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Kell v. Appalachian Power Co.: Aerial Application of Herbicides on Utility Right-of-Ways

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Case Comment

KELL v. APPALACHIAN POWER CO.: AERIAL APPLICATION OF HERBICIDES ON UTILITY RIGHT-OF-WAYS

I. INTRODUCTION

Aerial application of herbicides and pesticides has increased greatly in recent years.[1] With this increase and the related growth in the "crop dusting" industry has come a new area for litigation and significantly broadened notions of common law liability. Although case law on the subject is abundant, most precedent deals primarily with "drift"[2] and the vast majority of actions have been grounded in negligence, nuisance, trespass or strict liability.[3] As such, a unique problem arises when the grantee of an easement uses aircraft to spray toxic herbicides over the right-of-way because liability for aerial spraying must then be considered in conjunction with the property rights of the parties to the easement agreement.

In *Kell v. Appalachian Power Co.*[4] the West Virginia Supreme Court of Appeals was confronted with this problem. Because the court was primarily concerned with property rights, it considered the general rights of parties to easement agreements, the general rules of construction applied to such indentures, and the nature of the activity involved. The court ruled that the grantor-owner of the land retains certain rights and interests in the land subject to the easement and that the language in the indenture[5] did not authorize the grantee to apply toxic herbicides to the right-of-way by aerial broadcast spraying.

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[1] Kennedy, *Liability in the Aerial Application of Pesticides*, 22 S.D.L. REV. 75 (1977) [hereinafter cited as Kennedy]. *See also* Comment, *Agricultural Pesticides: The Urgent Need for Harmonization of International Regulation*, 9 CAL. W. INT'L L.J. 111 (1979). Although aviation in agriculture is not new, dusting and spraying did not assume great importance until after World War II. This was brought about by a surplus of aircraft and trained pilots and the development of the herbicide 2, 4-D. McBreen, *Legal Implications of Agricultural Aviation*, 18 J. AIR L. & COM. 399, 399 (1951).

[2] Drift is a phenomenon which occurs when air is the medium through which the pesticide is applied to the target area; it causes the pesticide to come into contact with areas outside the target. Drift is a function of various factors: the chemical nature of the pesticide, the physical state in which it is applied, the method of application, the volatility of the substance, and atmospheric conditions.
Kennedy, *supra* note 1, at 76.

[3] *Id.* at 75.

[4] 289 S.E.2d 450 (W.Va. 1982).

[5] The language in the indenture gave the power company the right to cut and remove trees, overhanging branches or other obstructions that endangered the safety, or interfered with the use of the right of way. The use of herbicides was not mentioned. *Id.* at 451.

II. Statement of the Case

Kell was a suit brought by landowners seeking to permanently enjoin the Appalachian Power Company from using any form of toxic herbicide to clear trees, branches and other obstructions from the right-of-way granted to the power company.[6] The power company, asserting its rights under the indenture agreement, not only admitted using a helicopter to spray the easement on two different occasions but also stated its intention to continue spraying the area. The parties relied on their respective interpretations of the indenture and cross-motions for summary judgment were filed.[7] After hearing argument, the circuit court granted the power company's motion and the Kells appealed.

The West Virginia Supreme Court of Appeals viewed the case as presenting a novel question, and the issue was framed by Justice McHugh as follows:

> Is a power company authorized to spray toxic herbicides from an aircraft over its right-of-way under language in an indenture which provides . . . [the power company] with the right, privilege and authority . . . to construct, erect, operate and maintain a line or lines for the purpose of transmitting electric or other power . . . together with the right . . . to cut and at its option, remove . . . any trees, overhanging branches or other obstructions which may endanger the safety or interfere with the use of said poles and towers or fixtures or wires . . . .[8]

Applying a balancing test of the relative rights of parties to easements, the court held that the power company was not so authorized. The order of the circuit court was reversed and the case remanded with instructions to grant the injunction prayed for by the appellants.[9]

III. Prior Law

The issue in *Kell,* although simply stated, is nevertheless complex and requires an examination of the law in several areas. The principle areas of consideration are the general rights of parties to easement agreements, the general rules of construction applied to such indentures, and the nature of the activity involved.

