Marquette Law Review

Volume 9
Issue 2 *February 1925*

Article 3

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SOME PHASES OF FLOWAGE RIGHTS

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WATER powers created by dams were originally used mainly to operate the small local grist mill and saw mill by which the inhabitants of a small territory were supplied with their flour and corn meal for food and the timber with which they built their houses and other necessary buildings.

In some rare cases dams were constructed to control the flow of streams to aid navigation, whereby the products of factory and farm were carried to market, and the people were enabled to travel from place to place.

With the development of modern industry the uses of these water powers have very materially changed. The small local grist mill has practically disappeared, as has the saw mill, except in the heavily timbered region, and the principal use of water power now is by hydro-electric companies, whereby electricity is generated and distributed over large areas for furnishing power and light to cities, and to the citizen in home, store and factory.

In the development of these water powers, even in the case of the small saw or grist mill, the owner of the dam or power site frequently found it necessary to use for purposes of a "mill pond" or reservoir more land than he owned, and for this purpose he acquired the right to flow or flood much additional land by grant, and sometimes he even flowed or backed water upon land which he did not own, by means of his dam, for such a period that he acquired the right to do so by prescription.

In Wisconsin, and other states having large areas of cheap land, covered with timber and threaded by streams capable of developing water power, corporations or wealthy individuals or partnerships have acquired large areas of lands, to cut off and market the timber, and then develop by selling small holdings to settlers, or have acquired such tracts for speculation, by developing them by inducing small purchasers to take them, and where sales have been made of lands bordering on streams, either with developed or undeveloped water power, the seller, particularly when engaged in lumbering or the production of electricity, has reserved flowage rights by various designations over the land sold.

These grants or reservations of flowage or flowage rights have been

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frequently before the courts, and with the constantly increasing development of water power for the production of electricity, and the increasing value of lands, will become more important in the future and doubtless lead to more litigation until the meaning, construction, operation and effect of such grants and reservations have been settled beyond doubt or controversy.

This article is limited to a discussion, of a part only, of the questions arising from and in connection with some of these grants or reservations and their nature, construction, transferability, and rights and liabilities thereunder.

There is no uniformity of expression in either granting or reserving such rights. Some deeds have reserved "the right to flow a part of the described land with water perpetually by means of said dam." Here was a reservation of flowage in connection with a definitely located existing dam, and was held to be an exception and something more than a revocable license. *Kronoff v. City of Worcester,* 125 N. E. 394 (Mass. 1919).

Another deed in 1854 conveyed all of grantor's right in certain land on a certain river, "also all my right of flowing water by the dam and of using the same in the pond, or of drawing it through the dam, all my right of repairing the dam or of booming or securing timber upon my shores in said pond, or in the Great pond above it, with the right of passing on said shores for said purposes, doing as little damage thereby as may be practicable; also the right of flowing the Great pond;" and the court held that "the right to flow the Great pond above" was not an indefinite right, but a specific right—the right necessary and incident to the uses required by the whole grant; that the parties had in mind the grant of an entirety—such flowage of the Great Pond above as the existing dam when in perfect order, repaired, made tight, would cause and no more. That the parties could not have intended the construction of a different dam, one that might work destruction of the riparian rights of the grantor and flow out his land beyond what ever had been, or so far as he knew, had ever been thought of, and denied the defendant, a fibre company, as successor in interest to the grantee, the right to flow lands of the plaintiff, successor in interest to the grantor, to a much greater height than at the date of the deed without paying the damages caused by such flowage. *Bennett v. Kennebec Fibre Co.* 3 Atl. 800 (Me. 1895).

In 1865 the owner of land on both sides of a river conveyed a part of said land, lying on the east side of the river "reserving to myself the right of building a dam across said river at any point against said land together with the right of flowage of said land at any and all times caused by said dam when constructed," and the court held that

the right of flowage was a reservation and not an exception, that it created an easement appurtenant to the grantor's land which easement was perpetual and the word heirs was not necessary to make it perpetual. *Smith v. Furbish,* 44 Atl. 398 (N. H. 1894).

In connection with a mill the owners constructed a dam across the river to supply water to operate it, the dam causing the water of the river to overflow plaintiff's land, and the plaintiff executed a deed to the owners of the dam, conveying to them "their heirs and assigns forever all the rights of flowage caused by the mill dam over the following piece or parcel of land," the land being definitely described. The original dam was destroyed, but was reconstructed at the place and at substantially the same height as formerly maintained, and the court held that the deed was not void because the precise location of the dam was not given, nor was it essential to the validity of the deed that the precise quantity of land overflowed should be stated, and that the deed vested in the grantees, the right to overflow the land to the extent resulting from the dam in its then condition (that is the time of the execution of the deed); that the grantees were entitled to overflow so much of the land as was reasonably necessary for its maintenance. Having been erected prior to the time of the execution of the deed, the conditions then existing must be taken as the basis of the grantees' rights, and their successors in interest. It was further held that the easement or right of flowage passed as an appurtenance of the mill property, such property being the dominant estate. *Schlag v. Gooding-Coxe Co.* 108 N. W. 11 (Minn. 1906).

