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# Torts--Nuisance--Interference with the Flow of Surface Water

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were a substitution for disability compensation. Where the employee performed regular work under stress of pain and physical inconvenience the argument against credit is even stronger.[33] The employee should not be penalized for his desire and attempt to work under such physical disability.[34]

For these reasons the result of the principal case was justified as another step in the expanding theory of compensation for work-connected disabilities. The history of the *Ditty* rule indicates that the *Hayes* rule should have been adopted earlier. The disappearance of the credit rule will create an added incentive for the compensated employee to return to work.[35] The *Hayes* case will complement the 1948 amendment to KRS 342.110[36] in the law of set-offs and deductions against workmen's compensation awards.

*Marshall P. Eldred, Jr.*

TORTS—NUISANCE—INTERFERENCE WITH THE FLOW OF SURFACE WATER —Plaintiff and defendant own land on opposite sides of a highway. The natural surface drainage is northwesterly across plaintiff's land, under an abandoned fill, under the highway, and onto defendant's land. Defendant constructed a fill across a creek on his land six hundred feet northwest of the highway and installed several large drainpipes. During an unprecedented rainfall, water backed up behind defendant's fill and onto plaintiff's land, damaging a tenant house and other property. The issue was submitted to the jury under instructions based on negligence in the construction of the fill.[1] Judgment for defendant. *Held:* Affirmed. The civil law rule of absolute liability for obstruction of surface waters was applicable under the

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[33] *Id.* at § 2319(c).

[34] If the courts feel that credit should be allowed in some instances the test should be that of intention. If the employer intends that wages be in lieu of compensation and the employee is aware of this intention, credit might be allowed. 2 Larson, Workmen's Compensation § 57.41 (1960). Two such examples are: an employee not working but receiving full wages as a gratuity; and the creation of a position in which claimant does no work.

[35] The effect, if any, of the abolition of the *Ditty* rule on the employer will be insignificant. The employer who re-employes a successful claimant is protected by KRS 342.120(5), which provides that any part of an award not paid at the time the claimant is re-employed by the original employer shall be paid out of the Subsequent Claim Fund.

[36] Ky. Acts 1948, ch.64, § 11.

[1] The basis of the decision is not clear. The court first states that the case was given to the jury on instructions based on negligence, and later states that admitting the proof of the inadequacy of the pipes, the vital issue in the case was whether or not defendant's fill caused plaintiff's flooding.

facts of this case. Therefore, the only issue that should have been submitted to the jury was whether defendant's fill caused the flooding of plaintiff's land. Plaintiff was not in a position to claim error, since he offered instructions embodying negligence as a basis for liability. *Hopson v. Downs*, 340 S.W.2d 475 (Ky. 1960).

In the United States, there are three principal theories of liability for interference with surface waters. These are the civil law rule, the common enemy rule and the reasonable use rule. The reasonable use rule is followed in three jurisdictions, and the remaining jurisdictions are about evenly divided between the civil law and the common enemy rules.[2]

Kentucky follows the civil law rule which prohibits interference with the natural flow of surface water "so as to cause an invasion of another's interests in the use and enjoyment of his land."[3] In Kentucky, the rule is usually stated that the lower estate is subject to the natural flow of surface water from the upper estate, and that the upper owner cannot alter the natural flow so as to injure the lower owner.[4] In justification of the rule, it has been stated that any inconvenience arising from the flow of surface water is unavoidable, and any loss should fall according to the natural topography of the land.[5]

The only substantial modification of the civil law rule by the Kentucky court has been with respect to railroad structures and embankments built on easements. The court has held that a railroad is liable for interference with surface water caused by its embankment only when the embankment or culvert is so negligently constructed or maintained as to be inadequate to carry off the usual and normal flow of surface water.[6]

Under the common enemy rule, stated in its most extreme form, the owner has the right to use his land as he desires, and if injury to an adjacent landowner results from interference with the flow of surface water, it is *damnum absque injuria*.[7] The rule has been justified upon

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[2] Kinyon & McClure, *Interference with Surface Waters*, 24 Minn. L. Rev. 891 (1940); Annot., 59 A.L.R.2d 421, 423 (1958).

[3] Kinyon & McClure, *supra* note 2, at 893.

[4] White v. Howe, 293 Ky. 108, 168 S.W.2d 28 (1942); Stone v. Ashurst, 285 Ky. 687, 149 S.W.2d 4 (1941); Dugan v. Long, 234 Ky. 511, 28 S.W.2d 765 (1930); Hutchinson v. Copenhaver, 193 Ky. 301, 235 S.W. 761 (1921); Johnson v. Marcum, 152 Ky. 629, 153 S.W. 959 (1913); Pickerill v. City of Louisville, 125 Ky. 213, 100 S.W. 873 (1907).

[5] Pickerill v. City of Louisville, *supra* note 4.

[6] Chesapeake & O. Ry. v. Blankenship, 158 Ky. 270, 164 S.W. 943 (1914); Madisonville, H. & E.R.R. v. Wiar, 144 Ky. 206, 138 S.W. 255 (1911); Wallingford v. Maysville & B.S. Ry., 32 Ky. L. Rep. 1049, 107 S.W. 781 (1908); Louisville & N.R.R. v. Cornelius, 111 Ky. 752, 64 S.W. 732 (1901).

