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CONSTITUTIONAL LAW - DUE PROCESS - FISHING RIGHTS IN THE PUBLIC WATERS OF MICHIGAN

RECENT DECISIONS

CONSTITUTIONAL LAW — DUE PROCESS — FISHING RIGHTS IN THE PUBLIC WATERS OF MICHIGAN — The Ne-Bo-Shone Association, Inc., is an Ohio corporation which owns property on both banks of the Pine River for some distance. Following the decision of the Michigan Supreme Court in *Collins v. Gerhardt*[1] that the stream is navigable and public, the complainant association was ordered to remove obstructions in the stream which hampered the free use of the stream by the public for fishing purposes. Thereupon complainant sought an injunction against certain public officials from taking action to remove these obstructions, claiming that it has the right to exclude the public from this portion of the Pine River, and that the decision in *Collins v. Gerhardt* is not applicable because it disturbs a rule of property and denies due process of law. The United States District Court *held* that a decree of dismissal be entered. First, the court said that federal courts will not interfere by injunctive process with law enforcement by state officials, especially where the basis of jurisdiction is none other than the accident of residence, unless the "path is clear"; second, that the decision of the Supreme Court of Michigan did not disturb a rule of property and therefore did not deny due process of law; third, that as an independent matter, if the court were not bound by local rules of law, it would decide the same way because navigability determines the public character of the stream and affixes certain public rights therein, including, among other rights, the coequal rights of fishing. *Ne-Bo-Shone Association, Inc. v. Hogarth et al.*, (D. C. W. D. Mich. 1934) Commerce Clearing House Requisition Number 110847.

The decision, in its refusal to grant discretionary injunctive relief[2] and in following the rule that local rules of law govern in federal courts,[3] seems sound;

[1] 237 Mich. 38, 211 N. W. 115 (1926).

[2] The attitude of the Supreme Court is clear:

"Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin. . . . There must be reluctance even greater when the rights are strictly local, jurisdiction having no other basis than the accidents of residence. The need is clamant in such circumstances for cautious hesitation. . . . Our process does not issue unless the path is clear." Hawks v. Hamill, 288 U. S. 52 at 61, 53 Sup. Ct. 240 (1933).

See Massachusetts State Grange v. Benton, 272 U. S. 525 at 527, 47 Sup. Ct. 189 at 190 (1926); Cavanaugh et al. v. Looney, Attorney General of Texas, 248 U. S. 453 at 456, 39 Sup. Ct. 142 at 143 (1919).

[3] The rights of riparian owners in navigable waters are matters of state or local law. Fox River Paper Co. v. Railroad Commission, 274 U. S. 651 at 655, 47 Sup. Ct. 669 at 671 (1927); Port of Seattle v. Oregon and Washington R. R., 255 U. S. 56 at 63, 41 Sup. Ct. 237 at 239 (1921); St. Louis v. Rutz, 138 U. S. 226 at 242, 11 Sup. Ct. 337 at 343 (1891); Whitaker v. McBride, 197 U. S. 510 at 511, 25 Sup. Ct. 530 at 531 (1905).

It is true, however, that the federal courts may determine such matters inde-

the observations concerning public rights in the public waters of the State represent an intelligent and public-minded approach to the problem of the use by the public of such waters for other than purely commercial and pecuniary purposes. The problem presented in the principal case could arise only in those States where the rule of property is that the riparian owner on a navigable stream owns his share of the bed of the stream. The court seems correct in deciding that as a question of local law it had been settled that the rights of the riparian owner on a navigable stream in Michigan are subordinate to the superior public right to use the waters for public purposes, including the right of fishing.[4] The ownership of the beds of navigable streams of the State is in the riparian owners, but the water of such streams is impressed with a trust, inalienable, for public uses.[5] The test of navigability is one of fact,[6] and the capacity of the stream for public uses and not the frequency of such use determines its navigable character.[7] At one time public waters were only susceptible of use for transportation and commercial pursuits. The increase in population, the rise in the standard of living, the shortening of hours of labor, have made the use of leisure time a public problem. Water sports, fishing, boating for recreation and pleasure have become important uses for leisure time, and these factors indicate that the present-day public uses of water should not be confined to transportation or commerce of a pecuniary nature. If, under present conditions of society, bodies of water are used for public purposes other than commercial navigation, these uses should render the waters public. Some courts recognize that the susceptibility of waters for use by sailing boats, rowing, fishing, bathing, skating, renders them public waters.[8] While in Michigan the court has never had occasion to go this far, it has in the floatage cases determined the public character of waters by reference to the pub-

pendently if the local law or decisions do not establish a clear rule. Edward Hines Yellow Pine Trustees v. Martin et al., 268 U. S. 458 at 463, 45 Sup. Ct. 543 at 545 (1925); Kuhn v. Fairmont Coal Co., 215 U. S. 349 at 360, 30 Sup. Ct. 140 at 143 (1910). See WILLIAMS, FEDERAL PRACTICE, 2d ed., 352, 353, 356, 366 (1927).

[4] But in this case, although there was but one decision on the question of fishing rights, this one decision was well reasoned and represented no significant departure from the prior decisions of the court so that the decision could fairly be said to have determined the rule of property in Michigan. See WILLIAMS, FEDERAL PRACTICE, 2d ed., 353 (1927).

