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Municipal Law and Eminent Domain

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> [T]he preamble of an act is instructive of legislative intent, and as such it must be considered that the legislature intended to recognize the rights of Wisconsin citizens to be free from the harmful effects of a damaged environment where it can be shown that the person alleging injury resides in the area most likely to be affected by the agency action in question. Such is the situation in the instant case.[54]

The final issue raised was whether WED has standing to represent its members where the allegations of injury relate solely to the members' individual interests. The court resolved the issue by again adopting the federal view that if an organization, devoted to the protection and preservation of the environment, alleges facts sufficient to show that a member of that organization would have standing to bring the action in his own name, the organization itself has standing to sue in its own name.[55]

JOHN S. JUDE

MUNICIPAL LAW AND EMINENT DOMAIN

In the area of eminent domain, the Wisconsin Supreme Court, during its last term, modified its previous position on the issue of inverse condemnation in *Howell Plaza, Inc. v. State Highway Commission*.[1] Respondent Howell Plaza petitioned the trial court to force the State Highway Commission to proceed with the condemnation of Howell Plaza's property, claiming that the land was already "occupied" by the Commission. The supreme court pointed out that in order for such a request to succeed in the initial stages of the inverse condemnation proceeding, there must have been either a statutory occupation,[2] or a taking of the property such that compensation would be required under the terms of the Wisconsin Constitution.

The respondent alleged that the conduct of the Highway Commission in the various stages of plotting and planning the freeway, short of actual possession, was sufficient deprivation

54. 69 Wis. 2d at 18, 230 N.W.2d at 252.
55. *Id.* at 20, 230 N.W.2d at 253.

1. 66 Wis. 2d 720, 226 N.W.2d 185 (1975).
2. WIS. STAT. § 32.10 (1973).

of property to warrant the bringing of an inverse condemnation suit. The court pointed out that a cause of action by statute[3] may arise prior to actual condemnation by the Highway Commission if the complaint alleges facts which indicate the property owner has been deprived of all, or substantially all, of the beneficial use of the property.

The acts alleged by the plaintiff as constituting a taking of the Howell Plaza property on the part of the Highway Commission were: plotting, planning, and acquiring of other properties along the proposed route; public announcements of the proposed construction; notice to tenants of impending road work; appraisals of land in question; and announcements that just amounts of money were to be paid for any lands condemned. Such steps taken by the Commission were held by the court to be merely preliminary and insufficient to warrant inverse condemnation.

The *Howell Plaza* case goes on, however, to note that the earlier strict test of "taking" or "occupying" set out in *Muscoda Bridge Co. v. Worden-Allen Co.*[4] is not the only test of a "taking." There can be a "taking" and an inverse condemnation suit can be successfully pursued if less than total possession takes place. The court will now look to whether a restriction deprives the owner of all, or substantially all of the beneficial use of his property.[5]

In *Board of Education v. Sinclair*,[6] the court determined that the sale of textbooks to students did not violate Article X, section 3, of the Wisconsin Constitution, which provides in part that:

> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years. . . .[7]

The plaintiff had challenged the school's rights to charge fees for school books and "incidental educational supplies" basing

3. *Id.*
4. 196 Wis. 76, 219 N.W. 428 (1928).
5. 66 Wis. 2d at 726, 226 N.W.2d at 188
6. 65 Wis. 2d 179, 222 N.W.2d 143 (1974).
7. Wis. Const. art X, § 3.

his argument on the "free" school provision of Article X, section 3.

The court denied his challenge on the grounds that "free" meant without cost for the surrounding physical facilities—the school building itself. It interpreted the portion of Article X, section 3, declaring that schooling would be "without charge for tuition" to mean that there is to be no charge for instruction. Included in this category of materials for which there is to be no charge are pencils, pens, notebooks and paper. It was further determined that textbooks are only to be provided free to indigents and that other students must buy or rent the books.[8] Such a holding had recently been sustained by the Illinois Supreme Court.[9]

The subject of public assistance was dealt with this term in *State ex rel. Sell v. Milwaukee*[10] where the Milwaukee County Welfare Department was found to have violated its statutory duty[11] to make a factual investigation of an applicant's qualifications for relief.

Here, the plaintiffs were summarily denied temporary assistance without a hearing or factual determination as to their need for relief, simply because they refused to comply with a welfare department rule which required surrender of auto license plates and title as a prerequisite for admission to temporary assistance.

