Notre Dame Law Review

Volume 13 | Issue 3 Article 1

3-1-1938

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NOTRE DAME LAWYER

A Quarterly Law Review

VOL. XIII MARCH, 1938 NO. 3

COMMON OF PISCARY

OUTSIDE of its value to the profession for the legal questions discussed, this article will be of little interest to the person who has never experienced the thrill from the strike of a leaping trout or a fighting bass.

The right of the public to fish in waters of states such as Michigan becomes an important business factor. Michigan's second greatest industry is its tourist business. Other states, such as Wisconsin, Minnesota and New York, hold out inducements to tourists to visit their respective states. Michigan especially advertises its lakes and streams and the fishing opportunities therein provided.[1]

It will thus be observed that, independent of the recreational feature of the right of the public to fish in the lakes and streams of these various states, this right has great potential value as an inducement to tourist trade.

The law as to the right of fishery has back of it an ancient history. Intimately connected with this subject is the law

1 Michigan for the year 1936 issued 478,795 resident fishing licenses and 115,292 nonresident fishing licenses. The American Automobile Association, Washington, D. C., conservatively estimates that $315,000,000 was left in the State of Michigan in 1936 by automobile tourists; in Wisconsin $200,000,000; in Minnesota $90,535,000; in Maine $100,000,000 and in New York $198,000,000.

relating to navigable waters. A treatise of great length might be written discussing the various legal phases of this interesting and important subject. In describing the different kinds of fisheries the words "several," "exclusive," "common," and "free" are used. We are here, speaking generally, interested only in the common of piscary or free right of fishery in the public.

The right was a matter of controversy prior to the granting of the Magna Charta in the year 1215 by King John. By that charter it was directed that rivers that were fenced should be laid open and grants of exclusive fishery for the future were prohibited.

Prior to the Magna Charta, the Angles and Saxons had invaded and conquered England in the fifth and sixth centuries. They were an energetic people, loving freedom, and were excessively fond of outdoor sports, such as hunting and fishing. These characteristics were found in the Norsemen who occasionally made war upon the Anglo-Saxons and in their raid left behind them a portion of their people who mingled and became a part of the Britons.

Until the Normans invaded England such a thing as regulations concerning the right of fishery was unknown. The streams, and the fish within their waters, were common property and were free to be taken by the people generally.

The Normans strived for individual power and dominion. The great barons demanded, and William and his successors conceded to them, the right of private fishery. The king, however, reserved the sea, the arms thereof and the rivers entering therein, so far as the tide ebbed and flowed, because it was necessary to have access to the bays and rivers for navigation purposes. This class of waters was called public and the right of the public to fish therein was conceded because they were in fact public waters.

There grew up in the early legal history of England a series of distinctions of the right of fishery. These were di-

vided into the "several right of fishery," the "free right of fishery," and the "public" or "common right of fishery." The public right of fishery was the common right to take fish from the waters over which the king held dominion. Much litigation arose in England over these rights and alleged violations.

Among the principles which were established it was held that in a free fishery a man had a property in the fish before they were caught; in a common of piscary or public fishery and in a several fishery not until they were caught; that a public river is a public highway, and this is its distinguishing characteristic; that the right to common of fishery was vested in the people in all public rivers.[2]

In the early English history the public rivers were the rivers which were used for navigation and extended to where the tide ebbed and flowed.

In the early history of the United States, and particularly in the Northwest Territory, the right of public fishery in the streams and lakes was acquiesced in for many years, but landed proprietors, in imitation of their Norman ancestors, began to exclude the public from the streams running through private lands, which gave rise to litigation especially in the States of Michigan and Wisconsin.

The people of these states, since the adoption of their constitution, acted upon the belief that the right of public fishery existed in all of the streams of the state. They established hatcheries for the propagation of fish wherewith the streams might be stocked so that the supply would not be exhausted. They have established a Department of Conservation for the purpose of guarding, controlling and protecting the fish in these streams. Hundreds of thousands of dollars of the taxpayers' money have been expended to provide for public recreation and enjoyment in following this

2 2 Bl. Comm. 39; Coke on Littleton 122; Hargrave's Notes 181; Lord Hale, De Jure Maris II.

pastime. In these modern times not only are these resources used for industrial enterprises, but with the congestion and stress of city life, have become a necessity for rest and recreation. These blessings which Nature has provided ought not to be taken from the people generally except upon the most compelling legal reasons.

