Kentucky Law Journal

Volume 36 | Issue 2 Article 7

1948

Draffen v. Black--The State's Power to Regulate Fishing in Private Ponds

Arnett Mann
University of Kentucky

DRAFFEN v. BLACK—THE STATE'S POWER TO REGULATE FISHING IN PRIVATE PONDS

The owner of a tract of land had thereon a large fishing pond which has no inlet, outlet or connection with public waters. On payment of a fee he permitted members of the public to fish in the pond. A state conservation officer entered upon the property to determine whether persons fishing in the pond had state licenses to do so, and whether the fish taken from the pond were of the size and number permitted by statute. The owner of the pond protested this action of the officer on the grounds that the fish were private property, that the statutes did not apply to them, and that the officer had no right to enter upon his land without his permission.

As a consequence of this controversy, the officer and others brought an action for a declaration of the rights of the parties. The chancellor decreed that a license was not required of any person fishing in such a pond, that the statute imposing a limit on the number and size of fish withdrawn from waters, or in possession, did not apply to fish taken from a pond unconnected with a public stream. The chancellor was also of the opinion that, under the circumstances, conservation officers had no right to go upon the defendant's property

The Kentucky Court of Appeals in the case of *Draffen* v. *Black*,[1] reversed the chancellor's decree, basing its decision on a statute which prohibits any person from having in his possession fish above a specified number or below a specified size, and upon another statute requiring a license to fish in waters public or private.[2]

Any discussion as to the soundness of this decision would be incomplete if not futile, without first inquiring into the nature of the property interests, public and private, in fish. Fish are considered animals *ferae naturae,* when migratory, and belong to the public.[4] This public ownership is probably based on the fact that all the people are potential actual possessors through possible capture of the fish and yet none are actual possessors when the fish are free. Too, the land forming the beds of waters within which the fish exist, propagate and run, is owned by the people. Furthermore, as fish are desirable as property, it is convenient to have ownership vested somewhere. Ownership, not existing in individuals because

[1] 302 Ky. 775, 196 S.W 2d 362 (1946).

[2] Ky. R. S. (1946) 150.470.

[3] Ky. R. S. (1946) 150.170.

[4] Ex parte Fritz, 86 Miss. 210, 38 So. 722 (1905) State v. Hume, 52 Ore. 1, 95 Pac. 808 (1908)

fish are migratory and not in individual possession and control, is logically placed in the people as a whole. Though it has been stated that title is in the state,[6] this is probably erroneous.[7]

Though fish when free belong to the public, an individual may have a qualified property right in them, and when reduced to possession, a property right that may be the subject of larceny.[8] Logically, then, fish are deemed private property when confined in waters completely enclosed within private land.[9] The reason is clear. Such fish cannot pass to and from public waters and are therefore correctly considered as having been reduced to possession. The principle is well expressed in the case of *State* v. *Lipinske:* "Whether a land owner propagates fish in a glass bowl, a water tank, or a pond, such fish are not wild so long as they have no connection with navigable waters and so long as they are subject to the dominion and control of the owner." [10] So to consider fish in enclosed waters as private property because reduced to possession, is logical. An analogy to a similar property interest will make this apparent. The owner of a bee tree on his land owns the bees in the tree, for he has control of them by virtue of the fact that he may cut the tree and take them.[11] Similarly, the owner of a private pond may drain it any time he wishes if it has no connection with public waters, and though time may elapse before he does so, the fish cannot escape. Undoubtedly, therefore, the owner of the pond in the present case owned the fish therein.

This being true, it is pertinent to inquire whether the court could reasonably have, and should have, avoided constitutional questions by holding that the statutes were inapplicable in this case. As the court pointed out, the purpose of fish and game laws is to conserve wild life for the benefit of the public. But the public can have no interest in fish absolutely confined in a private pond. The public cannot go upon the land of the owner of the pond to fish therein, and the fish will not migrate to public waters. Therefore, the public has no legal concern in the preservation of such fish.

Another ground upon which the statutes in this case could have been held inapplicable is that the Act as a whole does not reveal the intention to regulate private ponds having no passageways with

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[6] Reid v. Ross, 46 S.W 2d 567, 568 (Mo. 1932).

[7] BROWN, LAW OF PERSONAL PROPERTY (1st ed. 1936) sec. 6.

[8] People v. Bridges, 142 Ill. 30, 31 N.E. 115 (1892).

[9] State v Shaw, 67 Ohio St. 157, 65 N.E. 875 (1902)

[10] Ark. Game & Fish Comm. v. Storthz, 181 Ark. 1089, 29 S.W 2d 294 (1930), Newman v. Ardmore Rod & Gun Club, 190 Okla. 470, 125 P 2d 191 (1942) Jones v State, 119 Tex. Cr. Rep. 126, 45 S.W 2d 612 (1932), State v. Lipinske, 212 Wis. 421, 249 N.W 289 (1933); *see* Ex parte Fritz, 86 Miss. 210, 38 So. 722, 723 (1905) State v. Roberts, 59 N.H. 484, 486 (1879).

