Michigan Law Review

Volume 16 | Issue 1

1917

Note and Comment

Gordon Stoner
University of Michigan Law School

Ralph W. Aigler
University of Michigan Law School

Michigan Law Review

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE

LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. **35 CENTS PER NUMBER**

BRADLEY MARTIN THOMPSON.—For a second time within the year death has claimed a member of the Faculty of the Law School. Professor Jerome C. Knowlton died in January, and now on September 29th last, Professor Bradley M. Thompson has completed his life-work.

The Law School, until Professor Knowlton's death, had had the unique experience of never having lost by death a single active member of its Faculty in all its fifty-five years. Of course death has called not a few of the former members of the Faculty, but, they had previously severed their active connection with the Faculty. Professor Thompson had in 1912 retired from active duty. He had the distinction of being a member of the first class graduating from the Law School, as well as of being the oldest member of the Faculty, both in years and in point of service. He was perhaps known and endeared to a greater number of students than any man, except Professor Knowlton, who has ever been connected with the Law School, and "Tommy" as he was affectionately known and called by all who had ever been his students, will be missed by a great number of lawyers practicing in every part of the country.

NOTE AND COMMENT

With all but one of the first group elected as editorial assistants for this year engaged in serving their country, it is evident that the REVIEW, too, must feel the pinch of the Great War. Every effort will be made to keep up to the standard of previous years. Inevitably, however, the amount of material available for publication will be much less than in normal times.

THE LAW SCHOOL.—The attendance has fallen off 52%. From the beginning there has been manifested a most inspiring patriotic spirit, and the falling off undoubtedly is due to a generous response to the call of the nation. Prophetic, perhaps, of the future, there has been a 200% increase in the number of young women in the Law School, there being six at the present time.

During the absence of Dean Bates, who is to be at the Law School of Harvard University on leave of absence for one year, the administration of the Law School is in the hands of a committee of five: Professors Goddard, Lane, Wilgus, Sunderland and Holbrook. Professor Goddard acts as Chairman of this committee, while Professor Holbrook succeeds to the office of Secretary.

At the close of last year, Professor Bogle, who during the last ten years has suffered not a little from ill health, resigned. His course in Common Law Pleading will be given by Professor Sunderland. Professor Durfee has dropped Criminal Law and takes Trusts. Professor Holbrook will conduct the course in Criminal Law. Professor Grismore, who on the death of Professor Knowlton, last December, took Contracts, has entered the Army. Professor Stoner will give Contracts this year. Dean Bates' course in Constitutional Law will be given by Professors Goddard and Waite, the former for the first semester, and the latter during the second. The smaller number of students with the consequent reduction in number of sections has made these changes feasible.

Professor Thompson, who taught in the Law School from 1888 to 1911 and who since the latter year has been Professor Emeritus, died September 29.

PROHIBITING ADVERTISING ON WALLS AND BUILDINGS UNDER THE POLICE POWER.—There have been many unsuccessful attempts by city authorities of late to abolish or prevent unsightly billboards and advertising. In a recent case A was arrested and fined for violating a city ordinance prohibiting the display of advertising matter on walls and buildings within the city without the consent of the city council. On refusal to pay the fine A was held in the custody of the city marshal, and brought *habeas corpus* to secure his release. The court held that the affidavit charged no violation of the ordinance unless it were construed as prohibiting the painting of *any* sign on walls or buildings within the city, and the ordinance, if properly so construed, was

invalid as constituting a taking of private property for public use without compensation. *Anderson* v. *Shackelford* (Fla. 1917), 76 So. 343.