The court pointed out that a proper determination of dependency

> . . . must include a finding as to the value of money, income, property, or credit presently available to the applicant, as well as a determination of the applicant's level of need for the services and commodities specified in sec. 49.01(1).[12]

When properly assessed, the court points out that relief is to be furnished to anyone whose "need exceeds the value of his presently available assets."[13] The court found that the department policy imposed an unauthorized restriction on obtaining relief in that Wisconsin Statute sections 49.91(1) and (2) do not

8. WIS. STAT. §§ 119.16(5) and 120.12(11) (1973).
9. Homer v. Board of Education, 47 Ill. 2d 480, 265 N.E.2d 616 (1970).
10. 65 Wis. 2d 219, 222 N.W.2d 592 (1974).
11. WIS. STAT. §§ 49.02(1), (2) (1971).
12. 65 Wis. 2d at 224, 222 N.W.2d at 595.
13. *Id.* at 224, 222 N.W.2d at 595.

require relief recipients to be totally without any assets at all. All that is required is that the need exceed their assets.

The case of *Sambs v. Brookfield*[14] delineated the possible liability of municipalities for negligent maintenance of highways. The plaintiff in this action sued the city of Brookfield for negligent maintenance of its highways and claimed waiver of the statutory[15] $25,000 liability limitation for municipalities by virtue of the defendant city's purchase of insurance in excess of $1,500,000.

An accident occurred as a result of an accumulation of ice on a city-maintained road, which caused the driver of the car plaintiff was riding in to skid and hit a utility pole, injuring the plaintiff. An accumulation of water on the road caused the icy conditions which eventually caused the accident. Wisconsin Statute section 81.15 holds the municipality liable for accumulations of snow or ice if present for three weeks, if the accumulation was "natural" as opposed to "artificial."[16] The court here found the three week limitation inapplicable because it felt that the build-up of ice was artificial. The artificial build-up was determined to have been caused by defective or inadequate drainage ditches, which allowed the accumulation to rise beyond that which is normal. The city had received notice, but repeatedly failed to remedy the defect.

The court distinguished *Kobelinski v. Milwaukee Suburban Transport Company*,[17] which failed to find an "artificial" accumulation where a city failed to remove ice once it accumulated. The issue involved there was negligence in removal, as opposed to the present case where the city negligently caused the accumulation. The court stated:

> The purpose of the three week requirement of sec. 81.15 Stats., was stated by this court to be to give the municipalities plenty of opportunity to learn of and remove snow and ice resulting from natural precipitation, not to provide immunity for cases where the municipality has itself negligently created the icy condition.[18]

The issue of damages introduced the problem of whether a

14. 66 Wis. 2d 296, 224 N.W.2d 582 (1975).
15. WIS. STAT. §§ 81.15 and 895.43 (1973).
16. 66 Wis. 2d at 304, 224 N.W.2d at 587.
17. 56 Wis. 2d 504, 204 N.W.2d 415 (1972).
18. 66 Wis. 2d at 307, 224 N.W.2d at 588.

municipality, by purchasing liability insurance, waives the statutory limitation of damages set at $25,000. Relying on a Nevada Supreme Court case,[19] which also dealt with a statutory limitation on liability, the Wisconsin high court held that purchasing of insurance of an amount greater than the statutory maximum could not be considered a waiver. The Wisconsin court had previously held that the purchase of insurance in amounts higher than a statutory maximum was a pro tanto waiver of the maximum when the liability policy specifically provided that an insurer could not raise the defense of governmental immunity.[20] In the *Sambs* case, no such clause existed, and, therefore, no waiver of the $25,000 limitation was found.

Edmonds v. Board of Fire and Police Commissioners[21] overruled *State ex rel. Heffernan v. Board*,[22] which held that in cases of police discipline, the municipal board hearing such complaints need not be any more specific than making a "mere determination of guilt or innocence."[23]

Factually, two Milwaukee police officers were given six-day disciplinary suspensions for conduct unbecoming officers as a result of an incident in a Milwaukee park. The Fire and Police Commission, in finding the officers guilty, did not specify the particular acts which constituted the offense.

