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## Navigable Waters - What under the Constitution Is a Navigable Stream

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## ANNUAL MEETING-SUGGESTIONS

The next annual meeting of the State Bar Association will be held at Bismarck, N. D., on September 18th and 19th, 1941, under the auspices of the Burleigh County Bar Association.

The plan inaugurated at the annual meeting last year at Fargo of a short legal institute will be continued under the joint guidance of the committee on the Legal Institute of which George A. Soule of Fargo is chairman, the local committee of the Burleigh County Bar, and your state officers.

And at this time we need the cooperation of the members in suggesting topics that they wish to have presented on this program, as well as lawyers who, in their judgment, are qualified to present practical discussions of their particular fields of law practice. Such suggestions can be sent to your secretary at the office of the association at Dickinson, N. D.

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NAVIGABLE WATERS — WHAT UNDER THE  
CONSTITUTION IS A NAVIGABLE STREAM

This is an action by the United States to enjoin the construction of a dam on the New River in Virginia without a license from the Federal Power Commission, as provided for in the Federal Water Power Act of 1920. The respondent sets forth the following defenses: (1) That the New River is non-navigable; (2) That should the New River be declared navigable the conditions of any federal license must be strictly limited to the protection of the navigable capacity of the waters of the United States; (3) That the Commission's refusal to grant a minor part license containing only such conditions was unlawful, and that any relief should be conditioned upon the Commission's granting respondent such a license. Held, the New River is navigable and subject to federal control under the delegated powers in the Commerce Clause. (2) That the term navigation as construed covers more than just the control of the waterway itself. The Court states that the power is as broad as the needs of commerce, and that navigable waters are the subject of natural control and planning is the broad regulation of commerce granted to the federal government. (3) That the license may contain these provisions which the Commission may deem necessary in the exercise of supervision and control over such navigable waters. *United States v. Appalachian Electric Power Company*, 61 S. Ct. 291 (1940).

The above decision is the farthest the Supreme Court has ever gone by judicial construction in advancing the development of the federal control over rivers. The rule followed up to the time of this case was found in this Court's decision in *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999 (1868), stated as follows: "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 of commerce, over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the state, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water." This rule from *The Daniel Ball* case was the basis of the holding by the District Court and by the Circuit Court of Appeals, to the effect that the New River was not navigable. The early common law rule was that all rivers affected by the ebb and flow of the tides were navigable. *Grand Rapids and Indiana Railroad Company v. Butler*, 159 U. S. 87, 15 S. Ct. 991, 40 L. Ed. 85 (1895). But this rule has not found wide acceptance in the United States and Canada because of the great fresh water lakes and inland rivers found so commonly here, as to which the common law rule was inapplicable. In *The Montello*, 20 Wall. 450, 22 L. Ed. 391 (1853), the court held that the probability of use of waterway by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river. In *Economy Light and Power Company v. United States*, 256 U. S. 113, 41 S. Ct. 409, 65 L. Ed. 847 (1920), the Court said navigability does not depend on the type of use or the difficulties attending navigation, such as falls, rapids, and sandbars, even though these be so great that they prevent the use of the best means of commerce. It is dependent rather upon whether the stream in its natural state is such that it affords a channel for useful commerce.

Among the considerations of prime importance in the determination of the navigability of rivers are: First—Its natural navigability. This is essential; no legislative enactment can declare a stream to be navigable when it is not so in its natural state. *United States v. Cress*, 243 U. S. 316, 37 S. Ct. 380, 61 L. Ed. 746 (1916). Secondly—The depth or capacity for floatage. *United States v. Holt State Bank*, 270 U. S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1925). Thirdly—In general, a stream must be used for trade or agriculture rather than for mere pleasure, and must be capable of sustaining more than a mere rowboat to be termed a navigable stream. *North American Dredge Company v. Mintzer*, 245 Fed. 297, 157 C. C. A. 489 (1917). Fourthly—In order for a stream to be classified as navigable it need not be navigable in its entirety. It can be navigable in part only, and still be regarded as navigable in the parts that are navigable. *St. Anthony Falls Water Company v. St. Paul Water Commission*, 168 U. S. 349, 118 S. Ct. 157, 42 L. Ed. 497 (1897). A stream that can be made navigable is navigable within the meaning of the constitution, and the true test of navigability is the capacity of the stream to be used after improvement for the purposes of transportation and commerce. This is a question of fact, the

burden of establishing such resting upon the party affirming it. *Charles L. Barnes v. United States*, 46 Ct. Cl. 7 (1910).

