Navigable Waters

George J. Uhlar

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In *Kane v. New Jersey*, a situation similar to the case under discussion, the appellant contended that a statute requiring the registration of nonresident motorists and the appointment of the secretary of state as attorney for receiving process was in violation of the due process clause. In that case the court recognized the power of the state to actually exclude such persons as would refuse to comply with the statute, from entering the state. In answer to the contention that such a statute is discriminatory, the Supreme Court held that the basic principles of the law were to render equal protection of the law to residents as well as to nonresidents. It is clear that before the passage of such statute, residents were at a disadvantage in attempting to get jurisdiction of a nonresident offender. By comparing the action of the New Jersey Legislature to an analogous crime situation, the court reasoned that the ability to enforce criminal penalties for transgression as an aid toward securing observance of laws would likewise apply to the enforcement of the observance of the civil law. There is no discrimination against nonresidents, denying them the equal protection of the law, but on the contrary, it puts nonresidents upon an equal basis with residents.

It follows, therefore, in logical sequence, that if a state has the power to exclude motorists from entering its borders upon the refusal of such motorists to comply with its statutes, the state may declare the use of its highways by nonresident motorists the equivalent of appointment of an attorney upon whom process may be served, and so the court held in the instant case. It is a progressive and material step toward the protection of citizens of a state possessing such a law from any disadvantage they may have suffered by reason of not being able to obtain jurisdiction of an offending nonresident motorist.

*Stewart G. Honeck*

**Navigable Waters.**

State Railroad Commission must determine compensation to be paid state as a prerequisite of contract for removing material from bed of navigable lake, and the requirement of "compensation to be paid" to state for taking material connotes idea of use of money. Rights of riparian owners to center of beds of navigable streams and rivers and constitutional rights of such owners. Power of the state to dispose of materials in and under navigable waters.

The importance of Section 31.02 (5) of the Wisconsin Statutes is fully determined in a recent decision handed down by the Wisconsin Supreme Court in the case of *Angelo et al. v. Railroad Commission.*

W. B. Angelo and other riparian owners on Lime Lake, Portage County, sought to enjoin the defendant Railroad Commission from action under Section 31.02 (5) Stats. in conferring authority upon certain persons to take marl from the bed.

This lake covers fifty-nine acres and has been used for boating, hunting and fishing. It was not meandered in the U. S. Government survey. The patents from the United States conveyed as land the entire area. There is no showing whether it is connected with waters flowing into Lake Michigan or the Mississippi and the county map indicates that it has no apparent outlet.

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8 242 U.S. 160.
9 217 N.W. 570. (Wis.) Decided Jan. 10, 1928.
On November 5, 1924, the Railroad Commission, after a hearing at which the plaintiffs appeared granted to one Somers et al., upon their application, leave to dredge and take marl from the bed of such lake, upon conditions that said marl should be sold at not more than $1.00 per cubic yard; that such leave was not exclusive; was but for five years, the commission reserving full control over all conditions of such lease. It provided that "no compensation shall be paid to or received by the State of Wisconsin under this agreement. "No provision for compensation to plaintiffs or riparian owners was made. The necessary equipment cost about $800, and the average cost for such removal is seventy to eighty cents per cubic yard. The trial court affirmed the order of the Commission and dismissed the complaint.

The appellants challenge as in violation of rights claimed to be secured to them under the Federal and Wisconsin Constitutions, the act of the Railroad Commission in granting such powers over the objections of plaintiffs and without compensation to them.

The main question is whether the Legislature was inhibited by constitutional provisions from enacting a statute referring to the Railroad Commission, which reads as follows:

31.02 (5)—The Commission whenever consistent with public rights, is authorized and empowered to make contracts for the removal of any material from the bed of any navigable lake, to fix and determine the compensation to be paid to the state of Wisconsin for material so removed, and to enter into contracts, on behalf of the State of Wisconsin, for the lease or sale of such material, with such conditions as may be necessary for the protection of the public interests and the interests of the state of Wisconsin, provided that no such contract shall be made to continue for a longer period than five years.

The Supreme Court reverses the judgment below because of the failure on the part of the Railroad Commission to comply with the direct mandate and important condition of the statute.

The Legislature has plainly declared that the Railroad Commission in making such contracts for the removal of material from the bed of any navigable lake "fix and determine the compensation to be paid to the state of Wisconsin for material so removed." Such provision is a prerequisite in any contract that the commission is authorized to make. The words used "compensation to be paid," should be given their primary and ordinary significance and as used on such occasions. The word "compensation" has been held to be synonymous with "salary." The word "pay" primarily and ordinarily means the use of money and especially so when used in connection with an obligation owing to the government. The possible lowering of the price for such material to the people of the state at large is surely not what is meant as the "compensation to be paid to the state of Wisconsin for material so removed." The tenor of the statute is that the state is disposing of that which is of value, and upon which a price can be placed and being so, a reasonable proportion thereof must be paid to the state. The Legislature did not intend to give away the natural resources of the state with no return therefrom to the state.

