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# The Law of Navigable Streams in West Virginia

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## STUDENT NOTE

### The Law of Navigable Streams in West Virginia

A recent decision of the Supreme Court of Appeals of West Virginia held that the Public Land Corporation of West Virginia holds title to the beds of all navigable streams in the state and that the said Public Land Corporation may license individuals or corporations to extract the minerals on and under the beds of such navigable streams.[1]

The navigability of a stream is a question of fact to be decided in each case.[2] The United States Supreme Court has said that if a stream be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, then the stream is navigable in fact and becomes in law a public river or highway.[3] And once a stream has met the test of navigability, it remains navigable in law even though its use for navigation may have ceased.[4] Under the above rule, a stream usable only for pleasure boating has been held navigable;[5] and "in logging

[1] Campbell Brown & Co. v. Elkins, 93 S.E.2d 248 (W. Va. 1956).

[2] The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871).

[3] The Montello, 87 U.S. (20 Wall.) 430 (1874).

[4] United States v. Appalachian Electric Power Co., 311 U.S. 377 (1941); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).

[5] Coleman v. Schaeffer, 163 Ohio St. 202, 126 N.E.2d 444 (1955).

communities, streams which are capable of floating logs on their way to the mills have been held to be navigable waters although actual boating on them would, for the most part, have been impossible. The same has been held true of shallow streams in agricultural communities where the streams have been habitually used to carry the produce of the country to market."[6] The real test of navigability, then, is whether the stream can supply a useful commercial service to the public.[7]

In effect, West Virginia has followed the above rules in determining the navigability of its streams, and in the leading case of *Gaston v. Mace,*[8] the court defined three classes of navigable streams as follows:

"1. Tidal streams that are held navigable in law, whether navigable in fact or not;

"2. Those that, although non-tidal, are yet navigable in fact for 'boats or lighters', and susceptible of valuable use for commercial purposes;

"3. Those streams which, though not navigable for boats and lighters, are floatable, or capable of valuable use in bearing logs or the products of mines, forests and tillage of the country they traverse to the mills or markets."[9]

The second test, above, was applied by the court in the recent case of *Campbell Brown & Co. v. Elkins.*[10] The stream there in question was at one time the only means of transportation and the only avenue of commerce serving the region through which it flowed. Its present commercial value is greatly diminished, but, in earlier times, its value as a public highway was accepted even though navigation was sometimes difficult and at certain periods of the year impossible. The stream, however, "must only be thus capable of being navigable, not all the time, but for such length of time during the year as will make such stream valuable to the public as a public highway."[11]

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[6] Iowa-Wisconsin Bridge Co. v. United States, 84 F. Supp. 852, 866 (Ct. Cl. 1949), *cert. denied,* 339 U.S. 982 (1950).

[7] *Ibid.*

[8] 33 W. Va. 14, 10 S.E. 60, 5 L.R.A. 392 (1889).

[9] Gaston v. Mace, 33 W. Va. 14, 20, 10 S.E. 60, 62 (1889).

[10] 93 S.E.2d 248 (W. Va. 1956).

[11] Gaston v. Mace, 33 W. Va. 14, 21, 10 S.E. 60, 63 (1889).

It now seems settled in West Virginia that the beds of all navigable streams belong to the state.[12] This rule has been previously stated in the early cases of *Ravenswood v. Fleming*[13] and *Gaston v. Mace.*[14] Such a holding can be traced back to the old English law which held that the king was the owner of all the land under navigable waters.[15] The king held such land for the benefit of the people, and such is the American view. In states formed out of the public domain, the United States originally held title to the beds of the navigable streams, and, upon the formation of the state, the title to such beds passed to the state.[16] The correctness of this rule cannot be questioned at this time. In the case of *Campbell Brown & Co. v. Elkins,* the court did consider the question as to whether a state has the power to grant the bed of a navigable stream to an individual or corporation. In that case, the defendant attempted to trace his title to the bed of a navigable stream by a series of conveyances going back to original land grants made by the commonwealth of Virginia in 1796 and 1797. The West Virginia court paid little attention to these grants, even though it was admitted that they included the bed of the stream in question. In so holding, the court relied on *Norfolk City v. Cooke,*[17] which stated, in point two of the syllabus, "a patent for land constituting a part of the bed of a navigable river, conveys no title to it." This holding was just repeating an earlier decision of the same court.[18] Virginia also passed statutes to the effect that grants subsequent to their passage were void as to the beds of streams, but the statute covering the western part of Virginia was not enacted until 1802, and earlier grants were exempted.[19] The better view would seem to be, however, that the early grants passed no title to the beds of any navigable rivers, for an opposite holding would crowd the courts with litigation for the determination of the validity of the grants, notwithstanding the overall validity of making the grants.

Would public policy or existing laws now prevent West Virginia from granting away the beds of her navigable streams, with the

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[12] Campbell Brown & Co. v. Elkins, 93 S.E.2d 248 (W. Va. 1956).

[13] 22 W. Va. 52 (1883).

[14] 33 W. Va. 14, 29, 10 S.E. 60, 5 L.R.A. 392 (1889).

[15] 1 FARNHAM, WATERS AND WATER RIGHTS 192 (1904). "It has become firmly established (in England) that the title to shores of tidal waters is prima facie in the Crown."

[16] United States v. Holt State Bank, 270 U.S. 49, 54 (1926).

[17] 27 Gratt. 430 (Va. 1876).

[18] Home v. Richards, 4 Call 441 (Va. 1798).