The court in this case refuses to extend the police power to prevent offenses against public taste. In this it is in accord with the consensus of opinion as evidenced by the decided cases, weakened by not a single dissent. *Passaic* v. *Paterson Bill Posting, &c. Co.*, 72 N. J. L. 285, 62 Atl. 267; *Bill Posting Sign Co.* v. *Atlantic City*, 71 N. J. L. 72, 58 Atl. 342; *City of Chicago* v. *Gunning System*, 214 Ill. 628, 73 N. E. 1035; *People* v. *City of Chicago*, 261 Ill. 16, 103 N. E. 609; *People* v. *Murphy*, 195 N. Y. 126, 88 N. E. 17. In argument against such limitation of the police power use has been made of the analogy of billboards to smoke, noise and obnoxious odors, which may be prohibited by ordinances enacted under the police power of a city. *Rochester* v. *Macauley-Fien Milling Co.*, 199 N. Y. 207, 92 N. E. 641; *Glucose Refining Co.* v. *Chicago*, 138 Fed. 209; *St. Paul* v. *Haugbro*, 93 Minn. 59, 100 N. W. 470 (smoke); *Commonwealth* v. *Patch*, 97 Mass. 221; *Grand Rapids* v. *Weiden*, 97 Mich. 82, 56 N. W. 233 (obnoxious odors); *Goodrich* v. *Busse*, 247 Ill. 366, 93 N. E. 292; *New Orleans* v. *Fargot*, 116 La. 370, 40 So. 735 (noises and unsightly buildings and advertising signs); FREUND, POLICE POWER, sec. 182. There are, however, two respects in which the analogy fails. First, all or nearly all of the cases upholding ordinances enacted under the police power to prohibit odors, noises and smoke, including those above cited, emphasize the deleterious effect of such nuisances on the health of the community, and there can be little doubt that these things cause actual physical discomfort to those offended by them and are injurious to the general health of such persons. Few, if any, esthetes who are offended by the sight of ugly signs will attribute any real physical discomfort or injury to such unsightliness. Second, the group of persons in any community who are offended by the display of inartistic advertising matter is infinitely smaller than the group of those who are offended by noise, bad odors and dense smoke.

The determination of the existence of a nuisance is made to depend upon the presence of actual physical discomfort to persons of ordinary sensibilities, *McGill* v. *Pintsch Compressing Co.*, 140 Iowa 429, 118 N. W. 786; *Wolcott* v. *Doremus* (1917), 101 Atl. 868, and the same test seems to have been uniformly applied by the courts where an attempt has been made to prevent the display of unsightly, but not immoral, advertising. The growth of civic pride and the education of the masses in art coupled with a more general belief in the intimate relation between mental contentment and physical wellbeing may work the desired extension of the police power in the future to prevent unsightly billboards and advertisements without abandonment of this test.

The instant case must be distinguished from cases upholding ordinances prohibiting the erection of billboards of a certain kind or in certain localities on the ground that they tend to encourage crime, increase the fire hazard and harbor nuisances dangerous to the public health. *St. Louis Gunning Co.* v. *St. Louis*, 235 Mo. 99, 137 S. W. 929; *Cusack Co.* v. *Chicago*, 267 Ill. 344, 108 N. E. 340, affirmed, 242 U. S. 526. It must also be distinguished

from cases declaring valid ordinances prohibiting "museums of anatomy," displaying models, pictures and charts of the human body, as the purpose of such ordinances is clearly the protection of the public morals. *Chicago* v. *Shaynin*, 258 Ill. 69, 101 N. E. 224. G. S.

RIGHTS IN PERCOLATING WATERS.—Almost without exception the courts approve of *Acton* v. *Blundell*, 12 M. & W. 324, to the extent of its actual decision,—that where as a result of improvement or enjoyment of one's own land one conducts operations which draw off percolating waters from a neighbor's land, even to the extent of drying up a well or spring, such inconvenience is to be deemed *damnum absque injuria*. The doctrine of the court "that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure," if intended to be taken as broadly as stated and not limited to the facts then before the court, has not received such uniform support.

In *Chasemore* v. *Richards*, 7 H. L. Cas. 349, that doctrine was applied to a case where percolating waters were drawn off by powerful pumps, the water being conducted some distance away for use. And in *Mayor* v. *Pickles* [1895], A. C. 587, it was held that even though the abstraction was malicious the result should be the same.

On the other hand in *Meeker* v. *East Orange*, 77 N. J. L. 623, 74 Atl. 379, 25 L. R. A. (N. S.) 465, 134 Am. St. Rep. 798, it was held that the right of an occupant of land as against neighbors to abstract percolating waters was not absolute, but relative, that the doctrine of "reasonable use" applied. About all there is to be said against *Chasemore* v. *Richards* was said by Chancellor Pitney in the New Jersey Case. The opinion contains not only a thorough discussion of the problem on principle but also a review of the decided cases.

