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Navigability of Waters in Kentucky

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STUDENT NOTES

NAVIGABILITY OF WATERS IN KENTUCKY

A recent Kentucky case, *Natcher v. City of Bowling Green*,¹ raises the question of when, in the law of Kentucky, a river or stream will be considered navigable. In this case the defendant city had erected a dam across Barren River at a point below a pool from which the city drew its water supply, and also below plaintiff's gravel bars, which previously, though submerged during part of the year, were at other times exposed and available for commercial exploitation. The effect of the dam was to submerge these bars even during periods of low water and render it impossible to remove any gravel. Plaintiff brought action to compel the removal of the dam and to recover damages for the destruction of her gravel bars. From a judgment for the defendant in the circuit court, the plaintiff appealed.

The city contended that one of the primary purposes of the dam was improvement of the stream for purposes of navigation, though it was established that steamboats had never been able to come farther upstream than about twelve miles below the city, and the only effect of the dam was to create facilities for small boats for about two miles upstream. The court rejected this contention, saying "The conclusion is inescapable that this dam was erected to improve the facilities of the waterworks system and that the improvement of navigation, even for the small canoes and skiffs, was purely incidental and a very minor consideration. Even the accomplishment of such collateral purpose would not and did not 'improve navigation' in the eyes of the law. In the legal test of navigability of a stream, it is generally held that the fact of its sufficiency for pleasure boating or for hunters or fishermen to float their skiffs or canoes does not make it navigable in law as 'to be navigable a water course must have a useful capacity as a public highway of transportation.' . . . The use of a stream by a boat a few times in many years for a picnic or excursion cannot be deemed a navigation. . . . The true criterion of navigability of a river is whether it is generally and commonly useful for some purpose of trade or commerce of a substantial and permanent character. . . ." The court therefore reversed the judgment of the trial court, holding that since the city did not take plaintiff's property in the exercise of its delegated plenary power to improve navigation, it was liable in damages for the destruction of her gravel bars.

What is the test of navigability? Under the rule established by the English common law, navigability was attributed only to those waters and streams in which the tide ebbed and flowed.² The reason

¹ 264 Ky. 584, 95 S. W. (2d) 255 (1936).

² Case del Royall Piscarie de le Banne, Davis, 55, 80 Eng. Rep. 540 (1611); *Murphy v. Ryan*, 2 Ir. R. C. L. 143 (1868); *Pearce v. Scotcher*, 9 Q. B. D. 162 (1882).

for the rule lay in the geographical fact that nearly all British rivers which are navigable in fact are subject to the ebb and flow of the tide. The rule was adopted into the early American law for the same reason; in the Atlantic coast states, only those waters below fall line are navigable in fact, and all waters below fall line are to some degree tidal. Since "navigable" and "tidal" were as a matter of fact so nearly synonymous, there is little reason to wonder at the adoption of the tidal test of navigability, particularly as such a test is definite and easily ascertainable.

This is not to say that by the common law rule there was no public right of navigation of those few streams which were navigable as a matter of fact and yet non-tidal. However, tidal waters were considered navigable from their very nature, constituting a right of way for the public for every purpose of navigation, whereas the public right of navigation in non-tidal rivers was not a general common law right, but depended upon a grant from the owners of the underlying soil, a legislative act, or a usage creating a prescriptive right.³

Later American decisions, representing the rule in many states and in the federal courts, abandoned the common law doctrine as unsuited to American conditions, and substituted therefor the rule that if a stream or other water were navigable in fact, it would be considered navigable in law.⁴

Which rule does Kentucky follow? The cases in which the question of navigability of waters is decided appear to fall into two classes. One such series deals with the question of title to banks and stream bed below high water mark, the other with the public right to navigate. At common law, it was well established that title to the river bed up to high water mark was in the public if the river were navigable, whereas the title of riparian owners extended to the "thread" or middle line of non-navigable streams.⁵ Determination of the title to the stream bed necessarily, therefore, involved determination of the navigability of the stream.

The earliest Kentucky case containing a reference to this question is that of *Thurman v. Morrison*.⁶ Though the question actually determined therein was the liability of the defendant therein for destruction by his flatboat of the plaintiff's logway, there is dictum to the effect that the Ohio River being a "public navigable stream", the court would be "inclined", if the question were involved, to regard the bed of the river below low water mark as belonging to the public, thus recognizing in effect the test of actual navigability, since the Ohio is, as a matter of common knowledge, a non-tidal stream.

However, when the question did actually arise in the case of

³ *Ewing v. Colquhoun*, 2 App. Cas. 839 (1877).

⁴ *The Genesee Chief v. Fitzhugh*, 53 U. S. 443, 13 L. Ed. 1058 (1851).

⁵ *Berry v. Snyder*, 3 Bush 266, 96 Am. Dec. 219 (Ky. 1867).

⁶ 14 B. Mon. 296 (Ky. 1853).

*Berry v. Snyder*⁷ the court, recognizing that though the Ohio is navigable in fact it is a non-tidal stream, held that such a river must be considered non-navigable in law and that the title to a sand-bar lying in the stream below high water mark was in the riparian owner. This rule was again adhered to in the case of *Miller v. Hepburn*,⁸ which involved determination of the title to accretions to lands bordering on the Ohio. In *Williamsburg Boom Co. v. Smith*⁹ the court did not discuss the question of navigability, but stated the law as being that "grants of land upon navigable waters above tide-water vest the soil *ad filum aquae* in the grantee," thus apparently assuming that the test of navigability was one of fact but that navigability was immaterial in the determination of riparian titles.

