

MICHIGAN CASE LAW RELATING TO WATER

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Preface to the Second Update

In 1978 the Michigan Department of Natural Resources and Michigan Department of Attorney General prepared a packet of case summaries in response to the rising number of requests for information on how Michigan law affected the rights of riparian owners, as well as the right of the public to the use and enjoyment of Michigan lakes, rivers, and streams. The packet was intended to show how the development of Michigan case law has historically affected those rights.

Ten years later, the first update was incorporated. In that short span of time, the Michigan Courts had decided over twenty additional significant cases. In 2000 the Department of Attorney General updated the packet with pertinent water law cases decided between the first update and the end of 1999.

As with both the original and first update, this second update to *Michigan Case Law Relating to Water* is a quick reference tool for those having an interest in how Michigan case law has developed over the years. *Michigan Case Law Relating to Water* is divided into three sections: a table of contents and topic index, the chronological progression of case summaries, and a glossary. While by no means exhaustive, this packet will prove as a good resource for those interested in the current, as well as historical, state of Michigan case law as it relates to Michigan waters.

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Moore v Sanborne, 2 Mich 520 (1853)

SUBJECT: Floatage - public highway - periodic floatage -
obstruction in right to passage - Pine River

FACTS: This is a civil suit seeking damages for obstruction of the Pine River by a log jam. The Pine River is a small, inland river which has a limited capacity for floating logs in certain seasons. The parties to the suit are both non-riparians engaged in the logging business and competing for the use of the river during the three-week period of floatage.

HELD: The Pine River is declared a public highway with a public right to passage.

The Michigan Supreme Court holds that the Pine River has a public easement which creates a right to passage because of the necessity of commerce and transportation. The Court expands the common law rules of high and low water marks and continual usage. The Court declares that those rivers are public highways which in their natural state have a capacity for valuable floatage, irrespective of their actual public use.

If the river may naturally, without artificial dams or locks, float vessels, boats, rafts, or logs, then the river is navigable, and the public easement attaches.

The capacity of floatage need not be continuous, but rather only of a periodic or seasonal capacity. The Court adopts a liberal stance based upon the "purpose" of the use.

People v Tyler, 7 Mich 160 (1859)

SUBJECT: Criminal jurisdiction - local law - Michigan - Canada
Great Lakes divided

FACTS: A victim was attacked upon an American vessel while the vessel was outside the territory of the U.S.A. on the St. Clair River within the Province of Canada. Death ensued upon land in Canada. The People of Michigan Sought to Prosecute the defendant Tyler under the Crimes Act of 1857.

HELD: The State of Michigan may not prosecute for a crime committed outside its territorial borders but upon an American vessel under the Crimes Act of 1857. The Court holds that the Crimes Act of 1857 was not intended by Congress to apply to non-maritime waters, on an inland river, under exclusive jurisdiction of a foreign sovereign. Where a private vessel enters a foreign jurisdiction, the vessel and all aboard are subject to the foreign jurisdiction and local law.

The Great Lakes are clearly divided by treaty into international zones, which also delineate the jurisdictional borders for most crimes except those which are particularly injurious to a nation, such as treason, crimes with international ramifications, and mutiny.

The holding was affirmed in *Tyler v People*, 8 Mich 319 (1860).

3

Lorman v Benson, 8 Mich 18 (1860)

SUBJECT: Private riparian ownership of river bottom - Detroit River - log boom blocking access to river - right to remove ice - trespass action - public easement - state regulation of streams

FACTS: The plaintiff was a leaseholder of riparian property. The defendant had constructed a log boom which blocked plaintiff's access to the river to gather ice. The plaintiff's action is in trespass for obstructing the access to the Detroit River.

HELD: A riparian leaseholder may bring a trespass action upon land submerged under a public access river.

The Court adopts the common law rule that the title to the soil under public rivers is in the adjacent riparian owner. This soil when held by the State or by private hands is part of the jus privatum (private law) until the legislature intends otherwise. The riparian owner has a right in the property only so long as he regards the public easement. He is entitled to every beneficial use of the property in question, including enforcement of trespass rights, provided he exercises due regard for the common (public) easement of passage. But the State may still regulate the waterway although the soil belongs to the riparian owner. The trespass action was upheld.

4

Rice v Ruddiman, 10 Mich 125 (1862)

- SUBJECT:** Riparian ownership of lake bottom - inland lake - Lake Muskegon - mill operation
- FACTS:** The defendant, Rice, was a U.S. Marshal who forced entry and took possession of a mill owned by plaintiff, Ruddiman, pursuant to a foreclosure order. The mill was located approximately 30 rods (495 feet) from the shoreline of Lake Muskegon. The mill was built upon footings over the lake and had approximately two feet of water below the floor. Lake Muskegon is six miles long by two and a half miles wide and connects both to the Muskegon River and Lake Michigan. The level of Lake Muskegon rises and falls with the levels of Lake Michigan.
- HELD:** The riparian ownership of lands along Muskegon Lake is governed by the common law rule of fresh water streams above the ebb and flow of the tide as in Lorman v Benson, 8 Mich 18 (1860). The Court extended the rule of Lorman to inland lakes. The ownership of land bordering upon the lake carries with it the ownership of the land under the shallow water so far out as it is susceptible of beneficial private use, but these property rights are subject to the public access rights. The Court limited the extension of the Lorman principle to the inland lakes and excluded the Great Lakes.

The Court considered whether Muskegon Lake is an inland lake, broadening of a river, or part of the Great Lakes. There is a discussion of what factors are important to this determination. The Court concluded that Muskegon Lake is indeed an inland lake.

5

Ryan v Brown, 18 Mich 196 (1869)

SUBJECT: Injunction sought for obstruction of navigation - navigational hazard - obstructions - public domain - docks

FACTS: Plaintiff, a riparian owner, sought an injunction against defendants to prohibit the intended destruction of a dock, warehouse, and sunken cribs. The defendants claimed that the structures presented a hazard to navigation and were illegal. The trial court issued a modified injunction.

HELD: The defendants were not justified in removing the structures as navigation hindrances. When the banks are publicly owned, any erections by other riparian owners are unlawful, not as navigation nuisances, but as encroachments on the public domain. But where the banks are privately owned and the only public rights are easements of public access, the riparian owner may do as he wishes, as long as he regards the public privilege of access. The issue of private right infringing upon the public right is a question of fact varying with the circumstances of the case. The title to lands bordering upon a stream extends over the bed to the middle of such stream. Any lawful structure in the water, not an infringement upon the public access or navigation, attaches to the riparian estate. The owner's use is prima facie lawful. If the structures are reasonable and essential to commerce, they are not to be considered nuisances. Injunction upheld.

Clark v Campau, 19 Mich 324 (1869)

- SUBJECT:** Riparian right - trespass action - boundary line dispute
- FACTS:** This was a trespass action based upon a boundary dispute between adjoining riparian owners
- HELD:** The property lines for submerged land should be extended at right angles with the centerline of the stream from the point where the border line meets the shore. The aim in every instance is to secure to each owner such share as was indicated by his shoreline, and not by his land back of it. This agrees with Lorman v Benson, 8 Mich 18, and Rice v Ruddiman, 10 Mich 125.

Wood v Rice, 24 Mich 422 (1872)

- SUBJECT:** Dam as an obstruction to natural flow - mill operation - Muskegon River - Board of Supervisors - dam construction approval
- FACTS:** Plaintiff's mill was located upon the Muskegon River upstream from the defendant's dam. The defendant's dam was legally authorized by the legislature and the Board of Supervisors. Plaintiff sued for the dam's obstruction of the natural flow of the river and the damages to his business because the defendant's dam obstructed plaintiff's logs from their free flow down river.
- HELD:** No damages are awarded to an upriver mill owner for damage done to his business by a legally authorized and constructed dam which obstructs the stream's natural flow.
- The Court denied the plaintiff's cause of action. There is no right to have a stream flow unobstructed in its natural course if the obstruction has been legally authorized. If the dam was not constructed as authorized, this might result in a justified complaint, but mere claim of

obstruction of the natural flow is not sufficient to support a cause of action in a civil suit.

The rights of the public to floatage on internal waterways are subject to the discretion of the supervisors as granted by law to authorize dam construction on navigable streams.

8

Watson v Peters, 26 Mich 508 (1873)

SUBJECT: Ejectment action - riparian rights - booming operation - middle ground (island) - platted lots - sand bar - limited rights conveyed by deed

FACTS: This was an ejectment action by a riparian owner whose land was located upon the Saginaw River. The defendant operated a log boom from Sand Island which was located between the shore and the middle of the channel. The island was in actuality a sand bar totally submerged by one to three feet of water unless the wind was strong and from the south. The lots were platted and boundary lines clearly delineated only to the shoreline. The deeds made no express reservation of submerged lands.