In *Schenk* v. *City of Ann Arbor*, 163 N. W. 109 (May 31, 1917), the Michigan court repudiates *Chasemore* v. *Richards*, the court contenting itself with quoting from and following *Meeker* v. *East Orange*, *supra*, and *Hathorn* v. *Natural Carbonic Gas Co.*, 194 N. Y. 326, 87 N. E. 504, 23 L. R. A. (N. S.) 436, 128 Am. St. Rep. 555. Four justices dissented, but not on the fundamental question.

One feature of *Chasemore* v. *Richards* perhaps has not been sufficiently emphasized. The plaintiff there was the owner and operator of a mill operated by water power, developed by a stream, a part of the supply of which was the percolating water cut off by the defendant. The water abstracted had not reached the stream nor any tributary thereof—it was not stream water any more than rain water wandering over the surface is stream water. The rights of the plaintiff were those of a riparian proprietor to have a reasonable use of the waters of the stream and the defendant no doubt owed him a duty not to make an unreasonable use of the waters of the stream. In truth, however, the defendant had not done anything with the water of the stream, not any more than had the defendant in *Broadbent* v. *Ramsbottom*, 11 Ex. 602.

Percolating water is a gift of nature; like air we know not whence it comes nor whither it goes. If the doctrine of reasonable use is properly applied in the case of air, why should it not be good sense and good law in the case of water? R. W. A.

THE RIGHT OF FISHING.—While the man engaged in fishing is ordinarily more concerned with the supply of fish and their susceptibility than with his right to be doing what he is, not infrequently the latter question is thrust upon his attention. Popular notions on this matter are not to be relied upon. "In country life a multitude of acts are habitually committed that are technically trespasses. Persons walk, catch fish, pick berries, and gather nuts *in alieno solo,* without strict right. Good natured owners tolerate these practices until they become annoying or injurious, and then put a stop to them," ADAMS, J., in *Albright* v. *Cortright,* 64 N. J. L. 330.

It would seem quite clear that a man has no right to fish where he has no right to be. So it is uniformly held that the public have no right to fish in a non-navigable, non-tidal body of water, the beds of such bodies being owned privately. *Albright* v. *Cortright, supra; Baylor* v. *Decker,* 133 Pa. St. 168; *State* v. *Theriault,* 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695; *Hargreaves* v. *Diddams,* L. R. 10, Q. B. 582. On the other hand it is equally clear that the public may fish in tidal waters. *Warren* v. *Mathews,* 6 Mod. 73; *Weston* v. *Sampson,* 8 Cush, 347. For this purpose the Great Lakes and the bays and arms thereof are treated as the sea. *Lincoln* v. *Davis,* 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116; *Hogg* v. *Beerman,* 41 Oh. St. 81, 52 Am. Rep. 71. The beds of the sea and the Great Lakes, it should be noted, are not privately owned.

Difficulty is encountered when the body of water is non-tidal but navigable in fact. Confusion has been provoked by the use in cases and books of the expressions "navigable water" and "tidal waters" or the "sea" as interchangeable. So when it is said, as in *Warren* v. *Mathews, supra,* that "every subject of common right may fish with lawful nets, etc., in a *navigable river,* as well as in *the sea,*" the extent of the right of the public to fish in a navigable body of water would seem quite clear. It has been held, however, in England, that there is no public right of fishing in water merely because it is capable of being navigated. The right of fishing in such waters is in the proprietor of the bed thereof. *Pearce* v. *Scotcher,* 9 Q. B. D. 162. In *Smith* v. *Andrews* [1891], 2 Ch. 678, where the action was for trespass by fishing in the Thames, the court said (p. 692): "The plaintiff's title having been thus challenged, she has thought it necessary or desirable to prove it from the earliest times. * * * It would certainly have been necessary if that portion of the Thames now in question had been affected by the ebb and flow of the tide, as well as being navigable, for then the bed or soil of the river would have been in the Crown, and the right of fishing in the public, unless the plaintiff could have made out a valid title to the fishery based upon some grant by the Crown antecedent to Magna Charta." Again, on page 695, it was said: "The idea is sometimes entertained that the right to pass along

a public navigable river carries with it the right to fish in it, but so far as regards non-tidal rivers this is not so. No lawyer could take that view. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it." See further *Hanbury* v. *Jenkins* [1901], 2 Ch. 401. The English law as to the ownership of the soil of inland lakes is not certain. At least the Crown does not have ownership therein, as in tidal waters, even though the lake is navigable. *Bristow* v. *Cormican*, 3 App. Cas. 641. And there is no public right of fishing in such lakes. *Bloomfield* v. *Johnston*, 8 I. R. C. L. 68; *O'Neill* v. *Johnston* [1909], 1 I. R. 237.