Milwaukee County v. Hulsey, 149 Wis. 82, 136 N.W. 139.
Krohn v. Goodrich, 164 Wis. 600, 160 N.W. 1072; Oneida County v. Tibbits, 125 Wis. 9, 102 N.W. 897.
The next question presented by the construction of section 31.02 (5) is as to the nature of title to the bed of navigable lakes; in whom is such title vested; and how far may the little title holder make a matter of bargain and sale of the material therein and thereunder.

In disposing of this question we shall treat only of the subject of the bed or soil under navigable lakes as separate from navigable rivers and streams, title to the center of which has been declared to be in riparian owners, subject to the public rights incident to navigation. This rule carries with it the right to sell separately title to the submerged land of the river bed.

We shall also consider it as though such lake, having no apparent connection with the waters of the Mississippi or St. Lawrence but being within the statutory definition of navigable waters of the state is subject to the same trust as that proclaimed in Section 1 Article 9 of the Wisconsin Constitution.

That the patent from the United States in terms included the land under this body of water as though it were not submerged does not affect the situation because such grants are presumably subject to the rule of the state as to waters and riparian rights.

Our Constitution declares (Section 3, Art. 9):

"The people of the state, in their right of sovereignty, are declared to possess the ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people." This provision is an explicit assertion of a fundamental attribute of state sovereignty. Under such power the state had the right to determine all matters concerning the title to lands covered by navigable waters subject only to the paramount authority of the federal government in matters concerning navigation as a part or means of interstate commerce and of its proper disposal by the United States prior to statehood.

Section 1 Article 9 declares:

"The navigable waters leading into the Mississippi and St. Lawrence, . . . . shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor." This state has assumed such trust and has always recognized such as an absolute duty and obligation.

That there is a substantial difference between rivers and streams on the one hand and lakes on the other on the question of ownership to the soil covered by such waters has been plainly recognized by legislative action in section 30.01 (2) (3) where it was declared that meandered rivers and streams and rivers, streams, sloughs, bayous, and marsh outlets, navigable in fact for any purpose, are declared navigable to the extent that they cannot be obstructed without legislative consent.

Not until chapter 328 of 1895 were lakes so dealt with, and then it was declared that all meandered lakes, navigable in fact or so declared

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*Jones v. Pettibone, 2 Wis. 308.*

*Bright v. Superior, 163 Wis. 1.*

*Brewer Oil Co. v. U.S. 260 U.S. 77, 43 Sup. Ct. 60.*


*Diana Shooting Club v. Husting, 156 Wis. 261.*
by federal survey are navigable and public waters and all persons shall
have the same rights thereon and thereto as in and to all other navigable
or public waters within the state, and the act shall not interfere with
any vested rights theretofore acquired upon such lakes. The law is now
section 30.01 (1). Whether a given body of water is navigable within
the meaning here attached becomes, in the absence of legislative declara-
tion, a question of fact.9

In no other case has the question arisen as to whether the title of
the state to the bed of a navigable lake permits the lawful disposition
of substances found in or under such body of water. Language is found
in several decisions tending to indicate that it was the opinion of the
court that the state's title carried with it no power to grant anything
thereof to others and that such title was so impressed with the public
trust that there was nothing left which resembles any of the incidents
of private ownership so far as the power to dispose of was concerned.10

Apparently in England the crown claims the right to mines and
minerals under channels and rivers.11 In a few cases found in this
country, it has been held a proper exercise such title even though held
under trust, to allow selling or disposing of products therein or there-
der.12

- The Court believes that it was within the power of the Legislature
to enact section 31.02 (5) and that no rights of the plaintiffs under
the federal or state Constitutions are invaded by such an act.

Although no mention is made of the rights of riparian owners to such
navigable waters, the presumption is that the Legislature did not intend
to give leave or license to persons acting thereunder to invade or injure
the rights of riparian owners on such navigable waters, or to take
away from such owners or others injured in the carrying on of such
work the usual remedies for wrongs.

GEORGE J. UHLAR

Partnership—Right of Wife to contract as Co-Partner with her
husband.*

Replevin to recover merchandise and store fixtures seized under
a writ of attachment in an action in which the First National Bank
of Crandon was plaintiff and J. F. Sparks, husband of plaintiff in the
present action, was defendant. Kuss, sheriff, levied the attachment.
Sparks filed a voluntary petition in bankruptcy, and one, Prescott, was
appointed trustee. By stipulation of the parties to prevent deteriora-
tion, the goods held by sheriff were sold by the trustee and the funds
kept in his possession. Plaintiff, Nannie Sparks, began this action
against the sheriff and the bank for an alleged amount of
$30,000. Lower court held wife was the owner and entitled to one-half the
proceeds from the sale. Judgment was entered in her favor, from
which she appeals, claiming more money. Notices of review were
filed by the receiver of the bank, subsequently appointed, and by the
trustee in bankruptcy.

*See Bixby v. Parish, 148 Wis. 421.
*See McLennan v. Prentice, 85 Wis. 427.
*See Coosaw Mining Co. v. South Carolina, 144 U.S. 380; 12 Sup. Ct. 689; 36. L.
ed. 537.