The common right of fishery is substantially in every case determined by ascertaining whether or not the stream or lake in question is public or navigable water. In the decisions a difference is sometimes made between public and navigable waters. This, however, is a distinction without any substantial difference.

In approaching the question of the rights of the public and the riparian owner to the beneficial uses of our streams and lakes, it is well to keep in mind the provisions of the Ordinance of 1787 which was passed for the Government of the United States northwest of the Ohio River, upon the cession of this territory by Virginia to the United States. This Ordinance provides:

"The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free as well to the inhabitants of the said territory as to the citizens of the United States."

This Ordinance has been referred to time and again by the courts in considering the rights of the public in navigable waters in this territory.

It is important at this point to keep in mind what the courts have said constitutes navigable waters. The Michigan Supreme Court, in the early case of *Moore v. Sanborne*,[3] laid down the following rule:

"Navigability extends to embrace all streams upon which, in their natural state, there is capacity for valuable floatage, irrespective of the fact of actual public use, or the extent of such use . . . nor . . . can the fact that a floatable stream has not been used by the public or has

[3] 2 Mich. 519, 524, 525 (1853).

only been used by persons following a particular occupation, deprive such stream of its public character."

Again, approving *Brown v. Chadburn,*[4] there cited:

" 'The true test, therefore, to be applied in such cases is, whether a stream is inherently and in its nature, capable of being used for the purpose of commerce for the floating of vessels, boats, rafts or logs.' "

And again, navigation by boat

"is too narrow a rule upon which, in this country, to establish the rights of the public, and as already intimated, such is not the rule in any of the States. The servitude of the public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use."

This is the rule generally followed in other states, as well as in Michigan.[5]

The leading case upon the right of the public to fish in such navigable streams as above described is *Collins v. Gerhardt.*[6]

Originally, the courts held the title of navigable streams to be in the state. For some reason, which is not clearly

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[4] 31 Me. 9 (1849).

[5] The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. Ed. 999 (1871); The Montello, 20 Wall. (87 U. S.) 430, 22 L. Ed. 391 (1874); United States v. Holt State Bank, 270 U. S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926); United States v. Utah, 283 U. S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); Toledo Liberal Shooting Co. v. Erie Shooting Club, 90 Fed. 680 (C. C. A. 6th, 1898); Harrison v. Fite, 148 Fed. 781 (C. C. A. 8th, 1906); Gratz v. McKee, 270 Fed. 713 (C. C. A. 8th, 1920); Moore v. Sanborne, 2 Mich. 520, 59 Am. Dec. 209 (1853); Lorman v. Benson, 8 Mich. 18, 17 Am. Dec. 435 (1860); Tyler v. People, 8 Mich. 319 (1860); Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 18 Am. Rep. 184 (1875); Att'y Gen'l v. Evart Booming Co., 34 Mich. 462 (1876); White River Log, etc., Co. v. Nelson, 45 Mich. 578, 8 N. W. 587, 909 (1881); Buchanan v. Grand River, etc., Log Co., 48 Mich. 364, 12 N. W. 490 (1882); Burroughs v. Whitwam, 59 Mich. 279, 26 N. W. 491 (1886); Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405 (1888); City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498, 28 Am. St. Rep. 276 (1891); Baldwin v. Erie Shooting Club, 127 Mich. 659, 87 N. W. 59 (1901); People v. Horling, 137 Mich. 406, 100 N. W. 691 (1904); Cole v. Dooley, 137 Mich. 419, 100 N. W. 561 (1904); Giddings v. Rogalewski, 192 Mich. 319, 158 N. W. 951 (1916); Winans v. Willetts, 197 Mich. 512, 163 N. W. 993 (1917); Putnam v. Kinney, 248 Mich. 410, 227 N. W. 741 (1929).

