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Waters and Water Courses-Natural Lakes and Ponds-Nature and Extent of Riparian Rights

WATERS AND WATER COURSES—NATURAL LAKES AND PONDS—NATURE AND EXTENT OF RIPARIAN RIGHTS—John Sanders, Jr., plaintiff, was owner of certain real estate, approximately twenty acres of which was covered with a nonnavigable body of fresh water. Practically all of said lake was on the land of the plaintiff except a very small portion thereof which extended across plaintiff's east line onto land owned by one Artie D. Fast. The plaintiff averred that the part of his land so covered by water was very valuable and profitable as a pleasure and recreation resort for rowing, fishing and other pastimes, and that he so used and derived profit therefrom. The plaintiff brought this action against the defendant, a licensee of Artie D. Fast, to enjoin the defendant from entering upon land of plaintiff (covered by the lake) and boating and fishing thereon, and anchoring his boat to the soil covering plaintiff's land over plaintiff's objection. Defendant demurred to this complaint for want of sufficient facts, and the demurrer was sustained. Held, where there are several riparian owners on a nonnavigable lake, proprietors and their lessees and licensees may use surface of whole lake for boating and fishing, if not interfering with the reasonable use of waters by other riparian owners.[1]

The precise holding of the above case would seem, from the statement of the court, to represent a well settled, undisputed statement of the law. However, a search of the very few authorities on the point involved has not proved this to be so.

The court, in its opinion, based part of its reasoning on State v. Lowder,[2] the only Indiana case touching, either directly or indirectly, upon the issue involved. In this case, Lowder and others were prosecuted for having unlawful possession of a seine and for taking fish therewith, in violation of the statute. The Supreme Court, in passing on the correctness of several instructions given in that case, among which was one that told the

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[17] (1898) 12 Colo. App. 220, 55 Pac. 750.

[1] Sanders v. De Rose (1933), 186 N. E. 388.

[2] (1926), 198 Ind. 234, 153 N. E. 399, 401.

jury that "if the pond was located on two or more tracts of land owned by different persons, it would not be a private pond," said that "these instructions correctly declared the law." The pond in question, however, was connected with public waters in times of heavy rainfall and frequently in other seasons of the year, by a channel, and the Supreme Court was attempting to formulate a definition of "private pond" in light of a statute forbidding seining of fish from public waters. Whether such an interpretation is entirely applicable to the case in point, is open to question.

Having exhausted the only Indiana authority on the subject, we are free to examine the authority from other states upon the same issue.

Such authorities are unanimously in accord with the conclusion that an unnavigable lake, that is, a lake which is not really useful for navigation although of considerable size compared to fresh water streams, may be the subject of private property.[3] However, upon the question of whether such a lake, if covering the land of two or more proprietors is still subject to the rights of private ownership, there is a definite split of authority evident in the few cases touching this issue.

Agreeing and in accord with the principal case we find Peters v. State,[4] a Tennessee case, which said concerning right of control of fish in a large body of water covering the land of two owners, "To exercise this unlimited control, the property must be essentially private. It must be a sheet of water covering exclusively his own land and such as no one could forbid him its use any more than the cultivation of the soil underneath if it was free of the water."

So also is Reynolds v. Commonwealth,[5] a Pennsylvania decision, saying in part, "If the waters of a pond cover a large surface of land, and one whose lands are covered by a part only of the water, places fish therein for the purpose of propagation, it does not thereby become a 'private pond.' The question is not whether he has a right which may be trespassed on, but is the whole body of water private within the meaning of the statute. . . . It is not both public and private. The pond must be treated as an entirety. Either the whole or none is private."

It is to be noted that both of the above cases are dealing solely with the question of control of the fish in the entire lake, and not with the question of the rights to exclusive use of the part of the lake covering the owner's own land.

The only leading authority in support of the principal case is a Michigan case, Beach v. Hayner,[6] whose decision the Indiana court adopted in toto as the ruling in the principal case.

The Michigan court based its reasoning on the reasoning of the Massachusetts courts[7] in similar situations. This reasoning briefly was that the public should have and has universally had the right to use such lakes in common. Gould on Waters says, however, "In Massachusetts the colony ordinance of 1641 provided in substance that great ponds containing more

[3] Gould, Waters (1900, 3rd ed.), Sec. 83, 84; Ledyard v. Ten Eyck (1862), 36 Barb. 102; Cobb v. Davenport (1867), 32 N. J. Law 369, 97 Am. Dec. 718; Shandalee Camp v. Rosenthal (1929), 233 N. Y. S. 11, 133 Misc. Rep. 502.

[4] (1896), 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114.

[5] (1880), 93 Pa. St. 458.

[6] (1919), 207 Mich. 93, 173 N. W. 487, 5 A. L. R. 1052.

[7] Inhabitants of West Roxbury v. Stoddard (1862), 7 Allen (Mass.) 158.

than ten acres of land, and lying in common, though within the bounds of a town should be free for fishing and fowling. . . . This is the foundation of the law of that state upon the subject."[8] Thus it can be seen that a unique situation in the case of one state has been responsible for law followed and adopted by another state whose own early law was free from such colonial influence. Similar to the Massachusetts development we find Maine and New Hampshire.[9]

In spite of these isolated decisions, the weight of authority appears to be the other way. There are a number of courts, and at least one leading text writer, Tiffany,[10] who hold as a general proposition that one who owns the land under non-tidal waters has the exclusive rights to fish thereover.[11] These cases deal with the rights of the owner of a portion of the bed as against the general public, and do not touch directly on the rights of such owner as against other part owners. Nevertheless, it is difficult to find any difference in principle between a stranger and an adjoining owner when applied to the exclusiveness of one's right over his own land, even though covered by water.

