

Board of Railroad Commissioners, Powers of. Artificial Lakes, Inspection of Boats upon. Boats, Upon Artificial Lakes, Inspection of.

Lakes formed by the building of dam upon private property, which dam may be removed at the pleasure of the owner, are not navigable waters within the meaning of the provisions of Chapter 63, Session Laws of 1913, and the Railroad Commission has no authority to inspect boats upon such waters.

September 21st, 1916.

Hon. Board of Railroad & Public Service Commissioners,
Helena, Montana.

Gentlemen:

On August 16th, you submitted for my opinion a question as to what jurisdiction your Commission has to require boats upon Lake Avoca to have certificates and the operators to have licenses. From your letter, it appears that Lake Avoca is an artificial body of water made by the Luna Park Amusement Association, by placing a dam across a coulee. The bed of the lake and the contiguous shore is owned in fee by the Lake Amusement Association Company and the launches on the lake are used for the transportation of pleasure parties who visit Luna Park, for which a charge of ten cents per passenger is made. The Amusement Company refuses to submit to the inspection of your commission or to pay fees for certificates and pilots licenses, claiming that they are not subject to inspection because the waters of Lake Avoca are not navigable.

The question resolves itself, then, into one of whether the waters are navigable. The provision of law authorizing inspection by your

Commission is found in Chapter 63, Session Laws of the Thirteenth Legislative Assembly. The scope of the Act, as defined by its title is

"An Act to provide for the inspection of steamboats, and all other boats propelled by machinery, sailing crafts, ferry boats and barges, other than private pleasure crafts, on any of the navigable waters of the State of Montana."

This law does not define "navigable waters." We must, therefore, look elsewhere for definition.

Section 1326, Revised Codes of 1907, under the subject of "public ways" says:

"Navigable waters and all streams of sufficient capacity to transport the products of the country, are public ways for the purpose of navigation and such transportation."

This is more of a declaration of what are public ways than it is of navigable waters.

At common law, navigable waters were those only in which the ebb and flow of the tide was noticable or felt. They were considered as arms of the sea and hence common highways of commerce and trade. Such a doctrine, developed as it was in a country of short streams, was too narrow and limited for a nation having such streams, as the United States has. We find, therefore, the Courts holding all streams and lakes navigable, which are useful in commerce; that is, all waters which can be used as highways in bringing produce to market. If it is capable, in its ordinary condition, of being so used, it is a public highway and navigable water. This conforms to Section 1326 above quoted and thus far, that Section is declaratory of the common law. *The Daniel Ball*, 77 U. S. 557; *Moore v. Sanborn*, 2 Mich. 519; *Brown v. Chadbourn*, 31 Main, 9. Thus it will be seen that the test is one of public usefulness.

The authorities are not harmonious as to the quantity or character of navigation necessary to bring waters within the definition. The majority seem to hold that it must be navigation of a useful nature or purpose and the mere fact that canoes, skiffs, or shooting punts may be used thereon, does not make them navigable. These Courts hold rather strictly to the idea of usefulness in commerce and agriculture. Others hold that water used for pleasure boating must be classed as navigable. *Lanfrey v. State*, 52 Minn. 181, 53 N. W. 1139.

The ordinary tests, therefore, and definition do not seem to be conclusive as to the facts in hand. We find, however, that all authorities seem to agree that waters must be either (1) naturally navigable, or (2) constructed with a view to offering a passage to commerce between bodies of water naturally navigable, such as canals. Furthermore, the Courts hold that public termini are necessary in order to constitute water navigable. As was said by one Court,

"The test is whether the stream is capable of becoming a public highway, that is, a means open to the public of passing from one place where they have a right to be, to another place where they have the same right to be; in other words, there must be a public terminus at each end."

Again, streams to be classed as navigable waters must be natural-

ly so. It was so held by the Supreme Court of New York in a case where a small stream which in its natural state was not navigable, but which had been widened and deepened by the construction of a dam so as to be capable of carrying small boats. It appeared that the dam was built by a private corporation, which paid for the land submerged, and that such corporation could, at pleasure, remove the dam and thereby reduce the stream to its natural state. Under this state of facts, the Court held the stream not to be navigable. *Ten Eyck v. Warwick*, 27 N. Y. S., 536. It will be seen that Lake Avoca is of the same class with the water under consideration in that case.

I am of the opinion, therefore, that the waters of Lake Avoca, under the principles above stated, are not navigable. It follows, therefore, that your Commission is without authority to inspect the boats thereon or to require licenses and certificates.

Yours very truly,

J. B. POINDEXTER,
Attorney General.