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Water Law - Artificial versus Natural Fluctuation of Water Level of Navigable Lake - Rights of Public Held Same in Both Situations - Wilbour v. Gallagher

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WATER LAW—Artificial Versus Natural Fluctuation of Water Level of Navigable Lake—Rights of Public Held Same in Both Situations. Wilbour v. Gallagher, 462 P.2d 232 (Wash. 1969).

Lake Chelan is a large and beautiful navigabel lake located in Chelan County, Washington. In 1927, the Chelan Electric Company, owner of the shorelands involved in this action, obtained a permit from the State to raise the water of the lake to a level 21 feet above its natural level in connection with the construction of a dam for electrical power generation. The company conveyed and quitclaimed to the town of Chelan and to the public the right of access over these lands to Lake Chelan at all stages of water. Platted lots of the land were sold, including the lots now owned by the defendant Gallaghers, subject to the permit right to seasonally flood the premises.

Defendants' land was flooded to depths of 3 to 15 feet from June to September of each year. During this period, the general public, including plaintiffs, used the waters covering this land and the submerged portions of the adjacent streets and alleys for fishing, boating, swimming and for general recration use. After this condition had been in existence 35 years, defendants, littoral owners as to the natural lake level, undertook to fill the land to an elevation five feet above the artificial high water level. This was done to prevent their land from being submerged and to make it available at all times. Two trailer courts were constructed on the fills.

Plaintiffs, littoral owners as to the artificial lake level, brought a class action on behalf of themselves and the public asking abatement of the fills and damages. The trial court, basing its decision on prescriptive rights, held that the fills, though wrongful, were not subject to abatement. Damages were awarded the particular plaintiffs, however, for the lessening of the value of their property occasioned by the fills. The court also considered loss of view, inability to use the waters as before, and a resulting algae problem. Both sides appealed the decision. The state supreme court *held* that the

public has a right to go where navigable waters go, even though the waters cover privately owned land, and decreed that the fills be abated.

The majority of the court acknowledged the doctrine of prescriptive rights as having a valid basis under the facts of the case, but preferred to rest their decision on the proposition that the fills constituted an obstruction to navigation, and, therefore, could not be authorized or approved by this or any other court. The court theorized that under established law the "logically resulting rule" would be that artificially induced fluctuation should be considered the same as a natural fluctuation, and that the rights of the public would be the same in either case.

The "established law" referred to and generally set forth by this court is to the effect that:

> in the situation of a naturally varying water level, the respective rights of the public and of the owners of the periodically submerged lands are dependent upon the level of the water. As the level rises, the rights of the public to use the water increases since the area of water increases; correspondingly, the rights of the landowners decrease since they cannot use their property in such a manner as to interfere with the expanded public rights. As the level and the area of the water decreases, the rights of the public decrease and the rights of the landowner increase as the waters drain off their land, again giving them the right to exclusive possession until their lands are again submerged.[1]

The dissent, after discussing at some length and rejecting the prescriptive rights argument, concluded that the periodic flooding involved is entirely different from a natural raising and lowering of the lake level. The substance of this opinion was to the effect that as defendants' lots all lie above natural high water they are not subject to the public's right of navigation unless there has been a voluntary conveyance, eminent domain proceedings, estoppel, or loss through prescription.

1. Wilbour v. Gallagher, 462 P.2d 232, 238 (Wash. 1969).

There is no case or other law cited as a basis for the propositions advanced by the minority opinion.

In determining that an artificial fluctuation gives the defendants no greater rights than they normally would have as littoral owners to the natural level of a lake, the court established the right of the public to use the navigable waters of the state irrespective of the nature and extent of their flow, and regardless of the fact that the underlying lands are privately owned. This case served to reinforce two previous Washington cases which held that the state, under its constitutional provisions, can fully control the foreshores below the high-water mark in order to prevent any interference with the public's free use of the water.[2]

It is evident that even though the State never owned the land involved in this case, one who takes title to such shoreland may not get a clear title as against the State and the public rights which the State is deemed to hold in trust for the people. Such ownership carries with it qualified property rights.

