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MISSOURI SECTION

COMMENTS

REAL PROPERTY—PUBLIC FISHING RIGHTS IN FLOATABLE STREAM

Elder v. Delcour, 269 S.W.2d 17 (Mo. 1954)

Plaintiff fished from his canoe at a place in a river where it flowed across defendant's land. At this point the river could be traveled only by canoes and similar floating craft, and was unsuitable for substantial commercial travel. Defendant, asserting ownership of the river bed, claimed the river was non-navigable and not subject to public use, and threatened to sue plaintiff for trespassing. Plaintiff brought a declaratory judgment action to establish his rights in the stream. The Missouri Supreme Court held that the river was a "floatable"¹ stream in which the plaintiff, as a member of the public, had the right to travel and to fish.²

In Missouri the concept of navigability is used to determine the ownership of land subjacent to the state's rivers and streams.³ The beds of all navigable rivers are owned by the public,⁴ while land subjacent to non-navigable rivers is owned by the adjoining riparian landowners.⁵ Navigable rivers are defined as those which, in their ordinary condition, are susceptible of commercial use by customary modes of water travel.⁶ There is a public right to travel and to fish in all rivers which are determined to be navigable under this definition.⁷

1. See text supported by note 8 *infra*.

2. *Elder v. Delcour*, 269 S.W.2d 17 (Mo. 1954). Plaintiff also camped along the river bed, and upon finding a log jam in the water, removed his canoe and carried it for a short distance over defendant's land in order to continue his travel along the stream. The trial court ruled that plaintiff had the right to engage in such activities, subject to liability for actual damages to defendant's property. Defendant did not except to this part of the trial court's judgment. In a declaratory judgment action, as in an ordinary civil action, however, the entire judgment is before the appellate court, and in affirming the judgment of the trial court, the Supreme Court necessarily confirmed all holdings of the trial court. See BORCHARD, DECLARATORY JUDGMENTS 253-254 (2d ed. 1941).

3. *Bratschi v. Loesch*, 330 Mo. 697, 51 S.W.2d 69 (1932); *Cooley v. Golden*, 117 Mo. 33, 23 S.W. 100 (1893); 2 TIFFANY, LAW OF REAL PROPERTY § 661 (3d ed., Jones, 1939).

4. *State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow*, 169 Mo. 109, 69 S.W. 374 (1902); *Cooley v. Golden*, 117 Mo. 33, 23 S.W. 100 (1893); *Benson v. Morrow*, 61 Mo. 345 (1875).

5. *Slovensky v. O'Reilly*, 233 S.W. 478 (Mo. 1921); *Wright Lumber Co. v. Ripley County*, 270 Mo. 121, 192 S.W. 996 (1917); *Hobart-Lee Tie Co. v. Grabner*, 206 Mo. App. 96, 219 S.W. 975 (1920).

6. *Slovensky v. O'Reilly*, 233 S.W. 478 (Mo. 1921); *Weller v. Missouri Lumber & Mining Co.*, 176 Mo. App. 243, 161 S.W. 853 (1913). See *State ex rel. Missouri Water Co. v. Bostian*, 272 S.W.2d 857, 862 (Mo. App. 1954).

7. See *Hickey v. Hazard*, 3 Mo. App. 480, 483 (1877). See also, *Herrin v. Sutherland*, 74 Mont. 587, 241 Pac. 328 (1925); *Hume v. Rogue River Packing Co.*, 51 Ore. 237, 92 Pac. 1065 (1907).

The Missouri courts, however, have not restricted public water rights to rivers which are navigable under the test used to determine title to the river bed. The public also has the right to travel over rivers and streams which are "floatable," *i.e.*, streams which are non-navigable in that they cannot be used by ordinary commercial vessels, but are nevertheless useful commercially to the lumbering industry for floating logs.⁸ In finding that the stream in the principal case was floatable, the court also purported to base its decision, in part, on the stream's capacity for commercial usage, although the stream's only real utility, in fact, was its adaptability for public recreational purposes.⁹

