JOHNSON v. SEIFERT

Supreme Court of Minnesota
100 N.W. (2d) 689 (1960)

MATSON, JUSTICE.

The principal question raised by this appeal is whether the owner of a tract abutting on a lake, suitable for fishing, boating, hunting, swimming, and other domestic or recreational uses to which our lakes are ordinarily put in common with other abutting owners, has a right to make use of the lake over its entire surface, irrespective of whether the lake is navigable and irrespective of the ownership of the lakebed.

This was an action by plaintiff — appellant — to enjoin defendants from constructing and maintaining a fence through and across two lakes and from taking water from one of the lakes for irrigation purposes. The trial court found that the waters of each lake border partly on the land of plaintiff and partly on the land of defendants. Both lakes are unmeandered. Each lake is approximately 35 acres in area and neither has an inlet or outlet. The depth of one of the lakes, referred to in the record as the west lake, is approximately 32 feet at its deepest part. The depth of the other lake, referred to as the east lake, is not shown. The west lake contains several species of fish, and the east lake is used for duck hunting. The section line dividing the property of plaintiff from that of defendants runs near the northern shoreline of each lake, so that approximately 5 percent of the water area of each lake is on plaintiff's side of the section line. Defendants own all the land surrounding the west lake, except as noted above, and own much of the land surrounding the east lake, although there are several parcels of land owned by others also abutting on that lake. There is no public access to either lake. Defendants have constructed a fence along the section line common to them and plaintiff through the bodies of both lakes so as to prevent plaintiff from having free access to the main body of either lake…

The trial court found that both lakes are and were in 1858 nonnavigable and that the beds thereof are privately owned. It decreed that the waters overlying each party's portion of the bed are the private property of the owner of the bed and subject to his complete and exclusive control, and that plaintiff had no right to fish, hunt, swim, water cattle, or otherwise trespass on the waters overlying that part of the beds belonging to defendants. It further found that defendants' sole obligation to plaintiff in connection with the lakes was not to lower or raise the level thereof so as to materially harm plaintiff's use thereof. It found that defendants' use of lake water for irrigation was reasonable …

Plaintiff contends that he has a right to use the entire surface of both lakes for such purposes as watering cattle, boating, swimming, fishing and hunting. With commendable foresight and prudence, plaintiff throughout this litigation has based his contention on more than one theory. His claim is based on the assertion, first, that the lakes are navigable and the beds thereof are owned by the state; second, that if the lakes are not navigable under the Federal test, the state test should be applied; third, that regardless of ownership of the bed, he has a riparian right to use the entire surface of the lakes for such purposes in common with other riparian owners; and fourth, that he has acquired a right to use the lakes for such purposes by reason of prescriptive use.

In view of our conclusion as to the applicability and the nature of the intertract riparian rights involved herein, it does not matter whether the beds of these lakes are privately owned, and therefore it does not matter whether the Federal or the state test of navigability should be applied to determine such ownership and the incidents thereof.

The principal question relates therefore to the nature of the rights of one owner of land abutting on a portion of an unmeandered, intertract lake to the use and enjoyment of the water and entire surface of such lake as against the rights of another such owner. No public rights are involved. The trial court cited as authority for its decision Lamprey v. Danz, 86 Minn. 317. Lamprey v. Danz was a suit to enjoin the defendant from shooting ducks over that part of a large but relatively shallow lake overlying lands owned by plaintiff, and from operating a boat on the surface thereof for the purpose of picking up ducks shot. In upholding the injunction order, this court stated that: "It is elementary that every person 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."