> The mere ownership of land under water does not give rise to an exclusive right to use the water; nor, indeed, does it confer any legal right to grant or withhold the use of the water. The riparian owner's rights in submerged lands adjacent to riparian lands are qualified, restricted, and subordinate to the paramount rights of the public, and are subject to the public rights of navigation.[3]

The Washington case of *Dawson v. McMillan*[4] followed this line of reasoning when it held that the fact that title of the bed of the channel or the land upon which an obstruction is placed is vested in the appellants does not confer upon them the right to obstruct navigation upon navigable waters.

2. Ghione v. State, 26 Wash.2d 635, 175 P.2d (1946); Kemp v. Putnam, 47 Wash.2d 530, 288 P.2d 837 (1955). The constitutional provision referred to provides that: "The State of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes. . . ."
3. 65 C.J.S. *Navigable Waters*, § 109 (1966); Citing: United States v. Willow River Power Co., 324 U.S. 499 (1944).
4. 34 Wash. 269, 75 P. 807 (1904).

And, there is further authority that such lands may even be reclaimed by the state during periods of low water in order to protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, *without compensation.*[5]

Clearly, whatever the nature of such title, it is not as full and complete as is that to land having no connection with navigable water. The theory seems to be that such an owner takes and holds such title in trust for the use of the public; or that it is "held" in trust by the state for public use. In any event, it is a qualified title and such owner must govern himself accordingly. Even the vested rights of a riparian or littoral owner to use the shore to build piers, wharves, harbors, or booms in aid of navigation will fall in so far as the structures erected by the riparian owner into the water interfere with the public rights of navigation.

The general view appears to be that the exercise by the state of the rights of the public does not deprive the riparian owner of any right, but merely regulates and limits the exercise of existing rights. The United States Supreme Court has held that the owner's use of such property is limited by the right of the public to use the stream in the interest of navigation, and when government acts as to such land, it is exercising its paramount powers in the interest of navigation, rather than taking private property of anyone.[6] In this way the right to compensation is rationalized away, and it would appear that any riparian or littoral owner acts at his peril in acquiring and utilizing such land. It is obvious that the courts of Washington adhere to this view, and it is interesting to note that the State of Washington is one of the most restrictive of the states in this area.[7]

To change the situation slightly, had the defendants been

5. State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914).
6. United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950).
7. Port of Seattle v. Oregon & W.R. Co., 255 U.S. 56 (1920). The court stated that so complete is the absence of riparian or littoral rights in the owner of lands bordering on navigable waters in the State of Washington that the State may, subject to the superior rights of the United States, wholly divert a navigable stream and sell the river bed, and yet have impaired in so doing no right of the upland owners, whose land is thereby separated from all contact with the water.

the original owners of this land in 1927, a better case could have been made out for their position. It is plausible that they would have been entitled to compensation for the partial taking, at least, of their property.

> The absolute rights of persons in the use of a navigable stream for the purpose of navigation do not extend to the appropriation of the soil, trees, and vegetation on its banks, either permanently or temporarily, to their own use; and such an appropriation is a taking of private property, within the meaning of the law, and cannot be done, either by the public or an individual, without compensation to the owner.[8]

The above authority is citing a Washington case. A 1967 Washington case[9] reiterated this view as to taking by an agency for power purposes, which parallels the situation found in the case at bar.

As the use of the land would be limited only one-fourth of the year, the compensation paid would have to be determined accordingly. Under the Fifth Amendment, the property owner can only recover compensation for what was actually taken. Two United States cases are generally cited to this view when lands are intermittently flooded.[10]

In retrospect, it would appear that the defendants could have received compensation for the periodic taking of their land caused by the artificially induced flooding if they had been the original landowners in 1927, or, perhaps, could be compensated tomorrow if the easement were expanded by a new agreement which would involve more of the defendant's land. If the fills had been in existence prior to 1927, the electric company undoubtedly would have had to pay the defendants for their removal, if they felt that such removal would be beneficial to their project.

