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RIPARIAN RIGHTS — INLAND LAKES

The southeast corner of respondent's property lay underwater in a land-locked non-navigable lake. The owners of the contiguous tracts to the east and the south erected barriers along the property lines which united at this corner. Respondent's minute circumvallated sector of the lake was thereby rendered inadequate for recreational purposes. Removal of the barriers was sought through mandatory injunction. *Held*, granted: where each of multiple properties embraced land underlying the lake, each owner was entitled to use of the entire lake; provided, such use did not transgress the concurrent rights of the others. *Duval v. Thomas*, 114 So.2d 791 (Fla. 1959).

The rule was early formulated in England that non-tidal non-navigable lake bottoms were susceptible of private ownership.[1] Most jurisdictions hold that the English rule obtains.[2] In the majority of these jurisdictions so recognizing private ownership, it was further decided that an owner of a segment of a lake bed was restricted to use of those waters overlying his land while he pursued the usual recreations of fishing, boating and swimming.[3] This conclusion was a literal extension of the common law

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1. Bristow v. Cormican, 3 App. Cas. 641 (1878); Menzies v. Macdonald, 2 Macq. 463, H.L. 9 Scots Rev. Rep. 692 (Scot. 1856); Cochrane v. Earl of Minto, 6 Paton 139, H.L. 2 Scots Rev. Rep. 541 (Scot. 1815), construing enfeoffments dating from 1520.

2. Crutchfield v. F. A. Sebring Realty Co., 69 So.2d 328 (Fla. 1954); Bannon v. Logan, 66 Fla. 329, 63 So. 454 (1913); Sanders v. DeRose, 207 Ind. 90, 191 N.E. 331 (1934); *In re* Opinions of the Justices, 118 Me. 503, 106 Atl. 865 (1919) (littoral proprietors may own lake bed except where, by size, lake meets statutory definition of a great pond); Town of West Roxbury v. Stoddard, 7 Allen 158 (Mass. 1863) (except for ponds over ten acres which are reserved for the public); Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117 (1946); Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578 (1902); State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940); Walden v. Pines Lake Land Co., 126 N.J.Eq. 249, 8 A.2d 581 (1939); Ledyard v. Ten Eyck, 36 Barb. 102 (N.Y. 1862); Lembeck v. Nye, 47 Ohio 336, 24 N.E. 686 (1890); Baylor v. Decker, 133 Pa. 168, 19 Atl. 351 (1890); Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. Civ. App. 1935); Proctor v. Sim, 134 Wash. 606, 236 Pac. 114 (1925). *Contra*, Ne-Pee-Nauk Club v. Wilson, 96 Wis. 290, 71 N.W. 661 (1897), held that a riparian owner owns to the middle of a stream but the state owns bed of an inland lake.

3. Sanders v. DeRose, *supra* note 2, ". . . each owner has the right to the free and unmolested use and control of his portion of the lake bed and water thereon for boating and fishing"; Lamprey v. Danz, *supra* note 2, where owner was enjoined from boating over neighbor's portion of lake to retrieve fowl shot from blind erected in his own sector; Walden v. Pines Lake Land Co., *supra* note 2; Commonwealth Water Co. v. Brunner, 175 App. Div. 153, 161 N.Y. Supp. 794 (1916), ". . . have no right to fish, boat, bathe, take ice, race horses upon the ice, or do any other act in or upon any part of said lake under which they do not own the land" (by dictum the court said their decision was *contra* common law); Lembeck v. Nye, *supra* note 2; Smoulter v. Boyd, 209 Pa. 146, 58 Atl. 144 (1901), held owner could erect fence in water; Taylor Fishing Club v. Hammett, *supra* note 2, held owner has exclusive right to boat and fish in the water area over his land.

theory that an owner exercised absolute dominion and control indefinitely upward from his property line.[4]

A minority of the jurisdictions concluded that each lake bottom owner was entitled to use of the entire lake.[5] Two approaches were evident in reaching this conclusion. First, a rational determination that the concept of riparian interests applied to lakes as well as streams,[6] that the rights to fish and boat were riparian in origin[7] and that ownership of a segment of the lake bottom did not alter those rights.[8] Second, an admission of an owner's right to an interest extending upward from his land, but a determination that the interest was one of control rather than one of absolute dominion.[9]

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4. Lamprey v. Danz, 86 Minn. 317, 321, 90 N.W. 578, 580 (1902): "It is elementary that every owner has exclusive dominion over the soil which he absolutely owns; hence such an owner of land has the exclusive right of hunting and fishing on his land, and the waters covering it."; 73 C.J.S. *Property* § 7 (1951).

