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Torts—Damage to Property from Surface Water of Neighboring Lands

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Damage to Property from Surface Water of Neighboring Lands

In *Kossoff v. Rathgeb-Walsh, Inc.*,[4] the issue arose whether an upper property owner has the right to make improvements on his property which, without leader pipes, drains, or ditches, have the effect of increasing the flow of surface water from the higher to the lower lot.

Under the civil law doctrine, as between the owners of higher and lower lots, the upper proprietor had an easement to have surface water flow naturally from his land onto the land of the lower proprietor. The lower proprietor had no right to obstruct its flow and cast it back on the land above.[5] However, in *Barkley v. Wilcox*,[6] decided in 1881, New York rejected the civil law approach. In that case, improvements to the defendant's land caused the surface water to back up on the plaintiff's higher premises where it seeped into the plaintiff's cellar and caused damage. The Court held that the lower land owner had a right to improve his property and was not subservient to his higher neighbor.

In the *Kossoff* case, the defendant made improvements on his upper lot which caused surface water to flow onto plaintiff's previously improved lower lot to the damage of the plaintiff. The plaintiff alleged that since he had improved his lot first, he had the right to insist that the defendant keep his land in its natural state, so that the surface water would percolate into the ground without flowing upon plaintiff's land. The adoption of such a rule, said the Court, would result in an inversion of the civil law doctrine, creating a dominant tenement in the lower proprietor and a servient estate in the upper.

In re-examining the *Barkley* case, the Court concluded that the discussion therein of the rights and liabilities of upper and lower owners did not signify that only the lower owner has the right to improve his land. Both the upper and lower land owners have equal rights to improve their properties, provided, of course, that the improvements are made in good faith to fit the property to some rational use to which it is adapted and that the water is not drained into the other property by means of pipes or ditches.[7] Such a doctrine is in keeping with our society's encouragement of expansion and improvement.

Prima Facie Tort

Due to the modern trend of extending liability in tort actions where plaintiff suffers temporal damage as a result of defendant's intentional action, courts have been continually confronted with problems of increased litigation,

4. Kossoff v. Rathgeb-Walsh, Inc., 3 N.Y.2d 583, 170 N.Y.S.2d 789 (1958).
5. People v. Stowell, 139 C.A.2d 728, 294 P.2d 474 (1956).
6. 86 N.Y. 140 (1881).
7. Kossoff v. Rathgeb-Walsh, Inc., *supra* note 4.