HELD: The Court followed the general rule that the grant of lands upon a stream conveyed to the grantee the land under the water to the center of the stream. However, they recognized that the grantor may limit his conveyance. This limitation must be express and will not be presumed to cut off the riparian rights of the grantee. These riparian rights are usually the main inducement to the sale and determine the value and price of the lot. The platting diagrams alone will not reserve the riparian rights in the grantor.

Here, the Court determined as a fact that Sand Island was not an island at all but was merely a sandbar. There is dicta that if an island exists, the riparian rights of the lot owner would only extend to the mid-point between the shoreline and the island, instead of between the shoreline and the mainstream.

Treat v Bates, 27 Mich 390 (1873)

SUBJECT: Dam abatement - injunction - health hazard - nuisance
right to natural flow - right to drain riparian land - expert
opinion

FACTS: The riparian plaintiff sued to abate a downstream dam.
The plaintiff sought to prevent threatened reconstruction
of the dam on two theories: a health hazard (public
nuisance) and injury to his land caused by a raising of the
water level (private nuisance). The defendant claimed
that the dam was not the cause of the injuries to the
public and private parties. The evidence was in conflict
but finally resolved by the trial court in the plaintiff's
favor.

HELD: A dam which causes a health hazard or injury to upland
riparian property may be ordered abated. A riparian
owner has the right to drain that portion of his land
which requires draining and he has the right to a natural
flow of the stream for drainage and other uses. To enforce
these rights and to prevent injury to his land, the riparian
may involve the equity powers of the courts. The
injunction was affirmed.

Brig "City of Erie" v Canfield,
27 Mich 479 (1873)

SUBJECT: Boom operation - riparian rights - brig operation - inland
river - interstate journeys - negligence action - floatage -
nuisance to navigation - admiralty jurisdiction

FACTS: The plaintiff was a boom operator who sued the
defendant brig for negligence and unseaworthiness as a
result of a collision between the brig and the boom. The
brig made runs between Chicago and Manistee. The
plaintiff sued under a Michigan statute which grants a

remedy for damages occasioned by watercraft navigating in the State waters where no admiralty remedy exists. The trial court granted damages to plaintiff under the act.

HELD: The boom covered a considerable portion of the navigable stream and the defendant claimed that it constituted a nuisance to navigation. The Court upheld the trial court's finding of no nuisance, based upon the best interests of the area's commerce. The river had greater value for floatage than for navigation. The majority opinion felt that the Act was intended to apply to any navigation incident upon the waters of Michigan where no admiralty remedy existed and was not limited to those voyages originating and ending within Michigan. Since the tort was to a structure (boom) which pertained to the adjacent land and did not constitute an infringement upon navigation, no admiralty remedy existed and so the act granted jurisdiction. Affirmed.

11

Bay City Gas - Light Co v The Industrial Works,
28 Mich 181 (1873)

SUBJECT: Ejectment action - boundary line dispute - riparian rights to river bottom - dock lines - navigation

FACTS: This is an ejectment action in a boundary dispute concerning submerged river property. The sides of the lots strike the shore at right angles with the middle thread of the stream but at a different angle with the shore at that point.

HELD: The Court reaffirms the doctrine of Clark v Campau, 19 Mich 324 (1869). The boundaries of private riparian lands bounded by navigable fresh water rivers or lakes do not alter with the shoreline but extend at right angles to the thread of the stream, subject to navigation rights. The Court applies the Clark rule but extends the rule to streams not subject to easements of passage (non-navigable, non-floatable streams).

The docking lines fixed by the municipality are only limitations to avoid disputes as to what structures might interfere with navigation. These docking lines have no relationship or bearing on the boundary lines established by the Clark rule.

12

Dumont v Kellogg, 29 Mich 420 (1874)

- SUBJECT:** Civil suit - dam operation - reservoir - diversion - impaired flow - priority of appropriations - prescriptive right - reasonable use of stream - equal proprietors
- FACTS:** The plaintiff mill - owner sues for damages caused by the upstream dam of defendant. This dam caused a considerable reservoir to be formed, thereby diminishing the flow of water to plaintiff's mill. The plaintiff's mill predated the dam.
- HELD:** The Court states the Michigan rule on priority of appropriation: priority gives no superior rights to water use of a stream, unless the facts create a prescriptive right. Here, there was no question of prescription. The Court points out that this is not a case of diversion nor a case of interference by a non-riparian owner, but rather, involves two equally situated proprietors on the same stream. Each proprietor is, therefore, entitled to any use of the stream which is "reasonable". Factors considered are many, including usages and wants of the community, like uses by other similarly situated riparians and amount used. Each proprietor is entitled to a fair participation and a reasonable use of the water. To deny any and all diminutions or obstructions would be to deny all value of the stream to the proprietors.

The injury, which is incidental to a reasonable use, does not give rise to a cause of action or call for a remedy.

Grand Rapids Booming Co v Jarvis,
30 Mich 308 (1874)

- SUBJECT:** Trespass action - booming operations - flow back causing damage to riparian estates - flowage of land - running logs - detention of logs - taking of property without compensation
- FACTS:** The plaintiff was a leaseholder of riparian lands and brings an action of trespass on the case. He seeks damages for flow back of the waters caused by the booming operations of the defendant upon the Grand River.
- HELD:** A boom company is liable for injury to real riparian property caused by a rise of the water level due to normal booming operations. The Court states that persons who run or store logs on a river must do so with due regard to the rights of the riparian owners in the use and enjoyment of their lands. To raise the river and cause flowage of water upon the land of others, thus causing property damage (loss of crops) and denial of the use or enjoyment of that land (a taking), must be considered a compensable injury, not merely incidental injury. The log ownership was considered immaterial, as liability was created by the booming operations.

Thunder Bay River Booming Co v Speechly,
31 Mich 335 (1875)

- SUBJECT:** Periodic navigation and floatage - diminished flow - dam to regulate the natural flow of the river mill operation - boom operation - public highway - artificially navigable water levels
- FACTS:** The plaintiff is a downstream mill operator who sued for damages to his business as a result of the defendant's upstream mill and boom operations. The defendant's dam was used to regulate the flow of the stream, causing either flood or drought at the plaintiff's mill. In its

natural state the river had sufficient speed and flow for plaintiff to operate his mill twenty-four hours per day. After damming operations began, plaintiff's use was reduced to seven hours per day causing lost contracts and profits. The river in its natural state could not support navigation or floatage year-round. Therefore, defendant caused periodic flooding to run logs during the naturally non-navigable period. The defendant claims that this damming and water regulation is incidental to his rights of passage, navigation, and floatage. The trial court found for plaintiff.

HELD: An upstream riparian may not regulate the water flow, causing damage to downstream riparians. The court extends the rationale of Moore v Sanborne, 2 Mich 520, that a stream which can support navigation is a public highway, but if a stream has non-navigable periods, it is not a public highway during those periods. An upper riparian proprietor does not have the right to artificially create navigable conditions during non-navigable periods to the damage of downstream riparians. Affirmed for plaintiff.

15

Attorney General v Evert Booming Co,
34 Mich 461 (1876)

SUBJECT: Criminal case - reasonable use of water - navigation - floatage - boom operations - public nuisance - purpresture - log detention - ownership of river bottom - Muskegon River

FACTS: The Attorney General brings this information against the Evert Booming Company for booming both sides of the Muskegon River, leaving an eighteen to twenty foot opening at center stream. The Muskegon River at this point is only valuable for floatage, not ordinary navigation. The information seeks damages and an injunction because such booming operations are a public nuisance and a purpresture. The information is based upon allegations of the Muskegon Booming Company that their logs were detained and landed by the Evert

booming operations, causing expense to relaunch the logs. They claim that Evert has too few men and inadequate equipment to handle and sort the floatage past its booms.

HELD: A purpresture is an enclosure by a private party of that which should be open to the public. But a purpresture is not necessarily a public nuisance, since a public nuisance must subject the public to inconvenience or annoyance. Here, the submerged soil is owned to mid-stream by the riparians; therefore, the only public interest is in the floatage privilege. Since the Legislature has declared booming companies to be lawful and some appropriation of the stream beds is necessary, the public has waived its right to complain of an appropriation which is not unreasonable. The Court examines the facts and comes to the conclusion that the use by the Evert Booming Company was reasonable; therefore, any injury was incidental to the exercise of a general right and not subject to a private or a public complaint. The Court considers this to be a private matter to be resolved between the competing boom companies.