In *Lincoln* v. *Davis*, 53 Mich. 375, where the question involved was the right of fishing in Thunder Bay off Lake Huron, CAMPBELL, J., said (p. 391): "Such fishing as is done with lines from boats, even in narrow streams, cannot be complained of by riparian owners. The fish are like any other animals *ferae naturae*, and in this region have always been regarded as open to capture *by those who have a right to be where they are captured.*" (Italics ours.) In the same case CHAMPLIN, J., said (p. 387): "If the position is correct that the owner of land bounding on Thunder Bay has the same riparian rights that the owner of land bounded by a river or other stream has, then there can be no question as to his exclusive right to fish in the waters where plaintiff had attempted to, in this case, and that plaintiff was a trespasser, * * * for the law is well settled that riparian proprietors upon fresh water streams have the exclusive right of fishing in the waters opposite their lands."

In accord with Judge CHAMPLIN'S view are *Sterling* v. *Jackson*, 69 Mich. 488 (divided court), where the question arose over shooting ducks; *State* v. *Shannon*, 36 Oh. St. 423, same; *Winous Point Shooting Club* v. *Bodi*, 20 O. C. C. 637, 643, 57 Oh. St. 226; *Winous Point Shooting Club* v. *Slaughterbeck* (1917), 117 N. E. 162; *Hartman* v. *Tresise*, 36 Colo. 146 (*dictum*, for apparently the river involved was non-navigable); *Holyoke Co.* v. *Lyman*, 15 Wall. 500, 512 (same); *New England Trout & S. Club* v. *Mather*, 68 Vt. 338 (same); *Schulte* v. *Warren*, 218 Ill. 108. *Contra* is *Willow River Club* v. *Wade*, 100 Wis. 86. In *Carson* v. *Blazer*, 2 Binn. (Pa.) 475, the right of fishing was held to be public, the river being navigable, the court being of the opinion that there was no private ownership of the bed thereof. There is but very little real authority for the proposition that a person may lawfully fish in waters where for some other purpose, as navigation, he has a right to be.

In *Winans* v. *Willets, et al.*, 163 N. W. 993 (July 30, 1917), the Michigan court was called upon to determine the fishing rights in one of the numerous small inland lakes of that state. The majority of the court being of the opinion that the lake was not a "public, navigable body of water," but a "privately owned pond," it was held that the defendants merely by reason of being members of the public had no right to fish there. Two Justices, FELLOWS and KUHN, were of opinion that since a very small boat could be navigated from Lake Erie through a river and various lakes into Winans Lake, the body of water in question, and since the lake had been stocked with fish in the state, the statute, Sec. 7694, C. L. 1915, applied. That statute pro-

vides "That in any of the navigable or meandered waters of this state where fish have been or hereafter may be propagated, planted or spread at the expense of the people of this state or the United States, the people shall have the right to catch fish with hook and line during such seasons and in such waters as are not otherwise prohibited by the laws of this state."

It is familiar doctrine that the public are lawfully on one's land within the limits of a highway only when using the same *for highway purposes.* So it should be in the case of navigable waters, the soil of which is owned privately. This, as seen above, is the English law, which would seem to be wholly sound, and it is so recognized by American courts very generally. Obviously fishing is not in any sense a part of navigation. In the case then of bodies of water, the beds of which are privately owned, the fact of navigability, in the absence of some controlling statute, should be immaterial.

In the principal case there was a statute, as quoted above, on which the dissenting Justices relied. No question ever has been raised—in the reported cases—as to its constitutionality. If the right of navigation does not, at common law, include the right of fishing,—if it would be a trespass to be upon such navigable waters when not engaged in navigation, a very serious question, it is submitted, may be made as to the power of the legislature to invade in that way the property rights of the owner of the soil. Should the fact that the waters have been stocked with fish at the expense of the state or United States make any difference? See *Albright* v. *Cortright, supra; State* v. *Thierault, supra; Hartman* v. *Tresise, supra.* R. W. A.