Another deed conveyed the right and privilege, to erect a dam at or below the entrance of the Small Portage into the Big Portage, also the right and privilege to make races, dams, gates and necessary appurtenances thereto on, across and through the land of the grantor, "but no right is hereby given or granted to flow back the water on the Little Portage further than the north bank of the same,—such dam or dams, races and conduits of water to be made and used for the purpose of water power." The court held, that to entitle grantee to flow grantor's land, it was not necessary, that the dam be built on the grantor's land, and that if the flowing was not unnecessary and was no greater than would have been caused by building the dam and race on the grantor's land, the deed authorized it; that the conveyance was intended to grant a water power to which the dam and race were mere incidentals and grantee was not compelled to use all of the privileges granted in connection with the power unless he chose. *Kilgore v. Hascall,* 21 Mich. (1870) 505.

A deed after describing the land conveyed contained the following: "excepting and reserving to first parties, their heirs and assigns in

perpetuity, all flowage and riparian rights of every kind, including the right to overflow and flood with water any part of said land which may be overflowed by reason of the construction and maintenance of any dam at Beaverton, Michigan."

The deed of the same land to grantor contained a similar provision except that following the word "maintenance" it read as follows: "of an artificial dam having a twenty-foot head of water at Beaverton, Michigan."

At the time of the execution of these deeds there was an existing twelve or fourteen feet high dam which was subsequently raised, so that the flowage was increased, and the court held, that the owner of the land was not liable for damages caused by such increased flowage; that the reservations in the two deeds did not refer to any existing development and by definitely reserving a greater height plainly pointed to anticipated future development; that the right of flowage or to dam water back above its natural level is an interest in land of value, in its nature and easement which an owner of full title can reserve when disposing of the fee, or he may retain the fee and deed the right of flowage to others as a perpetual easement, which can only be acquired by an instrument in writing under seal in the nature of a deed of conveyance or by prescription, and an omission by the riparian owner to use such right does not impair his title or confer any right thereto upon another. It is not the nonuser by the owner, but the adverse enjoyment of it by another for the prescription period, which may destroy his rights. *Glidden v. Beaverton Power Co.* 193 N. W. 862 (Mich. 1923).

A corporation engaged in the business of manufacturing cotton cloth by means of mills and a dam conveyed certain land reserving to itself, its successors and assigns, "the right to raise and forever maintain their ram, by flashboards or otherwise, three feet above its present height, without being subject to any claim or demand from said grantee, his heirs or assigns, for damages to said Barnard farm or to said Upper Intervals by reason thereof," and later the grantee conveyed to said corporation its successors and assigns the right to flow said land "by backwater from the dam of said corporation, raised and maintained forever by permanent structure or otherwise, one foot above the present permanent height thereof," and the court held that the reservation and the grant of the right to flow the land created an easement appurtenant to the mill privilege; the height to which the right to flow extended was measured by reference to the permanent height of the existing dam, but the easement would not be destroyed by taking down the dam and erecting a new dam across the stream above the old dam, on land which was a part of the mill privilege of the corporation, to

which the easement of the right to flow was appurtenant, if the water was not raised beyond the height mentioned in the reservation and the grant, the easement of flowage, being appurtenant to the mill privilege, was appurtenant to every part of the mill privilege. The erection of a new dam on the mill privilege whether above or below the old dam, if raised the water no higher than the right granted would work no injury to the land owner for which he could recover. *Forbes v. Commonwealth,* 52 N. E. 511 (Mass. 1899).

Certain lands were conveyed and the grantor at the same time, as a part of the same transaction, executed an agreement under seal, which was recorded, which provided that the grantees in the deed or their assigns "may build a dam across said stream not more than six feet in height above the bed of the river," and that the grantor, his heirs and assigns, should not demand or receive any pay for damages done to land or property whatsoever by reason of water raised by the dam. A six foot dam, measuring the height from bed rock in the bed of the river at the abutments of the dam, was erected in 1853 which was replaced in 1883 by a new dam on the same site and of the same height. In 1903 a new dam was built about fifty feet below the old one but was seven feet above the then bed of the river which had been deepened both by erosion and by quarrying the rock from it. The court held that the grantees acquired the right to set back the water upon the superior riparian lands to the extent that they would be overflowed by a dam six feet high above the highest part of the bed of the river on the grantees' land, the height and capacity being the common instrument by which to measure the extent of the water rights; that the height of the dam as fixed by the grant settles the right to maintain the dam at that height, regardless of the extent to which the water has been held and the land overflowed by the erection of the former dams, and evidence as to the flooding of the lands during the time the old dams were in use, as compared with the flooding since the erection of the new dam cannot control in deciding the height at which the dam could be erected, and that the right to overflow to the full extent of the grant was not lost by non-user even for a period of twenty years unless there was also an actual adverse possession for twenty years. *Haigh v. Lenfesty,* 87 N. E. 962 (Ill. 1909).

