A Comparative Analysis of Kentucky Water Law

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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol43/iss4/4
that acknowledgment by the testator of his signature will be a sufficient compliance with the statute and will be the equivalent of "acknowledgment of the will," although the statute states that the will must be acknowledged and in spite of the fact that a number of cases also state that the will, and not the signature, is the subject of acknowledgment. Kentucky Revised Statutes sec. 394.040, dealing with proof of a will when witnesses thereto are unavailable, indicates that the purpose of the statute is fulfilled when a testator's signature on a will is proved to be genuine and seems to suggest that appearance of a testator's genuine signature on a will indicates that the instrument was intended to be his will.

As a practical matter, when a will is published or acknowledged as the testator's will, his signature must almost always by subscribed thereon at that time, although in some cases a liberal presumption operates in favor of the conclusion that the testator's signature was already on the will at the time it was acknowledged. Of course, if the testator acknowledges his will to the witnesses and then signs in their presence this problem concerning the testator's signature is unimportant. The liberal presumption in favor of the prior signing of the testator in cases where his signature on a will is proved to be genuine is believed to be sound. Proof of one's genuine signature on a will is a good indication that the testator intended that the will should take effect as such.

It is submitted that the meaning of "acknowledgment of a will" should be clarified in future Kentucky cases. The Court of Appeals should clearly state that "acknowledgment of a will" does not mean that a testator must inform witnesses that the instrument in question is his will (publish the will), but merely that he must indicate to them that it is his act and deed. The mere request to sign or witness an instrument, the identity of which is unknown to the witnesses, should be sufficient.

P. Joan Skaggs

A COMPARATIVE ANALYSIS OF KENTUCKY WATER LAW

The 1954 Kentucky General Assembly substantially clarified the rights of landowners to use the water resources on and contiguous to their land by the enactment of sections 262.670 through 262.690 of the Kentucky Revised Statutes.\(^1\) The legislature did not intend these

new statutory sections to be a complete codification of water rights law stating all the provisions governing the use of water, but they are the adequate beginning of a comprehensive water code which could eventually cover all water problems in the Commonwealth. The purpose of this note is to make a comparative analysis of recent similar statutory provisions adopted by Kentucky’s sister state, Virginia. The analysis includes a general, section-by-section comparison between the Kentucky and Virginia statutes where applicable, but the principal concern is for those sections affecting a landowner’s right to use and conserve water from riparian streams. Of the states bordering Kentucky, the Virginia statutes seem to offer the most fruitful opportunity for comparison because of the similarity of water problems in the two states, and also because statutory changes adopted in Virginia in 1954 are based on a comprehensive study of water problems completed in 1953. It is thought that such a comparison will be helpful in determining whether any of the Virginia provisions are needed in Kentucky.

The Virginia statute is found under Title 62 of the Code of Virginia, and it is entitled “Waters of the State, Ports, and Harbors.” The first chapter of the Code, entitled “Water Courses Generally,” is primarily a declaration of principle, based on case law which existed in Virginia at the time the statute was adopted, that the navigable waters of the state and the soil under those waters are the property of the state, and are to be controlled by the state at its discretion. The Kentucky legislature has not found it necessary to give statutory expression to this principle since the amount of navigable waters within the jurisdiction of the Commonwealth is limited. Kentucky case law, however, recognizes that the state may exercise plenary control of the navigable waters within its limits up to the high watermark.

The Virginia sections most important for purposes of comparison are found in Chapter 1.1 and were enacted in 1954. They state basic water law policy as to the rights of landowners to water in public streams or lakes. The statute begins by defining the words “water”

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2 Code of Va. sec. 62-1 (1919). For a discussion of case law of Virginia prior to the adoption of the statute, see Taylor v. Commonwealth, 102 Va. 759, 47 S.E. 875 at 879 (1904) where it is said that “the navigable waters and the soil under them, within the territorial limits of a state, are the property of the state, to be controlled by the state, in its own discretion, for the benefit of the people of the state, and demonstrate that (sec. 92.1) of the Code is a declaration of right in the state, sanctioned and supported by the common law.”