8. 56 AM. JUR. *Waters* § 213 (1947). Citing: Watkins v. Dorris, 24 Wash. 636, 64 P. 840 (1901).
9. Public Utility District no. 1 of Pend Oreille Co. v. City of Seattle, 382 F.2d 666, 672 (9th Cir. 1967). On this page the court held: "We conclude that Seattle as a licensee of FPC may not assert the Government's dominant navigational servitude; that if shorelands are necessary to its projects they must be *taken* in the constitutional sense, and compensation for the taking must follow."
10. United States v. 2,648.31 Acres of Land, 218 F.2d 518 (4th Cir. 1955); United States v. Cress, 243 U.S. 316 (1917).

It does not follow, however, that defendants can now make a full and unlimited use of their property, or, in the alternative, recover compensation for not being able to do so, due to the fact that their land lies above the natural high-water line and that the taking of their land is artificially induced.

The only tenable answer to such argument is the one set forth by this court—an artificial fluctuation must be treated as if a natural one for the purposes of this case. There can be no difference, especially where, as here, the condition has been in existence 35 years. There is ample authority to the effect that the continuance of an artificial condition for a prescriptive period of time will result in a permanent change in favor of this new condition.

Village of Pewaukee v. Savoy, a relatively similar case, held that the maintenance of the artificial level of the lake for upwards of 20 years had given to the new level, as regards title to submerged lands, all the characteristics of a natural lake. The court determined that as the public had used and enjoyed the lake in such new condition during this period, the title to such land, so far as necessary to maintain this condition, vested in the state by dedication.[11]

C.J.S. indicates that an artificial condition of a body of water may well become a natural or normal condition in respect to the rights of the public.[12] Apparently the principle is well settled that if the volume or expanse of navigable waters be increased artificially, the public right is correspondingly increased, and rights must be determined with reference to the artificial level as if it were the natural level.[13]

Cases holding a right to have an artificial condition continued base their decision on grounds of estoppel, or on long acquiescence in the changed condition. Any action brought,

11. 103 Wis. 271, 79 N.W. 436 (1899).
12. 65 C.J.S. *Navigable Waters* § 20 (1966).
13. Smith v. Youmans, 96 Wis. 103, 70 N.W. 1115 (1897); Mendota Club v. Anderson, 101 Wis. 479, 78 N.W. 185 (1899). The Smith court at page 1117 states that: "It has long been settled that the artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained. The water course, although artificial, may . . . have been so long used as to become a natural water course prescriptively."

to be effective, must be timely. It can hardly be said that the action for recovery of the land in this case was timely.

Accordingly,

> A person is presumed to intend the natural consequences of his deliberate acts. A situation once created and continued for such length of time that it would be considered a violation of good faith to the public for the person responsible for it to change his position and restore the original situation, brings into play the principle of estoppel in pais, which precludes him from revoking what is legally considered a dedication of his land affected by his acts, to the public use. (3 Wash. Real Prop. p. 79).
>
> There is no taking of lands for public use contrary to the will of the owner without just compensation in the circumstances of this case, but a mere acceptance of lands voluntarily surrendered to the public use by the owner, which surrender, by reason of the facts, the owner is precluded from revoking or interfering with, so that, as a consequence, in effect at least, the title to the lands is vested in the state to the same extent as that of lands constituting the original natural beds of the lake.[14]

It is obvious that the Wasington Supreme Court treated the artificial condition of the lake as the natural one for all intents and purposes. That there could be no other conclusion in this case is reflected in the argument of the dissent on this point. Under the reasoning of the dissent the rights of the public to Lake Chelan would stop at the natural high-water mark, and to go beyond would be to trespass on the rights of the defendant Gallaghers. If this argument had been adopted by the court, the public would be required to carry maps, charts, and compasses to determine where their judicially protected rights ended and where a trespass began. There can be no such arbitrary restriction on the use and enjoyment of a navigable body of water. And, if the defendants had clarified the situation by stringing a fence or other barrier at the natural level, the court would again be facing an obstruction to navigation, and abatement proceedings.

