

Eleventh District Court of Appeals Misstates, Misquotes, and Misapplies Century Old Ohio Supreme Court Case Law on the Boundary of Lake Erie Public Trust

Merrill v. Ohio, Eleventh District Court of Appeals, 2009-Ohio-4256 August 21, 2009

To rule against the OEC and NWF's contention that the public trust boundary has always been the Ordinary High Water Mark (OHWM), the court of appeals, quoting the 1878 Ohio Supreme Court ruling in *Sloan v. Biemiller*, holds that "the shoreline is the line of actual physical contact by a body of water with the land between the high and low water mark undisturbed and under normal conditions."¹

The court of appeals callously misquotes the holding in *Sloan*, by interjecting its own definition of the boundary into the Ohio Supreme Court's ruling, attempting to rewrite precedent. However, the court of appeals, ten pages earlier in the decision had correctly quoted from the case, revealing the 1878 ruling to be the ordinary high water mark, and clearly not where the water meets the land. The court of appeals, here states, in Paragraphs 60-65 of the decision:

We commence with the lead case of Sloan v. Biemiller (1878), 34 Ohio St. 492, a quiet title action regarding property on Cedar Point. The Supreme Court of Ohio held, at paragraph four of the syllabus:

"Where no question arises in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to the line at which the water usually stands when free from disturbing causes." (Emphasis added.)

The Sloan court derived this definition from the opinion of the Illinois Supreme Court in Seaman v. Smith (Ill. 1860), 24 Ill. 521, and quoted that case with approbation in the body of its opinion. Sloan at 512-513. . . . Consequently, we find this extended quote from Seaman illuminating:

*"A grant giving the ocean or a bay as the boundary, by the common law, carries it down to ordinary high water mark. *** The doctrine, it is believed, is well settled, that the point at which the tide usually flows is the boundary of a grant to its shore. As the tide ebbs and flows at short and regular recurring periods, to the same 15 points, a portion of the shore is regularly and alternately sea and dry land. This being unfit for cultivation or other private use, is held not to be the subject of private ownership, but belongs to the public. When the adjacent owner's land is bounded by the sea or one of its bays, the line to which the water may be driven by storms, or unusually high tides, is not adopted as the boundary. On the contrary, the ordinary high water mark indicated by the usual rise of the tide, is his boundary.*

¹ *Merrill* at ¶97

“The principle, however, which requires that the usual high water mark is the boundary on the sea, and not the highest or lowest point to which it rises or recedes, applies in this case, although this body of water has no appreciable tides. Here, as there, the highest point to which storms or other extraordinary disturbing causes may drive the water on the shore, should not be regarded as the point where the owner’s rights terminate, nor yet should it not be extended to the lowest point to which it may recede from like disturbing causes, But (sic) it should be at that line where the water usually stands when unaffected by any disturbing cause.” Seaman, supra, at 524-525. (Citation omitted.)

To the extent the *Sloan* case established the boundary of Lake Erie, it established it as “the line at which the water usually stands when free from disturbing causes.”² As the court of appeals noted, that formulation was enunciated in *Seaman*, which rejected the *high* water mark as the boundary in favor of the *ordinary* high water mark. The court in *Seamen* acknowledged that the Great Lakes, unlike the oceans and seas has no appreciable tides.³ Yet, as that court further acknowledged, “the rules that govern boundaries on the ocean, govern this case.”⁴ In the *Seaman* court’s words, “the highest point” water may reach is not “the point where the owner’s rights terminate, nor yet . . . the lowest point . . . it may recede” to). Rather, the point of demarcation, as in tidal waters, is the “ordinary high water mark,” which the court also called the “usual high water mark,” and described as “that line where the water **usually** stands when unaffected by any disturbing cause.” Thus, *Sloan* accepted the boundary of Lake Erie as the ordinary high water mark, and not the highest, nor lowest mark, and clearly not where the water meets the land at any given time.

In *State v. Cleveland & Pittsburgh RR. Co.* (1916), 94 Ohio St. 61, the Supreme Court of Ohio acknowledged the “public trust” doctrine – i.e., that the state holds the waters and subaqueous lands of Lake Erie in perpetual trust for the people of the state, while littoral owners retain a right to “wharf out” from the shore to the lake’s navigable waters. The public trust in subaqueous lands was reaffirmed over a quarter of a century later in *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303.

In the Merrill opinion, the court of appeals continues its misapplication of Supreme Court case law, by acknowledging the ruling *Squire v. Cleveland*, and its reaffirmation of *Cleveland & Pittsburgh*, and even cites *Squire* court’s reference to the *Cleveland and Pittsburgh RR* case by stating, in paragraphs 69- 70 that:

“[i]n State ex rel. Squire v. Cleveland (1948), 150 Ohio St. 303, the Supreme Court of Ohio was presented with a dispute regarding whether construction of the east shoreway in Cleveland, Ohio, impinged upon the rights of certain littoral property owners. Id. at 316-321. Throughout the body of the opinion, the court generally used the term “natural shore line” to describe where the property of littoral owners cease, and the public trust in

² 34 Ohio St. 492 (Syllabus at ¶4).

³ *Seamen* at 524

⁴ *Id.*

Lake Erie commences. Id. at 317, 319-322, 334, 337, 339. Notably for the matters at issue herein, the court, in describing the briefs filed on the case, states, at 322:

“There is a full discussion of the common-law rule to the effect that the title to subaqueous and marginal lands of tidal and navigable waters in Great Britain is in the crown, that the law with reference to tidal waters in Great Britain applies not only to tidal waters in the United States but likewise is applicable to the waters of Lake Erie, and that the title to subaqueous and filled-in lands beyond high water mark is in the state bordering upon such waters.” (Emphasis added.)

This statement by the state’s high court, that title of lands beyond the high water mark are the property of the people of Ohio, should definitely support the OEC’s arguments in favor of the OHWM as the public trust boundary. The court of appeals, here, even emphasizes the phrase “beyond the ordinary high water mark,” seemingly to draw attention to that phrase as being, as it is, the Supreme Court’s understanding of “natural shoreline”. However, the court of appeals, later, completely disregards the case law citation they reference, and instead hold that “any reference by the Supreme Court of Ohio to the “high water mark” acting as the boundary of the public trust in navigable waters in *Cleveland & Pittsburgh RR. Co.*, and *Squire*, is simply a reference to the history of the public trust doctrine, as imported from English law.”⁵ Essentially, the court of appeals is saying that the state's high court did not mean what it stated, but meant what these three judges are saying.

Again, the court’s actions in callously discounting Ohio Supreme Court precedent may forever change the landscape of Ohio’s north coast and Ohio’s legal system. This opinion disregards the long standing rule that littoral owners do not own the land lake-ward from the Ordinary High Water Mark, and cannot exclude people from that land.

⁵ *Merrill* at ¶184