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THE RULE IN KENTUCKY AS TO SURFACE WATER

Tiffany has defined surface water as follows: "Water spread upon the surface of land, or contained in depressions therein, if not flowing in a fixed channel, or not having permanent sources of supply, so as to constitute a watercourse, and not constituting a permanent lake or pond, is known as 'surface water.' Waters of that character include such as come from rains and snows, do not belong to a well defined body of water or natural stream, but are confined partly to the surface and partly beneath the surface in swamps or sloughs where they lie stagnant and inactive."

The term watercourse is sometimes used loosely so as to include depressions of the nature of ravines and gullies. Technically, however, these are not watercourses. Water coming naturally into, and flowing through depressions is entirely surface water. On the other hand, a watercourse has a more permanent source of supply than this. Although a watercourse may carry surface water, this is not its only source. Thus, a river is a watercourse but ravines and gullies are not. According to Webster's International Dictionary the legal definition of a watercourse is: "A watercourse may be dry during unusual droughts, but the term does not apply to a stream depending for its flow merely upon surface drainage." Therefore, watercourses are not under consideration in this note.

There are two principal rules in the United States relative to rights in surface water; the common law rule and that of the civil law.

The common law rule, in theory, although such is here not averred to be the fact, might well have been based on the maxim: *cujus est solum ejus est usque ad coelum*, (the owner of the soil owns to the sky). This is mentioned to show the concept of total right of anything on the soil to him who owns the soil. That is, the owner can use anything of nature on his land in any manner and to whatever extent, for it is his absolutely. Generally, by the common law rule, the owner of the soil might use it or make any alterations thereon regardless of the effect such use or alterations would have on the flow of surface water. In fact, this maxim seems to have been the basis upon which the common law rule was applied in the case of *Gannon v. Hargadon*. There, after stating this maxim, Chief Justice Bigelow remarked: "A party may improve any portion of his land, although he may thereby cause the sur-

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2 Tiffany, *op. cit. supra* note 1, sec. 743, p. 165, n. 21: "This is a misnomer, since there appears never to have been any direct decision on the subject in England." See Notes (1908) 20 L. R. A. (N. S.) 155, (1913) 43 L. R. A. (N.S.) 792.
4 92 Mass. (10 Allen) 106 (1865).
face water thereon, whencesoever it may come, to pass off in larger quantities than previously. If such an act causes damage to adjacent land, it is *damnum absque injuria.* This case is an example of the unqualified application of the common law rule. However, the rule has not always been so applied. Some jurisdictions have qualified it so that surface water may be interfered with without liability as long as such interference is within the course of reasonable use by the owner of his land, and so as not to cause injury to another unreasonably, negligently, or without necessity.

The civil law rule, on the other hand, suggests kinship to, though it is not suggested that it has its origin in, or is based upon, the maxim: *aqua currit, et debet currere ut currere soletab exjure nature,* (water runs and ought to run as it is by natural law accustomed to run). By this rule the owner of the upper or dominant estate has no right to interfere with the natural flow of surface water onto the lower estate which is subject to the servitude of receiving it from the upper estate.

The scope of this note is to confine consideration to the rule that is applied in Kentucky. As to rural property, the lower proprietor may sometimes erect an obstruction, such as a dam, to protect his land from water draining through a natural depression, which water has been increased by artificial drainage by the upper proprietor. However, he will not be allowed to maintain the obstruction if some of the water in the depression is naturally flowing surface water. Under such circumstances the lower proprietor would inevitably, at some time or other, obstruct naturally flowing surface water. In such a case the upper proprietor will be required to desist from artificial drainage and the lower proprietor will be required to remove the obstruction. This is because the civil law rule will not allow the upper proprietor to increase the natural flow of surface water to the detriment of the lower proprietor, nor the latter to obstruct it so that it will back upon the upper estate. Railroads, for example, are liable where they erect embankments without maintaining proper culverts for escape of surface water, and such water is caused to back upon and damage the land of adjacent owners.

In some states the civil law rule permits an exception in favor of urban land in order to afford opportunity for improvements.

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6 Id. at 110.
7 Baker v. Allen, 66 Ark. 271, 50 S.W. 511 (1899); Hume v. Des Moines, 146 Iowa 624, 125 N.W. 846 (1910); Werner v. Popp, 94 Minn. 118, 102 N.W. 366 (1905); Shaw v. Ward, 131 Wis. 646, 111 N.W. 671 (1907).
8 Tiffany, loc. cit. supra n. 3.
9 Stone v. Ashurst, 258 Ky. 687, 149 S.W. 2d 4 (1941); Grinstead v. Sanders, 22 Ky. L. R. 51, 56 S.W. 665 (1900).
10 White v. Howe, 238 Ky. 108, 168 S.W. 2d 23 (1942); Hutchinson v. Copenhaver, 193 Ky. 301, 235 S.W. 761 (1921).
thereon. Thus, some alterations in the land, though interfering with the natural flow of surface water, are permitted. Kentucky, however, applies the civil law rule to urban as well as to rural land, and denies the right to both the upper owner, and the lower owner, to obstruct the natural flow of surface water even when making improvements. Thus, if water drains onto the defendant's lower land through a depression that extends from the plaintiff's land through the defendant's lower land, the latter cannot, legally, fill in the depression as a building site or for any other beneficial purpose. This is true for the reason that in so doing, the defendant would violate the plaintiff's easement to have the water from his estate flow naturally and without obstruction onto the land of the defendant. Conversely, the upper owner cannot, legally, obstruct water that flows from his estate onto a lower estate. This seems to be a serious objection for it discourages making improvements, and especially so, if the rule is applied unqualifiedly. No doubt, those states which except urban property from the rule, have seen the apparent superiority of the common law rule in encouraging the making of improvements.