During the nearly 60 years intervening since the Lamprey decision this question has not again arisen until the present case. The Lamprey case has been cited in only one subsequent Minnesota case involving lakes, that case being Burnquist v. Bollenbach, which involved the right of the state, under a condemnation statute, to condemn a public access to a lake completely surrounded by the land of one owner. This court there held that the lake was nonnavigable and that the bed was owned by the abutting landowner. From this it was concluded, following the Lamprey case, that the waters thereof were also private property, and that the lake was not a public lake to which the state had power to condemn such an access. No question of riparian rights was involved since there was but one owner. This is clear from the statement of the issue in that case: "Thus the issue in its simplest terms is whether, under the federal test, the evidence sufficiently established Five Lake to be navigable in fact in 1858, for, if it was not navigable in fact at that time, it conclusively and correctly follows that Five Lake is not navigable at law; that respondent Bollenbach is the owner of the fee to the bed of Five Lake; *and that those waters are private waters upon which the public has no right to hunt and fish.*" (Italics supplied.)

The citation of the Lamprey case in the Bollenbach case was solely for the proposition that the right to hunt and fish is an incident of ownership of the soil. The quotation from that case was particularly apt because it also involved the question of rights in waters overlying privately owned lakebed land, and thus was in point as authority for the proposition that the waters, as well as the land, were privately owned. But there was no question in the Bollenbach case as to the respective *private* hunting and fishing rights of two or more shore owners in an intertract lake since all the land surrounding and underlying the lake was owned by one person.

In view of the pronouncements of this court in other decisions, as well as in view of the ever-increasing significance of the customary use of lake waters of this state (irrespective of whether the lakes are meandered or unmeandered and irrespective of whether they be navigable or nonnavigable), it becomes desirable to reexamine the theory upon which Lamprey v. Danz was decided in 1902. That case involved the right of use of an unmeandered and shallow 500-acre body of water known as Howard Lake. Danz, as lessee, was in possession of 6 acres which included a part of the lake. Lamprey's lands embraced the remainder of the lake. According to unchallenged findings of fact, it appears that it was always possible to pole or row a small boat

on the lake, but owing to the character of the shores and the bottom, and because of the heavy growth of wild rice therein, it was impracticable if not impossible for the public to use the lake for boating, sailing, bathing, or skating, and it had never been used by the public except for the purpose of hunting ducks. Despite the fact that the sole issue involved the respective rights of two abutting landowners to the use of the entire waters of the lake, this court held that *no riparian rights were involved,* and then concluded that Lamprey as owner of the soil beneath the lake waters had absolute supremacy and control of the waters as if they were solid land and that he had therefore the exclusive right of hunting and fishing in and on said waters. The basic error of the Lamprey case — irrespective of whatever other errors are embraced therein — is that no riparian rights were involved.

Any assumption that a lake — whether it be meandered or not — whose shore is owned by more than one tract owner does not involve riparian rights unless it is navigable under the Federal test of navigability is wholly untenable and must be rejected. It is not to be overlooked that the Federal test of navigability is designed for the narrow purpose of determining the ownership of lakebeds, and for the additional purpose of identifying waters over which the Federal government is the paramount authority in the regulation of navigation. Whether waters are navigable has no material bearing on riparian rights since such rights do not arise from the ownership of the lakebed but as an incident of the ownership of the shore.

That riparian rights do not stem from the ownership of the lakebed but from shore ownership, and that the ownership of the lakebed does not carry with it a right of control over the overlying waters, has been clearly indicated by our more recent decisions. In Petraborg v. Zontelli, which involved a navigable lake, we said: "As to a public lake, a mutual right of enjoyment exists between and is shared by riparian owners and the public generally. Insofar as such recreational benefits as boating, hunting, and fishing therein, the riparian proprietor has no exclusive privileges." In Sanborn v. People's Ice Co. we said, however, with reference to the vested interests of the shore owners: "There are certain interests and rights vested in the shore owner which grow out of his special connection with such waters as an owner. *These rights are common to all riparian owners on the same body of water, and they rest entirely upon the fact of title in the fee to the shore land.* To say that a shore owner does not have additional private rights and interests distinct from the public is to ignore completely those rights which attach by reason of his shore ownership." (Italics supplied.) …