16

Pettibone v Smith, 37 Mich 579 (1877)

SUBJECT: Diversion of stream - diminished flow - return to natural bed

FACTS: The defendant diverted a stream upon his own land and later returned the stream to its natural bed. The plaintiff, a downstream riparian owner, claims that he suffered damage from diminished flow caused by the diversion of the stream to its natural water course.

HELD: A mere change in the course of the stream above the plaintiff's land is not wrongful and unlawful unless it materially diminishes the flow of water to the plaintiff.

Hall v City of Ionia, 38 Mich 493 (1878)

- SUBJECT:** Injunction to prevent diversion - right to own water - reservation of water rights in deed restriction
- FACTS:** The plaintiff sought to prevent diversion of water by the defendant. The plaintiff claimed to be the holder of water rights reserved by deed from past conveyances. The city desired to purchase these water rights from the plaintiff, intending to sell most of the water to the railroads, thereby using the remaining water for city purposes at little or no cost. When these negotiations fell through, the city purchased upstream mill property with the intention to divert the water and avoid dealing with the plaintiff. The city claimed that this diversion should be allowed because of its status as a riparian owner. But the city-owned mill land was limited in its water rights, by deeds, to using only the water necessary for use on the riparian land and called for the return of the unused water to the stream above the point of removal.
- HELD:** The Court closely construed the deeds and the chain of title of each section of land involved and came to the conclusion that water rights were clearly reserved in the plaintiff's grantor and his successors. The ownership of water is not a license and is not dependent upon the ownership of riparian land. A title of water is an interest in realty conveyable and reservable. A right to use water is not dependent on a riparian estate and is separate and distinct. The city was mistaken in believing that they, as upper riparian owners, could divert and use the stream for city purposes when, by deed, the water rights of their riparian property were limited to only those uses necessary on the riparian property. All other uses were reserved by deed and held by the plaintiff. The injunction issued to prevent diversion by the city.

Marsh v Colby, 39 Mich 626 (1878)

- SUBJECT:** Trespass for fishing in plaintiff's lake or pond entirely on plaintiff's farm.
- FACTS:** Plaintiff brought an action for trespass against defendant. Trial court held a trespass was committed by defendant fishing in plaintiff's pond which "was almost entirely enclosed within the lines of plaintiff's farm".
- HELD:** The court held it has always been customary to permit the public to take fish from small lakes and ponds, and in absence of notification to the contrary, anyone may understand that they may do so. Defendant held not a trespasser.

Maxwell v Bay City Bridge Co,
41 Mich 453 (1879)

- SUBJECT:** Bridging navigable stream - private wharf interference - ownership of river bottom - public trust - Board of Supervisors procedure - license by riparian - revocability of license by riparian - estoppel
- FACTS:** Plaintiff is a warehouse and wharf proprietor who complains that a bridge and swing dock located on his submerged riparian property prohibits docking procedures at his wharf. The Board of Supervisors approved the bridge upon petition by the defendant bridge company. The petition presented to the Board by the defendant was found to be lacking in certainty. The location and description of the bridge were lacking or inadequate.
- HELD:** The power to decide these matters was a public trust to be delegated only to the Board of Supervisors. The manner in which the petition was worded and presented made the Board authorization illegal because of uncertainty and the illegal delegation of the public trust to the defendant to determine the location and description of the bridge. It

appeared that plaintiff's grantor actually requested the present bridge location and, therefore, granted to the defendant a license to drive bridge pilings into his submerged lands. But a license is revocable at the will of the grantor or is automatically revoked upon subsequent conveyance (as here, to plaintiff). The defense claimed that plaintiff should be estopped to revoke when the defendant detrimentally relied upon the license and spent money and time to improve the property. But the lower court did not address this issue, and as a result, neither could the appellate court. Remanded for new trial. See Maxwell v Bay City Bridge Co, 46 Mich 278 (1881).

20

Benjamin v Manistee River Improvement Co,
42 Mich 628 (1880)

SUBJECT: Toll collection for use of a navigable stream - Manistee River - navigation - Ordinance of 1787 - free navigation - river improvement companies - statute challenge - removal of obstruction - notice of toll to interested parties

FACTS: Plaintiff challenged defendant corporation's right to collect tolls for navigation upon the Manistee River. The statute comes under attack in three ways: conflict with the Ordinance of 1787 and its granting of "free navigation"; "improvements" made by defendant corporation were not as intended by the statute; and the statute grants arbitrary power (no hearing) to the Board of Control.

HELD: The Court sustained the statute despite the three challenges to its validity. Although the navigable waters of the United States should remain forever free, they are subject to State improvements authorized by State legislation. "Free navigation" is not the right to unobstructed navigation in the stream's natural condition. By statute, the tolls are not taxes upon the use of the stream, but rather tolls for the enjoyment of the improvements which increased navigability. This is in accord with the State policy of not paying for highway improvements by taxation. The Court states that the intent of the Ordinance of 1787 and the Constitution of

Michigan was to allow improvements for navigation. If the State improves, it must raise the revenues to pay for these improvements. But taxation is against State policy, so tolls are used. Tolls and improvements could not be made by the State directly because of the constitutional provision against it, so an independent corporation was authorized to do so.

The statute provides for no hearing by interested parties in plan approval. The meeting of the Board of Control requires no notice to interested parties, because it could not be ascertained who they might be. The toll price-fixing is not a judicial act, but rather, an administrative act. Therefore, the Court refused to review the discretion delegated to the Board of Control. The enabling statute was upheld.

21

People's Ice Co v The Steamer "Excelsior",
44 Mich 229 (1880)

- SUBJECT:** Negligence action - riparian rights to ice field - Detroit River - steamer damage to new ice field - navigation - ice boom -measure of damages for newly formed ice
- FACTS:** Plaintiff was an ice company located upon the Detroit River. Defendant was a ferry steamer who, it was claimed, negligently made three trips on one day past plaintiff's ice boom. The steamer passed too close to the boom and the swell broke up plaintiff's ice. The remainder of the winter was extremely mild, and no new ice formed. Plaintiff sued for damage done to his ice by the steamer. The steamer relied upon its navigation rights taking precedence over the riparian owner's rights. Plaintiff's boom was large and located in the navigable portion of the river, but there was still much room to pass without swell damage.
- HELD:** The right of navigation, while paramount, is not exclusive and cannot be relied upon to justify needless destruction of private rights or property where both can be preserved. This follows the maxim, "Though a man does a lawful act, if damage results, he may be liable if he might

have avoided it." Here, the property rights of the riparian to store and harvest ice are not interfered with as long as he does not infringe upon navigation. The measure of damages for the immature ice crop is the value of the amount of ice that would probably have been saved for market, less the cost of storage.

22

Pere Marquette Boom Co v Adams,
44 Mich 403 (1880)

SUBJECT: Riparian ownership - boom company fees - replevin action - lake covered land turned dry - meander line

FACTS: Parties are disputing the reasonableness of booming fees. Plaintiff sued in replevin to recover his logs, which were withheld due to non-payment of booming fees. The key to the case is in the issue of whether land that had been surveyed and determined to be part of the lake and had since become dry land should be owned by the riparian estate, the United States government, or the State of Michigan.

HELD: Private ownership does not end at the meander line. The Court followed the principles of private ownership set out in Lorman v Benson, 8 Mich 18; Bay City Gas-Light Co v Industrial Works, 28 Mich 181; and Maxwell v Bay City Bridge Co, 41 Mich 453. Private ownership of lands bounded by navigable fresh waters is not restricted to the meander line.

23

Maxwell v Bay City Bridge Co,
46 Mich 278 (1881)

SUBJECT: Riparian rights and state interference - legalization of a bridge - public trust - license - Board of Supervisors - estoppel - past and future claims

FACTS: The facts are the same as previously considered in 41 Mich 453. The Court now addresses the two unanswered questions of estoppel and legalization of the bridge.

HELD: A dock owner whose property is restricted in use by the nearness of a bridge is not estopped by the grantor's petitioning for the bridge. Here, it was firmly established that the builder of the bridge looked to the Board of Supervisors for authority to build the bridge and did not rely at all upon the license of plaintiff's grantor.

The structure was built without legal authority because of lack of certainty in the petition to the Board of Supervisors and the illegal delegation of the public trust that resulted. But in 1875 the Legislature legalized the toll rates that had been determined by the Board of Supervisors. The Court holds that this action by the two bodies "legalizes" the bridge.