[5] Collins v. Gerhardt, 237 Mich. 38 at 46, 211 N. W. 115 at 117 (1926). See a critical comment on this case in 25 MICH. L. REV. 654 (1927).

[6] Collins v. Gerhardt, 237 Mich. 38, 211 N. W. 115 (1926); The Daniel Ball, 10 Wall. (77 U. S.) 557 at 563 (1870).

[7] Moore v. Sanborne, 2 Mich. 520 (1853); Collins v. Gerhardt, 237 Mich. 38, 211 N. W. 115 (1926); The Montello, 20 Wall. (87 U. S.) 430 at 441 (1874); Economy Light and Power Co. v. United States, 256 U. S. 113 at 123, 41 Sup. Ct. 409 (1921).

[8] See Lamprey v. State, 52 Minn. 181, 53 N. W. 1139 (1893); Nekoosa-Edwards Paper Co. v. Railroad Commission, 201 Wis. 40, 228 N. W. 144 (1929). In State v. Korrer, 127 Minn. 60 at 63, 148 N. W. 617 at 618 (1914), the court said: "If a body of water is adapted to use for public purposes other than commercial navigation it is to be held public water, or navigable water, if the old nomenclature is preferred. Boating for pleasure is considered navigation, as well as boating for mere pecuniary profit."

lic necessity for their use; very early the court made an important advance by recognizing the right of floatage in the waters of the State as a public right.[9] And in *Collins v. Gerhardt*[10] it seems clear that the court recognized that fishing is one of the rights of the public in navigable waters.[11] Since the public has the right of fishing in navigable streams,[12] it follows that members of the public may navigate the stream, on the submerged land of the riparian owner, without molestation.[13] The Supreme Court of Michigan has also recognized that the right to navigate includes such rights as are incidental to that right and necessary to render it reasonably available.[14] It would seem that the same rule should apply to the analogous and coequal right of fishing in public waters;[15] the public

[9] "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. . . ." Moore v. Sanborne, 2 Mich. 520 at 525 (1853).

It is, however, true that a narrow view of navigability was taken in Michigan in City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661 (1891), and Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308 (1874), but the progressive and sound view of Moore v. Sanborne was again adopted in the case of Collins v. Gerhardt, 237 Mich. 38, 211 N. W. 115 (1926).

[10] 237 Mich. 38 at 50, 211 N. W. 115 at 119 (1926). Justice Fellows wrote: "I do not think it can be said that fishing is an incident of navigation. The navigability of a stream or lake, however, fixes its public character, that of public water, and the right of fishing in public waters is a public right belonging to the people of the state."

[11] In Wisconsin, where the ownership of the bed of the navigable stream is in the riparian owner, there is the same view toward fishing which prevailed in the Collins v. Gerhardt case. See Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273 (1898); Nekoosa-Edwards Paper Co. v. Railroad Commission, 201 Wis. 40, 228 N. W. 144 (1929). Even the right of hunting in navigable waters is considered public. Diana Shooting Club v. Husting, 156 Wis. 261, 145 N. W. 816 (1914). See note of criticism on this case in 27 HARV. L. REV. 750 (1914).

[12] Since the public has an independent right to fish in the public waters of the State, it seems that a more reasonable test for determining the nature of public waters must be evolved. Just as navigability for commercial vessels was not a sufficient test for determining the public character of waters for floating logs, so the test of floatability cannot be conclusive as to the public waters in which the public right of fishing exists. A natural development of a test for such use might be the general adaptability of a stream for purposes of public fishing, in addition to such streams as are commercially navigable or floatable. A general test for determining public waters might be the adaptability of a given body of water for recognized public uses.

[13] On the other hand, in streams which are not navigable the riparian owner has complete control over the waters of the stream, and there is no public right of fishing in such streams. Burroughs v. Whitwam, 59 Mich. 279, 26 N. W. 491 (1886).

[14] Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308 at 318 (1874).

[15] The right to improve in aid of navigation is well recognized by both the Michigan and the United States courts. Scranton v. Wheeler, 113 Mich. 565, 71 N. W. 1091 (1897); Gibson v. United States, 166 U. S. 269, 17 Sup. Ct. 578 (1897); United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 at 70, 33 Sup. Ct. 667 at 675 (1913); Willink v. United States, 240 U. S. 572, 36 Sup. Ct. 422 (1916). Thus in Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82 at 88, 33 Sup. Ct. 679 at 680 (1913), the Supreme Court said: "By necessary implication from the dominant right of navigation, title to such submerged lands is acquired and held

authorities should be able to make incidental and necessary improvements in the condition of a navigable stream for purposes of public fishing.[16]

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subject to the power of Congress to deepen the water over such lands or to use them for any structure which the interest of navigation, in its judgment, may require."

Likewise, structures which the riparian owner places in the stream may be removed in the interest of navigation. In United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53 at 70, 33 Sup. Ct. 667 at 675 (1913), the Court said: "But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river."

[16] Modern fish culture makes necessary the placing of dams, obstruction, protective devices, in streams in order to improve the fishing in a stream, and this right seems analogous to the right of the public authorities to make improvements in aid of navigation. Such improvement of a stream would seem incidental and necessary to the public right of fishing in public (navigable) waters, subject, of course, to the equal right to use the waters for other public purposes.