Although an easement is an interest in land[10] it gives no title to the land.[11] Case law dealing specifically with power company easements supports this notion and indicates that a power company acquires neither a fee interest[12] nor

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[6] Although the indenture was actually entered into in 1939 by the Kells' predecessors in interest there was no question as to the validity of that agreement. *Id.* at 451.

[7] All parties conceded that there was no genuine issue as to any material fact in the case. *Id.* at 452.

[8] *Id.* at 453.

[9] *Id.* at 456-57.

[10] Paden City v. Felton, 136 W.Va. 127, 66 S.E.2d 280 (1951).

[11] Korricks Dry Goods Co. v. Kendal, 33 Ariz. 325, 264 P. 692 (1928).

[12] *See, e.g.,* De Penning v. Iowa Power & Light Co., 239 Iowa 950, 33 N.W.2d 503 (1948); Shedd v. Northern Ind. Pub. Serv. Co., 206 Ind. 35, 188 N.E. 322 (1934); Patterson Orchard Co. v. Southwest Ark. Util. Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929); Dickel v. Bucks-Falls Elec. Co., 306 Pa. 504, 160 A. 115 (1932). This authority was recognized by the court in *Kell,* 289 S.E.2d at

the right to exclusive possession of the right-of-way.[13] It follows that both parties to an easement have certain rights and interests which must be considered.

The extent of permissible use by the owner of the dominant estate varies with the degree of specificity of the indenture. An easement granted in general terms without limitations may be used for any reasonable purpose,[14] but if the terms are specific they define the limits.[15] The general rule with regard to power company easements is that the power company may enter the land to maintain the right-of-way and effect necessary repairs.[16] There is also authority that the dominant owner may vary his mode of enjoying the easement and take advantage of modern inventions if by doing so he can more fully carry out the purpose for which the easement was granted.[17] These rights are tempered, however, by a line of cases prohibiting the easement holder from increasing the burden or imposing additional burdens on the servient estate.[18]

The owner of the servient estate also has certain rights. An easement does not extinguish the landowner's right to ordinary use of the property[19] and the owner of the servient estate may use the land for any purpose which does not unreasonably interfere with the rights of the owner of the dominant estate.[20] The owner of land subject to a right to construct and maintain electrical power transmission lines has been held to have the right to use the land in any manner which does not interfere with such lines.[21] Specifically, the grantor may cultivate the strip, pass along and across it, and use it in any way which does not affect the rights of the grantee.[22] Clearly, each party's rights under an easement are relative to the other's. Thus, in the absence of a grant of exclusive use, the owners of the dominant and servient estates must use the land in such a manner as not to interfere with one another.[23]

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453 n.8.

[13] *See, e.g.*, Patterson Orchard Co. v. Southwest Ark. Util. Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929); Draker v. Iowa Elec. Co., 191 Iowa 1376, 182 N.W. 896 (1921); Alabama Power Co. v. Keystone Lime Co., 191 Ala. 58, 67 So. 833 (1914); Kentucky & West Virginia Power Co. v. Elkhorn City Land Co., 212 Ky. 624, 279 S.W. 1082 (1926); Hartford Elec. Light Co. v. Wethersfield, 165 Conn. 211, 332 A.2d 83 (1973). The court in *Kell* recognized this authority, 289 S.E.2d at 453 n.9.

[14] Cushman Virginia Corp. v. Barnes, 204 Va. 245, 129 S.E.2d 633 (1963); State Road Comm'n v. Chesapeake & O. Ry. Co., 115 W. Va. 647, 177 S.E. 530 (1934). *See also* Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963); Cantrell v. Appalachian Power Co., 148 Va. 431, 139 S.E. 247 (1927).

[15] City of Lynchburg v. Smith, 186 S.E. 51 (Va. 1936); Shock v. Holt Lumber Co., 107 W. Va. 259, 148 S.E. 73 (1929). *See also* Cover v. Platte Valley Pub. Power, 162 Neb. 146, 75 N.W.2d 661 (1956).

[16] Otter Tail Power Co. v. Malme, 92 N.W.2d 514 (N.D. 1958); Moore v. Indiana & Mich. Elec. Co., 229 Ind. 309, 95 N.E.2d 210 (1950).

[17] Diller v. St. Louis, S. & P. R.R., 304 Ill. 373, 136 N.E. 703 (1922); Davis v. Jefferson County Tel. Co., 82 W. Va. 357, 95 S.E. 1042 (1918).