24

Backus v City of Detroit, 49 Mich 110 (1882)

SUBJECT: Riparian right to the bottom of an inland river - public right to wharfage where a street abuts on streams - public access to a navigable stream - plat construction - dedication of streets

FACTS: Plaintiff is a riparian owner who subdivided and platted lots to sell. Part of this plat was dedicated to the public for use as a roadway. The dedicated property touched the river bank. The city claimed that the dedication extended not only to the shoreline, but into the river. The city intended to construct a wharf on this submerged land. Plaintiff sought an injunction against this wharf construction and claimed ownership of the submerged river lands.

HELD: The city has a right to build a wharf for public purposes where a street dedicated to the public abuts a navigable stream. Michigan follows the common law view that the line of private ownership is to the middle of the stream as in Lorman v Benson, 8 Mich 18. But here the dedication

passed the fee to the city for all ordinary uses. Case law and the city charter favor the city's claim. Plaintiff, however, claimed that the plat submitted should be the exact guide to the lines of dedication and the dedication terminated at the shore. The Court rejected this theory and stated that the purpose of the dedication was to provide a means of public access to the navigable waters.

25

Shepard v Gates, 50 Mich 495 (1883)

SUBJECT: Stream diversion - river improvement company - bridge construction and destruction - navigation - Board of Supervisor procedure - general regulation of vessels with less than a fifteen-ton burden - treble damages

FACTS: Defendant, under State authority, destroyed a bridge and diverted the stream through a newly-dug ditch. Defendant is the agent of the East Branch Improvement Company. This branch of the river was only used for floatage of logs and not capable of ordinary navigation. Legislation of 1851 construed the constitutional provision requiring approval by the Board of Supervisors for the construction of bridges to "navigable streams" (those capable of navigation by vessels of fifteen tons burden or more). Any stream incapable of supporting a fifteen-ton burdened vessel could be bridged without special approval of the Board of Supervisors, but was subject to general regulations promulgated by such board.

HELD: The constitutional requirement that leave must be obtained by the Board of Supervisors before bridging a navigable stream does not apply to a stream which, in its natural condition, could not be navigated by a vessel burdened by fifteen tons or more. See Obrecht v National Gypsum Co, 361 Mich 399 (1960).

Fletcher v Thunder Bay River Boom Co,
51 Mich 277 (1883)

- SUBJECT:** Ejectment action - middle ground - Thunder Bay River - private agreements concerning riparian rights - notice to grantees of limited riparian rights - U.S. surveys deed descriptions
- FACTS:** This is an ejectment action over disputed middle ground (or island) in the Thunder Bay River. The evidence is in conflict, but it appears that the land is almost always, if not always, submerged. The Court agreed with the trial court that the defendant owned the land, regardless of its being above or below the water. The West Branch could support only log floatage, while the East Branch could support navigation. The land was located closer to the West shore (owned by defendant) than the East (owned by plaintiff). Plaintiff claimed that the middle ground was a distinct island, therefore, defendant's boundary extended only to the midway point of the Western Branch. The island was not shown in any U.S. surveys. The common grantors (Fletcher, Oldfield & Mason) entered agreements defining rights to the submerged areas, but these agreements were made after the unlimited sale of Lots 14 and 23 on the West shore to Bassett, the grantor of defendant. These agreements, which are relied upon by plaintiff, were not binding upon Lots 14 and 23 and are not applicable to defendant.
- HELD:** Riparian rights, unless expressly limited, extend to the middle of the navigable channel and cover any shallows or middle ground not shown in the government surveys lying between the navigable channel mid-point and the shore. It makes no difference that the deed describes the land in terms of a city plat rather than the government survey. Agreements between joint riparian owners dividing the rights to submerged lands cannot limit the riparian rights of their grantees, if the grantees have no notice of the limitations or agreements.

This case adheres to the principles of Lorman v Benson, 8 Mich 18; Rice v Ruddiman, 10 Mich 125; Ryan v Brown, 18 Mich 196; and Clark v Campau, 19 Mich 324.

27

Lincoln v Davis, 53 Mich 375 (1884)

SUBJECT: Erections in navigable waters (fishing stakes) - fishing rights in Great Lakes - riparian rights to the bottom of Great Lakes - island in Great Lakes - one mile limit - State regulation of navigable waters

FACTS: Plaintiff and defendant are competing commercial fishermen. Defendant was a leaseholder of Sulphur Island in Thunder Bay. Plaintiff drove in his fishing stakes one mile east of Sulphur Island. Defendant also drove in stakes and ordered plaintiff to remove his stakes. Plaintiff refused and defendant removed plaintiff's stakes. Trial court found for plaintiff.

HELD: A statute allows riparian owners on the Great Lakes to have exclusive fishing rights with stationary nets to within one mile of the low tide mark. This statute is upheld and interpreted to mean that any water beyond the one-mile limit is open to public fishing.

The State can forbid any erections in navigable waters and can fix the distance beyond which private erections cannot be maintained. The Court holds that defendant's "ownership" ended at the low water mark, but the legislative authority granted by the statute gives him the exclusive right to fish one mile from shore. This exclusive fishing right is subject to the paramount right of navigation. There are no proprietary rights outside the one-mile limit. Affirmed for plaintiff.

Riparian rights on Great Lakes are now subject to Act 24, Public Acts of 1955, as amended, MSA 13.700(1), *et seq.*

Woodin v Wentworth, 57 Mich 278 (1885)

SUBJECT: Dam as an obstruction - mill operations - periodic detention of water - log running - equal riparian proprietors - reasonable use of water

FACTS: Plaintiff was a downstream mill owner who sought civil damages for defendant's damming operations sixteen miles upstream. Plaintiff claimed damages because the periodic release and retention of water by defendant's dam caused plaintiff to cease mill operations. The dam was a small dam with a head of two feet six inches. The trial court found for plaintiff.

HELD: The Court found that both were equal riparian proprietors and that each was entitled to a fair and reasonable use of the water. If the use is reasonable and no one suffers damages, there is no cause of action. Damages will be recovered for the detaining of waters of a navigable stream in order to cause flooding if such action prevents a lower riparian from running his mill. Only an unreasonable use is actionable and retaining water which deprives another of a use that he would normally enjoy is considered an unreasonable use. Affirmed for the plaintiff.

Burroughs v Whitwam, 59 Mich 279 (1886)

SUBJECT: Trespass action - fishing upon mill pond - Thread River - navigability of river - Ordinance of 1787 - free navigation - prescriptive fishing rights

FACTS: This is a trespass action for damages because defendant fished in plaintiff's mill pond. Defendant claimed that the Thread River is navigable and that he had the right to be there fishing. Plaintiff claimed that riparian ownership gives him exclusive fishing rights upon the pond. At trial, the judge instructed the jury that they should answer the question of navigability. Plaintiff claimed the court

should have instructed the jury that under the evidence submitted the instruction was conclusive that the river was not navigable.

HELD: The river was fifteen to fifty feet wide, two to three feet deep, and has never been used for floatage or travel. The Court found that the condition of the river was not within the definition of a navigable stream in its natural state. The fact that the public has navigated on the river after the dam was built does not prove it navigable. The Ordinance of 1787 calling for "free navigation" upon navigable waters leading to the St. Lawrence River does not elevate every brook whose waters reach the St. Lawrence River into a navigable stream. The ordinance applies only to streams that were then common highways for commercial use by canoe or bateau. Under the proofs, the trial judge should have instructed the jury that the river was not navigable.

The dissent argues that if a river is capable of navigation or floatage, it should be considered navigable. It criticizes the majority opinion for looking to past usages rather than the capacity of the river for floatage or navigation. The dissent also claims that the trial court instruction was proper and that the appellate court should have no power to contradict the jury's answer.

30

Webber v Pere Marquette Boom Co.
62 Mich 626 (1886)

SUBJECT: Riparian rights to bottom of inland lake - Pere Marquette Lake - island - U.S. survey - boom operations - conveyance by U.S. government - U.S. patents

FACTS: In 1838 the United States conducted a survey of the area in question and it contained no island. In 1850 they conveyed by patents to Farnsworth (defendant's chain of title) the southern shore of the then Pere Marquette Lake. Defendant used the submerged lands for booming operations. In 1883 the United States authorized a new

survey, which found an island. This island was conveyed by patent to the plaintiff in 1883. Plaintiff claimed that defendant's booming operations infringed upon his riparian rights as owner of the island.

HELD: The Court finds that in order for the commission to order a new survey, there must have been an island omitted from the old survey and the land must not have been previously conveyed by the United States. Here, the evidence conclusively shows that no island exists, since the land is always completely covered by water. Also, since no island exists, the conveyance of 1850 covered the submerged island property because State law prevails. The State rule has been well established that the title of the riparian owner extends to the middle line of the lake or stream of inland waters. Therefore, the survey of 1883 was improperly authorized and plaintiff's claim is unsupported. The Supreme Court of the United States has stated that each state may determine riparian rights and doctrines for itself. Patents issued by the United States are usually unassailable in an action at law but the exception occurs where the land has previously been conveyed by the United States to a private riparian because these rights are governed by State law.

