Navigable Waters: Rights of State and Riparian Owners in Navigable Waters; Water Power Rights

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Navigable Waters: Rights of State and Riparian Owners in Navigable Waters; Water Power Rights.

A case of great importance to Wisconsin has recently been affirmed by the United States Supreme Court: *Fox River Paper Company v. Railroad Commission.*

This case involved the constitutionality of a recent Wisconsin Statute which, it was contended, violated the Fourteenth Amendment of the Constitution in that it took property without due process of law.

The problem involved was in substance that by Section 31.02, Wisconsin Statutes 1925, the State Railroad Commission was given supervisory power over the navigable waters of the state, and control of the construction and maintenance of dams in navigable rivers. Section 31.07 authorizes the Railroad Commission to grant permits to applicants to operate and maintain existing dams. By Section 31.09 every applicant for a permit is required to file with his application proposals in writing, consenting, among other things, to the grant of a permit subject to the condition:

"That the State of Wisconsin or any municipality, not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefore, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit as determined by the commission, and by paying, in addition thereto, the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1) plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1) and that the applicant waives all right to any further compensation."

The plaintiffs contended that the Railroad Commission, acting under the statute, deprived the plaintiffs of their property without due process of law. That by the law of Wisconsin, the rights vested in riparian owners include the right to use the water power for that purpose to dam the river, subject only to the exercise by the state of its police power to regulate the use of navigable waters in the public interest.

The trial court held, and such holding was affirmed by the higher courts, that the right of the riparian owner to make use of the water power in a navigable river by maintaining a dam is subordinate to the power of the state to regulate the use of obstructions in navigable waters; that the state may forbid all obstruction by dam or otherwise; that the right of the riparian owners to develop the water power by the construction of the dam remains inchoate until the state has given its consent.

"If the legislature may wholly refuse permission to erect a dam or other structure in the navigable waters of the state, it follows that it may grant such permission upon such terms as it shall determine will best protect the interests of the public."

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The United States Supreme Court held:

"Though the title to soil under navigable waters within the state is presumptively in state, the nature and extent of the rights of the state and of riparian owners in navigable waters within the state, and to soil beneath such waters, are matters of state law, to be determined by state statutes and judicial decisions."

Also that:

"It is the function of state courts to define rights in land located within the state, and in the absence of an attempt to forestall Supreme Court's review of constitutional questions, the Fourteenth Amendment affords no protection to supposed rights of property which state courts determine to be nonexistent."

This case has done a great deal to reclaim to the people of Wisconsin the valuable water power rights which have been exploited in the past, with other natural resources. Our water power has an enormous potential as well as present value. As the state continues to grow the power rights will become increasingly valuable and now the state has a safety valve with which to protect such a valuable right.

Elmer Goodland

Frauds, Statute of: no quantum meruit recovery on oral real estate contract by broker.

This is an appeal from a judgment for the reasonable value of services performed by a firm of real estate brokers. The original complaint was on contract for service, but since the contract for performance of such service was not in writing, the complaint was amended to set up a cause of action on quantum meruit. The evidence established the fact that the oral contract between the parties provided for a payment of commission when the purchaser had paid $5,000 or more on the purchase price. Such amount was never paid, and the purchaser, after a few payments, refused both to make further payments and to take the land in question.

Held 240.10 Wis. Stats. extending the statute of frauds to include real estate brokers' contracts, precluded a recovery on quantum meruit.

Where there is no written agreement between the vendor and the broker, the employment and consequent agreement to pay commissions may be implied from the circumstances; such implication being based on the conduct of the parties, as where the principle accepts the broker's services with the knowledge that he expects to be paid, or where he places property in the hands of a broker and a sale is effected through the efforts of the broker. Therefore, in the absence of a statutory provision to the contrary, a contract employing a broker for the purchase or sale of lands need not be in writing and he may accordingly recover for services rendered under an oral contract. Under some statutes, however, written authority is required, and where such statute exists,

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1 Hale v. Kriesel, — Wis. —; 215 N.W. 227.
2 82 Conn. 557; 120 Cal. 551; 52 Colo. 205.
3 146 Ky. 439; 48 Wash. 364.
4 C. J. Vol. IX 558.