It is not necessary, though, to rely on these cases very heavily; for there are a number of cases with fact situations almost identical to that of the principal case, where the courts expressed an opinion of law entirely opposite to that expressed by the Indiana court.

Contra to the ruling of the principal case we find a number of New York decisions, all of rather recent date. These cases hold that the principles of private ownership apply to the bed of a small lake the same as to other lands; and an owner of a part of the bed is limited as to bathing, boating and fishing to the waters of the lake lying over that part of its bed which he owns;[12] and that the owner of a portion of bed of lake has exclusive right of boating, bathing and fishing thereon.[13] The court in one instance said that it would not be equitable to allow the owners of a small strip or portion of land covered by such a lake to use the whole lake at will for purposes of business.[14]

Apparently in accord with this doctrine, and cited by the New York courts, is an Ohio decision where the court restrained the defendants, in a situation similar to that of the principal case, from use of any portion of the lake covered by the plaintiff's grants.[15] For similar reasoning, there is also another Ohio case, The Bass Lake Co. v. Hollenback.[16]

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[8] Gould, Waters (1900, 3rd ed.), Sec. 84.

[9] Note in 5 A. L. R. 1052.

[10] Tiffany, Real Property (1920, 2nd ed.), Sec. 309.

[11] State v. Theriault (1898), 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695; Cobb v. Davenport (1867), 32 N. J. Law. 369, 97 Am. Dec. 718; Adams v. Pease (1818), 2 Conn. 481; Commonwealth v. Chapin (1827), 5 Pick (Mass.) 199, 16 Am. Dec. 368; People v. Platt (1819), 17 Johns (N. Y.) 195, 8 Am. Dec. 382; Baylor v. Decker (1890), 133 Pa. 168, 19 Atl. 351.

[12] Commonwealth Water Co. v. Brunner (1916), 161 N. Y. S. 794, 175 App. Div. 153; Gouverneur v. National Ice Co. (1892), 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, 30 Am. St. Rep. 669; Tripp v. Richter (1913), 158 App. Div. 136, 143 N. Y. S. 563.

[13] Shandalee Camp v. Rosenthal (1929), 233 N. Y. S. 11, 133 Misc. Rep. 502.

[14] Commonwealth Water Co. v. Bruner (1916), 161 N. Y. S. 794, 175 App. Div. 153.

[15] Lembeck v. Nye (1890), 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828.

[16] (1896), 11 Ohio C. C. 508, 5 Ohio C. D. 242.

Likewise, the Illinois court in Beckman v. Kreamer,[17] said, "A right to take fish belongs so essentially to the right of soil in streams or bodies of water where the tide does not ebb and flow, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to-wit, to the thread of the stream, where he owns upon one side only. Within these limits, by the common law, his right of fishery is sole and exclusive, unless restricted by some local law, or well established usage of the State, where the premises may be situated."

Also in Washington and Pennsylvania, the courts even went so far as to say that a part owner of a small lake or nonnavigable stream may fence off his portion.[18]

It might be interesting to state briefly the English law upon the question involved in the principal case. There the general rule sems to be that the public has no right of fishing in non-tidal lakes, as the title to such lakes is in the riparian owners.[19] In spite of this, however, the English law also says that a part proprietor may boat and fish in the whole lake,[20] and that the rights of boating, fishing and fowling are to be enjoyed over the whole water space by all the riparian proprietors in common.[21] This has been followed, of course, in the Dominion of Canada, with the exception of the province of Quebec, where the courts adopted a rule along the same lines as that expounded by the New York courts, previously explained.[22]

Irrespective, however, of the authority upon the main issue, there is another point which the Indiana court seems to have overlooked in the decision of the principal case.

The plaintiff alleges that the defendant anchored his boats to the soil and the land beneath the water. By demurring to this complaint the defendant thereby admitted such allegations. This would seem clearly to constitute a trespass, disregarding the question of the defendant's use of the water of the lake.

The general rule seems to be that land under water is private to same extent as other realty, and user thereof without permission would constitute a trespass.[23] The Indiana cases clearly establish that whatever portion of the bed of a lake that is covered by the grant is the subject of private ownership.[24] The United States Supreme Court in Hardin v. Jordan reenforces the decisions which affirm the private ownership of beds of small lakes and ponds.[25]

R. S. O.

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[17] (1867), 43 Ill. 447; 92 Am. Dec. 146.

[18] Griffith v. Holman (1900), 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 173, 83 Am. St. Rep. 821; Smolter v. Boyd (1904), 209 Pa. 146, 66 L. R. A. 829, 103 Am. St. Rep. 1000, 58 N. W. 144.

[19] Mackenzie v. Bankes (1878), L. R. 3 App. Cas. 1324, and note to 5 A. L. R. 1052; Johnston v. O'Neill (1911), 27 L. R. 545.

[20] Menzies v. Macdonald (1856), 36 Eng. L. & Eq. Rep. 20, 2 Macq. H. L. Cases 463.

[21] Mackenzie v. Bankes (1878), L. R. 3 App. Cas. 1324, and note to 5 A. L. R. 1052.

[22] Tetreault v. Lewis (1900), Rap. Jud. Quebec, 19 C. S. 257, note to 5 A. L. R. 1052.

[23] White v. Knickerbocker Ice Co. (1930), 172 N. E. 452, 254 N. Y. 152.

[24] Ridgway v. Ludlow (1877), 58 Ind. 248; Edwards v. Ogle (1881), 76 Ind. 302; Stone v. Rice (1889), 121 Ind. 51, 6 L. R. A. 387.

[25] (1890), 140 U. S. 391, 35 L. ed. 428.