[18] *E.g.*, Lowe v. Guyan Eagle Coals, Inc., 273 S.E.2d 91 (W. Va. 1980); McBrayer v. Davis, 307 S.W.2d 14 (Ky. 1957).

[19] Hartford Elec. Light Co. v. Wethersfield, 165 Conn. 211, 332 A.2d 83 (1973).

[20] Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868 (1926).

[21] Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 51 S.E.2d 191 (1949).

[22] Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868 (1926).

[23] Wallis v. Luman, 625 P.2d 759 (Wyo. 1981); Miller v. Georgia Pac. Corp., 48 Or. App. 1007,

In construction of easement agreements, it is generally held that the ordinary rules of contract construction and interpretation apply.[24] As with any written agreement, the intention of the parties is controlling.[25] Although a grant in general terms is construed to imply a right of all reasonable uses,[26] the right-of-way cannot be used to burden the servient estate to a greater extent than was contemplated or intended at the time of the grant.[27] Furthermore, when the language is clear and unambiguous there is no need to consider extrinsic events to show the extent of the right granted.[28]

Finally, it is necessary to consider the nature of the activity involved. The primary features which make aerial spraying dangerous are the toxicity of the chemicals used and drift.[29] Until recently, the problem of drift was the main focus of case law in this area, and most cases dealing with toxic herbicides and pesticides have been grounded in the various theories of tort liability.[30] Recovery has been allowed on numerous theories ranging from negligence and the requirement of due care under the circumstances[31] to strict liability[32] on the ground that aerial spraying is, per se, inherently dangerous. It is often difficult to detect exactly what theory the courts are following,[33] but most are willing to accept theories of action which do not require proof of negligent conduct.[34] The present and potential problems associated with drift are obvious, but the full ramifications of the chemical hazard are only now coming to light.[35] Increased concern over the effects of chemical agents on man and the environment has generated a myriad of laws and regulations,[36] and in recognition of the dangers involved and as a matter of public policy, pesticides and herbicides are regulated at both federal[37] and state[38] levels.

Thus, although various authority exists specifically regarding aerial application of toxic herbicides, a review of the cases brings to light the unique aspect of *Kell.* Prior law in this area has been grounded in tort, whereas the

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618 P.2d 992 (1980); Lindsey v. Shaw, 210 Miss. 333, 49 So. 2d 580 (1950).

[24] *See, e.g.*, Penn Bowling Recreation Center, Inc v. Hot Shoppes, Inc., 179 F.2d 64 (D.C. Cir. 1949); Hennen v. Deveney, 71 W. Va. 629, 77 S.E. 142 (1913).

[25] *See, e.g.*, Georgia Power Co. v. Leonard, 187 Ga. 608, 1 S.E.2d 579 (1939).

[26] Davis v. Jefferson County Tel. Co., 82 W. Va. 357, 95 S.E. 1042 (1918).

[27] *E.g.*, Lowe v. Guyan Eagle Coals, Inc., 273 S.E.2d 91 (W. Va. 1980); Doody v. Spurr, 315 Mass. 129, 51 N.E.2d 981 (1943).

[28] Hennen v. Deveney, 71 W. Va. 629, 77 S.E. 142 (1913).

[29] Comment, *Crop Dusting: Two Theories of Liability?*, 19 HASTINGS L.J. 476 (1968). *See also* Kennedy, *supra* note 1.

[30] Kennedy, *supra* note 1.

[31] *E.g.*, Wieting v. Ball Air Spray, Inc., 84 S.D. 493, 173 N.W.2d 272 (1969).

[32] *E.g.*, Young v. Darter, 363 P.2d 829 (Okla. 1961).

[33] Kennedy, *supra* note 1, at 88.

[34] *Id.* at 96.

[35] Comment, *Agricultural Pesticides: The Urgent Need for Harmonization of International Regulation*, 9 CAL. W. INT'L L.J. 111, 113-15 (1979); Note, *Environmental Law: Agricultural Pesticides*, 13 WASHBURN L.J. 53 (1974).

[36] Kennedy, *supra* note 1, at 90-92. *See also supra* note 35.

[37] *E.g.*, Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 135-49 (1976).