[19] Boerner v. McCallister, 197 Va. 169, 174, 89 S.E.2d 23, 27 (1955).

retention of the public easement therein? The court in *Campbell Brown & Co. v. Elkins* did not have to consider this question; the case only decided that the state owned the beds, not whether the state may transfer this ownership. By statute, Virginia has decreed that such ownership shall remain in the state.[20] This statute became a necessity when the highest court of that state decided that the state had the right to dispose of the beds of navigable streams as long as in so doing, the public rights therein were preserved.[21] In several states, this has been found to be the rule.[22] Dictum in an early West Virginia case indicates that West Virginia would not permit such grants.[23] Nevertheless, the case of *Campbell Brown & Co. v. Elkins* can be interpreted to show that the West Virginia court is now leaning toward the policy of permitting such grants. Although the case holds that the state has retained ownership of such beds, the fact that the same opinion allows the state to license corporations or individuals to extract the minerals from these beds seems significant. At page 259 of the opinion, the court calls the right granted by the state a license, but it had previously been termed a lease by the parties. The court felt that this changing of the terms avoided any implication that it was permitting a conveyance of any estate in the minerals extracted. West Virginia could do well to settle such matters by statute in order to make it clear that the state will not grant any beds of navigable streams, but that leases of these same beds for mineral development will be permitted. Virginia permits such leases by statute.[24] As the law in West Virginia now exists, the state can only license individuals or corporations to remove minerals from the beds of navigable streams.[25] And a license is unenforceable on either party except that an action for breach of contract will lie if the licensor revokes the license and consideration was given therefor.[26] Since the constitution of West Virginia prohibits the state from being a defendant in any action at

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[20] VA. CODE ANN. tit. 62, § 1 (Michie 1950).

[21] James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp., 138 Va. 461, 469, 122 S.E. 344, 347 (1924). However, the grant in this case was held to convey no title to the river bed.

[22] 1 FARNHAM, WATERS AND WATER RIGHTS 215.

[23] Ravenswood v. Fleming, 22 W. Va. 52, 59 (1883): "I do not suppose the court wished to be understood as saying that the State could grant such lands for more private purposes."

[24] VA. CODE ANN. tit. 62, § 3 (Michie 1950).

[25] Campbell Brown & Co. v. Elkins, 93 S.E.2d 248, 259 (W. Va. 1956).

[26] 1 MINOR, REAL PROPERTY § 180 (2d ed. 1928).

law or suit in equity,[27] the licensee of the mineral rights in the bed of a navigable stream would have no available remedy if the state were to revoke the license. Thus, anyone who made a large investment in the equipment necessary to carry out the dredging of a river for minerals would be doing so at his own risk.

Although the case of *Campbell Brown & Co. v. Elkins* does not so hold, it is possible to construe the existing West Virginia statutes in such a manner as to permit the Public Land Corporation to "contract or lease for the proper development of oil, gas, mineral and water rights within or upon the lands or property under its control."[28] Under a similar statute, the Minnesota court held that the state was under a duty to use such lands for the greatest public good, and leases to private individuals for the removal of the ore under navigable waters, with a royalty to the state, were for the promotion of the public good.[29]

There is a basis for the holding in *Campbell Brown & Co. v. Elkins*[30] that seems to lessen the importance of the decision concerning the ownership of the beds of navigable streams. The plaintiff in that case was seeking injunctive relief against the defendant's interfering with his removal of coal from the bed of a river. The coal being removed was not virgin coal, but it was coal which had been washed downstream after being mined elsewhere. As such, the court termed the coal "derelict property." In West Virginia, by statute,[31] "any property derelict or having no rightful owner, may be recovered from any person in possession thereof, by a bill in equity in the name of the State." The term "derelict" is usually used exclusively in cases concerning a vessel or boat found deserted or abandoned on the seas.[32] Obviously, the geographical location of West Virginia is such that the usual meaning of the word is not applicable here. There do not seem to be any cases other than *Campbell Brown & Co. v. Elkins* so construing the term "derelict", and there have been no other West Virginia cases on the above-quoted part of the statute. If the statute is interpreted properly, the state would have the right to decide who gets the subject coal regardless of the navigability of the river and the ownership of the bed thereof.

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[27] W. VA. CONST. art. VI, § 35 (amended 1936).

[28] W. VA. CODE c. 37, art. 2A, § 8 (Michie 1955).

[29] State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947).

[30] 93 S.E.2d 248, 259 (W. Va. 1956).

[31] W. VA. CODE c. 34, art. 2, § 1 (Michie 1955).

[32] The Hyderabad, 11 Fed. 749, 754 (E.D. Wis. 1882).

Thus far, the state of West Virginia has shirked the duty of fully developing the mineral potentiality of her navigable streams, and it is hoped that, in the future, the state will increase its revenue by *leasing* the beds of navigable streams to persons or corporations who will fully develop them. To avoid further litigation, it would be best to adopt a statute specifically permitting such leases. Such a statute can also designate the line between mineral development for the public good and the right of the public to use such navigable streams freely. One additional safeguard seems necessary, and that is to make some provision for the public leasing of such beds. When the Public Land Corporation disposes of forfeited or waste lands of the state, the constitution of West Virginia requires that such proceedings be made public.[33] At present, the Public Land Corporation is not required to conduct any public bidding before granting leases to the beds of navigable streams, and the development of such streams would seem to be of such importance to merit any political stigma being removed from the awarding of such leases.

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[33] W. VA. CONST. art. XIII, §§ 3, 4.