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Condemnation: Public Access to Waterways

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solely on *stare decisis,* did not address themselves to the question at all. Wisconsin adopted the approach of the Michigan Court without extended discussion, when it considered charitable immunity in the *Kojis*[20] case. However, it has not directed itself, when applying the new rule to a case at bar, to the question of what weight, if any, should be given to the reasonable expectations of municipal corporations. Such corporations may have not insured themselves, relying on the heretofore settled doctrine of immunity. This is an additional reason for the wholly prospective application of the abrogation urged by Justice Black. The question of whether the municipal corporation had legislative authorization to acquire liability insurance might also be raised,[21] as, on the other hand, might the question of the court finding an implied authorization to purchase such insurance once the court were to remove the immunity.

The *Williams* decision in Michigan may be the forerunner of the abolition of the doctrine of municipal immunity in Wisconsin, paralleling the course of charitable immunity through these same courts.

PATRICIA GODFREY

Condemnation—Public Access to Waterways: With the increasing interest in the various forms of water recreation these days, the decision of the Wisconsin Supreme Court in *Branch v. Oconto County,* 13 Wis. 2d 595, 109 N.W. 2d 105 (1961), is important in the area of conflict which finds interests of riparian landowners and those of the general public adverse to each other when seeking access to waters. In this case[1] the court affirmed the validity of Section 23.09(14)[2] which grants to county boards the power to condemn a right of way for a public highway to any navigable water.

Plaintiff, landowner, had acquired a strip of land surrounding a lake. This lake because of its shallowness and mucky bottom, offered no opportunities for fishing or swimming, but proved to be an excellent site for duck hunting. The public was restricted from use of the lake, except upon payment of a fee to the plaintiff. The county, therefore, petitioned for condemnation pursuant to Section 23.09(14).

The landowner did not contest the issues of necessity or navigability, but claimed that Section 23.09(14) was unconstitutional where duck hunting is the sole purpose to be served by the taking. He claimed

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[20] Kojis v. Doctor's Hospital, *supra* note 18.
[21] See 68 A.L.R. 2d 1437 (1959).
[1] Branch v. Oconto County, 13 Wis. 2d 595, 109 N.W. 2d 105 (1961).
[2] WIS. STAT. §23.09(14) (1959):
WAYS TO WATERS. The county Board of any county may condemn a right of way for any public highway to any navigable stream, lake, or other navigable waters. Such right of way shall not be less than sixty feet in width, and may be condemned in the manner provided by chapter 32; but the legality or constitutionality of this provision shall in nowise affect the legality or constitutionality of the rest of this section.

that the condemned strip of land was important, because it kept his rights in the lake intact, and without control of the lake a prospective business (a private hunting club) would now be impossible. In answer to these contentions the court stated that Section 23.09(14), authorizing the condemnation, was not unconstitutional in its *application* under these circumstances. It refused to upset a finding that there was a sufficient necessity for the taking, in the absence of proof showing the trial court's determination to be unreasonable, arbitrary, or not made in good faith.[3]

The laws pertaining to waters vary from state to state; thus a basic understanding of the Wisconsin legal doctrine on this matter is required to appreciate the basis of the court's decision. Water in a natural stream or lake is not of itself subject to ownership,[4] but as to the use of navigable waters, Wisconsin has long recognized this right as being held by the state in trust for the public.[5] Furthermore, beds of navigable lakes are also subject to this trust, with title to them being held by the state.[6]

Navigable waters being held in trust, the test to determine navigability becomes increasingly important, in order to decide who is the owner of the lake or stream and its respective bed and thus entitled to its beneficial use. The tests involved vary from state to state and in different areas of the country,[7] most of them requiring commerce as an essential element. However, in Wisconsin the modern test of navigability states that a stream or lake is navigable "if it is capable of floating any boat, skiff, or canoe of the shallowest draft used for recreational purposes."[8] This stressing of recreation as an incident of navigation makes more lakes and streams subject to the trust and places on the riparian landowner an almost impossible task of proving nonnavigability even though the lake or stream would be declared so under the tests of many other jurisdictions.

Once the water has been declared navigable, the uses the public as citizens of the state retain in the lake or stream are numerous. Besides the recognition of hunting,[9] fishing,[10] boating,[11]

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[3] Branch v. Oconto County, *supra* note 1, at 598-601, 109 N.W. 2d 107-109.
[4] Lawson v. Mowry, 52 Wis. 219, 234, 9 N.W. 280, 281 (1881).
[5] Illinois Steel Co. v. Bilot, 109 Wis. 418, 426, 84 N.W. 855, 85 N.W. 402 (1901).
[6] Ne-pee-nauk Club v. Wilson, 96 Wis. 290, 71 N.W. 661 (1897).
[7] Kannenberg, *Wisconsin Law of Waters,* 1956 WIS. L. REV. 345, 346: "There is no branch of law in which the rules differ so widely in different sections of the United States and from state to state as that branch of law which pertains to Waters."
[8] Muench v. Public Service Comm., 261 Wis. 492, 506, 53 N.W. 2d 514, 55 N.W. 2d 40 (1952).
[9] Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).
[10] Baker v. Voss, 217 Wis. 415, 259 N.W. 413 (1935).
[11] Nekoosa-Edwards Paper Co. v. Railroad Comm., 201 Wis. 40, 47, 228 N.W. 144, 147, 229 N.W. 631 (1930), *aff'd* 283 U.S. 787 (1930).