[11] 212 Wis. 421, 249 N.W 289, 291 (1933)

[12] 2 COOLEY, TORTS (3rd ed. 1906) 838.

public waters. It is a familiar principle of statutory construction that provisions of an act are to be construed together.[12] Yet the court did not note that another section of the Act, prohibiting fishing except by angling, and fishing from May first to May twenty-ninth, except with a pole and line, applied only to public waters.[13] Also, the court might well have observed that the statute prohibiting the placing of injurious substances and explosives in public waters,[14] made no mention of bodies of water entirely enclosed within private property. If the legislature had intended to regulate such bodies of water, it would seem that these statutes would have included them.

Of course, it may be argued and, it is admitted, not without reason, that the court was correct in applying the language of the statutes literally and could not avoid finding them applicable. The fact remains that courts take into account the inabilities of mankind to express clearly what it intends. And the spirit and not the letter of the law is applied.[15] In *Jones* v. *State*,[16] an indictment was brought under an article of the *Texas Penal Code*, similar to the Kentucky statute on possession of fish. Though the article made possession of fish of a certain size or number illegal, and mentioned neither public nor private waters, the defendant was adjudged not guilty solely on the ground that the article did not apply to private ponds. This conclusion was reached by construing articles together, one of which exempted private ponds. In *State* v. *Lowder*,[17] the defendants were being tried for seining in a pond contrary to a statute, though private ponds were exempted. The statute was held to have been violated and the court decided that the pond within which the defendants seined was not a private pond for the reason that it overflowed. Yet the pond was not public property because it was upon private property. The result reached was proper. The pond was subject to overflow and the fish therein belonged to the people and came within the scope of conservation.

Two other cases will further show that courts do not interpret statutory language literally but rather make the purpose of the fish conservation laws the determining factor. In *People* v. *Conrad*,[18] the defendant had been convicted by the lower court of spearing fish contrary to the statute. Though the statute prohibited spearing in "any of the inland lakes in this state," and the defendant had

[12] Commonwealth v. Louisville Taxicab & Transfer Co., 210 Ky. 324, 275 S.W 795 (1925) Ashland Iron & Mining Co. v Fowler, 208 Ky. 422, 271 S.W 589 (1924).

[13] Ky. R. S. (1946) 150.440.

[14] Ky. R. S. (1946) 150.460.

[15] Dougherty v. Ky Alcoholic Bev. Control Bd., 279 Ky. 262, 30 S.W 2d 756 (1939), Commonwealth v. Fenley, 189 Ky 480, 225 S.W 154 (1920), Neutzel v. Ryans, 184 Ky. 292, 211 S.W 852 (1919) Sams v. Sams' Adm'r., 85 Ky. 396, 3 S.W 593 (1887).

[16] 119 Tex. Cr. Rep. 126, 45 S.W 2d 612 (1932).

[17] 198 Ind. 234, 153 N.E. 399 (1926).

[18] 125 Mich. 1, 83 N.W 1012 (1900)

speared fish in an inland lake in the state, the conviction was reversed. The statute was held inapplicable in this case because the lake had no inlet or outlet, and the court concluded the public had no interest in the protection of fish in such a lake. But in *People* v. *Horling*,[19] the court affirmed a conviction obtained under the same statute, basing its decision on the fact that the fish in the lake from which defendants fished could migrate to public waters.

Let us assume, however, for the purpose of discussion, that the court in the case of *Draffen* v. *Black* correctly construed the statutes therein as applicable to a private pond with no inlet or outlet. This raises the question of whether the court was correct in holding the statutes within the constitutional exercise of the state's police power.

This question of the state's right to regulate fishing in a body of water entirely on private land and having no passageway for fish to pass to and from public waters, is a novel one, heretofore not passed upon by a Kentucky court, and upon which there is a dearth of decisions in other jurisdictions.

That fish, as animals *ferae naturae*, in whose preservation the public has an interest, are proper subjects of state regulation under its police power, is well settled.[20] It is likewise well settled, though judicial opinion is scarce on the subject, that since the public has no interest in non-migratory fish, the state's police power does not extend to them and bodies of water wholly enclosed on private land are not subject to regulations.[21] The determining factor in deciding whether a regulation may apply to a body of water on private land is not whether such a body of water is private property, but whether it affords a means for fish to pass to and from public waters.[22] The conclusion is inescapable that the police power does not extend to the preservation of fish within "land locked" bodies of water.

However, this fundamental aspect of the case was ignored by the court. Rather, the decision was made to turn on the issue of the right of the state to subject property to state regulation in order to enforce the law in respect to public property. The court stated: "If,

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[19] 137 Mich. 406, 100 N.W 691 (1904).

