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## Masthead and Comments

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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

### WATER AND WATERCOURSES—NAVIGABILITY OF STREAMS IN MISSOURI

Tiedeman in his treatise on *Real Property*, when discussing what is a navigable stream, said: "Perhaps there is not a more difficult question to answer in the law of real property. . . . The courts of this country have been discussing the problem for many years and have come to different conclusions of the various branches and subdivisions of the question"<sup>1</sup> The question of navigability of streams in Missouri has been recently brought to the attention of the general public by newspaper reports

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1. TIEDEMAN, *REAL PROPERTY* § 599, p. 872 (4th Ed. by Gill, 1924).

of *Elder v. Delcour*.<sup>2</sup> This was an action under the declaratory judgment act to decide plaintiff's right to use the Meramec River where it flows across defendant's land in Dent County. Defendant is the owner of a farm in Dent County and the Meramec River, which rises in Dent County twenty-five miles from defendant's farm, flows across his land. The river there is navigable by canoes, row boats, and other small floating craft, but not by larger boats or vessels. In the past it was used for floating logs at this point and can still be so used. It is well stocked with fish and is heavily fished by sportsmen both by wading and by floating. Defendant posted signs prohibiting trespassing or fishing without his permission. Plaintiff, who had a fishing license, was floating down the river when his passage was blocked by a water gate, and defendant threatened plaintiff with suit for trespass. Plaintiff told defendant that he was going to proceed down the river, crossing the water gate, so that he would tie up and wade while fishing likely spots, that if he found immovable obstructions, he would carry his canoe around them. He further asserted that he would camp to eat lunch or repair his canoe if necessary. Defendant contended that the stream was not navigable and that he had the right to restrain the public from trespassing thereon. The Circuit Court of Dent County found for plaintiff and decided that the Meramec is public water subject to travel by plaintiff and those who desire to wade or float down it in boats for purposes of fishing. Defendant appealed to the Springfield Court of Appeals which reversed the decision of the trial court and decided that fishing by wading or floating in small boats is not sufficient to make a river navigable, thus not allowing private ownership to be subjected to the public easement. The case was ordered transferred to the Missouri Supreme Court for further consideration, which court affirmed the trial court, holding that the Meramec was suitable for public and commercial purposes and that the bed was a public highway for travel by floating and wading, and one who travelled for fishing purposes was not a trespasser. Although the court's reasoning will be discussed later, it is significant to mention here, as a preface to later paragraphs, that the court speaks of navigability in two senses. The broad sense of the word means that the river in question admits of such extensive navigation that the state retains title to the bed of the stream. The narrow sense of the word (which often substitutes for "navigable" such words as "public highways", "floatable streams", or "privately owned streams subject to public easement") means that the stream does not allow sufficient navigation to warrant state retention of title to the bed, but it does not warrant public easement.

It is beyond the scope of this comment to discuss navigable waters over which the United States Federal Government exercises control; it is limited to a discussion of those waters over which Missouri exercises jurisdiction.

#### THE ENGLISH RULE

In England, where all the principal streams of any importance are but continuations of sea inlets, the common law rule as to navigability has been said to be that a stream is navigable only as far as the ebb and flow of the tide can be felt. It has

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2. 263 S.W. 2d 221 (Mo. App. 1953), 269 S.W. 2d 17 (Mo. 1954).

been doubted, however, whether this is the true and unqualified rule in England.<sup>3</sup> It became clear, at any rate, that such a tidal theory of navigability was not suited to the territory which is now the United States of America, where great inland streams and rivers, though never affected by tides, carried a large amount of necessary commerce. Although there are still some evidences of adherence to the common law rule, the tide test did not gain approval by the majority of the American states. The majority opinion is that navigable waters are those capable of being navigated, or navigable in fact.<sup>4</sup> However, there is a fairly general view that all tidewater *prima facie* is navigable.<sup>5</sup>

#### STATUTORY DECLARATIONS OF NAVIGABILITY

The absolute necessity for public use of the streams and rivers of the frontier country made it necessary for the first legislatures to adopt statutes protecting such right. Although modern highways make traffic on Missouri streams less necessary at the present time, a great amount of useful traffic is still carried thereon, and justifies retention of such protective statutes.<sup>6</sup> Certain streams which were not navigable in the sense that the state owned the beds were valuable for millruns, and an attempt was made to declare these streams navigable by statute, calling them "public highways".<sup>7</sup> Trouble arose, however, in connection with those statutes which called streams navigable or public highways which in fact were not navigable.<sup>8</sup> The Springfield Court of Appeals in *Elder v. Delcour*, speaking of such statutory declarations said:

"We find it is unnecessary to discuss the state laws which declare certain non-navigable streams to be public highways. In the first place the Supreme Court of this state has held that the legislature has no right to declare a non-navigable stream navigable. The law clearly is that the question as to whether or not a stream is navigable is a judicial question."<sup>9</sup>

The reference to the supreme court evidently is to the case of *State ex rel. Applegate v. Taylor*, *supra* note 7, which agreed with the contention that the "legislature had no authority to establish and declare the Chariton River to be navigable even though it had intended to do so by virtue of the act of 1845,<sup>10</sup> for the reason assigned, that the federal government alone possesses that power." The *Applegate*

3. 56 AM. JUR. *Waters*, § 178, p. 643: ". . . an examination of the English decisions and the works of the textwriters of the time leads to the conclusion that the tidal test of navigability has never been the rule of the English courts, but that rather the question has been determined with respect to actual usability for navigation." See also 42 L.R.A. 305 (1899) for an exhaustive history of the English rule.

4. 56 AM. JUR., *Waters*, § 177, p. 642 et seq.; *McKinney v. Northcutt*, 114 Mo. App. 146, 154, 89 S.W. 351, 354 (1905); *Hickey v. Hazard*, 3 Mo. App. 480, 484; *TIEDEMAN*, *op cit*, *supra*.

5. 65 C.J.S., *Navigable Waters*, § 4, p. 48.

6. Mo. CONSR. Art I, § 1 (1875); Mo. REV. STAT. § 560.545, 560.550 (1949); *State v. Wright*, 201 Mo. App. 92, 95, 208 S.W. 149, 150 (1919).

7. *State ex rel. Applegate v. Taylor*, 224 Mo. 393, 123 S.W. 892 (1909).

8. Mo. LAWS 1838, p. 83, § 1.

9. 263 S.W. 2d at p. 224.

10. Mo. LAWS 1845, p. 299.

case involved an act of the state legislature which allowed certain rivers to be improved by the county through which it flowed.<sup>11</sup> The act specifically exempted navigable streams from the act, and appellants urged that the act of 1845, referred to above, which declared that the Grand Chariton River was a "public highway", had the effect of removing the Chariton from the improvement act. However, the court, by the language quoted, disagreed with that contention, agreeing with the respondents that the legislature had no authority to declare a river navigable.

A good reason for not allowing the legislature to declare a stream navigable that is not navigable in fact is the Constitutional provision against the taking of private property for public use except by eminent domain proceedings. If an otherwise non-navigable stream were declared navigable by statute, the riparian owner would either lose title altogether if the broad sense of navigability were used, so that title to the stream bed would be transferred to the state, or he would at least have his interest in the stream subjected to a public easement, if the narrow sense of navigability were used. It should be clear that the state can no more declare a non-navigable stream a public highway, then it could build a highway through a farm without compensating the owner therefor. The general rule of law undoubtedly is that the state cannot in any way make a non-navigable stream navigable thereby destroying or considerably damaging the property rights of adjacent riparian owners without making compensation. Thus, if the public good may be enhanced by calling non-navigable streams public highways, the only way it can be permitted constitutionally is through eminent domain.<sup>12</sup> Therefore, it is quite evident that the Missouri legislature may not declare a river navigable or a public highway when it is not so in fact.

Many rivers in Missouri were effected by such statutory declarations, and several of these statutes have never been repealed. The Salt River from its junction with the Mississippi River to the junction of the North fork, the Middle and South forks of the Salt River was declared navigable.<sup>13</sup> The Loutre River below Carroll's Mill was declared a public highway.<sup>14</sup> The Current River above section ten in township thirty-one, north of range six west was declared not to be a navigable stream, but any person building a mill dam on the portion concerned was compelled to provide a "good and sufficient way" for rafts belonging to mill owners up stream from the dam in question.<sup>15</sup> The Meramec River above Crooked Creek was declared a public highway, but that act was repealed eighteen years later.<sup>16</sup> Fourche-a-Courtois Creek below Sawyer's mill was declared a public highway.<sup>17</sup> The Ni-chi-na-bo-ta-na river was declared a navigable stream and public highway from its mouth to the northern boundary of Missouri, but that act was repealed

11. Mo. Laws, 1903, p. 234.

12. 56 AM. JUR., *Waters*, § 185, p. 651, 65 C.J.S., *Navigable Waters*, § 7 b, p. 57; 19 YALE L. J. 654 (1910); 1 FARNHAM, *WATERS* p. 119 (1904).