The question sometimes arises as to whether an upper proprietor may discharge surface water by artificial means, such as ditches, into a water course instead of allowing it to reach such stream by natural drainage. The view in Kentucky seems to be that this is permissible if the watercourse is not thereby so increased in volume as to exceed its natural capacity to the point of overflowing the land of the lower proprietor. Generally, an owner will be liable for resulting damage if, by artificial means, water is cast in greater volume and quantities upon the land of another than would naturally drain thereon.

Though the servitude of the lower estate subjects that estate to receive the natural flow of water from the upper estate, the

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11 Tiffany, op. cit. supra n. 1, sec. 743, p. 167.
12 Moody v. Fremd, 177 Ky. 5, 197 S.W. 433 (1917) (right of upper proprietor to maintain barrier may be gained by prescription, fifteen years); see Pickerill v. City of Louisville, 125 Ky. 213, 226, 100 S. W. 873, 876 (1907).
13 Watson v. Chesapeake & Ohio Ry., 238 Ky. 31, 36 S.W. 2d 641 (1931) (qualifies rule by not allowing plaintiff to recover for damages he could have avoided by ordinary care and reasonable expense); Dugan v. Long, 234 Ky. 511, 28 S.W. 2d 765 (1930); Johnson v. Marcum, 152 Ky. 629, 153 S.W. 959 (1913); Pickerill v. City of Louisville, 125 Ky. 213, 100 S. W. 873 (1907). Contra: Middlesborough Town Co. v. Helwig, 14 Ky. L. R. 430 (1892) (denies recovery on basis that filling a marshy lot was not obstruction of a watercourse).
14 Smith v. Wathen, 156 Ky. 820, 162 S.W. 88 (1914); Jones v. Bower, 32 Ky. L. R. 450, 105 S.W. 1169 (1907); Finley v. City of Williamsburg, 24 Ky. L. R. 1336, 71 S.W. 502 (1902); Newport News & M. V. Co. v. Wilson, 16 Ky. L. R. 262 (1894).
15 Frank v. Dierson, 235 Ky. 229, 30 S.W. 2d 950 (1930); Steinke v. North Vernon Lumber Co., 190 Ky. 231, 227 S.W. 274 (1921); Louisville & N. R. v. Stephens, 188 Ky. 1, 220 S.W. 746 (1920); Bonte v. Postel, 109 Ky. 64, 58 S.W. 536 (1900).
lower proprietor is under no duty to keep a ditch open to receive and facilitate the flow.\textsuperscript{16} Thus, if water flows from the upper land to a ditch on the lower land, which ditch is on the upper side of the lower proprietor's right of way, and the ditch does not suffice, or becomes clogged, there is no liability for the consequent stoppage.\textsuperscript{17} The reason for this is that the upper proprietor's easement to have his water flow on the lower land may be limited by the nature of that land.

In a few cases there has been presented what appears to be a qualified application of the civil law rule. In some of these cases where the lower land had been overflowed by the upper proprietor's interfering with the flow of surface water, the lower proprietor was held to be under a duty to minimize damages by ordinary care and reasonable expense.\textsuperscript{18} This is equivalent to saying that the upper proprietor by interfering with the flow of surface water may overflow the land of the lower proprietor and will not be liable for damages which by ordinary care and reasonable expense, the lower proprietor could have avoided. In two cases involving railroads, the rule seems to have been qualified by basing liability upon negligence in flooding another's premises.\textsuperscript{19}

The civil law rule might well be qualified in Kentucky to permit reasonable interference with surface water. Such qualification would encourage the making of improvements. The advantage of not being injured by another's treating surface water as a "common enemy," to be gotten rid of regardless of the effect on others, would still be retained. There is authority for qualifying the rule in the jurisdictions that have allowed improvements in urban property, even though the civil law rule was in force in that state. A few Kentucky cases have shown a tendency in that direction. At least the rule should not be applied rigidly. In so doing undue hardships will obviously result. To qualify the civil law rule is to point the way in placing surface water in the category of other classes of water in which the "reasonable use" rule is applied. Where interests conflict, the extent of the respective rights of the parties cannot better be determined than by putting the exercise of the rights to the test of reasonableness.

\textsuperscript{17} Johnson v. Chesapeake & Ohio Ry., 208 Ky. 143, 270 S.W. 726 (1925).
\textsuperscript{18} Watson v. Chesapeake & Ohio Ry., 238 Ky. 31, 36 S.W. 2d 641 (1931); Johnson v. Ratliff, 233 Ky. 187, 25 S.W. 2d 355 (1930); Raleigh v. Clark, 114 Ky. 732, 71 S.W. 857 (1903); see Walter v. Wagner, 225 Ky. 255, 257, 8 S.W. 2d 421, 422 (1928).