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Water and Water Courses--Riparian Rights--Extent of Owner's Title

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Another suggested method of accomplishing a refund of taxes is by a statute which would require the tax commissioner to hold tax payments for thirty days in order that an overpayment might be recovered by suit. The theory of this means of recovery is that since the taxes are not yet within the treasury of the state, the state would not be an interested party and the tax commissioner would not be protected by the state's immunity from suit. See Sclove, *Refunds and Recovery of State Taxes Erroneously, Illegally, or Unconstitutionally Imposed in West Virginia*, 41 W. Va. L.Q. 348, 383 (1935). However, this means of recovery has several serious defects. It places a thirty-day statute of limitations upon actions for tax recoveries. It would also place a burden upon the state if the tax funds were needed immediately, because it would delay expenditures of the funds during the period.

F. R. T.

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**Water and Water Courses—Riparian Rights—Extent of Owner's Title.**—The plaintiff, owner of two islands situated in the Ohio River, sued for an injunction against the defendant, a sand and gravel corporation, charging it had wrongfully entered upon the two islands with its dredges and had engaged in taking sand and gravel from the submerged bars surrounding and belonging to the islands. The lower court discharged the temporary injunction it had previously awarded, and plaintiff appealed. Defendant admitted plaintiff's title to the sand and gravel rights within the low-water line surrounding the islands, but denied plaintiff's contention that such line extended to the furthest point to which the Ohio River had ever receded. *Held*, that low-water mark, as related to the Ohio River, is that point to which the water recedes at its lowest stage. Injunction reinstated. *Carpenter v. Ohio River Sand & Gravel Corp.*, 60 S.E.2d 212 (W. Va. 1950).

In laying down this rule the court seems to have made a unique decision. There is a split of authority as to whether the title of a riparian owner extends to high-water mark, *McCauley v. Salmon*, 234 Iowa 1020, 14 N.W.2d 715 (1944); or to the low-water mark, *Philadelphia v. Pennsylvania Sugar Co.*, 348 Pa. 599, 36 A.2d 653 (1944); and some cases hold to the thread of the stream even on a navigable river, *Ulbright v. Baslington*, 20 Idaho 539, 119 Pac.
292 (1912). In those jurisdictions holding the owner's title extends to low-water, such mark is almost unanimously declared to be ordinary low-water. *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796 (1915). The Illinois court declares low-water mark to be the farthest point to which the river ever recedes, *Joyce-Watkins Co. v. Industrial Comm.*, 325 Ill. 378, 156 N.E. 346 (1927), but that rule does not have application to the rights of riparian owners because in Illinois the fee of land bordering on the Mississippi River extends to the middle line of main channel, or the thread of the stream. *Davis v. Haines*, 349 Ill. 622, 182 N.E. 718 (1933). Thus, it seems that West Virginia is the only state holding that the title of riparian owners on a navigable stream extends to low-water mark and that such mark is the lowest point to which the water ever recedes.

It is interesting to note that the plaintiff cited only one case in his brief, *Union Sand & Gravel Co. v. Northcott*, 102 W. Va. 519, 135 S.E. 589 (1926). In that case the court stated in the syllabus, "Low water mark within the intendment of our law, as related to the Ohio River, is the point to which the water recedes at its lowest stage." This is substantially the same wording the court uses in the syllabus of the principal case; thus, it would seem that the present court was doing nothing more than re-emphasizing an old rule. However, that is not the fact. In the *Northcott* case, *supra*, the court stated, "And the evidence is pretty clear that the sand and gravel taken by the defendant was removed from within the level of low water mark no matter what line may be designated ..." At 529, 135 S.E. at 593. Therefore, that sentence seems to make the opinion expressed in the syllabus dicta.