13. Mo. Laws 1830, p. 80.

14. Mo. Laws 1838, p. 81.

15. Mo. Laws, 1838, p. 37.

16. Mo. Laws 1838, p. 83; repealed by Mo. Laws, 1856, p. 172.

17. Mo. Laws 1838, p. 83.

ten years later.<sup>18</sup> The Ni-Da-Wah river was declared to be a navigable stream from its mouth to Buchanan's fork.<sup>19</sup> The North Grand River from its mouth to where the township line dividing townships sixty-two and sixty-three north crosses the east and west forks of said river was declared a public highway, but that act was repealed thirty years later.<sup>20</sup> Apple Creek from its mouth to Inggram's mill was declared a navigable stream.<sup>21</sup> Cowskin or Elk River in Newton County below Holmes and Wallaces' mill was declared a public highway, but that act was repealed thirty-one years later.<sup>22</sup> Fourche-a-Courtois River below the mouth of Hazel Creek was declared a public highway, amending the law of 1838, p. 83, *supra.*, note 17.<sup>23</sup> The Sac River from its mouth to the three forks was declared a public highway.<sup>24</sup> The Spring River from its mouth to the section line dividing sections eleven and twelve in township twenty-eight, range thirty west, was declared a public highway, but that act was repealed two years later.<sup>25</sup> Bryant's fork of the White River from where the stream crosses the state line in Ozark county up to Bowlin's mill was declared a public highway, but leave was given one Parsons to erect a two foot mill dam.<sup>26</sup> A later act amended this and made Bryant's fork a public highway from where it crosses the state line up to the mouth of Spring Creek which empties into Bryant's fork above the town of Rockbridge.<sup>27</sup> The James fork of White River in Missouri from its mouth to the mouth of Finley creek, and Flat Creek from its mouth up to John William's mill were declared public highways by the same statute.<sup>28</sup> The Platte River was declared a public highway from Whitson's mills to its mouth.<sup>29</sup> The Marias des Cygnes, the Marmiteaux and the Little Osage Rivers were declared public highways up to Ball's mill.<sup>30</sup> The Grand Chariton was declared a public highway from its mouth where it empties into the Missouri River to the northern boundary of the state, but this act was not to affect the "right of any person or persons who now have, or may hereafter have, a gristmill or other machinery constructed on said river."<sup>31</sup> Beaver Creek in Taney County between Samuel Nelson's mill and its confluence with the White River was declared to be a navigable stream "for all practical purposes."<sup>32</sup> Big Piney fork of the Gasconade River from the mouth to Newberry's mill in Texas County was declared a public highway.<sup>33</sup>

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18. Mo. Laws 1838, p. 87; repealed by Mo. Laws 1848, p. 121.
  19. Mo. Laws 1838, p. 88.
  20. Mo. Laws 1838, p. 88; repealed by Mo. Laws 1868, p. 279.
  21. Mo. Laws 1840, p. 114.
  22. Mo. Laws 1840, p. 115; repealed by Mo. Laws, 1871, p. 249.
  23. Mo. Laws 1840, p. 115.
  24. Mo. Laws, 1840, p. 115.
  25. Mo. Laws 1842, p. 69; repealed by Mo. Laws 1844, p. 300.
  26. Mo. Laws 1842, p. 70.
  27. Mo. Laws 1848, p. 121.
  28. Mo. Laws, 1842, p. 70.
  29. Mo. Laws 1844, p. 299.
  30. Mo. Laws 1844, p. 299.
  31. Mo. Laws 1844, p. 299.
  32. Mo. Laws 1848, p. 120.
  33. Mo. Laws 1848, p. 121.