> there is language in the decisions indicating that sailing, swimming, skating, and the enjoyment of scenic beauty are all activities in which the public may indulge in navigable streams. In fact it seems likely the court will uphold the right of the public to make any recreational use of a navigable stream that it sees fit, so long as the recreation involved is otherwise lawful.[12]

This language seems to have been made applicable to navigable lakes by the reasoning contained in a later case.[13]

Though the above legal doctrine appears to be well-established, and though it embraces the interest of the public as paramount, the problem of access still remains. Assuming the riparian owner controls the land contiguous to waters, he has a legally recognized right to prevent entry by the public; the Wisconsin Supreme Court has upheld the riparian owner's rights in this type of property as against persons who would stray from or to the lake.[14]

With this background in mind it appears the court reasoned logically in the face of existing legal doctrine of Wisconsin. In holding that Section 23.09(14) and the condemnation for which it provides were a valid means of fulfilling the public rights of use and enjoyment held in trust, the court stated:

> Wisconsin holds the beds underlying navigable lakes in trust for all its citizens. Hunting is one of the uses of water which are recognized as public purposes of the trust. . . . Creation of a public way to the edge of a navigable lake *which the public cannot otherwise conveniently reach* simply permits the public to enjoy the activities for which the state holds the title in trust.[15] [Emphasis added.]

The phrase containing the words "which the public cannot otherwise conveniently reach,"[16] presents an interesting question as to whether the court, by implication, sought to place a limitation upon the power granted to the county. Would the county be allowed effective use of Section 23.09(14) if public access to a lake or stream already existed? Is it proper to infer that this statute can be used only in the complete absence of public access, as in *Branch v. Oconto County?* This remains an open question, but it appears that a riparian landowner of lake property could possibly challenge the right of a county to condemn if there is an existing public access at some point on the lake.

At the present time it appears that there is a trend favoring more extensive land development to promote public access to waters. This intent manifests itself in the enactment of Section 23.09(15)[17] which

[12] Waite, *Public Rights to Use and Have Access to Navigable Waters,* 1958 WIS. L. REV. 335, 339.
[13] State v. Public Service Comm., 275 Wis. 112, 81 N.W. 2d 71 (1957).
[14] Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393 (1923).
[15] Branch v. Oconto County, *supra* note 1, at 598, 109 N.W. 2d at 107.
[16] *Ibid.*
[17] WIS. STAT. §23.09(15) (1959).

became law subsequent to the commencement of the *Branch case.* Under this law the conservation commission is permitted to make certain state aid available to counties and towns upon their passing a resolution indicating their desire to acquire and improve lands for public access to navigable lakes or streams in their county or town. The commission must find that the project will best serve the public interest and the need of the state as a whole.[18] There are, however, limitations in that cities are not eligible for this aid, nor may a county or town receive aid to improve existing accesses which they already own.

Through this decision construing Section 23.09(14) and in view of more recent Section 23.09(15), it appears that Wisconsin has wholeheartedly adopted a policy of promoting public access to navigable waters. The condemnation power and the offer of financial assistance under certain circumstances may instill a desire in county boards to develop public accesses and recreational facilities in their respective areas. On the other hand the riparian landowner seems to be fighting a losing battle in view of the manifested state policy. His defenses appear limited to situations where the taking of land is pursuant to the arbitrary action of the condemning authority.

Perhaps the most significant point of this decision concerns the subject of damages. The benefit which the landowner receives in excluding the public by virtue of his ownership of land surrounding the lake will not be considered by the court as a property right. Thus, such personal benefit will not enter into a "before the taking" valuation and cannot be compensated for as an element of damages.[19]

JERRY D. GULL

Wills—Liability of Attorney to an Intended Beneficiary for Negligent Drafting of a Will: Robert Lucas alleged in his complaint that defendant L. S. Hamm, an attorney at law, had agreed with testator, Eugene Emmich, to prepare a will and codicils for him by which plaintiffs were to be beneficiaries of a trust provided for in the will and to receive 15% of the residue. The instruments provided that the "trust shall cease and terminate at 12 o'clock on a day five years after the date upon which the order distributing the trust property to the trustee is made by the court having jurisdiction over the probation of this will." The defendant attorney, who was also counsel for the executors, advised plaintiffs, after the death of testator and admission of the will to probate, that the trust provision was invalid and advised plaintiffs to make a settlement with the blood relatives of the testator. Plaintiffs allege that the attorney's negligent drafting, which violated the statu-

[18] 49 A.G. 141-142.
[19] Branch v. Oconto County, *supra* note 1, at 602, 109 N.W. 2d at 109.