14. Village of Pewaukee v. Savoy, *supra* note 11, at 438.

It is essential that an additional factor be considered in regard to the property rights of the defendants in this land:

> [I]f several persons contract expressly, or so act that from their conduct a contract will be implied, for the creation, maintenance, or use of an artificial condition of a body of water, this contract will be enforced so far as it can be consistently with the rules of law.[15]

The defendants in this case were not innocent purchasers for value.[16] They were fully aware that their fee was restricted and diminished by the permit rights of the company, and undoubtedly this was a major factor taken into consideration when the purchase price was negotiated. The littoral owners to this lake knew what they were getting when they purchased—valuable property fronting on a rather large and beautiful lake of the state. Defendants, as a result of their location, were now trying to capitalize on their property by establishing the trailer parks. While an admittedly worthwhile project, it simply could not be realized under the facts and circumstances of the case at bar.

Ordinarily, a person trying to maximize the use of his property in the furtherance of such a project has several causes of action available to him. Foremost among these would be to buy out the interests of the persons adversely affected by such project, if such could feasibly be done. In the present case it is not only the particular plaintiffs who are adversely affected, but also the general public. It is apparent that the public interest could not have been bought out here. Defendants would have had a much stronger case made out for them if Lake Chelan had been non-navigable and the bed privately owned. A stronger argument for the right to fill would have followed also.

The general consensus, however, appears to be that no

15. 56 AM. JUR. *Waters* § 244 (1947).

16. Wilbour v. Gallagher, *supra* note 1, at 237. Note 11 states that: "Title to the defendants' property below the 1,100 foot level is deraigned through deeds which make it subject 'to the perpetual right to raise the waters of Lake Chelan, Washington to the elevation of eleven Hundred (1100) feet above mean sea level, and to perpetually innundate and overflow [said proprety] to said elevation of eleven hundred (1100) feet above mean sea level.' "

matter what the causative forces and factors involved, the right to reclaim and improve submerged lands is subordinate to, and must not be exercised in any manner inconsistent with, the public rights, and it is subject to the paramount power of the state and federal governments to regulate navigation.[17] It is also the general consensus of the authorities studied that "navigation" is a nebulous term used by the courts rather uniformly in this area of water law when they really are referring to the public "interests" in water. With this in mind, it is interesting to note other cases which have considered the right to fill versus the right of "navigation."

A 1968 Washington decision[18] refused to allow the defendants to build an apartment out on a fill into a lake on the ground that such constituted an unreasonable use of their riparian rights to the lake. The court indicated that no fill or any structure thereon could be effectuated unless the use was "intimately associated with the water." It is apparent the court feels that apartments and trailer parks do not qualify. Along these same lines, a Michigan decision, *Burt v. Munger,* held that the riparian bed owner could not make dirt fills out into a lake in order to increase his farmland, as the fills would be "acts constituting an invasion of the rights of the defendant in and to the waters of the lake."[19] In a more recent decision[20] this same court enjoined the defendant from conducting dike and fill operations on the ground that the area was being used for public boating and fishing and constituted a fish and game habitat subject to protection under the public trust doctrine.

Under the "trust doctrine" mentioned in the above case, and earlier in this article, the state holds the waters "in trust" for the benefit and protection of the people. But the rights of the public in such waters may be limited or withdrawn when greater interests demand such, and it is apparent that the trust doctrine does not prevent either this curtail-

17. 65 C.J.S. *Navigable Waters* § 113 (1966).
18. Bach v. Sarich, 74 Wash. 2d 580, 445 P.2d 648 (1968).
19. 314 Mich. 655, 659, 23 N.W.2d 117, 120 (1946).
20. Township of Grosse Ile v. Dunbar & Sullivan Dredging Co., 167 N.W.2d 311 (Mich. App. 1969).

ment in rights or minor alterations of the water-land boundaries when such is deemed to be for the greater public good.

The Wisconsin courts expounded this view in *City of Milwaukee v. State* when they balanced interference with navigation, which would be caused by a steel company building a pier and harbor out into the waters of a lake, against the benefits of such a project to the city and the state. The court considered the interference with navigation to be "trifling" in comparison with the public good arising from such a project.[21] In two more recent cases,[22] fills of small portions of lakes for park improvement in the one instance, and for construction of an auditorium and civic center in the other, were allowed by the same court. In both cases the court felt that the disappointment of those members of the public who may desire to boat, fish or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.

One of the most protected public interests today is that of public recreation. This is especially true due to the recent emphasis placed on environmental problems. In considering any cost-benefit theory, the benefits to be acquired through means of a particular project must necessarily outweigh the detriments flowing from that same project. And the loss of public recreational opportunity must be counted as a cost.