31

Clute v Fisher, 65 Mich 48 (1887)

SUBJECT: Trespass action - riparian rights on an inland lake - ice removal - border line dispute - meander line

FACTS: Plaintiff sues for damages caused by defendant's trespass and the removal of ice from a inland lake. Plaintiff owns a fractional subdivision of the land bordering an inland lake. Plaintiff claims that he owns the soil under the water of the lake, which would be included within the subdivision if the lines were fully extended into the lake. Defendant claims that such submerged soil is the property of the State.

HELD: The soil under the water of an inland lake in Michigan does not belong to the government, but rather to the

riparian owner. Private riparian ownership is not limited to the meander line of navigable fresh water or non-navigable fresh water. The bed ownership lies in the riparian owner of the fractional subdivision and follows the lines of the subdivision as they would run if extended into the lake.

The owner of a fractional subdivision of land owns the soil under the water which would be included within the subdivision if its lines were fully extended, and he may maintain trespass against anyone who removes ice without consent.

32

Turner v Holland, 65 Mich 453 (1887)

SUBJECT: City lot owners - inland bayou - dedication by plat - reserving riparian rights - injunction - navigability of current less bayou

FACTS: Plaintiffs are the owners of separate lots bordering on an inland bayou. The grantor sold these lots by plat without any reservation in the plat or in the deed. Defendant operated a boom within the bayou, which is navigable by vessels taking less than nine feet of water. Plaintiffs sought an injunction to have the boom prohibited so that they might exercise their full riparian rights. The defense was that the plats and deeds given by the grantor expressly reserved the bayou, which is not a running stream. The trial court issued the injunction.

HELD: The Court adhered to the doctrine of Watson v Peters, 26 Mich 508, that if the plat conveys the bayou-bounded lots without a clear and express reservation of the submerged land, all the riparian rights incidental to the ownership of the shore pass to the grantees. Here the Court finds no clear reservation by the grantor. The fact that the length of the lines of the lots bordering on the bayou are given in feet and decimals of a foot does not indicate an intention to limit the length of the lot to the size specified and to therefore reserve the riparian rights in the grantor. The Court is extending to platted lands the same presumption,

that riparian rights pass to grantees, that is used in individual lot sales. There is dicta, however, that had there been a continual and exclusive booming use by the grantor after the conveyance, this would have been given great weight in interpreting the plat and deeds. But although there was continual use by the grantor as a booming operation, the use was not exclusive. The private lot owners were also using the navigable bayou for personal navigation.

The Court stated that in such a case, whether or not the bayou has a current is immaterial as long as the bayou is navigable. Injunction upheld.

33

Sterling v Jackson, 69 Mich 488 (1888)

SUBJECT: Great Lakes - fowling rights - riparian rights to the bottom of the Great Lakes - Swamp Land Act of 1850 - trespass action - right to public navigation

FACTS: Plaintiff brings a trespass action against defendant duck hunters. The Swamp Land Act of 1850 granted to Michigan all the swamp and overflowed land described in the Act, including the land in question. The land was Great Lakes shoreline in 1850, but by the 1880's had become open water. This open water was navigable. The riparian plaintiff claimed trespass while the hunter defendant claimed a right to be there and a right to shoot wildfowl.

HELD: The Court says that any change in the condition of land granted under the Swamp Act that occurs naturally, whether drier or more overflowed, cannot deprive the State of present ownership, of such lands, so the now submerged land was still State owned and regulated until the State conveyed the land to plaintiff. He received title to the now submerged land, as well as the dry, but since such open water was navigable, there is an implied license to the public to all rights of navigation. But this right to navigation is merely an easement of passage, not the right to shoot fowl. Everyone has a right to shoot and capture

fowl in any place they have a right to be, as long as they do not infringe upon another's superior right. The owner of land, submerged or dry, has the exclusive right of fowling upon his own land.

Strong dissenting opinion by J. Campbell, that "we cannot, in this country, treat the game laws of England as any part of our inheritance."

34

Hilliker v Coleman, 73 Mich 170 (1889)

SUBJECT: Farming - diversion of river waters - right to a natural watercourse injunction

FACTS: Both parties are farmers who own adjoining lands. Defendant has on his land a natural spring and planned to divert the water from its alleged natural watercourse through plaintiff's land. Plaintiff has for many years enjoyed the water for farming purposes. Defendant had tilled the path from the spring to the plaintiff's land and followed the natural watercourse. Defendant claims that no natural watercourse ever existed.

HELD: The Court recognizes that judicial notice should be taken that in Michigan the natural watercourses are decreasing in volume and drying up due to cultivation and clearing of land. Since the plaintiff here has enjoyed such water for many years and has no spring upon his own property, and since the defendant seems to have acknowledged the natural watercourse by tiling, the Court refuses to allow the threatened diversion and upholds the injunction. Constant flow is not necessary to constitute a natural watercourse.

35

Jones v Lee, 77 Mich 35 (1889)

SUBJECT: Ejectment - riparian rights - adverse possession - surveys

FACTS: Plaintiff brought an ejectment action to recover part of a lot running to Muskegon Lake. Upon this appellate review, the Court found an entire absence of legal proof as to what the plaintiff owned, in fact or theory. Also, twenty or thirty years before a line of piles had been driven as a boundary, the defendant made an uncontested claim of adverse possession. The piles were indeed used as a boundary for many years.

HELD: Here again, the Court discussed the characteristics of Muskegon Lake as a river, inland lake or part of the Great Lakes; see Rice v Ruddiman, 10 Mich 125. Again, the Court concluded that Lake Michigan is an inland lake. A river is characterized by its confining channel banks which gives it a substantially single course throughout. A lake occupies a basin of greater or lesser depth, and may or may not have a single prevailing direction. But since this lake is large and navigable, the middle thread rule of apportionment is impractical because of the predominant right of public navigation. The Court uses the piles driven as the boundary to a doubtful line. The statute of limitations on adverse possession has run uncontested.

36

Mathewson v Hoffman, 77 Mich 420 (1889)

SUBJECT: Waters and watercourses - prescriptive rights - diversion of river

FACTS: Plaintiffs are lower riparian farmers who seek an injunction to prevent defendant, an upper riparian from removing a dam and returning the stream to its former bed. The dam has been in existence for over forty years, and the older river bed has been used for cultivation and developed by plaintiff into useful and valuable farm land. The old river bed is about 400 acres. Plaintiff claims that by the continuous, open and hostile use by defendant of his dam for over forty years, the plaintiff has developed a prescriptive right to use the 400 acres of old river bed as farm land. Therefore, defendants should be enjoined from returning the river to its old banks and

overflowing the old bed. Plaintiff also claims that this would cause a health hazard.

HELD: A person who continues to divert water from a stream for a period beyond the statute of limitations cannot return the stream to its original state, if to do so will materially injure the property of those lower riparians. Rights in a stream may not be lost by long-continued, adverse enjoyment by others. The Court upholds the trial court injunction and enjoins defendant from the removal of the dam.

37

Lumber Co v Peters, 87 Mich 498 (1891)

SUBJECT: Waters and watercourses - riparian rights - boundary line

FACTS: Plaintiff and defendant own adjoining lands upon Green Bay, a part of Lake Michigan. Green Bay is navigable and both parties operate saw mills with deep water wharves extending into the bay. Defendant proposed to extend his wharf crossing the docks of plaintiff and reducing their usefulness.

HELD: The Court seeks to resolve this boundary dispute by adopting the "Massachusetts Rule", which has two steps: First, measure the whole length of the old bank or line of the cove and compute how many yards each riparian owner has upon the line; then, divide the newly-formed line into as many equal portions as those contained in the shoreline drawing straight lines from the point at which the proprietors' land bounded on the shoreline to the points determined as the points of division on the newly-formed line.

This rule may be modified to do justice. The goal is to secure to each proprietor access to navigable water and an equal shore of the dockage line at navigable water which is proportionate to his share of the original shoreline.

38

City of Grand Rapids v Powers,
89 Mich 94 (1891)

SUBJECT: Waters and watercourses - dock lines - navigable waters

FACTS: Defendant is a riparian owner who extended a stone wall into the Grand River past the dock line. The dock line was created by city ordinance. The ordinance was drafted without notice or hearing to the riparian owners affected. The Grand River was navigable for floatage, but this use has been abandoned due to lack of available lumber. Plaintiff claims damages for interference with public navigation and seeks an injunction to remove the stone wall. Defendant claims that his riparian rights should allow the wall because he owns the bed to the middle of the stream subject to the rights of public navigation. The dock line encroaches upon defendant's shoreline and dry land.