The court relied upon several recent United States Supreme Court decisions in coming to the conclusion that a statement of findings is an integral part of procedural due process.[24] In the present case, the factual basis or specific conduct relied upon by the board was unknown to the officers and, therefore, deprived them of their procedural due process rights.

Probably the most significant case of the term dealing with municipal law was *Hortonville Education Association v. Joint School District No. 1*.[25] The action arose out of the March, 1974 strike by teachers and their subsequent discharge by the Hortonville School Board.

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19. Taylor v. State, 73 Nev. 151, 131 P.2d 733 (1957).

20. Marshall v. Green Bay, 18 Wis. 2d 496, 118 N.W.2d 715 (1963).

21. 66 Wis. 2d 337, 224 N.W.2d 575 (1975).

22. 247 Wis. 77, 18 N.W.2d 461 (1945).

23. *Id.* at 85, 18 N.W.2d at 465.

24. Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); Willner v. Committee on Characters, 373 U.S. 96 (1963).

25. 66 Wis. 2d 469, 225 N.W.2d 658 (1975), *cert. granted*, ___ U.S. ___, 96 S. Ct. 34 (1975).

The first issue dealt with by the court was whether or not municipal employees could be discharged for such activity. The court, in relying on both statutory[26] and case law,[27] determined that the school board did have the power and right to discharge teachers engaged in strike activity.

Secondly, the court determined the issue of whether the discharge of the striking employees was selective enforcement of the Wisconsin prohibition against public employee strikes, thereby denying the teachers equal protection. It was determined that the question of selective enforcement is "whether a difference in treatment amounts to invidious discrimination."[28] While admitting that the school board could have pursued injunctive, mediating, or fact finding remedies, as well as attempting to continue bargaining, the court determined that the choice of discharge is not, in itself, a denial of equal protection. The right to discharge here was soundly based in statute, case law, and the previously negotiated contract. As to unequal treatment, all striking teachers were offered the same treatment in relation to hearing, discharge, and opportunity to seek reinstatement. On these grounds, the court denied the request for a finding of invidious discrimination and denial of due process.

The teachers had also alleged a violation of due process because of the denial of a right to strike, and the lack of arbitration afforded other public employees. Addressing the lack of arbitration aspect of this allegation, Justice Beilfuss, stated that:

> Absent a suspect classification or a fundamental right, . . . [o]nly if a classification is arbitrary and has no reasonable basis and has no reasonable purpose or reflects no justifiable public policy will it be held violative of constitutional guarantees of equal protection.[29]

The court concluded that a reasonable basis grounded in justifiable public policy exists in the present classifications which require binding arbitration for such public employees as police

26. WIS. STAT. §§ 111.70(4)(1) and 118.22(2) (1973).

27. Millar v. Joint School District, 2 Wis. 2d 303, 312, 86 N.W.2d 455, 460 (1957): A school board has implied power to dismiss a teacher before the expiration of his term of service for good and sufficient cause. . . . If a teacher fails to perform his duties under his contract, the board may discharge him from further service.

28. 66 Wis. 2d at 482, 225 N.W.2d at 665.

29. 66 Wis. 2d at 483-84, 225 N.W.2d at 666.

and firemen[30] because of the imminent danger which would result if they struck. The same could not be held true as to teachers. The court found such classification to be " 'based upon substantial distinctions which makes one class really different from another.' "[31] As to the due process argument in the public employee strike ban, while admitting the tenuity of prevailing rationale which upholds such strike bans, the court refused to find the ban unconstitutional:

> The strike ban imposed on public employees is based upon a valid classification and the legislation creating it is not unconstitutional as a denial of equal protection. If the no-strike ban legislatively imposed on public employees is to be abolished or altered, it must be done by the legislature and not the courts.[32]

The fourth issue decided by the court revolved around the strikers' allegations that they were denied due process because the group hearing was not considered and their discharges were not made by an impartial party. The court pointed out that for there to be a deprivation of due process, the appellants had to have been deprived of a property or liberty by state action. Relying on the United States Supreme Court cases of *Board of Regents v. Roth*[33] and *Perry v. Sindermann*,[34] the Wisconsin court found that the Hortonville teachers had a property interest in their expectation of future employment to which they had a legitimate claim. Rejecting the school board's claim that by striking, the teachers gave up their property rights as circuitous, the court found a deprivation of a constitutional property right. Again, relying on *Roth*, the court found a deprivation of liberty in the possible detrimental effect a dismissal from employment might have on the individual's reputation and his chances of reemployment. The action of the school board in dismissing the teachers from public employment was viewed as state action for the purposes of providing due process to the teachers. The court determined that "[d]ue process requires a notice and hearing and an opportunity for the teachers to