[6] 237 Mich. 38, 211 N. W. 115 (1926). See: Ne-Bo-Shone Ass'n v. Hograth, 81 Fed. (2d) 70 (C. C. A. 6th, 1936); Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273 (1898); Lincoln v. Davis, 53 Mich. 375, 19 N. W. 103 (1884); Ainsworth v. Hunting and Fishing Club, 153 Mich. 185, 116 N. W. 992 (1908); State v. Fishing and Shooting Club, 127 Mich. 580, 87 N. W. 117 (1901); People v. Collison, 85 Mich. 105, 48 N. W. 292 (1891).

stated, the Michigan court held that the title to subaqueous soil was in the riparian owner.[7]

In order to meet the argument that the ownership of subaqueous soil in the riparian owner carried with it all of the beneficial uses of the stream possibly outside of the right to navigate, the trust doctrine was adopted by the courts. The trust theory and the right of the public to fish in navigable waters are complementary, each stating the same rule, one from the standpoint of the public right, the other from the standpoint of the land owner's obligation.

Navigation is the paramount right in public navigable waters. The common right of fishery can be said to occupy a place side by side with navigation though sometimes obliged to give way to the navigation rights, and sometimes navigation rights having to give way to fishery rights.[8]

These are the dominant estates of the inhabitants over the servient estates of the owners of the bed of these public navigable waters. Fish in a state of freedom in navigable waters are *ferae naturae* and the property of the people and the state in whose waters they may be, not as a private proprietor but in their sovereign capacity, as the representative and for the benefit of all people in common. No individual of the state can claim particular exclusive ownership therein. In the exercise of the right of fishery the individual citizen of the state may pursue and capture in such waters over the submerged lands those fish inhabiting the same without being a trespasser or wrongdoer, and he may do this lawfully without the consent of the owner of the submerged lands. Whether the trust theory of title to and ownership of subaqueous land in public navigable waters ever had any sound philosophical basis or not, it now exists. Possibly like Topsy, it "just grew." At all events, it was so declared and is the common-law doctrine today in the state of Michigan

7 Lorman v. Benson, 8 Mich. 18 (1860).
8 Wright v. Mulvaney, 78 Wis. 89, 46 N. W. 1045 (1890).

and supports the public navigation and fishery rights in all such waters. The trust theory was best expressed in the language of Mr. Justice McDonald in *Collins v. Gerhardt* [9] as follows:

"The plaintiff, though owner of the soil, has no greater fishing rights than any other citizen. Their rights are equal and correlative. So long as water flows and fish swim in Pine River, the people may fish at their pleasure in any part of the stream subject only to the restraints and regulations imposed by the State. In this right they are protected by a *high, solemn* and *perpetual* trust, which it is the duty of the State to forever maintain. Of course, in exercising this right people cannot go upon the uplands of riparian owners in order to gain access to the water. If they do that they are guilty of trespass." [10]

At this point it may be interesting to note the right of fishery in wholly private lakes or ponds where there are several riparian owners. The courts generally hold that where a person is an owner of a portion of the riparian rights, either he or his licensee has a right to fish in any portion of the waters of such private lake or pond.[11]

As a summary we conclude: (1) The public have a right to fish in all public or navigable waters; (2) That a stream is navigable when in its natural state it has the capacity to float logs; (3) That floatability is not separable from navigability as has been frequently argued in our courts; (4) The trust doctrine has been applied where the courts have held the title to subaqueous soil to be in riparian owners so that the riparian owner holds the land as a servient estate subject to the right of the public to fish thereon; and (5) That private lakes may be fished in any part thereof by any of the riparian owners or their licensees.

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9 *Op. cit. supra* note 6.

10 See: State v. Venice of America Land Co., 160 Mich. 680, 125 N. W. 770 (1910); Kavanaugh v. Rabior, 222 Mich. 68, 192 N. W. 623 (1923); Nedtweg v. Wallace, 237 Mich. 14, 208 N. W. 51 (1926); Kavanaugh v. Baird, 241 Mich. 240, 217 N. W. 2 (1928); Hot Springs Lumber & Mfg. Co. v. Revercomb, 106 Va. 176, 55 S. E. 580 (1906).

11 Beach v. Hayner, 207 Mich. 93, 173 N. W. 487 (1919); Douglas v. Bergland, 216 Mich. 380, 185 N. W. 819 (1921); Putnam v. Kinney, 248 Mich. 410, 227 N. W. 741 (1929).

The courts should continue to follow the ruling in *Collins v. Gerhardt,* to the end that the citizens of our country and the thousands yet unborn may not be denied one of God's greatest blessings.

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