HELD: The general rule in Michigan is that the riparian owns the soil to the middle of the stream subject to the public use of the stream. The Court adheres to this principle. The Court finds that the Grand River is not navigable since floating logs has been abandoned. There is no longer a reason to hold the stream to be public and it should be considered private once again. The dock line ordinance is struck down as invalid because it deprived the riparian of his rights without due process (notice and hearing).

39

Cornwell Mfg Co v Swift, 89 Mich 503 (1891)

SUBJECT: Watercourses - flowage rights - prescriptive rights - estoppel

FACTS: This dispute arose over a conflict of flowage and pondage rights by neighboring mill owners. Plaintiff's dam is located within defendant's area of pondage. Plaintiff seeks an injunction to restrain defendant from raising the flushing boards above two feet, three inches. The operation of plaintiff's mill built in 1885 seriously

interferes with the operation of defendant's mill built in 1835. Defendant claims pondage and flowage rights gained by grant and prescriptive use over a forty— year period.

HELD: The Court agrees with the compromise order of the trial court allowing defendants to build to four feet and granting to defendant damages. This compromise was an attempt to permit plaintiff to continue to operate his mill. The Court held that in order to create a prescriptive right of flowage or pondage, the occupation need not be constant but only consistent. They weighed heavily the experiment of 1841 where the grantors determined flowage rights. Defendants have gained flowage and pondage rights by grant and prescription by occasionally raising the flash board to four feet, six inches. The Court upholds the compromise decree plus damages in order to allow both mills to continue to function.

See William v Barber, 104 Mich 31 (1895) on rights to flowage by prescription. See Also Preston v Clark, 238 Mich 632 (1927).

40

Hoag v Place, 93 Mich 450 (1892)

SUBJECT: Watercourse - ice removal right - prescriptive right

FACTS: Plaintiff claims right to ice by an 1855 deed and by prescription. Defendants are heirs of plaintiff's grantor and hold title to the remaining land. In 1863, a dam was erected creating a pond which in 1869 was appropriated for an ice business. Since that time, the ice business has been conducted openly and constantly. Defendants claim to own the soil below the pond and seek the ice ownership as incidental to their riparian rights.

HELD: The Court reaffirms the Lorman v Benson, B Mich 18, principle that the owner of the submerged soil has an exclusive right to the ice formed above as incidental to the riparian rights of Ownership. But here, the 1855 deed is ambiguous and unclear as to ownership of the land. The

Court interprets the deed in the same way that the parties, by their actions, have construed it. The facts show that Mrs. Place knew and acknowledged the ice business and acquiesced in its operation. Defendants, heirs of Mrs. Place, are estopped from asserting ice ownership by her acquiescence. Plaintiff's use of the ice was adverse, under colorable claim, within the knowledge of the owner, and contrary to the owner's interests. This ice use was continuous for over fifteen years and resulted in the creation of a prescriptive right to the ice in the plaintiffs. The plaintiffs are not restricted to the pond's areas which they had actually cut, but may take ice from the whole pond, which was their adverse claim. Plaintiff's right to harvest ice was created by prescription and anchored in the colorable grant of flowage given by the former owners of the land. The Riparian is the owner of the ice, but can lose that right by an adverse prescriptive use by another.

41

Potter v Railway Co, 95 Mich 389 (1893)

SUBJECT: Watercourse - bayou - navigability

FACTS: Plaintiff owns five lots near the St. Joseph River, but not bordering the river. His lots border a bayou two to three feet deep and a man-made canal, which connects downstream to the St. Joseph River. Defendant entered into a contract and built a bridge over the bayou. Plaintiff claims that this bridge is a public nuisance which obstructs navigation and therefore devalues his lots. The St. Joseph River is navigable, but little used. The canal is navigable, but almost never used, and the bayou is non-navigable because of its shallowness.

HELD: The Court states that the plaintiff, in order to maintain an action, must show special damages differing from that suffered by the public. Plaintiff's claim of the navigable bayou was unsubstantiated by the testimony and none of plaintiff's lots border on the canal which is probably navigable. He, therefore, has no interest distinct or "special" from that of the general public.

A land owner whose only interest in a navigable stream or canal is the right to use it as a public highway cannot recover in a private action for obstruction. The canal was privately constructed and maintained and is analogous to a private road which grants the public a right to travel upon it, but grants no vested rights.

42

The Grand Rapids Ice and Coal Co v
The South Grand Rapids Ice and Coal Co,
102 Mich 227 (1894)

SUBJECT: Navigability - ice removal - boundaries on inland lake

FACTS: This is a controversy over the right to cut ice on Reeds Lake. Plaintiff claims to own the bed within the lines of the fractional subdivisions extended. Defendant claims a division of the centerline proportionate to the shoreline so as to give each riparian an equitable share. Trial court found for defendant.

HELD: Plaintiff relies on Clute v Fisher, 65 Mich 48. The Court held it was governed by the rule laid down in Jones v Lee, 77 Mich 35.

The title of the riparian extends to the center of the lake or stream, not the fractional subdivisions extended.

43

Williams v Barber, 104 Mich 31 (1895)

SUBJECT: Watercourse - dams - flowage rights - prescriptive right

FACTS: Eleven plaintiffs are land owners who sue to enjoin the defendant dam owner from maintaining his dam at a certain height. This height, it is claimed, causes overflow upon their lands. Defendant claims that he has not increased the dam's height for at least fifteen years and

that any increase in the pond level and overflow was caused by a State-constructed bridge upstream of the dam.

HELD: The Court holds that if a dam owner keeps his dam at a certain height for more than fifteen years and floods neighboring lands without complaint, he has acquired title to those lands so far as the right to flood. He has gained a prescriptive right of flowage at that height.

44

Stofflet v Estes, 104 Mich 208 (1895)

SUBJECT: Navigability - dams - bridges

FACTS: Plaintiff is a mill owner who maintains a dam upon the Portage River. He also owns and operates a fifteen-ton steamship on that river. The steamship can only travel because of the increased water level of the river caused by the dam. The river's natural condition could only handle the floatage of logs. There were several bridges upon the river which, when repaired and rebuilt, allowed passage of the steamship beneath the bridges. The alterations and repairs of these bridges were paid for by the former mill and boat owner. Upon accidental destruction of one of the bridges, local authorities proposed to reconstruct the bridge in such a way so as not to allow the steamship to pass beneath. Plaintiff seeks an injunction to restrain the rebuilding of the bridge in such a manner as to prohibit the passage of his steamship.

HELD: The Court applies the test of the navigability as stated in Moore v Sanborne, 2 Mich 520. Is the stream inherently and naturally "capable of being used for the purposes of commerce for the floating of vessels, boats, rafts, or logs?" If "yes", the public easement of passage exists, even though periodically the river is incapable of such use. Under the facts, the plaintiff cannot be deprived by the township officers of his rights of flowage and navigation without condemnation and compensation. Also, since the stream is navigable, the only body that may authorize bridge construction is the board of supervisors, by statute. If the stream is navigable for any purpose, the private

individual rights are protected against arbitrary action by local authorities.

45

Pratt v Brown, 106 Mich 628 (1895)

SUBJECT: Riparian rights of dam owners and navigators - dam maintenance - dam break - log detention on a navigable stream

FACTS: Defendants are mill owners who operate a dam across the Tobacco River. While plaintiff was running logs down the river and as the logs approached defendant's dam, the dam suffered a break and needed repair, causing delay to plaintiff's logs. Plaintiff is seeking damages for the alleged unreasonable interference with the river's floatage. Defendant made a good faith effort to repair the dam as quickly as possible to allow the logs to pass and to avoid further damage to the dam.

HELD: The Court held that unless there is presented evidence to the contrary, it will be presumed that a dam across a navigable river was built and approved legally with the authorization of the Board of Supervisors. In the absence of evidence showing negligence in dam maintenance or lack of legal authority for the dam, if the stream is navigable, the defendants have the right to maintain the dam and floatage rights are subject to the operation of the dam. It follows that the owner of a lawfully-maintained dam should be allowed a reasonable time to repair an accidental break and, as an incident to such repair, should be allowed to detain floatage which might add, to the break.