## JUDICIAL DETERMINATION OF NAVIGABILITY

As has been mentioned before, determination of navigability has two different applications, that which is sufficient for state retention of the title to the river bed, and that which is sufficient to subject private riparian ownership to a public easement. Furthermore, the type of navigation, its value to the public, the size of vessels the stream will admit, and the duration of practical use all enter the determination of navigability in either of the meanings given to the word. Because of this, each decision must rest on the peculiar situation and facts surrounding the individual river at the time, place, and under the use in question. It is very hard to generalize, and close attention must be paid to the facts and opinions of the reported cases.

In 1905, the case of *McKinney v. Northcutt*<sup>34</sup> was decided. This was a suit for injunction. The bill alleged that plaintiff was a tie contractor who floated rafts of ties down Indian Creek in Washington and Franklin Counties to the Meramec River, thence down the Meramec to market. The defendants owned land through which Indian Creek flows and attempted to make plaintiff pay for his rafting. In furtherance of this they felled trees in the river which stopped plaintiff's use. Indian Creek, especially in March, April, May and June, was then fit, useful, and capable of such floatage. When plaintiff tried to remove the obstacles, he was threatened with arrest. A raft usually consisted of about six hundred ties. The creek is from thirty-two to forty-eight feet wide, and from twelve inches to fifteen feet deep. The Circuit Court of Washington County found for plaintiff and ordered an injunction. The St. Louis Court of Appeals affirmed that judgment. In determining the test for navigability, the court said:

" . . . capability of use by the public for purposes of the transportation of commerce, rather than the extent and manner of that use, affords the true criterion of the navigability of waters. If they are capable in their natural state of being used for the purpose of commerce, no matter in what mode the commerce may be conducted, they are navigable in fact, and become in law public highways."<sup>35</sup>

This would appear to be a fairly broad test, allowing navigability regardless of the manner in which it is carried on, and hints that the test will not be restricted to "ordinary" methods. This liberality is somewhat restrained, though, by language in *Weller v. Missouri Lumber and Mining Co.*, which is discussed shortly. Furthermore, saying capability of use rather than extent of use, would permit calling a stream navigable although at that particular time it was not being so navigated, thus protecting the public's future use. In connection with lapse of use, it has been said that a river does not lose its navigability because of assertion of private ownership which is submitted to in ignorance by the public.<sup>36</sup> What is meant by 'commerce' will be better illustrated by *Slovensky v. O'Reilly*, *infra*.

34. 114 Mo. App. 146, 89 S.W. 351 (1905).

35. 114 Mo. App. at 154, 89 S.W. at 354; See also, 56 AM. JUR. *Waters*, § 181, p. 647.

36. 65 C.J.S., *Navigable Waters*, § 52, p. 50.

The *McKinney* case went on to say:

"Waters, to be navigable, must be so far navigable or floatable in their natural state and in their ordinary capacity as to be of public use in the transportation of property. Waters which can be made floatable only by artificial means are not regarded as public highways. Nor is it necessary, to constitute a stream navigable for floating and rafting within the law, that they should be capable of continuous use during the whole year for that purpose. It is sufficient to render a stream navigable, within the sense under contemplation, if as a result of natural causes it be capable of floatage or other navigation periodically during the year, and so continue long enough at each period to render it susceptible to beneficial use by the public."<sup>37</sup>

Therefore, the case refuses to allow navigability to any but streams usable in their natural state. Other jurisdictions have not been so strict and declare that navigability does not depend solely on natural conditions of the stream, but if the stream is suitable for navigation in all other respects, artificial aids will be allowed to make the watercourse suitable for commercial navigation.<sup>38</sup> From the standpoint of beneficial use, the *McKinney* case allowed navigability when the stream was capable of floating rafts of railroad ties for several months during the spring of each year, but a case decided in 1926 refused navigability when a stream was only able to float ties in extraordinary or "freshet" times, and then only for short periods.<sup>39</sup> On the basis of this, then, if the stream in its natural state, and with an ordinary volume of water, either constant or regularly recurring with the seasons, is capable of floatage useful to the public, it is sufficient.<sup>40</sup>