Among the powers delegated to the federal government by the Commerce Clause of the Constitution is the exclusive control of the navigable waters of the United States. The expansion of the nation, the development of the scope of the constitution by judicial construction, and, finally, the powers assumed by the federal government, because of the exigencies of the great war, have all contributed to the development of an extreme federal attitude, a tendency toward federal control over rivers and lakes without regard for the rights of the states to control non-navigable waters. The precedents of the Supreme Court have uniformly tended towards the enlargement of federal authority and the whittling away of the powers of the states. *Le Beouf, State or Federal Control of the Water Powers of Navigable Streams*, (1927) 15 Geo. L. J. 201. In the *Daniel Ball*, *supra*, the court justified congressional jurisdiction over waters which had not been used for interstate commerce theretofore, but were susceptible of being so used. In *Gilman v. Philadelphia*, 3 Wall, 713, 18 L. Ed. 96 (1865), a more complete federalization of navigable waters was accomplished. The court held that commerce included navigation, that the power to regulate commerce comprehends control, for that purpose and to the extent necessary, of all the navigable waters of the United States, which are accessible from a state other than that in which it lies; that for this purpose, they are public property of the nation and subject to the requisite control of Congress. This necessarily includes the power to keep open and free from any obstruction to navigation, interposed by the states or otherwise; to remove such obstructions when they exist, and to provide for the punishment of offenders. For those purposes Congress possessed all the powers which existed in the states before the adoption of the National Constitution, and which have always existed in the Parliament of England. It is for Congress to determine when its power shall be brought into activity, and as to the regulations and sanctions which shall be provided.

The conclusive demonstration that the courts have created an independent life for the legal concept of navigation, based on the necessity of eliminating state-created barriers to national economic development, came in *Arizona v. California*, 283 U. S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931), where the Supreme Court held a simple congressional declaration that the shallow and rapid Colorado River was, in fact, navigable, justification for federal control, regardless of unanimous contrary testimony by regional hydrologic experts as to its actual navigability. Projects not affecting navigable waters require a license from the Federal Water Power Commission for the construction of dams or structures on rivers, even though they be not listed as navigable waters or affected with interstate commerce. 16 U. S. C. (sec.) 817. Section twenty-three of the present Act requires projects in non-traversable streams to be licensed, whenever the Commission finds "that the interests of interstate or foreign

commerce would be affected by such proposed construction . . . ." 49 Stat. 846 (1935). Thus once a relationship of the proposed project to navigation, either foreign or interstate, is found there is no longer a question as to the right of the Federal Water Power Commission to control such project very effectively.

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### OUR SUPREME COURT HOLDS

In *The First National Bank of Waseca, a Corporation, Respt., v. William L. Paulson, as Administrator with the Will Annexed of the Estate of A. P. Paulson, deceased, et al., Appls.*

That Section 7639 C. L. 1913, which provides that in giving decision the trial court must state the facts found and the conclusions separately, does not apply where the final decision is embodied in and evidenced by an order, and no judgment is required to be entered.

That said Section 7639 C. L. 1913, is applicable only to cases where there is a trial by the court of an issue of fact, arising upon material averments, presented by formal pleadings, and where following the findings, a judgment must be entered.

That said Section 7639 C. L. 1913, does not apply to an order confirming a mortgage foreclosure sale, entered pursuant to Section 2, Chapter 165, Laws of 1939.

Appeal from the District Court of Stutsman County, Jansonius, J.

Action by the First National Bank of Waseca against William L. Paulson, et al., to foreclose a mortgage on real property.

Plaintiff appeals from an order confirming a mortgage foreclosure sale. AFFIRMED. Opinion of the Court by Christianson, J.

In *Nome State Bank, a corporation, Respt., v. Melvin Brendmoen and Edna Brendmoen, Appls.*

That in an action between a mortgagee and mortgagor for the foreclosure of a chattel mortgage an allegation in the complaint to the effect that the mortgagee surrendered a copy of the mortgage to the mortgagor is not essential to the statement of a cause of action.

That the failure of a mortgagee to surrender to the mortgagor a copy of a chattel mortgage at the time of the execution thereof does not render the mortgage void as between the parties thereto.

Appeal from the District Court of Barnes County, Hon. M. J. Englert, J. AFFIRMED. Opinion of the Court by Morris, J.

In *Nanna M. Funk and C. E. Branick, Appls., v. L. R. Baird and T. A. Tollefson, Respts.*

That in an action for specific performance of a contract for sale of real property, plaintiffs seek relief upon purely equitable grounds; and in order to be entitled to such relief they must show that they are ready, willing, and able to fully perform their part of the contract.

That as against the vendees of an executory land contract, the heirs of the deceased vendor have no right to substitute their personal covenants for those of the vendor, the vendees having made no contract with the heirs and not having contracted with the vendor to take conveyance from either her heirs or assigns.

That where, by the terms of an executory contract for the sale of land, the vendor agreed "to convey unto the said parties of the second part, or