Under our decisions there could be no dispute that if the lakes involved herein were navigable or public lakes plaintiff would have the right to use the entire surface of the lake for all suitable purposes in common with all other riparian owners. This right would not be his merely as a member of the public but as a riparian owner of the shoreland. We can see little logic in a rule of law which would restrict such riparian rights because the riparian owner happens to own not only shoreland but also a part of the bed of the lake. Illogical as the rule may be, it must be conceded that a few states have taken the position that ownership of the bed of a nonnavigable or private lake carries with it complete and exclusive control and ownership of the overlying waters, but for the most part these states have few lakes or rivers of any value either to the public or to riparian owners. Significantly, however, states which like Minnesota have extensive waters of recreational or commercial value hold that an abutting or riparian owner has a right of reasonable use of the entire overlying water, and no distinction is made between navigable and nonnavigable, meandered or unmeandered, or public or private lakes …

A recent Florida decision, Duval v. Thomas, involved, as in the instant case, the issue of whether the owner of a portion of the bed of a nonnavigable, landlocked lake has the right to exercise *exclusive* dominion and control of the overlying waters. One of the defendants had built a fence through the lake along the boundary line of plaintiffs' property and the other defendant had built an obstruction along the other boundary line in the lake so as to effectively prevent the plaintiffs from gaining access to that part of the lake overlying the lands of the defendants. In holding that the plaintiffs had the right to use the entire lake for boating and fishing, the court stressed the practical necessity and desirability of reasonable common use among riparian owners in a state which has over 30,000 lakes.

Other jurisdictions likewise hold that an abutting owner on a nonnavigable lake has the right to use the entire surface of the lake for all suitable and reasonable purposes in common with all other riparian owners.

In the light of the foregoing we expressly overrule Lamprey v. Danz and hold that an abutting or riparian owner of a lake, suitable for fishing, boating, hunting, swimming, and other uses, domestic or recreational, to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners, regardless of the navigable or public character of the lake and regardless of the ownership of the bed thereof. It does not follow that the foregoing riparian-rights rule applies to every pothole or swamp frequented by wild fowl and over which a small boat might be poled to retrieve game, but which as a practical matter does not lend itself in any substantial degree to the customary propulsion of boats by outboard motors or oars. A minor body of water which by its nature and character reasonably has no overall utility common to two or more abutting owners would fall outside the rule. No hard-and-fast line can be drawn and each case must be determined according to its own peculiar facts.

The trial court found that there was a duty to maintain the water level of the west lake and not to unreasonably lower such water level by irrigation use. The court stated that this was not a riparian right but rather something akin to the right of lateral support. While we cannot agree with the trial court's basis for this duty, we do agree that such a duty exists as a riparian obligation. One of the incidents of riparian ownership is the obligation to do nothing which affects the water level of the lake so as to do substantial harm to another riparian owner. Each riparian owner has the privilege to use the water for any beneficial purpose, such as irrigation, provided such use is reasonable in respect to other riparian owners and does not unreasonably interfere with their beneficial use. We hold that the evidence supports the trial court's conclusion that the use made here for irrigation was in all respects a reasonable use of riparian waters.

We also affirm that part of the trial court's determination excluding any prescriptive rights in the use of the lakes or their beds for any purpose under the facts presented. Although this question is largely immaterial under our disposition of the case, it might become significant if the lakes in question should at some time in the future recede beyond plaintiff's land so that his riparian rights would be eliminated or suspended.

The judgment of the trial court is reversed in so far as it denies plaintiff the right to use the entire surface of both lakes for purposes such as fishing, boating, hunting, swimming, and other similar domestic or recreational uses. The decision is affirmed, however, in so far as it permits defendants to use the lake waters for irrigation subject to the proviso that such right of use must be exercised reasonably so as not to lower the water levels to the plaintiff's detriment.

Reversed in part and affirmed in part.

THE EDWARDS AQUIFER AUTHORITY v. DAY

Supreme Court of Texas
369 S.W.3d 814 (2012)

JUSTICE HECHT delivered the opinion of the Court.

