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WATERS AND WATERCOURSES-FISHING-RIGHT OF PUBLIC IN FLOATABLE STREAMS

R. W. A.
University of Michigan Law School

WATERS AND WATERCOURSES—FISHING—RIGHT OF PUBLIC IN FLOATABLE STREAMS — Through defendants' lands flowed a stream, a little over thirty feet in width and averaging in depth approximately one foot. It had a flow of less than fifty cubic feet per second. The stream was not capable of "commercial travel by any kind of boat" and it was doubtful whether it was "practical to use a boat on it in fishing." Some testimony indicated that in logging days some loose timber had been floated down the stream, but it was also testified by oldsters that it was "never possible to run logs down the stream without the use of dams." In an action by a private citizen and the Attorney General on relation of Hoffmaster (Director of Conservation) to compel defendants to restore the bed of the stream to its former condition by removing barriers and filling in holes dug in the bed at the entrance and exit of the stream, placed there to prevent waders from entering defendants' land, *held*, reversing the trial court, three judges sitting en banc, that defendants must make such restoration. *Rushton, Hoffmaster et al v. Taggart et al*, (Mich. 1943) 11 N.W. (2d) 193.

The court applied Collins v. Gerhardt [1] and Ne-Bo-Shone v. Hogarth,[2] involving a stream somewhat larger. The Michigan law thus seems definitely settled that the public right of fishing extends not only to waters, the beds of which are in public ownership, but also to waters that are navigable or even

[1] 237 Mich. 38, 211 N.W. 115 (1926), discussed fully in 25 MICH. L. REV. 654 (1927).

[2] (C.C.A. 6th, 1936) 81 F. (2d) 70, noted in 32 MICH. L. REV. 858 (1934).

floatable[3] for timber, the beds of which are owned privately. The problem and the pertinent cases have been fully considered in the notes cited. The fact that under the common law both in England and generally in this country, except in Wisconsin and Michigan, the right to fish follows ownership of the bed rather than navigability, is no longer ground for argument in this state.[4] The court, however, is careful to point out that "The instant case does not in any way affect very small trout streams on private property which have not been used by the public for logging or for boating, Burroughs v. Whitwam, 59 Mich. 279, 26 N.W. 491; nor does it cover private lakes and ponds owned by the abutting property owners. As to such bodies of water, the riparian owner has complete control."[5] Nothing in the decision indicates that those fishing these waters thus deemed public may wander outside the boundaries of the streams. One may now wonder what this court would hold with reference to the right of a member of the public to hunt within the boundaries of a highway, the bed of which is in private ownership.

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[3] It seems that it is capability of use for floating rather than actual use therefor that counts. Use, though many years ago, obviously is powerful, if not conclusive, evidence of such capability.

[4] Evidently in the principal case it was urged that the Collins case was an "orphan," hence should be overruled. To this Butzel, J., replied at p. 196: "Even if it is, such status will cease to exist if it is reaffirmed and adopted by this court in the cases at bar." The court thus accepts parenthood, but the child still is lonely!

[5] Principal case at p. 197.