3 See Natcher v. Bowling Green, 264 Ky. 584 at 588, 95 S.W. 2d 255 at 257, (1936) saying: “A state may exercise plenary control over the navigable waters within its limits up to the ordinary highwater mark in the absence of action by Congress or its agency under the commerce powers of the Federal Constitution.

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4 Code of Va. title 62 Chapter 1.1 provides in full: “Sec. 62-9.1 Definitions--
and "beneficial uses" in order to give clarity and meaning to these terms as used in the statute. Water is given a very inclusive definition by including "any river, stream, creek, branch, lake, pond, impounding reservoir, bay, roadstead, estuary, inlet, and bodies of surface waters, natural or artificial, wholly or partially within or bordering the state or within its jurisdiction, and which affect the public welfare." Beneficial uses means "domestic, agricultural and commercial and industrial uses." Although these definitions are made primarily for the purpose

As used in this chapter, the following terms shall have the meanings respectively ascribed to them:

(a) "Water" includes all waters of any river, stream, creek, branch, lake, pond, impounding reservoir, bay, roadstead, estuary, inlet, and bodies of surface waters, natural or artificial, wholly or partially within or bordering the state or within its jurisdiction, and which affect the public welfare.

(b) "Beneficial use" means domestic, agricultural and commercial and industrial uses.

"Sec. 62-9.2 Declared natural resources; State regulation and conservation; limitations upon rights to use-

(a) Such waters are a natural resource which should be regulated by the State.

(b) The regulation, control, development and use of waters for all purposes beneficial to the public are within the jurisdiction of the State which in the exercise of its police powers may establish measures to effectuate the proper and comprehensive utilization and protection of such waters.

(c) The changing wants and needs of the people of the State may require the water resources of the State to be put to uses beneficial to the public to the extent of which they are reasonably capable; the waste or unreasonable use or unreasonable method of the use of water should be prevented; and the conservation of such water is to be exercised with a view to the welfare of the people of the State and their interests in the reasonable and beneficial use thereof.

(d) The public welfare and interest of the people of the State requires the proper development, wise use, conservation and protection of water resources together with protection of land resources, as affected thereby.

(e) The right to the use of water or to the flow of water in or from any natural stream, lake, or other watercourse in this State is and shall be limited to such water as may reasonably be required for the beneficial use of the public to be served; such right shall not extend to the waste or unreasonable use or unreasonable method of use of such water.

"Sec. 62-9.8 Valid uses not affected; chapter not applicable to proceedings determining rights—Nothing in this chapter shall operate to affect any existing valid use of such waters or interfere with such uses hereafter acquired, nor shall it be construed as applying to the determination of rights in any proceeding now pending or hereafter instituted.

"Sec. 62-9.4 Construction with reference to rights, etc., of counties, cities, and towns—Nothing in this chapter contained shall be construed as a declaration of policy of the State to divest any county, city or town of its title or right to any water or of its powers conferred by law with respect to the disposition thereof; nor shall anything in this chapter be construed to authorize the impairment of any contract to which such county, city, or town is a party, or to obligate any county, city or town to appropriate or expend any funds. The purpose of this chapter is to recognize the public use to which such water is devoted.

These provisions were recommended by the Virginia Advisory Legislative Council after a thorough search into the law which existed in the state at that time. See "Report of the Virginia Legislative Council to the Governor and the General Assembly." Senate Document No. 17 (1953).

* Supra note 4, sec. 62-9.1 (b).
of interpreting later sections in the statute, they do result in making the policy provisions of the statute applicable to all kinds of water. The nearest equivalent to these sections in the Kentucky legislation is section 262.680 of the Kentucky Revised Statutes, which was also adopted in 1954. The classification "public water" is used and is given the comparatively narrow definition of "water occurring in any natural stream, natural lake or other natural water body in the Commonwealth which may be applied to any useful and beneficial purpose. . . ." The Kentucky legislation expressly declares that "diffused surface water" flowing over the land and "water left standing in the natural pools" in the streams after the streams have receded are excluded from the regulation of the statute. The Kentucky legislature, by indicating specifically the waters not to be covered by the legislation, has defined in this section the scope of the state's regulation of water. Under this section, the riparian owner knows exactly the water he can use without coming within the scope of regulation of the subsequent sections of the statutes.