30. WIS. STAT. §§ 111.70(4)(jm), and 111.77 (1973).

31. 66 Wis. 2d at 484, 225 N.W.2d at 666, *quoting* Wiener v. J.C. Penney, 65 Wis. 2d 139, 222 N.W.2d 149 (1974). For a discussion of the *Wiener* case, *see Commercial Law* section, *infra*.

32. 66 Wis. 2d at 487, 225 N.W.2d at 667.

33. 408 U.S. 564 (1972).

34. 408 U.S. 593 (1972).

clear themselves of such charges."[35] In determining what due process required in this case, Justice Beilfuss balanced the interest of the school board in summary dismissal against the teachers' interest in continued employment. He concluded that, because an impartial decision-maker was crucial to due process, the teachers were denied due process of law in having the school board make the decisions as to their dismissals. Such a conclusion was reached despite the court's admission that under the present law an impartial decision-maker does not exist to conduct such public sector hearings. The court, however, did suggest what it felt was the proper procedure:

> [T]he school board should make the initial determination as to the hiring or firing of one or many teachers. . . . [W]here due process is required, namely, where the employed teachers' property right or liberty is at stake—notice, a hearing and a statement of reasons should be given.[36]

The court further provided for de novo determinations by a court for teachers discharged or disciplined.

The majority decision concluded by remanding to the trial court for further proceedings by the parties, and by denying appellant's last contention relating to an alleged violation of the open meeting law.[37]

Justice Robert Hansen, concurring, stated that the action of the school board was a rescission of their contracts with the teachers, and that before a party such as the school board is entitled to rescission, the "essential object" of the contract must be destroyed. He felt that although the board was within its right by asserting such a destruction of the contract, it went beyond its own power, and into the domain of the courts, in determining for itself that the alleged breach was sufficient to warrant rescission.

Estate of Peterson,[38] another case dealing with public assistance, found the retroactive portion of Wisconsin Statutes section 49.195, allowing counties to recover for aid to dependent children given before the effective date of the statute, to be a violation of due process. The court found that such a provision created a new right against the recipient of this aid, or as in

35. 66 Wis. 2d at 491, 225 N.W.2d at 699.
36. *Id.* at 497-98, 225 N.W.2d at 673.
37. WIS. STAT. § 66.77 (1973).
38. 66 Wis. 2d 535, 225 N.W.2d 644 (1975).

this case, his estate, where at the time the aid was received no such right existed. Milwaukee County, relying on *McGoon v. Irvin*,[39] advanced the theory that a pre-existing right to recovery was present in common law. It contended that a parent had a legal duty to support and maintain his own children, and had to repay another for necessities provided his children. The court concluded, however, that in the case of public assistance, there is no promise, express or implied, on the part of the parent to repay. It is only charity, for which there can be no recovery.

The common law, based on *Saxville v. Bartlett*[40] and *State Department of Public Welfare v. Shirley*,[41] requires that the person sought for liability must have had a common law liability to repay, and second, the aid cannot have been gratuitously given or given under circumstances not raising an implied promise to repay. Here, there was no common law liability on the part of Mrs. Peterson to reimburse the county, and, therefore, the only recovery that can be had is for aid received after August 31, 1969, the effective date of Wisconsin Statute section 49.195.

Molbreak v. Village of Shorewood Hills,[42] altered the state law with respect to special assessments. The village had, according to statute,[43] levied special assessments to both commercial and residential property in the amount of $16.72 per front foot. The village had determined that both the residential and commercial properties within the area were equally benefited by the improvements. The work proposed included construction of an intersection, curb, gutter, storm-drainage, street lighting and hydrant work. The plaintiffs brought suit to have the assessment reduced, contending that their residential property received no special benefits from the improvements. The court pointed out that:

> It has long been the rule in this state that where the assessing body did consider what property would be benefited by the improvement and assessed according to the amount of the benefit, that in the absence of evidence to the contrary there

39. 1 Wis. (Pin.) 526, 44 A.D. 409 (1845).
40. 126 Wis. 655, 105 N.W. 1052 (1906).
41. 243 Wis. 276, 10 N.W.2d 215 (1943).
42. 66 Wis. 2d 687, 225 N.W.2d 894 (1975).
43. WIS. STAT. § 66.60 (1973).