We decide in this case whether land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by article I, section 17(a) of the Texas Constitution.[1] We hold that it does. We affirm the judgment of the court of appeals and remand the case to the district court for further proceedings.

I

In 1994, R. Burrell Day and Joel McDaniel (collectively, "Day") bought 381.40 acres on which to grow oats and peanuts and graze cattle. The land overlies the Edwards Aquifer, "an underground layer of porous, water-bearing rock, 300-700 feet thick, and five to forty miles wide at the surface, that stretches in an arced curve from Brackettville, 120 miles west of San Antonio, to Austin." A well drilled in 1956 had been used for irrigation through the early 1970s, but its casing collapsed and its pump was removed sometime prior to 1983. The well had continued to flow under artesian pressure, and while some of the water was still used for irrigation, most of it flowed down a ditch several hundred yards into a 50-acre lake on the property. The lake was also fed by an intermittent creek, but much of the water came from the well. Day's predecessors had pumped water from the lake for irrigation. The lake was also used for recreation.

To continue to use the well, or to drill a replacement as planned, Day needed a permit from the Edwards Aquifer Authority. The Authority had been created by the Edwards Aquifer Authority Act ("the EAAA" or "the Act") in 1993, the year before Day bought the property. The Edwards Aquifer is "the primary source of water for south central Texas and therefore vital to the residents, industry, and ecology of the region, the State's economy, and the public welfare." The Legislature determined that the Authority was "required for the effective control of the resource to protect terrestrial and aquatic life, domestic and municipal water supplies, the operation of existing industries, and the economic development of the state."

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[1] *TEX. CONST. art. I, § 17(a)* ("No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made . . . .").

The Act "prohibits withdrawals of water from the aquifer without a permit issued by the Authority". The only permanent exception is for wells producing less than 25,000 gallons per day for domestic or livestock use. The Act gives preference to "existing user[s]" -- defined as persons who "withdr[ew] and beneficially used underground water from the aquifer on or before June 1, 1993" -- and their successors and principals. With few exceptions, water may not be withdrawn from the aquifer through wells drilled after June 1, 1993…
A user's total annual withdrawal allowed under an "initial regular permit" ("IRP") is calculated based on the beneficial use of water without waste during the period from June 1, 1972, to May 31, 1993. The Act … defines beneficial use as "the use of the amount of water that is economically necessary for a purpose authorized by law, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose"…

An "existing user" who operated a well for three or more years during the historical period is entitled to a permit for at least the average amount of water withdrawn annually. And every "existing irrigation user shall receive a permit for not less than two acre-feet a year for each acre of land the user actually irrigated in any one calendar year during the historical period."

[In 1996, Day] applied for authorization to pump 700 acre-feet of water annually for irrigation. Attached to the application was a statement by Day's predecessors, Billy and Bret Mitchell, that they had "irrigated approximately 300 acres of Coastal Bermuda grass from this well during the drought years of 1983 and 1984." The application's request for 700 acre-feet appears to have been based on two acre-feet for the total beneficial use of irrigating the 300 acres plus the recreational use of the 50-acre lake. The authority denied the application because "withdrawals [from the well during the historical period] were not placed to a beneficial use." Day appealed the Authority's decision to the district court and also sued the Authority for taking his property without compensation in violation of article I, section 17(a) of the Texas Constitution, and for other constitutional violations. The court granted summary judgment for Day on his appeal, concluding that water from the well-fed lake used to irrigate 150 acres during the historical period was groundwater, and that Day was entitled to an IRP based on such beneficial use. The court granted summary judgment for the Authority on all of Day's constitutional claims, including his takings claim. Both parties appealed. The court of appeals affirmed the Authority's decision to issue Day a permit for 14 acre-feet, but the court also held that Day's takings claim should not have been dismissed.

III

Whether groundwater can be owned in place is an issue we have never decided. But we held long ago that oil and gas are owned in place, and we find no reason to treat groundwater differently.