Section 62-9.2 of Chapter 1.1 recognizes that Virginia has the right to regulate water as a natural resource under the police power. This section also states that the need and condition of water resources require that water be conserved and put to the use most reasonable and beneficial to the welfare of the people. Section 262.670 of the Kentucky Revised Statutes, while expressing essentially these same principles, gives in addition a factual background of reasons for the legislation. It is stated that excessive rainfall at certain seasons and prolonged droughts at other seasons threatens the economic welfare of the state. This factual treatment, describing the situation which exists in Kentucky, helps show the need for regulation under the police power in order to protect the general welfare.

Within section 62-9.2 of Chapter 1.1, Virginia also recognizes that the interests and welfare of the people can be best served by providing adequate protection to both water and land resources. Before a riparian landowner may use the water on his land in the way that he wishes, he must be sure that the water and land resources affected by such use are being properly conserved. Nowhere in sections 262.670 through 262.690 of the Kentucky Revised Statutes is there any provision recognizing that the land resources affected by the use of water must be considered in the conservation of water.

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7 Ibid.  
8 Supra note 4, sec. 62-9.2 (a) and (b).  
9 Id. at (c).  
10 Id. at (d).  
11 The Kentucky statute, section 262.680, by excluding surface waters from the regulation of the act has adopted the existing case law, viz., surface waters
The Virginia and Kentucky legislatures both establish, in their respective statutes, the same basic theory to govern all riparian owners in their right of riparian use. The riparian owner's right to use the water in streams is limited to such water as is reasonably necessary for the landowner's needs. The Virginia statute states in section 62-9.2 that the landowner is given the right to reasonably use the water found in any "natural stream, lake or watercourse," and thereby limits the definition of water in this section to riparian water, although the term is given a much broader definition in a prior section. It should also be noted that this section of the Virginia statutes does not have any provision expressly giving the landowner the right to use surface waters and waters left standing in pools in the stream after the stream has receded, as the Kentucky statutes give in section 262.680.

After stating that a landowner's right to use riparian water is limited to a reasonable use, the Kentucky statutes further define the rights of riparian owners, while the Virginia Code merely states the basic theory to be applied. The Kentucky provisions codify the common law principle that a landowner has an unlimited right to use water in a stream for "domestic purposes" without being liable to a lower riparian owner and defines what the term "domestic purposes" shall include. It is also provided in the Kentucky statutes that a riparian owner may impound water in a stream for his use while the water is at an excess, such as during a flood, so the water will be available when it is needed in time of a later drought. Under the statute any obstruction which is placed across a stream must have an outlet allowing a flow of water to be released for the use of a lower riparian owner. These additional declarations of the rights of landowners to use water contiguous to their land were placed in the Kentucky law to encourage the proper use of water by clearly stating what the rights were before the water is actually used. The Virginia
statutes, by failing to further define the rights of land-owners to use riparian water, do not achieve the clarity of the Kentucky statutes.

Section 62-9.3 of Chapter 1.1 of the Virginia Code provides that no right to use water acquired under this regulatory statute “shall operate to affect any existing valid use of such water or interfere with such uses hereafter acquired. . . .” Although ambiguously expressed, this section clearly means that a riparian landowner who has established a lawful use of water contiguous to his land may therefore continue the use of that water without being affected by the regulation of the instant statute, and another person who acquires that pre-existing use from him shall have the same rights to the water as his grantor had established.17 The Kentucky Revised Statutes state that a riparian owner shall have the right to the use of water which will not “impair existing uses of the owners heretofore established. . . .”18 Thus, in effect, the legislature in each state declares that existing valid rights to use water and a continuance thereof shall not be impaired.19