In *Wilson v. Watson*,¹⁰ however, the court again recognized the common law rule that "only those waterways are deemed navigable in which the tide ebbs and flows" and that "all grants of land bounded upon a river, at a point above the ebb and flow of the tide, whether navigable in fact or not, entitled the grantee to all islands lying between the mainland and the thread of the current." The Kentucky court has also held that all streams in Kentucky, where riparian rights are involved, must be regarded as non-navigable.¹¹ And some cases entirely ignore the question of navigability, stating merely that it is well settled that a conveyance of land to a water course and thence with the stream passes title to the thread or center of the stream.¹² In *Baxter v. Davis*,¹³ the latest of this class of cases, the court held that Rockcastle River, being a non-tidal stream, was to be considered non-navigable, and that therefore the true boundary line of the tract in controversy was the middle of the stream.

The second class of cases in which the Kentucky court has determined the legal navigability of waters consists of those cases in which the public right to use such streams for purposes of navigation is involved. Here the court seems to apply the test of navigability in fact. It appears that "where water is navigable, whether or not with the ebb and flow of the tide, the public have a common right to use it for navigation as a public highway", even in the absence of a legislative declaration that it is a public highway.¹⁴ If a stream, in its natural condition, is capable of being used for floating vessels,

⁷ *Supra*, note 5.

⁸ 8 Bush, 326 (Ky. 1871).

⁹ 84 Ky. 372, 8 Ky. Law Rep. 369, 1 S. W. 765 (1886).

¹⁰ 141 Ky. 324, 132 S. W. 563, 35 L. R. A. (N. S.) 227 (1910).

¹¹ *Strange v. Spalding*, 17 Ky. Law Rep. 305, 29 S. W. 137 (1895); *Robinson v. Wells*, 142 Ky. 800, 135 S. W. 317 (1911).

¹² *Ky. Lumber Co. v. Green*, 87 Ky. 257, 10 Ky. Law Rep. 139, 8 S. W. 439 (1888); *Cruikshanks v. Wilmer & Wilson*, 93 Ky. 19, 18 S. W. 1018 (1892); *Runion v. Alley*, 19 Ky. Law Rep. 268, 39 S. W. 849 (1897).

¹³ 252 Ky. 525, 67 S. W. (2d) 678 (1934).

¹⁴ *Monongahela River Cons. Coal & Coke Co. v. Lancaster's Admr.*, 169 Ky. 24, 183 S. W. 258 (1916).

rafts, logs, etc., and has in fact been used for that purpose, the public has an easement of navigation in it.¹⁶ A creek susceptible, at certain periods of the year, of valuable use for the purpose of floating logs to market must be considered, to that extent, a navigable or floatable stream.¹⁶ It is not essential that the navigable capacity of the stream should be continuous; it is sufficient if its periods of high water and navigable capacity continue a sufficient length of time to make it useful as a highway.¹⁷ But a stream that is not capable, during freshets, unaided by artificial means, of floating saw logs, is not a public highway for that purpose.¹⁸ And a stream may be navigable for the purpose of floating logs and timber to market, though it is not navigable for boats at ordinary stages of the river.¹⁹ The Kentucky courts will take judicial notice of the navigable character of the Ohio River,²⁰ and of the Kentucky River,²¹ but it cannot be assumed that such a stream as Straight Creek, in Bell County, is navigable, although courts might take judicial notice of the fact in regard to streams of more public importance.²²

It appears, therefore, that the legal test of navigability of waters in Kentucky depends entirely upon the question involved. If it is a question of the title of riparian owners to the bed of the stream, the common law or tidal test of navigability is applied; if the question is one of the right of the public to navigate the stream, or the right of a governmental agency to improve it, as in the principal case, the test is whether the stream is navigable in fact. There appears to be no particular reason for the distinction, but on the other hand there seems to be no particular inconvenience resulting from it.

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TORTS: LIMITATION OF DOCTRINE OF ATTRACTIVE NUISANCE IN KENTUCKY TO PERSONS UNDER 14 YEARS OF AGE

In the case of *Dennis' Administrator v. Kentucky and West Virginia Power Company*¹ a boy, 16 years of age, who had climbed defendant's electric transmission tower in order to see a ball game on a

¹⁶ *Goodin's Exrs. v. Ky. Lumber Co.*, 90 Ky. 625, 12 Ky. Law Rep. 573, 14 S. W. 775 (1890); *Floyd County v. Allen*, 190 Ky. 532, 227 S. W. 994 (1921).

¹⁷ *Ford Lumber and Mfg. Co. v. McQueen*, 14 Ky. Law Rep. 521 (Super. Ct. 1892).

¹⁸ *Murray v. Preston*, 106 Ky. 561, 21 Ky. Law Rep. 72, 50 S. W. 1095 (1899).

¹⁹ *Banks v. Frazier*, 111 Ky. 909, 23 Ky. Law Rep. 1197, 64 S. W. 983 (1901).

²⁰ *Ireland v. Bowman*, 130 Ky. 153, 113 S. W. 56, 17 Ann. Cas. 786 (1908).

²¹ *Bennett v. Bryan*, 1 Ky. Law Rep. 274 (1880).

²² *Warner v. Ford Lumber and Mfg. Co.*, 123 Ky. 103, 93 S. W. 650 (1906).

²³ *Hoskins v. Archer*, 6 Ky. Law Rep. 671 (1885).