[7] Annot., 59 A.L.R.2d 421, 424 (1958).

an over-emphasis of certain rights and privileges of land ownership and upon the public policy of favoring land improvements.[8]

The fundamental problem of interference with surface waters arises from the fact that each landowner has an interest in using his land as he chooses and also an interest in being free from interference with this use of his land.[9] Whenever one landowner desires to interfere with the flow of surface water, which would result in injury to the other owner, these interests conflict. From the nature of the problem someone must suffer an injury, one landowner in not being able to use his land as he chooses, or the other landowner in damage to his land.

Both the common enemy and civil law rules attempt to solve the problem by ignoring one of these interests of land ownership. Thus, the civil law rule places the burden of the injury on the owner who desires to change the natural drainage of his land, without regard to his interest in using his land as he chooses. In striking contrast, the common enemy rule places the burden on the owner who is injured by the interference with surface drainage, without regard to his interest in being free from interference with the use of his land. The unsoundness of each rule is indicated by the tendency of the courts to move toward a middle ground by subjecting both rules to numerous qualifications and exceptions.[10]

The reasonable use rule meets the problem by allowing a landowner to alter the flow of surface water so as to injure another landowner, provided he does so in order to make a reasonable use of his land.[11] A landowner is using his land reasonably if the utility of such use reasonably outweighs the gravity of the harm to the other's land which results from the alteration of the flow of surface waters.[12] The court will take into account such factors as: the purpose or motive with which the landowner acted,[13] the nature and importance of the improvements,[14] the normal use and development of land in the immediate area or locality,[15] the harm to others as compared to the value of such improvements,[16] the forseeability of such harm on the part

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[8] *Ibid;* Kinyon & McClure, *supra* note 2, at 898-99.

[9] Kinyon & McClure, *supra* note 2, 905-08; Prosser, Torts § 72, at 410 (2d ed. 1955).

[10] Kinyon & McClure, *supra* note 2, at 913. See Annot., 59 A.L.R.2d 421, 423 (1958).

[11] Annot., 59 A.L.R.2d 421, 423 (1958).

[12] Johnson v. Agerbeck, 247 Minn. 432, 77 N.W.2d 539 (1956); Enderson v. Kelehan, 226 Minn. 163, 32 N.W.2d 286 (1948); Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956); Restatement, Torts § 826 (1938).

[13] Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (1958).

[14] Kinyon & McClure, *supra* note 2, at 905 n.80.

[15] Collins v. Wickland, 251 Minn. 419, 88 N.W.2d 83 (1958).

[16] Johnson v. Agerbeck, 247 Minn. 432, 77 N.W.2d 539 (1956).

of the possessor,[17] the social value of the primary purpose of the conduct,[18] and the cost of avoiding the injury.[19]

The superiority of the reasonable use rule warrants its adoption in Kentucky. The rule protects each landowner by taking his interests into consideration and protects the interests of society in assuring that land will be developed for that activity which has the greatest utility.[20] This is in contrast with the common enemy and civil law rules, which arbitrarily protect the interests of one landowner at the expense of the other, and can conceivably work against the interests of society.[21]

The rule in Kentucky which subjects railroads to liability for obstruction of surface water, caused by negligence in the construction or maintenance of embankments and culverts, is subject to some of the same disadvantages as the civil law and common enemy rules;[22] therefore the reasonable use rule should also be adopted in respect to railroads.

*Thomas H. Burnett*

CONSTITUTIONAL LAW-CRIMINAL PROCEDURE-FEDERAL INJUNCTION WILL NOT ISSUE TO PROHIBIT WIRETAP EVIDENCE IN STATE COURTS—New York police armed with an ex parte court order[1] tapped petitioner's telephone. The petitioner, charged with the commission of several felonies, sought injunctive relief against Bronx County, the District Attorney and others to prevent introduction of wiretap evidence in state

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[17] Priest v. Boston & M.R.R., 71 N.H. 114, 51 Atl. 667 (1901). Under the reasonable use rule, as stated by the Restatement, Torts § 833 (1938), if defendants interference is unintentional, the rule governing negligent, reckless and ultrahazardous conduct is applied.

[18] Restatement, Torts §§ 827-28 (1938).

[19] Armstrong v. Francis Corp., 20 N.J. 320, 120 A.2d 4 (1956).

[20] *Ibid.*

[21] Kinyon & McClure, *supra* note 2, at 905-08.

[22] Once the railroad has knowledge of the interference with surface water caused by negligence in construction of the embankment, any subsequent interference is intentional and should be treated as such.

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[1] Art. 1, § 12 of the New York Constitution permits the interception of telephonic communications upon issuance of an ex parte court order. This constitutional provision is implemented by N.Y. Code Crim. P. § 813(a).

The New York statute has been criticized for making authorizations to violate federal law and denying its citizens the protection of a federal right. Even proponents of restricted wiretapping criticize the New York law since any officer above the rank of sergeant may make application to *any* judge so that all applications could be channeled through a willing judge. Note, 31 N.Y.L.J. 197, 204 (1956). See also Dash, Knowlton & Schwartz, The Eavesdroppers 35-166 (1959), for complete coverage of the wiretapping problem in New York and other so-called "permissive jurisdictions." They divide jurisdictions into three categories: (1) Permissive—those in which wiretapping is expressly allowed to some extent, (2) Prohibition—those in which wiretapping is expressly forbidden, and (3) Virgin —those which have no pertinent legislation on the subject.