[38] West Virginia Pesticide Use and Application Act of 1975, W. VA. CODE §§ 19-16B-1 to 26 (1977 & Supp. 1982).

problem here involves contract construction and a balancing of property interests. While this case law is clearly not on point, it is nevertheless useful in understanding how courts have approached the problem and in making an analogy with the situation in *Kell.*

IV. Analysis of the Case

Although *Kell* presented the West Virginia Supreme Court of Appeals with a novel issue, the court approached the problem in a very traditional manner. The primary issue, whether the power company could spray its right-of-way with toxic herbicides, was subdivided and the areas of concern separately considered. In reaching its decision the court affirmed existing law in some areas and extended it in others.

Construing the indenture, Justice McHugh noted that the intent of the parties is controlling and then proceeded to explain that since aerial spraying to control vegetation was unknown in 1939 it could not have been within the contemplation of the parties.[39] Although correct, the treatment of this important area is unnecessarily brief and not as convincing as it might have been. Perhaps a better approach would have been to spend more time dealing with the specific language of the agreement. For example, the indenture says "to cut and at its option, remove." This certainly seems clear and unambiguous, and the law in this regard is that if there be no ambiguity, one must arrive at the intention of the parties from the language used.[40] If, however, the indenture was construed to be ambiguous then prior law dictates that we resort to the circumstances surrounding the transaction, the situation of the parties, the subject matter, and the subsequent acts of the parties.[41] This line of cases supports and would have added credibility to the court's conclusion.

The most confusing aspect of the opinion is that dealing with the general rights of parties to easement agreements. Prior law in this area provides that the easement owner can make the right-of-way as usable as possible for the intended purpose so long as he does not unreasonably interfere with the rights of the servient estate owner.[42] Specifically, case decisions have indicated that an electric utility can do whatever is reasonably necessary to effect enjoyment of its easement for purposes of construction, operation and maintenance of high voltage transmission lines.[43] The phrases "reasonably necessary" and "unreasonably interfere" are characteristic of the prior decisions and have set the standard for determining the rights of the easement holder.

While the court unmistakably accepts the common law notion that the rights of the easement holder must be weighed against the rights of the grantor-owner, it appears to have tipped the scale in favor of the landowner. For example, in reference to aerial spraying, the court notes that "[it] inflicts un-

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[39] 289 S.E.2d at 456.
[40] *See* Flaherty v. Fleming, 58 W. Va. 669, 671, 52 S.E. 857, 858 (1906).
[41] *See* Shrewsbury v. Tufts, 41 W. Va. 212, 23 S.E. 692 (1895).
[42] *See, e.g.*, Moore v. White, 159 Mich. 460, 124 N.W. 62 (1909).
[43] Holding v. Indiana & Michigan Elec. Co., 400 N.E.2d 1154, 1158 (Ind. 1980).

necessary damage . . . is not necessary to the maintenance or protection of the power company's equipment" and "impermissibly interferes with the grantor-owner's rights and interest."[44] From this language it is unclear whether the court is following the common law "reasonable" standard of adopting a more stringent "necessary" standard. To be sure, in the absence of a specific indenture provision to the contrary, the aerial application of toxic herbicides will not pass either standard. What is not certain, however, is whether the grantee can do what is "reasonably necessary" under the circumstances or will be limited solely to those acts which are "necessary." *Kell* does not specify which standard lower courts should apply.

The recognized right of an easement holder to take advantage of technological improvements presents another problem for the court. *Kell* initially appears to limit the right. Upon further consideration, however, it is apparent that the court has simply qualified this right, included it in the rights of the easement holder generally, and balanced it against the interests of the grantor-owner.[45] Although it would be easy to criticize the court for offering no clear guidelines on when technological advances may be used, this is an area where the facts of each case are determinative and ad hoc decisions may be unavoidable.

