of water are non riparian and both should be governed by the same rule as to use of non riparian water for irrigation purposes.

GEORGE B. BAKER, JR.

TORT ACTIONS BETWEEN HUSBAND AND WIFE

In the recent case of *Brown* v. *Gosser*[1] the Kentucky Court of Appeals was called upon to decide whether a wife during coverture may continue an action commenced prior to marriage for a negligent injury inflicted by her husband. The jury returned a verdict for the

[22] Dugan v. Long, 234 Ky. 511, 28 S.W. 2d. 765 (1930).
[23] Pickerill v. City of Louisville, 125 Ky. 213, 100 S.W. 873 (1907).
[24] Franz v. Jacobs, 183 Ky. 647, 210 S.W. 163 (1919).
[25] Stone *et ux.* v. Ashurst *et al.*, 285 Ky. 687, 149 S.W. 2d 4 (1941).
[26] It should be noted that this statement is found in an intermediate court opinion, and would not bind the court of last resort in this state. In the case of Stith v. L. & N. R.R. Co., 109 Ky. 168, 58 S.W. 600 (1900) the Middlesborough case was cited and overruled, but only to the extent that it held that the so called "common law" rule applied in Kentucky. No mention was made of the further holding that riparian rights will not arise in surface water unless it flows in a water course or stream.
[27] *Supra* note 10.

[1] 262 S.W. 2d 480 (Ky. 1953).