The principal case is the initial decision in Missouri dealing with the right of the public to fish in a floatable stream in which both the adjacent and subjacent land is privately owned. The majority of states, following the common law rule, have considered the right to fish to be the exclusive proprietary right of the owner of the river bed.¹⁰ The principal case appears to have departed from the general rule, however, by making the right to fish an incident of the right to travel. Since floatable streams may be traveled by the public, it is not unreasonable to extend to the public the right to fish such streams as an incident of the right to travel, even though the stream-bed is privately owned.¹¹ The main utility of the many small rivers and streams comprising the network of watercourses in Missouri is for public fishing and recreational use.¹² In addition, the title to all fish

8. *Hobart-Lee Tie Co. v. Grabner*, 206 Mo. App. 96, 219 S.W. 975 (1920); *State v. Wright*, 201 Mo. App. 92, 208 S.W. 149 (1919); *McKinney v. Northcutt*, 114 Mo. App. 146, 89 S.W. 351 (1905). The courts frequently use the terms "floatable" and "navigable" interchangeably; there is, however, a definite distinction in Missouri since the beds of floatable streams are privately owned, while land subjacent to navigable rivers is owned by the public.

9. *Elder v. Delcour*, 269 S.W.2d 17, 26 (Mo. 1954). The stipulation of facts upon which the case was tried shows that there were obstructions in the stream which made even navigation by canoe impossible in parts of the stream. See note 2 *supra*. The court also relied in part on provisions in the early Missouri constitutions and in the Congressional Act admitting Missouri as a state. The provisions were that the "[R]iver Mississippi, and the navigable rivers and waters leading into the same, shall be common highways, and for ever free. . . ." 3 STAT. 546 (1820); MO. CONST. Art. I, § 1 (1875); MO. CONST. Art. XI, § 2 (1865); MO. CONST. Art. X, § 2 (1820). These provisions are only applicable, however, after the river has been adjudged to be navigable. The basic problem of determining whether the stream was in fact a navigable (or floatable) stream remained for the court to decide.

10. *Hartman v. Tresise*, 36 Colo. 146, 84 Pac. 685 (1905); *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905); 2 AMERICAN LAW OF PROPERTY § 9.49 (Casner ed. 1952).

11. This is apparently the view adopted in Michigan and Wisconsin. *Collins v. Gerhardt*, 237 Mich. 38, 211 N.W. 115 (1926); *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (1898). This view is criticized in 2 TIFFANY, LAW OF REAL PROPERTY § 671 (3d ed., Jones, 1939).

12. The elaborate program developed by the Conservation Commission for stocking fish in the streams of the state is another element which is indicative of the vast public interest in Missouri's fisheries. See OFFICIAL MANUAL OF THE STATE OF MISSOURI 310 (Toberman ed. 1953-1954).

and wild life is vested in the state, by statute, as a means of regulation and conservation.¹³ Under this statute there can be no private property rights in fish until they are reduced to possession in a manner prescribed by law.¹⁴

The determination of the relative rights of the public and of private landowners in the rivers and streams within the state is a matter for each state to decide in accordance with the maximal utilization of natural resources consonant with the protection of property rights of riparian landowners.¹⁵ By establishing the public right to fish in a floatable stream whose beds and banks are privately owned, Missouri has followed a water policy adopted in such states as Michigan and Wisconsin whose watercourses are an attraction to tourists and a source of enjoyment to residents.¹⁶ In view of the recognized recreational value of Missouri rivers and streams the result of the principal case does not appear to be an undue encroachment on the rights of riparian landowners. A more rational basis for future decisions would be provided, however, if the courts would recognize that the recreational interest alone is sufficient to support the public right to travel and fish on this type of stream.

13. MO. REV. STAT. § 252.030 (1949).

14. *Ibid.* The owner of a stream-bed, however, does have a sufficient property interest in the fish to prevent their being taken by those who trespass across his property to obtain them. *State v. Taylor*, 358 Mo. 279, 214 S.W.2d 34 (1948); *Gratz v. McKee*, 270 Fed. 713 (8th Cir. 1921).

15. *Barney v. Keokuk*, 94 U.S. 324 (1876); *State v. Korrer*, 127 Minn. 60, 148 N.W. 617 (1914).

16. *Rushton ex rel. Hoffmaster v. Taggart*, 306 Mich. 432, 11 N.W.2d 193 (1943); *Willow River Club v. Wade*, 100 Wis. 86, 76 N.W. 273 (1898). See Kanneberg, *Wisconsin Law of Waters*, 1946 Wis. L. Rev. 345.