46

A.P. Cook Co v Beard, 108 Mich 17 (1895)

SUBJECT: Prescriptive right of flowage - injunction to prevent increase in prescriptive rights - raising dam levels

FACTS: Defendants have gained by prescription the right to flowage over certain of plaintiff's lands. Plaintiff claims that defendants have raised their dam by eighteen inches and thereby increased the amount of overflowed land. Plaintiff seeks an injunction to have the dam lowered by eighteen inches. Defendants, at trial, claimed no change in height had occurred. The trial court, after a fact-finding, ordered that the dam be lowered by only eight inches. The plaintiff, on appeal, sought a greater decrease.

HELD: The Court held that this matter is strictly a question of fact and in affirming the injunction, decreased the dam height by the full eighteen inches. The holder of a prescriptive right to flowage over another's lands can be restrained, in equity, by an injunction from increasing the height of his dam, thereby increasing the area of land overflowed.

47

People v Silberwood, 110 Mich 103 (1896)

SUBJECT: Riparian rights in the Great Lakes - navigable waters - criminal action - construing 1895 PA 112 and its constitutionality - destruction of rushes upon public shooting grounds.

FACTS: This is a challenge to the constitutionality of Public Act 112 (1895) which set aside submerged lands in Lake Erie and the Detroit River for a public shooting grounds. This is a criminal prosecution of the cutting of rushes upon these grounds. Defendant was there by order of the adjoining riparian owner, Marsh Company, who claims ownership of the submerged lands as part of his riparian rights. If the Marsh Company is correct in their ownership claim, defendant's conviction should be reversed. The riparian owner claims that the State action deprived him, arbitrarily and without notice, of his property rights and is unconstitutional and void.

HELD: The Court holds that the submerged land under the Great Lakes is owned by the State and that the rights of the riparian owner are limited to the rights of ingress and egress, by navigation, and the right of wharfage. The

Court looks to sources of law outside of Michigan and alters the Michigan law so it will be uniform with the laws of the other Great Lakes States. They adopt the common law, as was applied to open seas, to the Great Lakes despite the fact that the Great Lakes have no appreciable tide.

The Court reaffirms the case of La Plaisance Bay Harbor v City of Monroe, 69 Mich ~ which holds that the beds of the Great Lakes are owned by the State. See Lincoln v Peters, 87 Mich 498, which appears to be in conflict. Conviction affirmed.

48

Oliver v Olmstead, 112 Mich 483 (1897)

SUBJECT: Riparian rights in ice removal - lease - notice to subsequent grantees - injunction

FACTS: Plaintiffs are seeking to restrain the removal of ice from a portion of the Shiawassee River. In 1890 the riparian owners entered a five-year lease arrangement with plaintiffs, whereby plaintiffs obtained the right to remove ice. Defendants are subsequent grantees of the riparian land, and there is conflicting evidence as to when defendants learned of the lease. But the lower court said it was some time before the written contract was entered into by defendants.

HELD: The Court upholds the right to cut and remove ice gained by lease from the riparian owners of the stream bed. The right to lease ice removal rights is upheld, but the plaintiffs lost, as the lease renewal was held invalid because the death of one of the partners of the riparian owning partnership dissolved the partnership.

49

Sherwood v Commissioner, 113 Mich 227 (1897)

SUBJECT: Riparian rights and ownership of an island in Great Lakes

FACTS: The grantee of an island by deed brings a mandamus action against the State and Commissioner of the State Land office to compel a conveyance of a small unsurveyed island located 600 feet from the Shoreline of the Upper Peninsula on Lake Huron. There are conflicting claims whether the island lies within the waters of the St. Mary's River or Within Lake Huron.

HELD: The Court finds that the island is located in Lake Huron and applies the rule of People v Silberwood 110 Mich 103. The title to an island located in the Great Lakes lies in the State, not in the riparian Owner.

50

Scranton v Wheeler, 113 Mi Mich 565 (1897)

SUBJECT: Riparian rights - navigable stream - navigation aids by U.S. Government - ejection

HELD: Plaintiff is a riparian owner upon the St. Mary's River who brings an ejection action to recover the possession of the submerged lands under the river. Defendant is the superintendent of the St. Mary's Falls Canal. The United States Government took possession of the submerged land, through the defendant, in order to build Piers which were necessary aids to navigation in the Great Lakes and navigable rivers. Defendant had the case removed to federal court where he prevailed in both the United States District Court and the United States Court of Appeals. The United States Supreme Court remanded the case to the State court for trial because of lack of federal jurisdiction. The State trial court again found for the defendant.

HELD: The Court again affirms the doctrine that the title to submerged land in a navigable river is in the adjoining riparian owner to the thread of the stream. But this title and the riparian rights of the owner are subject to the paramount right of the U.S. Government to use the land in aiding navigation, without compensation to the riparian owner.

Hall v Alford, 114 Mi Mich 165 (1897)

SUBJECT: Navigable waters - marshlands - riparian rights - fowling - trespass by sportsmen - Detroit River

FACTS: Plaintiff is a riparian owner who brings a trespass action for nominal damages against defendants. Plaintiff owns Horse Island in the Detroit River. Defendants were duck hunters and approached the island and anchored about sixty feet from the island's shore in about ten to twelve inches of water. In certain seasons, this spot was actually dry and can best be described as marshlands. The marshlands surround the island and have a slight current. Plaintiff, under State law, owns the submerged land to mid-stream subject to the rights of other riparians and paramount rights of navigation.

HELD: The Court concludes that even though the defendants reached this location by boat, it could not be considered navigable. Marshlands adjacent to an island located in a navigable stream which are periodically dry or covered by shallow waters are not navigable. The Court approves of the case of Sterling v Jackson, 69 Mich 488, which grants the riparian owner the exclusive right to hunt and sport upon his own soil, subject to the rights of navigation. But here, there is no navigable area and the trespass action is upheld. Had the trespass area been navigable however, it would have been possible to maintain a trespass action. Hunting fowl from an anchored boat in a navigable stream is an actionable trespass because hunting fowl is not incidental to the public right of navigation.

People v Warner, 116 Mich 228 (1898)

SUBJECT: Ownership of Great Lakes islands - marsh land - adverse possession - reclamation - accretions - access to navigable waters

FACTS: Ejectment action by the State. Defendant is the owner of the island of Maisou and lays claim to the "middle ground" under three theories: that the middle ground is an accretion to Maisou; that the riparian rights of Maisou include the submerged lands and dry lands to the middle of the main channel between the middle ground of the bayshore including all of the middle ground; and adverse possession. The State claims title to the middle ground by an 1891 statute which made such grounds a public hunting ground. The Commissioner of the General Lands Office (federal government) said that this was an accretion to Maisou, but a later ruling by the Secretary of the Interior reversed it. The State claims were excluded from a list of lands granted to the State. The trial court found ownership to be in the State.

HELD: A marshy island in the Great Lakes which did not exist in 1850 at the time of the Swamp Land Act belongs to the State because the State owns the soil under the Great Lakes. This ownership lies, in spite of the omission of the Secretary of the Interior excluding the middle ground from the lands within the Act list. The Swamp Land Act of 1850 covered swamps and overflowed lands, not just those capable of profitable reclamation. The limit of private ownership is the water line of the Great Lakes. Additions to shoreline that are privately owned and formed by accretion become the property of the riparian owner. But where an island arises and eventually connects with the private shoreline, the property remains in the State's ownership

Reversed to determine whether this disputed land was an accretion to Maisou or an island.

53

Pittsburgh Iron Co v Lake Superior Iron Co,
118 Mich 109 (1898)

SUBJECT: Riparian rights on inland lakes - ownership of lake bottom - adverse possession - estoppel - iron mining company - laches

FACTS: The parties are three iron mining companies which severally own all the riparian Property surrounding an inland lake. Iron ore was discovered in the soil beneath the lake, so the companies petitioned for an ordinance and entered into a private agreement to pump the water out of the lake in order to gain access to the iron deposits beneath the soil of the lake bed. The agreement stated that the dividing lines of the submerged land were to be drawn in accord with Clute v Fisher, 65 Mich 48, which established the rule that the territory should be divided by the extension of the government lines. Plaintiff claims that it relied upon Clute to be the law until Grand Rapids Ice & Coal Co v South Rapids Ice & Coal Co, 102 Mich 227. Plaintiff alleges that there was mutual mistake in the contract, which should entitle the plaintiff to his relief. Plaintiff alleges the Grand Rapids Ice & Coal Co overrules Clute, thereby changing the law.

HELD: The Court agrees with plaintiff that the division of the lake bed was erroneous in Clute, but this was mere dicta and not the main issue of the case, which was whether the State owned the lake bed. Plaintiff here, however does not prevail because the parties detrimentally relied upon Clute and upon the agreement between themselves. The parties expended time, money and manpower to the project. Plaintiff is thereby estopped from changing the terms of the contract or expanding its claim to the submerged lake bed because of this reliance by all the parties.