A

We agree with the Authority that the rule of capture does not require ownership of water in place, but we disagree that the rule, because it prohibits an action for drainage, is antithetical to such ownership.

We adopted the rule of capture in 1904 in *Houston & T.C. Railway v. East, 81 S.W. 279 (Tex. 1904).* A well on East's homestead, five feet in diameter and thirty-three feet deep, had long supplied him with water for household purposes. But the Railroad dug a well nearby, twenty feet in diameter and sixty-six feet deep, from which it pumped 25,000 gallons a day for use in its locomotives and machine shops, and East's well dried up. . . . "Under the common law . . . , a riparian use must be a reasonable one, and . . . [a] use which works substantial injury to the common right as between riparians is an unreasonable use . . . ." The issue before us was whether this law applied. The same issue had been considered by the English Court of the Exchequer in *Acton v. Blundell*, 152 Eng. Rep. 1123 (Exch.); 12 Mees & W. 324 (1843), [which] stated the applicable rule as follows:

> 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; and that if, in the exercise of such right, he intercepts or drains off the water collected from the underground springs in his neighbor's well, this inconvenience to his neighbor falls within the description of *damnum absque injuria*, which cannot become the ground of an action.

This Court, noting that arguments regarding the applicable law had been "thoroughly presented" in *Acton*, and believing that the English court's rule had been "recognized and followed . . . by all the courts of last resort in this country before which the question has come, except the Supreme Court of New Hampshire", adopted the rule for Texas. We later came to refer to the rule as the "rule or law of capture."

Under that rule, we held that the Railroad's conduct was not actionable. "The practical reasons" for the rule, we explained, had been summarized by the Ohio Supreme Court in *Frazier v. Brown*, *12 Ohio St. 294 (1861), overruled by Cline v. Am. Aggregates Corp., 474 N.E.2d 324 (Ohio 1984)*:

> In the absence of express contract and a positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would, therefore, be practically impossible. (2) Because any such recognition of correlative rights would interfere, to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and the general progress of improvement in works of embellishment and utility.

By "correlative rights", we referred specifically to the right East claimed: to sue for damages from a loss of water due to subsurface drainage by another user for legitimate purposes. The reasons the law did not recognize that right -- the "hopeless uncertainty" involved in its enforcement and the material interference with public progress -- did not preclude all correlative rights in groundwater. On the contrary, we noted that East had made "no claim of malice or wanton conduct of any character, and the effect to be given to such a fact when it exists is beside the present inquiry", suggesting at least the possibility that an action for

damages might lie in such circumstances, despite difficulty in proof. Malice and wanton conduct were only examples. *Acton*'s rule of non-liability, we said, was a "general doctrine."

The effect of our decision denying East a cause of action was to give the Railroad ownership of the water pumped from its well *at the surface*. No issue of ownership of groundwater *in place* was presented in *East*, and our decision implies no view of that issue. Riparian law, which East invoked, governs users who do not own the water. Under that law, the Railroad would have been liable even if East did not own the water in place. The Railroad escaped liability, certainly not because East did own the water in place, but irrespective of whether he did. . . .

Groundwater, like oil and gas, often exists in subterranean reservoirs in which it is fugacious. Unless the law treats groundwater differently from oil and gas, [our prior cases] refute the Authority's argument that the rule of capture precludes ownership in place. The Authority contends that the rule of capture deprives a landowner's interest in groundwater of two attributes essential to the ownership of property: a right of possession (i) from which others are excluded[88] and (ii) which may be enforced. Because a landowner is not entitled to any specific molecules of groundwater or even to any specific amount, the Authority argues that the landowner has no interest that entitles him to exclude others from taking water below his property and therefore no ownership in place. [We have rejected this argument previously.] Furthermore, we later held that a landowner is entitled to prohibit a well from being drilled on other property but bottomed in an oil and gas formation under his own -- a slant or deviated well. Thus, a landowner has a right to exclude others from groundwater beneath his property, but one that cannot be used to prevent ordinary drainage.