The *Weller* case, referred to above, was decided in 1913.<sup>41</sup> It was an action for damages allegedly sustained by plaintiff by reason of the obstruction of a navigable stream in which plaintiff floated logs. Plaintiff alleged that defendant had wilfully and maliciously planted a boom in the river to arrest the momentum of defendant's logs in such a way as to prohibit the plaintiff's logs from getting past to his saw mill, and forcing plaintiff to move his saw mill to a different location. The Circuit Court of Carter County gave a verdict to plaintiff, and the Court of Appeals affirmed, saying:

"a stream capable of transporting commerce in any manner in which such commerce is ordinarily conducted is a navigable or floatable stream, and is a public highway."<sup>42</sup>

This seems to require that whatever trade is to be carried on, must be done so in the "ordinary" or usual mode of carrying on water traffic. It must be navigated for the usual purposes, precluding any novel or extraordinary use. This follows the general trend of thought and is in accord with the test applied by the United

37. 114 Mo. App. at 154, 89 S.W. at 354.

38. C.J.S., *Navigable Waters*, § 5 b, p. 50.

39. *Greisinger v. Klinhart*, 282 S.W. 473, 476 (Mo. App. 1926).

40. See: 3 TIFFANY, *REAL PROPERTY*, § 937 (3d Ed., Jones, 1939); 1 FARNHAM, *WATERS* § 23, p. 100 (1904).

41. 176 Mo. App. 243, 161 S.W. 853 (1913).

42. 176 Mo. App. at 256, 161 S.W. at 857.

States Supreme Court in *The Daniel Ball*.<sup>43</sup> That case involved an act of congress which provided that it was unlawful for any vessel propelled by steam to transport merchandise or passengers upon the navigable waters of the United States without having obtained a license for the coasting trade.<sup>44</sup> The *Daniel Ball* was navigating on the Grand River in Michigan between Grand Rapids and Grand Haven, and was not licensed under the act. The United States filed a libel in the District Court for the Western District of Michigan in which it described the Grand River as navigable water of the United States. The answer of the owners denied that it was a navigable water of the United States and therefore the license requirement was inapplicable. The district court dismissed the libel and the circuit court of appeals reversed this decision and gave a decree for the penalty demanded for violation of the act. In affirming the circuit court's decree, the United States Supreme Court said:

"Those rivers must be regarded as public navigable rivers 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 travels are or may be conducted in the customary models of trade and travel on water."<sup>45</sup>

In *Hobart-Lee Tie Co. v. Grabner*,<sup>46</sup> the court gave an indication of what purposes it thought would be sufficient to find state ownership of the stream bed of the Gasconade River. In that case the plaintiff sought to enjoin defendant from landing ties on a sand bar which was on plaintiff's side of the thread of the Gasconade River in Pulaski County. Plaintiff was in under a lease on land adjoining the river at the point in question. Plaintiff contended that the Gasconade at this point was not a navigable stream, in the sense that title to the bed of the river is retained in the state, but was in the adjoining owners to the thread of the stream. Defendant contended that the Gasconade is a navigable stream and that the island or bar which formed in the stream and finally attached itself to plaintiff's bank did not become property of the adjacent landowner. Therefore, plaintiff had no right to complain about defendant's use of the gravel bar in hauling ties along it up to a nearby public road. The Springfield Court of Appeals affirmed the plaintiff's decree granted by the Circuit Court of Pulaski County.

"We take judicial notice of the fact that the point on the Gasconade river, where this cause of action arose, is near its source; that on the topography of the country is stamped the grandeur of the magnificent Ozark uplift; that the stream throughout the county of Pulaski is at many places narrow and its waters swift and beautiful; that in the beds of the Ozarks stream there are shoals and bars which furnish a happy camping ground for the erstwhile fisherman; an occasional rapid joins in the chorus of nature, and

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43. 77 U.S. (10 Wall.) 557, 19 L.Ed. 999 (1871).

44. 5 STAT. 304.

45. 77 U.S. (10 Wall.) at 563, 19 L.Ed. at 1001.