The final section of Chapter 1.1 is devoted to protecting the rights of any county, city, or town. The Code declares that nothing in this chapter pertaining to the rights of riparian owners shall be construed to either divest any county, city, or town of its rights in respect to the disposition of water, or impair any contract to which it is a party, or obligate it to expend any funds.20 There is no Kentucky statute comparable to this section of the Virginia Code. It is probable, however, that the increasing uses of water will cause the interests of municipalities and farmers who are both using riparian water to conflict, and the Kentucky legislature should adopt a similar provision in order to aid further municipal and agricultural development.

The Virginia Code then turns its attention to the problem of pollution which is dealt with in four chapters. Chapter 2 of Title 62 is devoted to the purpose of the pollution law, the policy of the state toward pollution, and the establishment of a supervisory body to

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17 Supra note 4. The last sentence of section 9.3, which provides that nothing in this chapter of the Virginia Code shall “be construed as applying to the determination of rights in any proceeding now pending or hereafter instituted,” avoids procedural difficulty in any immediate litigation.

18 Supra note 14 at 2.

19 Section 262.690 (2) of the Kentucky Statutes states that the riparian owner shall have the right to such reasonable use of riparian water as will not “. . . impair existing uses of other owners heretofore established. . . .” It is contended that the quoted phrase should contain the word “reasonably” just before the word “impair” in order to give the phrase the proper meaning. Otherwise the reasonable use theory will not be applied to existing uses, and it was the intention of the legislature in adopting the reasonable use theory to apply it to all riparian rights. For treatment of this problem, see supra note 1.

20 Supra note 4, sec. 62-9.4.
oversee the various aspects of the pollution law. Chapter 3 deals with the protection of water which is to be used for the supply of any city or town, and the supervision of water works by the State Board of Health. In the two other chapters, Chapter 4 and Chapter 4.1, the Virginia legislature has provided for the establishment of commissions between its own state and other states in order to supervise and control the contamination of mutual waters. These Virginia laws concerning pollution are equivalent to Chapter 220 of the Kentucky Revised Statutes, which is entitled "Sanitation Districts and Water Pollution Control." No discussion of the details of these provisions is necessary to the analysis of the problems of the right of private landowners to use the water flowing on their land.

The right to utilize the public waters of Virginia for producing water power is contained in Chapter 5 of the Code. The purpose of this chapter is to encourage the utilization of water resources in the state to the greatest extent. Although the Kentucky legislature has not found it necessary to devote a section to this aspect of water law, the right to use water in this state to produce water power has been recognized by statute.

Chapter 6 of the Virginia Code regulates the building of obstructions, such as dams, across a stream. The statute provides that a landowner who wishes to build a dam may submit an application to the circuit court of the county where the stream across which the structure will be erected is found, and a group of commissioners will be appointed by the court to inspect the stream and surrounding land in order to determine whether or not the privilege to build the dam should be granted. The Kentucky statutes, which give a landowner the right to apply for permission to build dams on the stream running through his land, provide substantially the same procedure as the Virginia Code does. The statutes of both states also declare that no person acquiring this right shall do anything which will injure any vested interest existing on the stream at the time that the right is granted. These historical statutes were adopted at a time when the conditions confronting a landowner who wished to construct a

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22 Id. at secs. 62-47 to 62-61.  
23 Id. at secs. 62-62 to 62-67 and secs. 62-67.1 to 62-67.10.  
26 Id. at sec. 62-68 (1942).  
31 The majority of Ky. Rev. Stat. secs. 182.170 to 182.990 were enacted in 1893. Code of Va. secs. 62-95 to 62-106 were enacted in 1919.
dam were quite different from those facing a landowner today, but nevertheless, the procedure to obtain permission to build a dam or other structure remains unchanged from that time to this.

