

RELATING TO NAVIGABLE RIVERS IN THIS STATE:

5-10
May 4th, 1934



Hon. W. C. Buford
Game and Fish Commissioner
Jefferson City, Missouri

Dear Sir:

We acknowledge receipt of your letter of April 17th, 1934 in which you state and inquire as follows:

"Since the proprietor of lands on either bank of a navigable streams owns only to the bank, while the property rights on banks of non-navigable streams extend to the stream's center subject to regulation by the State by virtue of the title to all fish being vested in the public at large, information relative to navigability of streams is repeatedly requested of this department. We, therefore, desire your opinion as to the question of navigability.

Would the capacity of a stream at normal water stage to float a tie or fence post for a commercial purpose constitute a sufficient test of navigability?"

I.

A river is navigable in fact when used or capable of being in their ordinary condition of floating boats and vessels for commerce. A river is navigable in law which is capable of transporting rafts of logs, ties, etc. for several months during year without the aid of men on the bank thereof.

Vol. 45 Corpus Juris, Paragraph 6 reads as follows:

"DEPTH AND CAPACITY FOR FLOATAGE--(a) IN GENERAL. What is a navigable water is determined by its capability of use by the public for purposes of transportation and commerce, rather than the particular extent and manner of that use. The ease or difficulty of navigation is not control-

ling; and the general rule is that if the water is adapted for commercial transportation it is immaterial what kind of vessels are or can be employed, although some authorities have taken as the test of legal navigability the capacity of the water to afford a passage for sea vessels or the like. The character of the commerce essential to navigability is that which is useful and has practical utility to the public, but whether the stream is used by boats or by rafts or for floating logs is not the test. It is generally, but not in all jurisdictions, held that the stream must be navigable for some useful purpose, such as trade or agriculture, rather than for mere pleasure, and must be capable of sustaining more than small boats such as rowboats or small skiffs or launches.

CAPABLE OF FLOATING LOGS. Streams which are merely floatable and useful for logging purposes, while not navigable in a technical sense, have been held navigable so far as this public use is concerned, but other authorities hold that such streams are not navigable in a broad sense or that the stream must be capable of floating rafts as distinguished from single logs."

In *Poe v. Economy Light, etc. Co.* 241 Ill. 290, the court said in part as follows:

"The fact that there is water enough in places for row boats or small launches answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose does not render the waters navigable."

In *Grantz v. McKee*, 279 Federal 713, the court said in part as follows:

"A small stream running through a swampy country, used only in times of high water to a small extent for floating of logs or for skiffs and dug outs by people living near, because of the bad conditions of the roads, is not navigable in any sense that would constitute it a part of the public waters of the State."

Hon. W. C. Buford

May 4th, 1934

In *Leerry v U.S.*, 177 U.S. 621, the court said in part as follows:

"The mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, is not sufficient to constitute a navigable water of the United States, which the federal statute makes it a misdemeanor to obstruct unless the channel is substantially useful to some purpose of interstate commerce."

By the common law no river was considered navigable, which was above the ebb and flow of the tide, but that is not the doctrine of this state.

In *State Ex rel v. Taylor*, 224 Mo. 1. c. 436 Judge Woodson, in ruling the case said in part as follows:

"Here all streams which are actually capable of floating and of permitting the passage of ordinary boats upon the bosom of their waters are considered navigable rivers."

In *Lumber Co. v. Ripley County*, 270 Mo. 1. c. 136, Judge Woodson, in ruling the case said in part:

"Current River is not navigable, and we are not going to let this case go off on the admission that it is, and hereafter be plagued in the future by an opinion of this court holding that it is such, because perhaps, counsel for plaintiff in this cause admitted it to be such."

In *Casbest v. McComas Hydro-Elec. Co.* 212 Mo. 1. c. 332-3, Judge Trimble, said in speaking for the court in part as follows:

"The petition alleged that Platte river is a navigable stream. At the trial defendant, when asked if it was agreed that Platte river had been designated by the United States Government as a navigable stream, replied that "It is admitted that the Government has designated this stream as navigable, but as a matter of fact it never has been navigated."

May 4th, 1934

The decree does not specifically find that it is navigable and makes no finding whatever in that regard unless it be contained within the general finding that "the allegations of plaintiff are true."

Under the Federal decisions only those streams are regarded as "navigable in law which are navigable in fact...And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." (The Montello, 20 Wall. 430, 439.) "The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water, does not make it a navigable river." (United States v. Rio Grande, etc., Co., 174 U. S. 690, 698.) By its own terms, the Federal Statute forbidding dams without authority of the Secretary of War (section 9910 supra) relates solely to navigable waters. (Egan v. Hart, 165 U. S. 188, 192.) Under the Federal test, Platte river is not a navigable stream since the most the evidence shows it that at some time in the remote past it was used for floating logs for short distances to saw mills, that once a party of fur traders went down the river to its mouth in a boat. It is only at certain flood times that the stream has a sufficient amount of water to either float logs or carry a boat. Whether the State test of navigability as found in McKinney v. Northcutt, 115 Mo. App. 146, 154, 155, and in Weller v. Missouri Lumber, etc., Co., 176 Mo. App. 243, 256, is different from or less than the Federal test, it is manifest that the Federal Statute, defining rights which depend upon the fact of navigability, would require that the Federal test is the one to be applied in determining that fact. Hence we may readily agree with defendant that, in this sense, Platte river is not a navigable stream."

In McKinney v. Northcutt, 114 M.A. 1. c. 157-8, Judge Norton, speaking for the court, said in part as follows:

May 4th, 1934

"So we find that by concurrence of authorities, a stream capable of transporting rafts of railroad ties, as in this case, for several months during the spring of the year, without the aid of men on the banks thereof, is navigable within the meaning of the law for that purpose and subject to the use of the public therefor, and the rights of the riparian owners to the soil adjacent to and underlying the bed of such stream are subject to this right or easement in the public, which rests upon the necessities of commerce; and where, as in the case at bar, it appears that there was no other practical route by which the ties could be transported to market, the adjacent owners would have no right to interfere with one using the stream for the commercial purposes indicated. Respondent had a right to occupy the stream in floating his ties to market without inflicting injury upon the adjacent property, and the appellants had no right to obstruct said stream as shown in the evidence, or otherwise interfere with respondent in the exercise of his privilege. The views herein expressed are abundantly supported by the courts of this country as will appear by reference to the following cases."

Therefore from the conclusion reached in the foregoing cases, we hold that rivers are said to be navigable, within the meaning of the law, and in fact when they are used, or are susceptible of being, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary mode of trade and travel on water, that a stream is navigable in law which is capable of transporting rafts of railroad ties or logs for several months during the year, without the aid of men on the banks thereof.

Respectfully submitted,

W. W. Barnes
ASSISTANT ATTORNEY-GENERAL

APPROVED:

ATTORNEY-GENERAL