> is a conclusive presumption that the assessment was on the basis of benefits actually accrued.[44]

The supreme court then expressly overruled the language in *Scheldknecht v. Milwaukee*,[45] which had previously put the burden on the city to show that the property assessed was benefited. The court set forth a new burden of proof:

> [T]he burden is on the objector to show either that the statutory procedure was not followed, or that the assessment was not based on benefits, or that the assessing authority did not view the premises to make such a determination, or to produce competent evidence that the assessment is in error.[46]

In striking down the residential assessments, the court found that the plaintiffs had adequately met their new burden by using expert testimony to the effect that the residential value of the property was actually reduced by the commercially-oriented improvements.

Appleton v. ILHR Department[47] determined the issue of whether DILHR can reverse the findings of its examiner without stating the specific reasons for such rejection. The case involved a claim for payments under the 1971 Wisconsin Statute section 66.191, the Wisconsin Retirement Act. The plaintiff's husband had died of cancer. At the hearing before the examiner, there was conflicting and inconclusive testimony as to whether the cause of death was cancer of the lung, arguably caused by the deceased's employment, or cancer of the colon, which the deceased had contracted almost ten years prior to his death. The department reversed the examiner's denial of payments without setting forth the reasons therefor.

The Wisconsin statute relating to department reversal of a hearing examiner[48] requires a statement of facts and conclusions relied upon. The court, relying on the reasoning of cases in the area of workmen's compensation,[49] determined that the parties involved in such a case have a right to know the reasons for the reversal, as well as the basis upon which the reasons

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44. 66 Wis. 2d at 696, 225 N.W.2d at 900.

45. 245 Wis. 33, 13 N.W.2d 277 (1944).

46. 66 Wis. 2d at 696, 225 N.W.2d at 900.

47. 67 Wis. 2d 162, 226 N.W.2d 497 (1975).

48. WIS. STAT. § 227.12 (1971).

49. Transamerica Insurance Company v. ILHR Department, 54 Wis. 2d 272, 195 N.W.2d 656 (1972); Braun v. Industrial Commission, 36 Wis. 2d 48, 153 N.W.2d 81 (1967).

were reached. This, the court held, was particularly true where, as here, there was contradictory testimony as to the cause of death. In such cases, the court mandated that in order to reject the examiner's initial finding, a statement of facts and ultimate conclusions must be provided.

A second issue in the case dealt with double recovery under both Wisconsin Statute sections 66.191 and 41.14, which respectively deal with special and regular death benefits for public employees. The plaintiff had received $21,851 from the Wisconsin Retirement Fund pursuant to section 41.14. This action was brought under section 66.191, which prohibits double recovery under section 41.13, but fails to mention section 41.14 in its prohibition. The court found that failure to provide for exclusion of section 41.14 indicates an intention to permit double recovery under both sections 41.14 and 66.191.

Justice Heffernan, dissenting, cited *Robertson Transportation Co. v. Public Service Commission*,[50] which states that in a case where two conflicting views are presented, each of which could be upheld by substantial evidence in the record, it is for the agency involved to make the determination as to the view to which it wishes to give credibility. Justice Heffernan also pointed out that as long as the presumption afforded by Wisconsin Statute section 891.45 is allowed to stand, an inference will be allowed to support an award if the three criteria of section 891.45 are met. Those are:

> The fireman must have been found to be free of any respiratory disease at the time of hiring, he must have served a total of five years as a fireman, and his disability or death must have been caused by a respiratory disease.[51]

The dissent persuasively argued that with the presence of the death certificate citing respiratory disease as cause of death, the plaintiff should be allowed the benefit of this presumption and the award of the department.

Village of Sussex v. Department of Natural Resources[52] affirmed the statutory authority[53] of the Department of Natural Resources to order construction of a municipal water system where there is a nuisance or menace to the health of the public.

50. 39 Wis. 2d 653, 159 N.W.2d 636 (1968).
51. 67 Wis. 2d at 173, 226 N.W.2d at 503.
52. 68 Wis. 2d 187, 228 N.W.2d 173 (1975).
53. WIS. STAT. § 144.025(2)(r) (1975).