The Authority argues that groundwater must be treated differently because the law recognizes correlative rights in oil and gas but not in groundwater. The Authority points to *East*'s observation that "the law recognizes no correlative rights in respect to underground waters percolating . . . through the earth" but over-reads this statement. As we have explained above, *East* did not rule out an action for "malice or wanton conduct", including waste. Likewise, the rule of capture does not preclude an action for drainage of oil and gas due to waste, as we held in *Elliff v. Texon Drilling Co*., *210 S.W.2d 558, 582-583 (Tex. 1949).* More importantly, however, the Court observed in *Elliff* that "correlative rights between the various landowners over a common reservoir of oil or gas" have been recognized through state regulation of oil and gas production that affords each landowner "the opportunity to produce his fair share of the recoverable oil and gas beneath his land". Similarly, one purpose of the EAAA's regulatory provisions is to afford landowners their fair share of the groundwater beneath their property. In both instances, correlative rights are a creature of regulation rather than the common law. In 1904, when *East* was decided, neither groundwater production nor oil and gas production were regulated, and we indicated that limiting groundwater production might impede public purposes. The State soon decided that regulation of oil and gas production was essential, adopting well-spacing regulations in 1919, and it has since determined that the same is true for groundwater production, as for example, in the EAAA.

The Authority argues that regulation of oil and gas production to determine a landowner's fair share is based on the area of land owned and is fundamentally different from regulation of groundwater production. It is true, of course, that the considerations shaping the regulatory schemes differ markedly. The principal concerns in regulating oil and gas production are to prevent waste and to provide a landowner a fair opportunity to extract and market the oil and

gas beneath the surface of the property. Groundwater is different in both its source and uses. Unlike oil and gas, groundwater in an aquifer is often being replenished from the surface, and while it may be sold as a commodity, its uses vary widely, from irrigation, to industry, to drinking, to recreation. Groundwater regulation must take into account not only historical usage but future needs, including the relative importance of various uses, as well as concerns unrelated to use, such as environmental impacts and subsidence. But as the State tells us in its petition: "While there are some differences in the rules governing groundwater and hydrocarbons, at heart both are governed by the same fundamental principle: each represents a shared resource that *must* be conserved under the Constitution." In any event, the Authority's argument is that groundwater cannot be treated like oil and gas because landowners have no correlative rights, not because their rights are different. That argument fails.

Finally, the Authority argues that groundwater is so fundamentally different from oil and gas in nature, use, and value that ownership rights in oil and gas should have no bearing in determining those in groundwater. Hydrocarbons are minerals; groundwater, at least in some contexts, is not. Groundwater is often a renewable resource, replenished in aquifers like the Edwards Aquifer; is used not only for drinking but for recreation, agriculture, and the environment; and though life-sustaining, has historically been valued much below oil and gas. Oil and gas are essentially non-renewable, are used as a commodity for energy and in manufacturing, and have historically had a market value higher than groundwater. But not all of these characteristics are fixed. Although today the price of crude oil is hundreds of times more valuable than the price of municipal water, the price of bottled water is roughly equivalent to, or in some cases, greater than the price of oil. To differentiate between groundwater and oil and gas in terms of importance to modern life would be difficult. Drinking water is essential for life, but fuel for heat and power, at least in this society, is also indispensable. Again, the issue is not whether there are important differences between groundwater and hydrocarbons; there certainly are. But we see no basis in these differences to conclude that the common law allows ownership of oil and gas in place but not groundwater.

In *Elliff*, we restated the law regarding ownership of oil and gas in place:

> In our state the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land. The only qualification of that rule of ownership is that it must be considered in connection with the law of capture and is subject to police regulations. The oil and gas beneath the soil are considered a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value.

We now hold that this correctly states the common law regarding the ownership of groundwater in place.