46. 206 Mo. App. 96, 219 S.W. 975 (1920).

that while actually capable of floating logs, ties, and commerce of this character, they are not navigable streams with the bed of the river in the public."<sup>47</sup>

This follows the United States Supreme Court in its decision in *U. S. v. Rio Grande Dam and Irrigation Co.*, which was a suit in the District Court of New Mexico to restrain defendant from constructing a dam across the Rio Grande to accumulate water for irrigation. The bill averred among other things that the dam will greatly diminish the usability of this river at points downstream which float rafts of logs, poles, and steamboats. The answer denied the river's susceptibility to navigation at these points. The district court took judicial notice that the Rio Grande was not navigable and dissolved the temporary injunction. Appeal was taken to the supreme court of the territory which affirmed the dissolution of the injunction. Then the United States appealed to the United States Supreme Court which reversed the lower courts' decisions and remanded the case. In doing this, the Supreme Court quoted with favor from *Rowe v. Bridge Corp.*, 38 Mass. (21 Pick.) 344 (1839), saying:

"It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'<sup>48</sup>

The case of *Grobe v. Energy Coal & Supply Co.* refused navigability to the Black River in the sense of public ownership of the stream's bed. In that case, plaintiff was owner of land on the bank of the Black River in Butler County and brought this action to recover for gravel allegedly taken wrongfully by defendant from the bed of the river. Defendant contended that the stream was navigable in the sense that title to the bed was in the general public. Plaintiff got judgment in the Circuit Court of Butler County, and defendant appealed to the Springfield Court of Appeals, which affirmed the plaintiff's judgment, saying:

"We may say, however, that there is no evidence of a substantial nature tending to show that Black River along and adjacent to plaintiff's land is a navigable stream in the broad sense and to the extent that the title to its bed is in the general public . . . but certainly Black river at the place in question is not such a stream as will permit and bear the passage of ordinary boats of commerce upon the bosom of its waters."<sup>49</sup>

In other jurisdictions there is a conflict as to whether the use to which the river is put must be pecuniarily valuable. In Missouri it has never been specifically decided; however, from the constant use of the word "commercial" in the Missouri cases, it would appear that we follow the majority rule which requires that the navigation be for some pecuniary purpose. *Slovensky v. O'Reilly*<sup>50</sup> was an appeal to the Supreme Court of Missouri from the Circuit Court of Crawford County. The

47. 206 Mo. App. 96 at 104, 219 S.W. 975 at 977.

48. 174 U.S. 690, 698, 19 Sup. Ct. 770, 773, 43 L.Ed. 1140 (1899).

49. 217 Mo. App. 342, 351, 275 S.W. 67, 68 (1925).

50. 233 S.W. 478 (Mo. 1921).

court affirmed the defendant's judgment holding that the Meramec River in Crawford County was not a navigable stream in the sense that riparian owners lost their interest in the bed when the stream changed its course and left its old bed. In the court's opinion it called rivers navigable when they are used or susceptible of use in their ordinary condition as highways for commerce over which trade and travel may be conducted. The usual rule in other jurisdictions follows that theme by declaring that the stream must be usable for commercial purposes, useful to trade or agriculture, and capable of transporting the products of riparian cities and farms to markets.<sup>51</sup> The minority rule in other jurisdictions would call rivers navigable if they allow pleasure floatage, even though pecuniary navigation is not possible or practicable.<sup>52</sup>

In *Greisinger v. Klinhart*, *supra* note 39, a case involving injury to plaintiff's lake frontage by defendant's opening the dam to the lake, which dam was on defendant's property, the court summarized several guides for determining navigability: 1) Is the stream fitted for valuable floatage? 2) Will the public or only a few individuals be interested in transportation? 3) How great are the public interests involved? 4) Are the periods of useful navigation sufficient to benefit the public? 5) Was the stream previously used by the public and for how long? 6) If declared public, will it probably be of future public use for carriage?

#### PRIVATE OWNERSHIP SUBJECT TO PUBLIC EASEMENT

A narrower sense of navigation has been imposed by the courts of Missouri on some streams which are not navigable by ordinary river vessels, but which are usable for the transportation of forest products, railroad ties, and other floatage. This type of navigation is very beneficial to the public, but is not sufficient to allow state or public ownership of the stream. Therefore, in cases of that kind the courts have imposed an easement in favor of the public on the adjacent riparian owner's interest in the stream and its bed. In the *Delcour* case, the Springfield Court of Appeals held that a natural stream of water capable of floating rafts of logs, timber, or ties to market is navigable in the sense that it is a "public highway" which no one, not even a riparian owner, has a right to obstruct, and that the rights of the riparian owner in the adjoining land, and the stream bed are subject to the easement of the public "which rests on the necessities of commerce."<sup>53</sup> The court went on to say at p. 227 that in order to "constitute a stream a highway or navigable in fact" it must have sufficient capacity to be useful for navigation, meaning "trade and travel in the usual and ordinary modes." They further said that if the stream is being used to float logs and ties it would be considered a navigable stream, in the sense of creating a public easement. It would not be enough, however, if the stream would only permit canoes and small fishing boats to navigate its waters for purposes of fishing.