Here, Sussex challenged the right of the Department of Natural Resources to order such construction on the grounds that supplying water to residents was a proprietary function, not governed by Wisconsin Statute chapter 144.[51] The court rejected the proprietary argument, relying on *Holytz v. Milwaukee*,[55] which abolished the distinction between proprietary and governmental functions. The court further reasoned that providing safe water systems to the people was in the interests of public health, and, therefore, a matter controlled by the state's police power.[56]

The village further contended that Wisconsin Statute section 66.065 (3), which requires a referendum of the villagers to establish a water system, renders the order of the department ineffective until such referendum occurs. The court rejected this argument citing the superiority of the state's public policy over the opinion of the local electorate. Wisconsin Statute section 144.025(2) (r) was viewed by the court as one of several alternative ways to exercise the option to establish a water system.[57] Since the present wells were unsafe, a nuisance was present and the department was empowered to abate the nuisance. In concluding, the court distinguished the "taking" of property under eminent domain from the exercise of police power:

> [I]t may be said that the state take the property by eminent domain because it is useful to the public, and under the police power because it is harmful. From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter principle does not.[58]

Therefore, the court goes on to point out, the necessity for compensation for loss of property because of the state's exercise

54. 68 Wis. 2d at 191, 228 N.W.2d at 176, *citing* Bino v. Hurley, 273 Wis. 10, 76 N.W.2d 571 (1956).

55. 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

56. 68 Wis. 2d at 191, 228 N.W.2d at 176.

57. The three alternative methods being:

a. WIS. STAT. § 197 (1973)—condemnation for existing utility plant;

b. WIS. STAT. § 66.065 (1973)—municipality may construct or buy a utility;

c. WIS. STAT. § 144.025(2), (5) (1973)—State-ordered construction under state's police power.

58. 68 Wis. 2d at 198, 228 N.W.2d at 179, *quoting* Just v. Marinette County, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 767 (1972).

of police power comes about when the property is restricted for public benefit, as opposed to public harm.

MARK W. SCHNEIDER

REAL AND PERSONAL PROPERTY

I. WATER LAW—DIFFUSE SURFACE WATERS

The most radical change in the law affecting real property rights to come out of the August 1974 Term of the Wisconsin Supreme Court was the new water law set down in *State v. Deetz*.[1] The State of Wisconsin on a public trust theory brought action against an individual property owner, a development association, and a town to enjoin them from permitting deposits of sand and dirt to accumulate in Lake Wisconsin and on adjacent roads. The deposit of debris was caused by erosion which resulted from the construction of roads and clearing of land for housing. The State also sought forfeitures under the statute for obstruction of navigable waters[2] and for deposit of deleterious substances in state waters.[3]

The trial court had dismissed the State's complaint in reliance on the common enemy doctrine which gave a property owner the right to cause diffuse surface water to be diverted from his land without regard for any damage which it might do to neighboring property. The supreme court, after reexamining the common enemy doctrine in light of other recent decisions of the court relating to land use and water, announced the adoption of a new rule governing diffuse surface waters—the reasonable use rule of the second Restatement of the Law of Torts.[4] The case was remanded to the trial court for a determination of whether the utility of the conduct outweighed the gravity of the harm caused under the rule of reasonable use.

II. HOMESTEAD EXEMPTION AND CREDITORS' RIGHTS

In *Schwanz v. Teper*[5] the supreme court addressed the ques-

1. 66 Wis. 2d 1, 224 N.W.2d 407 (1975). This case will not be discussed in any detail here because of its extensive treatment in the recent article Comment, *Wisconsin Strives to Minimize Conflicts Over the Use of Water*, 59 MARQ. L. REV. 145 (1976).

2. WIS. STAT. §§ 30.12(1)(a), 30.15(1) and (3) (1971).

3. WIS. STAT. § 29.29(3) (1971).

4. RESTATEMENT (SECOND) OF TORTS, § 822 (Tent. Draft No. 17, 1971), § 826 (Tent. Draft No. 18, 1972), § 827 (Tent. Draft 17, 1971), § 828 (Tent. Draft No. 17, 1971).

5. 66 Wis. 2d 157, 223 N.W.2d 896 (1975).