[20] People v Bridges, 142 Ill. 30, 31 N.E. 115 (1892), People v. Horling, 137 Mich. 406, 100 N.W 691 (1904) People v. Collison, 85 Mich. 105, 48 N.W 292 (1891), State v. Hume, 52 Ore. 1, 95 Pac. 808 (1908)

[21] People v. Conrad, 125 Mich. 1, 83 N.W 1012 (1900), Newman v. Ardmore Rod & Gun Club, 190 Okla. 470, 125 P 2d 191 (1942) *see* People v. Lewis, 227 Mich. 343, 198 N.W 957, 958 (1924), State v. Roberts, 59 N.H. 484, 486 (1879), Jones v. State, 119 Tex. Cr. Rep. 126, 45 S.W 2d 612, 614 (1932).

[22] State v Lowder, 198 Ind. 234, 153 N.E. 399 (1926), People v. Horling, 137 Mich. 406, 100 N.W 691 (1904), People v. Conrad, 125 Mich. 1, 83 N.W 1012 (1900), People v. Doxtater, 27 N.Y. Supp. 481 (1894), State v. Lipinske, 212 Wis. 421, 249 N.W 289 (1933) *see* Taylor Fishing Club v Hammett, 88 S.W 2d 127, 130 (Tex. 1935).

to enforce the law in respect to public property, it becomes necessary to regulate private property, such may be done by the state in the exercise of its police power "[23] The argument, upon the strength of which the correctness of the decision rests, was advanced that to exempt private ponds from the statute would destroy its force. Said the court: "At once it is apparent that the Fish and Game Commission would be helpless in its endeavor to prohibit the taking of excessive numbers or undersized fish from public streams, if one could retain in his possession all fish taken from private ponds, irrespective of their size and number; because, in penal actions to enforce the game laws, the Commonwealth would be required to prove the contraband in possession of an angler was taken from a public stream, and not from private waters."[24] This is a rather flimsy argument upon which to justify an interference with private rights. Mere possession of fish not conforming to statutory requirements could well create a presumption of illegal possession. This would cast the burden on the defendant of proving that he did not take the fish from public waters but from a legal source such as a private pond. Indeed, it is as illogical as it is novel, to argue that a statute though not expressly doing so, was intended to and could legally create an offense because of the difficulty of proving another. Rather than interfere with private rights, let the legislature meet this supposed difficulty by making possession of fish coming within the statutory restrictions as to size and number, prima facie evidence that they were taken illegally.

Additional fallacious reasoning was employed by the court when it stated that the legislature was not interfering with private rights in respect to the fish in the pond, but was only regulating the public invited to fish therein. "Ownership, or the right of property is, ., not a single, indivisible concept, but a collection or bundle of rights "[25] And one of the elements of ownership is the power to confer upon others an interest in the property owned.[26] Though the legislature has not taken the fish, property of the owner of the pond, it prevents him from disposing of them below a certain size or above a certain number to possible buyers by giving them the right to fish in the pond. Too, a restriction is placed on alienation in that only licensed individuals can buy from the pond owner the right to take fish from his pond. Further, the legislature in effect has authorized officers of the state to go on private property, an interference with the possession and enjoyment thereof by the owner.

These invasions of private rights could possibly be denominated a taking, though the corpus of the property remain with the owner.

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[23] Draffen v. Black, 302 Ky. 775, 778, 196 S.W 2d 362, 364 (1946).
[24] Draffen v Black, 302 Ky. 775, 777, 169 S.W 2d 362, 363 (1946).
[25] BROWN, LAW OF PERSONAL PROPERTY (1st ed. 1936) sec. 5.
[26] *Ibid.*

Indeed, the line between eminent domain and police power has been recognized as one of degree and the test of reasonableness is said to be the only barrier to uncompensated regulation.[27] Assuming, however, that only a question of police power is involved, it is the opinion of this writer that in the present case, accepting the court's view that the statutes were meant to be regulative of bodies of water wholly enclosed on private property, the state has transcended its constitutional power. Though the purpose of a regulation be a valid one, the regulation itself may be unconstitutional if it is not reasonable.[28] As shown previously in this note, little if any public good is accomplished by such regulations as applied to private ponds, and as there is no necessity for their application in this case, they constitute unreasonable invasions of personal and private property rights.

In conclusion, it seems justifiable to say that the decision is erroneous. The court should have construed the statutes as inapplicable in this case. Assuming, however, that the statutes were applicable, they should have been declared unconstitutional in so far as they apply to fishing in bodies of water wholly enclosed within private property

ARNETT MANN

[27] Note (1935) 35 COL. L. R. 938, 939.

[28] Liggett Co. v. Baldridge, 278 U.S. 105, 49 S. Ct. 57 (1928), Nectow v. Cambridge, 277 U.S. 183, 48 S. Ct. 447 (1928), Weaver v. Palmer Bros. Co., 270 U.S. 402, 46 S. Ct. 320 (1926), Burns Baking Co. v. Bryan, 264 U.S. 304, 44 S. Ct. 412 (1924) *Mallonee, "Police Regulations"—Essentials of Unconstitutionality* (1917) 51 AM. L. R. 187, 188.