Bearing in mind the principles of law as established in the foregoing cases, what are the rights and liabilities granted, reserved or created by provisions in deeds such as,—

1. "The right to set back water by dam or dams on the river below" without specifying the dam or its location, there being a dam of a certain height erected for certain purposes such as floating logs to a saw mill, or

2. "The right to flow and set back water by a dam or dams in the

river below on" certain described land, there being at that time no existing dam, or

3. "The said grantors shall never be liable for any damages resulting from the overflowing of said premises or any part thereof, or damages to any improvements now or that may hereafter be upon the same, or any part thereof, caused by any dams reservoirs or other devices or improvements now or hereafter constructed, maintained or owned in whole or in part by the grantor, in, upon or about the Pine River, or any of its tributaries, connecting streams or branches" and the grantor has dams on such streams but which could not possibly under any practical use of them set back water on the land conveyed, or

4. "Excepting and reserving for myself and my assigns the use of all the water power, water flowage, and dam privilege forever," the grantor owning no other land on the river and there being no dam or water power in which he was interested, and afterwards conveying his reserved right to the owner of a dam several miles below.

The cases above referred to clearly establish the construction to be given to a grant or reservation of flowage rights and the rights and liabilities of the parties where the height of the dam is clearly shown either by express specification in the grant or reservation or by reference to an existing dam; where the area to be flowed is clearly defined, and where there exists at the time of the creation of the right a dominant and servient tenement.

Considering the grant or reservation mentioned at (1) above there being an already existing dam, such dam fixes the extent of the flowage if at the time of the grant or reservation such dam caused a flowing of the land in question, the courts applying the rule of construction that where the language of the deed is ambiguous, the court may consider all the attendant surrounding circumstances, the existing state of facts, the situation of the property and the condition or state of things granted at the time.

If the dam is destroyed, the right of flowage is not lost, but a new dam either in the same or a different location may be erected, provided it does not increase the flowage or if the original dam leaks or is poorly constructed so that the entire right of flowage is not exercised it may be repaired to the extent necessary to fully enjoy the right granted or reserved. The fact that subsequent to the grant or reservation the dam is put to different use or the power created thereby is differently applied does not change the right or liability as to flowage.

The right of flowage is regarded as an easement, appurtenant to the dam, is assignable and passes with conveyance of the dam, and any purchaser of the land flowed takes it burdened with such easement, and is chargeable with notice of the extent to which it may be used. If,

however, the dam on the river below does not at the time of the grant or reservation, cause the flowing of any of the land in question it would seem to follow that, either a dam might be built below said land or the existing dam raised, and that the flowage thereby created be regarded as the right granted, the court in such case applying the rule of construction that an instrument intended to operate as a deed should so operate if it is not legally impossible for it to do so, or the rule that where a doubt arises as to the real intention, an interpretation which plainly leads to injustice should be rejected or the rule that some meaning should be given to every clause, word or expression if it can reasonably be done, and is not inconsistent with the general intent of the whole instrument so that the deed may operate, if by law it may, according to the intention of the parties.

Considering the grant or reservation above mentioned in (2), the instrument should be construed to permit the erection of a dam, on any part of the land belonging to the grantor of the flowage easement, of if he owned no land at that time on any land he might thereafter acquire below on the stream, and raise the water by means thereof to any height necessary for the proper enjoyment of the dam privilege even to the extent of completely flowing the land over which the flowage easement is granted.

If at the time of the grant or reservation, the grantee of the flowage right owns land below on the stream, the right of flowage is clearly an easement, and appurtenant to the dam privileges, and therefore assignable even without use of the words heirs and assigns. Where, however, the grantee of such flowage right is not the owner of a dam or dam site or land below on the stream, the courts while treating it as an easement and holding it assignable have apparently lost sight of the various kinds of easements and the distinctions between them.