Besides being dicta there is little authority to support the position taken by the court in the earlier case. The court cited Gould on Waters § 45 (3d ed. 1900) as supporting its view, but that author based his belief solely upon the opinion of Justice Wayne in *Howard v. Ingersoll*, 13 How. 381, 417 (U.S. 1851). That case turned upon the proper location of the boundary between the states of Georgia and Alabama. Justice Wayne stated that the line marked by the bank angling into the bed of the Chattahoochee River was to denote the boundary, and the question of riparian rights had no relevancy in the dispute. Yet the court in the *Northcott* case, *supra*, cited that case and adopted Mr. Gould's interpretation of it as authority for its syllabus.
The court in the principal case cited the same two authorities plus Farnham, Waters & Water Rights, and Paine Lumber Co. v. United States, 55 Fed. 854, 864 (C.C.E.D. Wis. 1893). In that case the court stated, "'Low water mark' is the point to which the river recedes at its lowest stage." The plaintiff sought to have determined the extent of damages caused to his property by the raising of a dam operated by the defendant, the United States government. The extent of damages was solely dependent upon the level of high-water mark upon the plaintiff's land, and the definition concerning the low-water mark had not the slightest connection with the problem. No authority was cited for the statement, so the definition was the court's own dicta. But in Mr. Farnham's text our court finds actual support, although no authority is cited for his statements except the dicta in the Paine Lumber Co. case, supra. The author thinks that to set the mark at ordinary low-water would leave a strip of land between the riparian owners and the water and would thus destroy the greatest advantage of a riparian owner, access to the water under all circumstances. Farnham, Waters & Water Rights 1462.

Partly on this theory of preserving access, the principal decision seems to have been rendered with justice. It is true the problem of access will probably never arise on the Ohio River because of the permanent locks and dams setting a nine-foot stage over the questionable area; nevertheless, that fact should not today deny a riparian owner any rights he would have been able to assert fifty years ago. It is possible the court thought it had established a rule of property in the syllabus of the Northcott case, supra, which now would be difficult to deny, particularly because it appeared that the plaintiff was induced to buy up nine islands, including the two in point, relying on that syllabus to protect his interests in the sand and gravel.

Perhaps the decision is further justified because of the added significance it gives to ownership of riparian land. If the court had not so established the mark, the sand and gravel between ordinary low-water marks on either shore of the Ohio River would be recoverable at will by anyone able to do so without payment, therefore being much the same as treasure trove in a navigable river. But as the rule is stated now, there will be available very little sand and gravel which dredging companies can take without risk of encroaching upon some owner's riparian rights. The decision is a boon to such owners along the Ohio River. As a direct
result of the decision sand and gravel companies are already mak-
ing overtures to farmers along the river's shores regarding payment
for any rights the company might invade in its dredging operations
in the bed of the river.

S. R. W., Jr.

MELVILLE WESTON FULLER. By Willard L. King. New York:
Macmillan Co. 1950. Pp. x, 394. $5.00.

While it might be accurate, it would not be adequate to
stigmatize this book as a competent but undistinguished biography
of a competent but undistinguished judge. True, the author has
not done for Fuller what Beveridge did for Marshall, or Fairman
for Miller, or even Mason for Brandeis; but he did not have a
Marshall, a Miller, or a Brandeis as subject.

A student of the law is apt to seek in judicial biography illumi-
nation of decisions, doctrines, developments as to which the subject
had some significant part. On a handful of questions, he will find
such materials here, most notably in connection with the historical
shell game which has arisen from Pollock v. Farmers' Loan & Trust
Co.; Mr. King has succeeded in pretty thoroughly dissipating the
myth of the fluctuating justice which has attached to that decision.
His interpretation of Fuller's somewhat ignoble role in invoking
the commerce clause to paralyze efforts of both the state and federal
governments in the regulation of business is not quite so convinc-
ing. Seeing it as animated by experiences demonstrating the
dynamic and constructive value of private enterprise, he overlooks
or at least omits to mention how here, as well as in the "morality"
cases (Mormon Church, liquor, lottery, etc.), Fuller's steady prefer-
ence was for making the public will yield to the private pursuit
and retention of gain. This is not to suggest that there was any-
thing sinister or consciously biased in such an approach; rather,
it was probably a reflection of attitudes generally held in the legal
profession of that and perhaps of this time which in turn reflect
the influence of conscientious and wholly proper concern with
securing the interests of clients. The most that can be charged
to Fuller is that he did not as a judge transcend his prior ex-

1 Member of the Illinois bar.