51. 1 FARNHAM, WATERS § 23, p. 100 et seq.

52. 56 AM. JUR., *Waters*, § 181, p. 648.

53. 263 S.W. 2d at 224.

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The supreme court agreed with the Springfield Court of Appeals that the Meramec at the point in question is not a navigable stream in the sense that title is retained by the State of Missouri; but the supreme court did not follow the reasoning of the Springfield court on the issue as to whether the stream is a public highway, and held that the capacity, suitability, and use of the river through the appellant's land in the manner in which appellant intended to put it, made this portion of the Meramec public waters and

"the submerged area of its channel over and across appellant's farm is a public highway for travel and passage by floating and by wading, for business or pleasure, and that in traveling the course of the stream by canoe or wading, respondent was not a trespasser on the property of the appellant."<sup>54</sup>

The appellant had made a further allegation in defense of his position in that he claimed an exclusive right to the fish in his portion of the stream. However, the supreme court held that title and ownership of fish is in the state until reduced to possession in a manner permitted by law, and since the respondent was not a trespasser, he had the right to take fish from this stream in a lawful manner.<sup>55</sup> The appellant made no attack on that part of the judgment which dealt with carrying objects on land to avoid stream obstructions, but in dictum the supreme court allowed the right subject to liability for damage to appellant's property.<sup>56</sup> Nothing was said with reference to camping on the shore, a privilege contended for in the trial court.

The *McKinney* case required that streams, to be public highways, must be floatable without artificial means, but did not require that they be usable throughout the year. It would be sufficient if they were capable of floatage periodically enough to be of beneficial use.<sup>57</sup> The *Grabner* case distinguished this right of public easement in this way:

"It is equally true that if the river at this point is a non-navigable stream in the sense that the state or government has not the title to the river bed, then the adjoining landowner's ownership runs to the thread of the stream, and such ownership is subservient only to the rights of the public to use such stream as a highway upon which it can float logs, ties and such other merchandise as the volume of water will carry during certain seasons of the year."<sup>58</sup>

It can be said, therefore, that the only difference between the courts' use of the word navigability is one of degree. The tests put forth by the courts are similar, the broader sense merely requiring a greater amount of traffic, in larger vessels ordinarily used in river trade, in order to find enough navigation to put title to the stream and its bed in the state. In order to be more definite, though, these rivers which may be used by the public, but are owned by private individuals, should be

54. 269 S.W. 2d 17 at 20 (Mo. 1954).

55. *Ibid.*

56. *Ibid.*

57. 114 Mo. App. at 154, 89 S.W. at 354.

58. 206 Mo. App. 96 at 102, 219 S.W. 975 at 976.

called "public highways" or, as done in some jurisdictions, "floatable rivers". Calling these rivers simply "navigable" would lead to confusion with the broader sense of state ownership, and thus should be avoided.<sup>59</sup>

#### CONCLUSION

The question of navigation has taken on new importance in recent times, and with greatly increased interest in recreation, including hunting, fishing, and general pleasure boating on the rivers of the State of Missouri a much greater number of people will be affected by its determination. *Elder v. Delcour* brings up definite problems that can be a source of difficulty, and strained relations between fisherman and farmer. All too often in the past certain weekend nimrods have left the stream so littered that even the most generous farm owner cannot welcome them. With this new decision broader rights for the fisherman are recognized, increasing the probability of landowner irritation. Perhaps one solution might be the expansion of the State Conservation Commission's already vigorous program to include creation of riverside parks, public lagoons and waterways by the use of the state's power of eminent domain, so that all parties might be amicably reconciled.

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59. For a good general discussion of this type of stream, see: 3 TIFFANY, REAL PROPERTY, § 937; 56 AM. JUR., *Waters*, § 188, p. 653; 65 C.J.S., *Navigable Waters*, § 1, p. 46; 41 W. VA. L. Q. 427 (1935).