5. Beach v. Hayner, 207 Mich. 93, 173 N.W. 487 (1919), a part owner and his licensees "may use the surface of the whole lake for boating and fishing"; State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940); Improved Realty Corp. v. Sowers, 195 Va. 317, 78 S.E.2d 588 (1953); Snively v. Jaber, 48 Wash.2d 815, 296 P.2d 1015 (1956), where several owners held land bordering a non-navigable lake, boating, fishing and other similar rights were owned in common and any proprietor or his licensee could use the entire lake. See also Cochrane v. Earl of Minto, 6 Paton 139, H.L. 2 Scots Rev. Rep. 541 (Scot. 1815), where each owner could dig bottom marle in his division only but the rights of fishing and fowling were common to each over the entire lake; Mackenzie v. Banks, 3 App.Cas. 1324 (1878), where one owner was denied use of the entire water area because that area was defined as *two* lakes although connected by a very shallow strait. *Cf.*, Menzies v. Macdonald, 2 Macq. 463, H.L. 9 Scots Rev. Rep. 692 (Scot. 1856).

6. Hardin v. Jordan, 140 U.S. 371 (1890), discussing an Illinois patentee, held that where patent is issued for land bounded by stream or lake, title passes for the land under the water; Mix v. Tice, 164 Misc. 261, 298 N.Y.Supp. 441 (Sup.Ct. 1937); Cochrane v. Earl of Minto, *supra* note 5.

7. United States v. Willow River Power Co., 324 U.S. 499, 505 (1945): "The fundamental principle of this system is that each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use"; Improved Realty Corp. v. Sowers, 195 Va. 317, 78 S.E.2d 588 (1953); Mackenzie v. Banks, 3 App.Cas. 1324 (1878), wherein the court stated that riparian ownership conferred the rights to boat, fish or shoot fowl.

8. State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 193 So. 9 (1940), where one of six proprietors owned most of the lake bottom, the court held "Where there are several riparian owners of an inland lake, each owner, their licensees, and any other inhabitant who can gain access thereto without trespass, may use the surface of the whole lake for boating and fishing. . . ." Herein lay a crux of the difference between the majority and minority opinions. The majority view focused on bottom ownership by grant and rationalized that such ownership instilled the owner with greater surface rights than the riparian owner. The minority focused on the surface rights and rationalized that they resulted from riparian proprietorship which obtained whether the bottom ownership came by grant or through the ripa. See also 1 FARNHAM, WATERS & WATER RIGHTS 305 (1904): ". . . the principle which makes riparian rights depend on contact with the water is not always perceived when the boundary line is in the water."

9. Beach v. Hayner, 207 Mich. 93, 95, 173 N.W. 487, 488 (1919): Where plaintiff owned most of lake bottom, the court held that licensees of the other bottom owners could use the surface of the whole lake for boating and fishing. The court agreed that the question was whether one owner could exclusively "use and control" his property against the licensees.

The instant case came before the court because of apparent conflict with earlier decisions[10] in Florida, but those decisions were easily distinguished.[11] The court acknowledged the majority[12] holding but denied that it was 'obligated"[13] to embrace it. Accordingly, the court was unrestricted in exercising its "judicial discretion"[14] in determining the litigants' rights and was at liberty to "take into account . . . our social and economic customs and present day conceptions of right and justice."[15] In exercising its discretion the court adopted the more "liberal" attitude. That "liberal" attitude coincided with the minority[16] viewpoint but the court denominated it "civil law."[17]

In *Duval v. Thomas, supra,* the court had an opportunity to take an unfettered harmonious step forward in the resolution of water rights in Florida. However, by needlessly labeling its decision as being founded on the civil law, the court has reared another problem. The water rights of riparian owners, under the civil law, are curbed by the paramount rights vested in the public under the concept of *res publicae*[18] which permits the creation of an usufruct[19] by appropriation.[20] Thus the civil

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10. Osceola County v. Triple E. Dev. Co., 90 So.2d 600 (Fla. 1956); Hamilton v. Williams, 145 Fla. 697, 200 So. 80 (1941); Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918); Clement v. Wilson, 63 Fla. 109, 58 So. 25 (1912).

