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Waters—Appropriation—Riparian Rights

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value; (2) *Hull v. Pfister and Vogel Leather Co.*, 235 Wis. 653, 294 N.W. 18 (1940), a case which is in accord with its position but in which the court was guided by a statute expressly limiting the preference allowable to preferred stockholders upon dissolution to the par value of the stock plus any profits; (3) *Michael v. Cayey-Caguas Tobacco Co.*, 190 App. Div. 618, 180 N.Y. Supp. 532 (1920). That case reached the result urged in construing a statute similar to REM. REV. STAT. § 3823, but relied for authority mainly on In re *W. J. Hall & Co.*, L.R. 1 Ch. 521 (1909), which has since been overruled by In re *Springbok Agricultural Estates Ltd.*, L.R. 1 Ch. 563 (1920).

In addition to its general argument the dissent observes: "The capital stock or assets of [the corporation] belong to the common stockholders. The preferred stockholders had either loaned money to the corporation and received payment in shares of preferred stock or had become purchasers of such stock." However, preferred stockholders are universally held to be owners, not creditors, *Armstrong v. Union Trust & Savings Bank, Wash.*, 248 F. 268 (9th Cir. 1918), and this status does not vary with the methods by which they acquire their stock. If the dissent's contention is assumed to be valid, it would seem to strengthen the position of the majority. The normal result in a debtor-creditor relationship based on an annual percentage return is that the creditor becomes entitled to his interest regardless of profits.

The dissent further states: "The purpose of [the clause] when considered in conjunction with other factors was that the preferred stockholders were entitled to have a redemption made of their stock and to receive any dividends which had at any time been made [declared] by the trustees out of net profits, which had not been paid to them." However, since this is true even if there is no specific agreement between the stockholders, the parties would probably have omitted the clause if that is the only effect they wanted it to have.

Other language of the dissent indicates that it would allow the preferred stockholders payment up to the amount of any surplus which a corporation might have upon dissolution. This proposed solution has some merit. Its difficulty is that if the technical meaning of the word "dividend" is applied, as the dissent strongly urges, there could be no dividend in existence until one was declared; thus the dissent can consistently construe "accrued dividends payable" only to mean "dividends declared but not paid," and not to mean that the preferred stockholders are entitled to any part of the surplus in situations where they have not received all of the stipulated periodical dividends and the corporation has a surplus upon dissolution.

LOUIS ROUSSO

Waters—Appropriation—Riparian Rights. Action by a water district to appropriate and condemn water for domestic uses from a nonnavigable lake. All the riparian land was privately owned by persons who used the lake for boating, bathing, and fishing. One tract was planted in berries and intensively fertilized, and drainage from it seeped into the lake. The trial court held that boating, bathing, fishing, and reasonable agricultural pollution were riparian rights which would be damaged by operation of the state health laws protecting water supplies, and awarded compensation for the resulting depreciation in land values. Appeal. *Held*: Affirmed. *Petition of Clinton Water District*, 36 Wn. 2d 284, 218 P. 2d 309 (1950).

The Washington court early held that fishing and reasonable agricultural pollution were riparian rights. *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239 (1900); *McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851 (1909). But it had never before decided the status of boating and bathing, although several other jurisdictions have long held these to be riparian rights at common law. *People v. Hulbert*, 131 Mich. 156, 91 N.W. 211

(1902); *George v. Village of Chester,* 202 N.Y. 398, 95 N.E. 767 (1911); *State v. Morse,* 84 Vt. 387, 80 Atl. 189 (1911). This is also the rule set out in 1. WIEL, WATER RIGHTS IN THE WESTERN STATES 803 (3d ed. 1911).

The common law rules on riparian rights are the law in Washington, *Benton v. Johncox,* 17 Wash. 277, 49 Pac. 495 (1897), but this state has also long subscribed to the doctrine of appropriation. See Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington,* 7 WASH. L. REV. 197 (1932). The water code of 1917, REM. REV. STAT. § 7351 *et. seq.* [P.P.C. § 993-1 *et seq.*], provides that rights in publicly owned waters shall be acquired only by appropriation, and permits private persons to exercise the right of eminent domain to condemn inferior uses of water for a use that is declared by the statute to be public in nature. Since riparian rights are valuable property rights, *Litka v. Anacortes,* 167 Wash. 259, 9 P. 2d 88 (1932), just compensation must be made when they are taken in the appropriation through the exercise of eminent domain. WASH. CONST. ART. I, § 16.

One line of Washington decisions would seem, at first glance, to preclude the rule of the instant case. In 1923 the court held that riparian rights do not attach to surplus waters, *i.e.,* those in excess of the amount which can be beneficially used by the riparian owner for irrigation and domestic purposes, either directly or within a reasonable time. *Brown v. Chase,* 125 Wash. 542, 217 Pac. 23 (1923). This rule was applied to a nonnavigable lake in the case of *Proctor v. Sim,* 134 Wash. 606, 236 Pac. 114 (1925). The water involved in the instant case clearly fits this definition of "surplus," but the holdings are distinguishable. The earlier two cases held that riparian rights involving quantitative takings of water extended only to the volume which could beneficially be used for irrigation and domestic purposes, while the instant case dealt with riparian rights to use the body of water without removing any part of it.

In 1929 the court edged closer to the instant holding by deciding that when an appropriation would lower a lake level and expose riparian land previously submerged, the appropriator would have to proceed by eminent domain and compensate the owners for damage to a riparian right. *Martha Lake Water Co. v. Nelson,* 152 Wash. 53, 277 Pac. 382 (1929). While the court expressly stated the injury would result from lowering the lake level, it added the "owners purchased their property because of its access to the water for bathing, boating, swimming, fishing and for summer homes. . . . The riparian land is chiefly valuable for the purposes mentioned." *Martha Lake Water Co. v. Nelson, supra,* 152 Wash. at 54, 277 Pac. at 382. By inference these uses were recognized as riparian rights. The rule in the *Martha Lake* case was reaffirmed three years later by *Litka v. Anacortes, supra.*

Thus the instant case is the first direct holding in this state that bathing and boating are riparian rights. While the rule creates an acute problem for smaller water districts whose only feasible source of water is a nonnavigable lake or stream, it is nonetheless a realistic rule in view of the considerable effect these activities have on riparian land values.

G. KEITH GRIM

Evidence—Witnesses—Proof of Prior Inconsistent Statements. *D* was convicted of second degree assault. The prosecuting attorney, ostensibly for the purpose of laying a foundation for impeachment, asked *D* questions concerning *D*'s prior inconsistent statements, using a purported manuscript of a wire recording. *D* neither confirmed nor denied making the statements, answering, "I don't know" or "I don't deny it or confirm it." The prosecutor failed to follow this up on rebuttal by proving or attempting to prove that the prior statements were actually made. Appellant contended this was