Although it is not specifically mentioned by the *Lake Chelan* court, this writer feels that a balancing of interests did occur, as is evidenced by the concern shown by the judge as to what would happen to the public's right in the lake if every littoral owner thereto has the right the defendants' claim.[23] Undoubtedly the court considered the conservation

21. 193 Wis. 423, 214 N.W. 820 (1927).

22. State v. Public Service Commission, 275 Wis. 112, 81 N.W.2d 71 (1957); City of Madison v. State, 1 Wis. 2d 252, 83 N.W.2d 674 (1957).

23. Wilbour v. Gallagher, *supra* note 1, at 237. The court determined that: "The property owners could make any use, not prohibited by law, of their properties—from fills for trailer parks close to the highways to high-rise apartments close to the lake.

Unless the laws applicable to the use of navigable waters apply to this annual artificial extension of the water of Lake Chelan, to preserve the status quo, it would seem that everybody is on his own."

of this natural resource for the people with also an eye toward continued utilization of the same for the economic benefits derived therefrom. Washington is well known for the natural beauty of its forests, streams and lakes, and spends no small sum each year advertising the same. I feel it safe to say that this may have been a factor taken into consideration.

> Lakes are natural open spaces, more difficult to destroy than others, and offer a special dimension of beauty, color and recreational potential to the people who live near them. Now even these environmental gems are being damaged and destroyed by a steady encroachement of fills and buildings—pushing further and further out into the water.[24]

The court recognized that not all fills and developments thereon would constitute a necessary evil in all cases, but that under the proper circumstances and conditions, established, preferably, by the public authorities, such developments might be "desirable and appropriate."

A recent article which apparently originates from the University of Washington School of Law sets forth more definite criteria or standards to be applied in determining the validity of a particular fill:

> In order to create a fill or structure on the bed of navigable waters, approval from the following sources ordinarily would be required: First, if the state still holds title, either title or a lease to the bed would have to be obtained from the state. Secondly, the fill or structure would have to stay within any navigation or harbor lines created by state authorities. Thirdly, the consent of the U. S. Army Corps of Engineers would have to be obtained to assure that the fill or construction did not interfere with interstate or foreign commerce and navigation. Fourthly, even though the United States did not object, care would have to be taken that the fill or structure did not interfere with the public's right of navigation. Fifthly, in those states that recognize

24. Johnson & Morry, *New Small Lake Law—Open Space and Recreation Versus Filling and Building;* found in JOHNSON & LEWIS, CONTEMPORARY DEVELOPMENTS IN WATER LAW, at 112 (1970).

> riparian rights on navigable waters care might have to be taken that the fill or structure was not 'unreasonable' under the riparian rights law of that state. Finally, compliance with local zoning laws and building codes would be required.[25]

Many of the dictates set forth by this court are embodied in the rules set forth, *supra,* and it would appear that one authority greatly influenced the other.

In conclusion, although Washington appears to make no distinction between private ownerhsip of beds and public ownership of the beds underlying its waters, at least as to the issues raised in this case, a stronger case can be made for the abatement of fills when public ownership is involved. The only other alternative to abatement that is mentioned in the *Lake Chelan* case is damages, which in itself is a nullity as it is impossible to determine to whom the damages would be awarded . . . certainly not to every member of the public. On the other hand, damages could be a distinct possibility where private ownership, and, therefore, more absolute property rights would be involved. The Washington Supreme Court manifested the correct principle of established law prevelant in the country at this time concerning the rights of all parties involved. Although the opinion is based on an obstruction to navigation theory, the court clearly left open the door for other bases, including the "excellent case" made out for prescriptive rights. The decision is definitely exportable to the other states as an establishment of the rights of the public in "navigable" waters, and of the rights of a purchaser of shoreland to exploit the same. As to the general overriding question raised by the litigation—whether there should be one set of rules governing an artificial fluctuation of a body of water, and another as to a natural condition— all logic was behind this court when it held that it would not be feasible to have such a dichotomy governing these parallel areas of water law.

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25. *Id.* at 132-33.