11. Osceola County v. Triple E. Dev. Co., *supra* note 10, where the defendant owned the entire lake bed and surrounding land, the county condemned a right of way to the water's edge and tried to assert a use in the public to boat and fish; Hamilton v. Williams, *supra* note 10, which held that a person owning land had the exclusive right to hunt upon it; Pounds v. Darling, *supra* note 10, which held that the City of Orlando could not prevent abutting owners from bathing in a lake used as a public water supply because such action would be taking property without due process; Clement v. Wilson, *supra* note 10, where defendant owned all land around a non-navigable cove except at its mouth where it emptied, plaintiff was held to be a trespasser when he went upon the cove.

12. See cases cited note 3 *supra.*

13. FLA. STAT. § 2.01 (1957), declares the common law of Florida to be the same as that in England prior to July 4, 1776. In the instant case the court stated ". . . research has not divulged the clear, unambiguous pronouncement of the common law . . . that would leave us no room but to adopt it."

14. Ripley v. Ewell, 61 So.2d 420, 423 (Fla. 1952): "When the rules of common law are in doubt, . . . we are sometimes called upon to determine what general principles are to be applied, and in doing this we, of necessity, exercise a broad judicial discretion."

15. Here the court took judicial notice of tourism as a salient factor for consideration and calculated that "immeasurable" damage would result if our visitors, as guests, were restricted to fishing and swimming only in those waters within the host's property lines.

16. See cases cited note 5 *supra.*

17. The civil law recognized both private ownership of subaqueous lands and common usage of the water itself. See SANDARS, INSTITUTES OF JUSTINIAN 168 (1876).

18. *Id.* at 36: "res publicae, things which belong to the State, as the State land, navigable rivers, . . ."

19. Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 555, 81 P.2d 533, 560 (1938): ". . . the riparian does not 'own' the water of a stream, he 'owns' a usufructory right—the right of reasonable use of the water"; SANDARS, INSTITUTES OF JUSTINIAN 194 (1876): "Usufruct is the right of using, and taking the fruits of things belonging to others . . . It is a right over a corporeal thing."

20. The instant case recognizes Snively v. Jaber, 48 Wash.2d 815, 296 P.2d 1015 (1956), as a pronouncement of the civil law. Apparently the court overlooked the included concept that a usufructuary interest in water can be acquired for reasons other than riparian ownership. *Accord,* Proctor v. Sim, 134 Wash. 606, 236 Pac. 114

law is broader in scope than the common law theory of riparian rights.[21] Accordingly, a further decision will be necessary to delineate the precise amount of civil law adopted in this case.

The court is to be commended for its ultimate definition of the respective rights of the owners in the present case. Well-reasoned, well-mannered men have for centuries adhered to a mode of social intercourse which permitted, even demanded, a reasonable sharing of waters. By virtue of its elemental fluidity, water, like air, infuses each owner with the benefits of a Kantorian unity and those benefits alone suffice to sustain a sharing. It is suggested however, that Florida, endowed with a relative largesse of water, need not adopt more of the civil law than is essential for the determination of the rights of owners situated exactly as those in the instant case.

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(1925), where appellant owned entire bed and all border area of lake and appellee, a nearby non-riparian owner, entered and pumped water for irrigation; *held*: owner's "only vested right is the beneficial use of the waters for irrigation and domestic purposes . . . any surplus waters are subject to appropriation for irrigating non-riparian lands."; SANDARS, INSTITUTES OF JUSTINIAN 191 (1876): ". . . among the servitudes of rural estates are rightly included the right of drawing water."

21. POMEROY, RIPARIAN RIGHTS § 21 (1887), states that appropriation is not available under the common law doctrine of riparian rights.