Thompson on Real Property, Vol, 1, Page 359, defines an easement as a privilege without profit which one has for the benefit of his land in the land of another, or it is a right without profit, created by grant or prescription, which the owner of one estate may exercise in or over, the estate of another for the benefit of the former. The same author in the same volume, at Page 364, gives the essential qualities of easements as,—first, they are incorporeal; second, they are imposed on corporeal property; third, they confer no right to a participation in the profits arising from such property; fourth, they are imposed for the benefit of corporeal property; fifth, there must be two distinct tenements, the dominant, to which the right belongs and the servient upon which the obligation rests, and distinguishes between an easement appurtenant which inheres in the land, is a privilege incident to particular land, concerns the premises, is necessary to the enjoyment thereof,

is in the nature of a covenant running with the land, attached to the land to which it is appurtenant, and passing by deeds of conveyance, while an easement in gross is a right in the land granted for the personal use and benefit of an individual, and is not incident to particular land, and while it is sometimes considered as an interest in land which is assignable it is more frequently held to not be assignable. This is apparently the belief of the court in *Spensley v. Valentine,* 34 Wis. 154, although in *Poull v. Mockley,* 33 Wis. 482, and decided a year earlier, the court held that in Wisconsin an easement in gross will be held assignable by the grantee.

The grant or reservation at (3) above does not in terms grant or reserve any right of flowage, but applying rules of construction hereinbefore referred to would seem to require a holding that such a right of flowage was intended to be granted. To provide that grantors shall never be liable for any damages resulting from overflowing of the premises caused by any dams would seem equivalent to reserving the right of flowage without liability for the damages caused thereby.

The right to erect dams other than those existing, flowage from which does not or cannot reach certain of the lands in question has been discussed in connection with (2) above.

Where the grant or reservation does not fix the height of the dam or the extent of the right of flowage, two other interesting questions arise.

First, as to what the intention of the parties should be construed to be where conditions have so changed that a dam such as in common use at the time of the grant or reservation, and answering all the power requirements known at that time, would be useless for the power requirements at the time of the exercise of the right of flowage. Can they be held to have intended that the requirements of the grantee at the time of exercising his rights, rather than his requirements at the time of the grant are controlling. The failure to limit the right or fix its extent or the time of its exercise should be held to show that the right was unlimited and to be exercised in accordance therewith. Application of the rule of construction that a grant is to be taken most strongly against the grantor, would seem to require the former construction. Not having limited the right or fixed its extent, or the time of its exercise, he should be held to have intended that the grantee could flow the land to such extent as he required at the time of constructing the dam.

Second. Does the construction of a dam and flowing the land fix the rights of flowage under the rule of construction that the practical construction given the instrument by the parties in the manner of exercising their rights under it may be considered and even be con-

trolling where the meaning is doubtful. The older authorities while not clear would seem to indicate that such is the law, and that the dam cannot be raised or the flowage increased without further compensating the owner of the land flowed. Such a holding would seem contrary to the weight of reason and the later authorities, and in violation of the rule that failure to use does not destroy the right. The grant or reservation being unlimited, the right ought to be adequate for the needs of the user. Having found it necessary for his requirements at one time to build only a small dam and flow only a limited portion of the land, when, at that time, had he so desired or profitable use required, he might have erected a dam to any height and flowed the land to any extent, ought not to deprive him of a right which he had but merely failed to use, particularly when to deny such right makes the thing granted of no value.

The grant or reservation shown at (4) above has been passed upon in Wisconsin in the case of *Hemmis v. Consolidated Water Power and Paper Co.* 173 Wis. 519 (1921) 181 N. W. 743.

The deed containing the reservation was executed in 1896, the grantor owning no other lands on the stream. There were rapids a short distance below the land in question and prior to the deed there had been a survey at the point to ascertain the head of water which could be developed, and it was suggested that a head of twelve feet was possible which would have flowed all the land in question. The dam causing the flowage is some six or seven miles below the land in question, the owner of the dam acquiring in July 1916, the flowage rights reserved in said deed of 1896.

In 1914 and for some years prior the dam had been maintained at a height of ten feet, which did not cause any flowage of the land in question. In February 1916 it was raised to about seventeen feet which flowed a part of the land and later it was raised to about nineteen feet and it was proposed to raise it to twenty-one feet, which would considerably increase the flowage.

The court held that the reservation in the deed gave the grantor and his assigns the right to flow the land with the dam at the proposed height of twenty-one feet without liability for the damage caused thereby; that there was no ambiguity in the deed permitting the court to consider surrounding circumstances to ascertain the meaning of the language used; that there was no language or limitations as to the time or place of exercising the right to build a dam or to cause the flowage; and the reservation should be given its natural interpretation not confining the grantor and his assigns to the location of the dam to any particular place; that the reservation being in effect a grant by the grantee should be construed most favorably to the grantor; and that the use of the land by the owner of the fee by cutting timber

and pasture was not inconsistent with the easement of flowage and did not constitute an adverse use barring the owner of the dam and right of flowage from the right to flow said land.

It is impossible within the limits of this article to discuss all the various grants and reservations of flowage rights which have been before the courts for consideration, for each has largely been determined by some language, fact or condition peculiar to itself, but only to refer to certain grants and reservations presenting some slightly different question and cite some cases which establish principles of general application, which enable one to arrive with a fair degree of certainty at their construction.