The problem of the regulation of ports, which is covered by the provisions of Chapter 6.1 of the Virginia Code, is not of as great importance in Kentucky as it is in Virginia, for Kentucky is not a seacoast state. Nor does Kentucky need any extensive laws covering erosion to beaches (Chapter 7.2 of the Code of Virginia); or harbor-masters, dockmasters, and portwardens who will inspect ships and prescribe the duties of the various ports (Chapter 9 of the Code of Virginia); or to regulate vessels and their seamen (Chapter 11 of the Code of Virginia); or aids to navigation, such as buoys or beacons (Chapter 12 of the Code of Virginia). The matter of federal aid to river, harbor, and flood control projects (Chapter 7.1 of the Code of Virginia) might, however, offer opportunity for study in Kentucky.

Chapter 10 of the Code of Virginia is entitled "Wharves, Docks, Piers and Bulkheads." In either Virginia or Kentucky an individual may erect any of these structures on his own land provided he does not obstruct navigation or injure the rights of others. Once the structure is erected, the court has the power to have it removed if it violates the provisions of the statutes.

Chapter 13 is devoted to preventing the removal of sand and gravel which lies on the shore of a stream or lake within the state of Virginia by one who does not own the land on which the sand or gravel is found.

The final chapter of the Virginia Code, Chapter 14, prohibits "miscellaneous offenses," which it is in fact entitled. It provides that it shall be unlawful for any person to cast an article into a river so as to injure the interests of another person, or build a dam or anything which will obstruct navigation or the passage of fish, except when the dam is allowed by law or order of the court. In 1954 the Virginia legislature adopted an additional provision which authorizes certain counties to enact ordinances prohibiting the casting of harmful articles.

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34 Code of Va. secs. 62-139 to 62-141.
35 Id. at secs. 62-182 to 62-194.
36 Id. at sec. 62-182 (1919) (wood and timber) and sec. 62-183 (1919) (dead animals, bait, etc.).
37 Id. at sec. 62-194 (1919) (in general) and secs. 62-185 to 62-191 (certain designated counties and rivers).
into waters.\textsuperscript{40} These provisions do indirectly affect a private landowner’s right to use the water in a river or stream contiguous to his land, and before a landowner can use the water as he wishes, he must look to these statutes to see if his act is prohibited under them. The Kentucky Revised Statutes are covered in most of these problems, although not in as great detail, in provisions which are not brought together under one chapter as the Virginia legislature has done.\textsuperscript{41}

In summary, although the Virginia legislation is called a Water Code, it contains few if any provisions governing riparian rights which the Kentucky legislature needs to adopt. The two principal riparian provisions which appear in the Virginia Code but not in the Kentucky statutes are, first, that land and water resources should both be adequately protected and conserved, and second, that neither the rights, contracts, nor obligations of counties, cities, and towns shall be affected by the statutory declaration of riparian rights. If the Kentucky legislature considered and adopted these two principles, the statutory law of riparian rights as it now exists in Kentucky would not be materially changed. In fact, the detailed provisions of the Kentucky statutes give a clearer statutory declaration of the law of riparian rights than does the Virginia Code. Also, the Kentucky statutes describe the factual background giving rise to the legislation which serves to emphasize that the existing situation in Kentucky demands regulation for the welfare of the people. The scope of the regulation of the statutes is clearly stated by expressly declaring what waters will and will not be subject to regulation. A riparian owner in Kentucky is given the right of reasonable use of the water contiguous to his land, and the statutes give a more detailed definition of the reasonable use theory. Finally, the common law principle of domestic uses is clearly set out in the statutes, and the landowner is encouraged to impound water while it is at an excess in order to avoid later shortages of water which might occur in time of drought. Of all of these provisions, the Virginia Code merely adopts the reasonable use theory.

J. Arna Gregory

\textsuperscript{40} Id. at sec. 62-183.1 (1954).
\textsuperscript{41} See Ky. Rev. Stat. sec. 438.060 (1893) (contamination of waterways) and sec. 182.010 (1924) (obstructing navigation).