The basic reasoning in the opinion is sound and it is evident that the court could have ended its discussion and held for the Kells at this point. Instead, Justice McHugh added a lengthy discussion of the hazards of herbicides in general and aerial spraying in particular.[46] In doing so, the court cited with approval the language of selected jurisdictions which characterized aerial spraying of toxic herbicides as "hazardous activity."[47] Although this dicta may support the court's holding and be useful in distinguishing between "reasonable" and "necessary" acts, it might have been omitted without affecting the decision. Perhaps the court felt compelled to address the problem and recognize the hazards involved as a matter of public policy. Whatever the reason, this discussion does show that the court is responsive to public concern over the perplexing aspects of pollution caused by agricultural chemicals. Specifically, the court was quick to point out that one of the herbicides used on the Kell property contained the same two ingredients as "Agent Orange."[48] In any event, whether significant in this case or not, these comments may have an eventual impact in the area of tort law. At the very least, it is an indication of how the court will rule when called upon to define the degree of care required to avoid tort liability for aerial spraying.

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[44] 289 S.E.2d at 456.

[45] *Id.*

[46] *Id.* at 454-56.

[47] *Id.* at 456.

[48] *Id.* at 452 n.2. "Agent Orange and its associated military and civilian herbicides containing 2, 4, 5-T with the contaminant dioxin have had far-reaching impacts. These herbicides were obviously utilized before the full ramifications of their use and effects were sufficiently known." Meyers, *Soldier of Orange: The Administrative, Diplomatic, Legislative and Litigatory Impact of Herbicide Agent Orange in South Vietnam*, 8 B.C. ENVTL. AFF. L. REV. 159, 197 (1979).

Finally, the court cited and heavily relied upon *Stirling v. Dixie Electric*[49] in support of its conclusion in favor of the Kells' position. In *Stirling,* a landowner sought compensation for damages to trees, plants and shrubs occasioned when the power company used a helicopter to spray toxic herbicides over its right-of-way.[50] In holding for the landowner, the Louisiana court noted that "the extent to which the chemical was used was excessive" and "not permissible under the circumstances."[51] The court added that if the removal of trees and shrubs becomes "necessary . . . it must be in a reasonable manner, with due regard to the rights of all parties."[52]

Stirling is basically an extension of the common law principle that both parties to an easement have certain rights and interests and each must, as far as possible, respect the other's use.[53] Although the *Stirling* opinion is well reasoned, it is important to note that the court made no reference to authority on this particular point. Furthermore, the court did not specifically rule out the use of herbicides when it stated that "perhaps the application of the chemical could have served the desired purpose had it been applied by means other than a helicopter and on a more selective basis."[54] Although the facts appear identical, the cases are distinguishable on the approaches taken by the courts. In *Kell* the primary concern was the relative property rights of parties to easement agreements. Actual damages were not discussed and the opinion implies that even potential interference constitutes grounds for an injunction. *Stirling,* on the other hand, was an action seeking compensation for damages along and outside the servitude. Actual damages were shown and experts testified on that point. Thus, although *Stirling* does somewhat support the *Kell* reasoning, it is clearly not directly on point.

V. Conclusion

Kell leaves little doubt that, in the absence of a specific indenture provision to the contrary, the aerial application of toxic herbicides will not be permitted over easement right-of-ways. Unfortunately, it is not clear what other rights of the easement holder may have been affected by the decision, and the question of whether the easement owner may continue doing what is "reasonably necessary" or will be limited solely to "necessary" acts remains unanswered.

The decision clearly favors the individual landowner at the expense of the easement holder, but it is the consumer who will feel the most immediate impact. Aerial spraying is the most cost-efficient method of controlling unwanted

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[49] 334 So. 2d 427 (La. 1977).

[50] The pertinent part of the servitude agreement gave the grantee the right "to cut and trim trees and shrubbery to the extent necessary to keep them clear of said electric line . . . and to cut down from time to time all dead, weak, leaning or dangerous trees that are tall enough to strike the wires in falling. . . . " *Id.* at 428.

[51] *Id.* at 429.

[52] *Id.*

[53] *See* Wallis v. Luman, 625 P.2d 759 (Wyo. 1981).

[54] 344 So. 2d at 429.

vegetation and any restriction on its use will naturally result in higher right-of-way maintenance costs to the utility and ultimately higher rates to the consumer. On the other hand, the beneficial effects of less exposure to chemical hazards must not be overlooked. When viewed in this light the decision is clearly public interest oriented.

Although the primary concern in *Kell* dealt with property rights, the decision may also have an impact in the area of tort law. By recognizing aerial spraying of herbicides as "hazardous activity" West Virginia has impliedly adopted a higher standard of care for those involved in this activity.

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