54

Goff v Cogle, 118 Mich 307 (1898)

SUBJECT: Riparian rights to an island - unsurveyed island - title to island - presumption

FACTS: Plaintiff brings a trespass action against the defendant for building a fence and cutting timber on an island between the shores of the Clinton River. Plaintiff and defendant are both owners of the opposite shores and, therefore, both riparians. The main channel of the river is between

the plaintiff's shoreline and the island, while between the island and the defendant's shoreline there is a small channel, which is periodically dry. Both parties claim ownership of the island and show tax receipts and claims of title. Defendant claims that there is no island because of the periodic dryness of the small channel and that the island was never recognized in any U.S. Government survey. Plaintiff's claim of title does not trace back to a government grant or patent, nor was evidence submitted that the island was ever surveyed by the government. The trial court found for the Plaintiff.

HELD: The Court recognizes that the jury question of the existence of the island was settled affirmatively but there was no evidence of such an island in any government survey. Under the defendant's deed, he takes title to the middle of the main channel. This presumption of ownership to mid-point of the main channel can only be overcome by a showing of recognition by a government survey. Plaintiff's proofs do not overcome the presumption that defendant's title extends to the middle of the main channel, thus including the island. Reversed for defendant.

55

Church v Case, 122 Mich 554 (1899)

SUBJECT: Title to island in an unmeandered lake - U.S. surveys - patents - estoppel - Long Lake - ejectment

FACTS: The U. S. Government granted a patent to defendant, without any reservation, to the land bordering Long Lake. The island in question was never recognized in the original survey. The defendant and his predecessors claim to have been in possession of the island for over forty years. The U.S. Government subsequently ordered the island to be surveyed and sold to a private party (plaintiff). Plaintiff therefore, claims through this subsequent U.S. grant. Plaintiff brings an ejectment action. Trial court found for defendant.

HELD: The original grant to the land adjoining the lake passed the title to the island. The Court states that an unreserved

patent of land bordering an unmeandered lake carries with it title to an unsurveyed island. This title is not affected by a subsequent survey and sale by the government. The fact that the defendant had applied to the government for a survey does not stop him because he notified the plaintiff-purchaser before the sale that he was the owner and would dispute the sale to plaintiff. Affirmed for defendant.

56

People v Conrad, 125 Mich 1 (1900)

- SUBJECT:** Statute construed - spear fishing on private inland lake - isolated lake - permission of owners
- FACTS:** This is a criminal action against defendant who was convicted of illegal spear fishing. Defendant is owner with three other riparians of Hibbard Lake. Hibbard Lake has no inlets or outlets thus being totally isolated from other waters. The statutes made spear fishing illegal in any inland lake of the state. Before spear fishing, the defendant had obtained permission from all the riparian owners of the lake. Defendant was convicted of violating the fish laws.
- HELD:** The Court construes the statute as inapplicable to spear fishing in a private lake or pond, which is unconnected with other waters, when all owners gave consent. There is no public interest in such a pond. Reversed for defendant.

57

Brown v Parker, 127 Mich 390 (1901)

- SUBJECT:** Title to swamplands - U.S. surveys - hunting - injunction - Great Lakes
- FACTS:** Plaintiff riparian seeks an injunction against duck hunters for fowling upon marshlands adjacent to Lake Erie. Defendants claim that the marshland is submerged and

part of the bed of the Great Lakes belonging to the State with a public right to hunt and fish without trespass, People v Silberwood, 110 Mich 103. This marshland was surveyed by the U.S. Government and bounded by the meander line of the lake. This land passed to the State under the 1850 Swamp Land Act and was sold by the State to plaintiff. Trial court found for Plaintiff.

HELD: The Court finds that such surveyed marshland is not part of the bed of the lake and title is conclusively established in the private riparian owner up to the meander line. The riparian may enjoin fowling within the limits of this title. The Court follows the rationale of Sterling v Jackson, 69 Mich 488. Affirmed for Plaintiff.

58

State v Lake St. Clair Fishing & Shooting Club,
127 Mich 580 (1901)

SUBJECT: Swamp Land Act of 1850 - island in Great Lakes - submerged lands - public trust - adverse possession

FACTS: This is an ownership dispute as to who owns the St. Clair Flats, the State or private owners. The disputed land is a mostly submerged island in the St. Clair River where it empties into Lake St. Clair. The area was a hunting and fishing paradise with many resorts. The State Land Commission claims authority through the Swamp Land Act of 1850 and caused a survey to be taken in order to define and sell lots. Trial court found for Plaintiffs.

HELD: The majority opinion found that the marshland was within the 1850 Act and subject to conveyance when patented by the State. Affirmed for Plaintiffs.

The minority opinion was later adopted as the correct stance in State v Venice of America Land Co, 160 Mich 680 (1910). The minority held that the submerged lands in question were part of the bed of Lake St. Clair and the Great Lakes so that when Michigan was admitted to the Union, it acquired title to such lands in trust for navigation and related public uses. The federal

government had no title in the land in 1850. The dissent contains two major Principles of Michigan public trust doctrine: (1) it is repulsive to the public trust to allow the sale of the lands in question to private parties for private profits and use, and (2) where lands are public trust lands, the State has no authority to convey unless given the authorization expressly by legislation and only then if consistent with the perpetual duty to hold the land for public benefit of fowling, fishing and navigation. Since the State has no right to convey without breaching the public trust, it follows logically that such land cannot be owned by claim of adverse possession.

59

Baldwin v Erie Shooting Club,
Mich 659 (1901)

SUBJECT: Navigability - Great Lakes - swamplands - Swamp Land Act of 1850 - way of necessity - injunction

FACTS: Plaintiff seeks an injunction against defendant from interfering with his passage over the submerged lands of defendant. Plaintiff owns eighty acres of submerged land, which is completely surrounded by 4,000 acres owned by defendant. The lands are submerged under six to twenty-four inches of water. Plaintiff claims that these are navigable waters, thus giving him a right to passage. The Court adopts the facts and conclusions of a federal case concerning the same areas; they find that the marshlands in question here are not navigable. A strong presumption against navigability is created by the fact that a U.S. Government survey was done and that the land was classified and passed to the State under the 1850 Swamp Land Act. The State subsequently conveyed the marsh to private parties. This private property was not capable of any commercial navigation because of its shallow depth. It is private property and is not subject to any public rights, such as navigation or passage easements. There is no right to trespass.

HELD: The Court does affirm and broaden the injunction issued by the trial court. The decree was based upon the fact that

the only means of ingress or egress were over defendant's land. It is an easement of necessity and is not restricted to daylight hours or in the number of guests allowed.

60

Valentine v Water-Power Co, 128 Mich 280 (1901)

- SUBJECT:** Damming over navigable stream - height of dam - Board of Supervisors - right of navigation - water power companies - notice of increased height - estoppel
- FACTS:** This suit is brought to test the validity of a franchise granted allowing a dam over a navigable river. The dam was authorized at sixteen feet by the Board of Supervisors, which would not allow navigation to pass. The dam's height was raised to twenty feet without public notice and all flowage rights for a twenty-foot dam had been obtained. Defendant is a water power company authorized by 1887 PA 202. The trial court found for plaintiff.
- HELD:** A water power company may construct a dam twenty feet over a navigable stream in such a manner that it will not allow the passage of vessels. The Court examines the authority of the Board of Supervisors granted by the Michigan Constitution and applicable statutes and concludes that they have authority to construct such a bridge over a navigable stream. The constitutional provision against prejudicing "free navigation" does not mean that every dam must be provided with a lock. Free navigation does not mean navigation of stream in their natural, unobstructed flow. The act that authorizes such damming has two purposes: the obtaining of water power and the deepening of the waterways. This is determined to be within the discretion of the Board of Supervisors. The Court also states that no notice to the public is required when increasing the dam from sixteen to twenty feet when flowage rights have been obtained Reversed and found for defendant.

61

People v Hulbert, 131 Mich 156 (1902)

SUBJECT: Riparian rights in lake - Lake Goguac - bathing rights - reasonable use - Police Power - Pollution

FACTS: Lake Goguac is a 360-acre lake with five miles of Shoreline. It is navigable by sailboats and steamers but has no natural outlets. This is a criminal action based upon a complaint by the City of Battle Creek as a riparian owner of 200 feet of lake front upon which is a pumping station supplying water for city use. The remainder of the lakeshore is in private lands and is primarily used for resorts and cottages. Defendant is a cottage owner who is testing his riparian rights. He bathed in the waters upon the property and the City complained because of his alleged pollution of the water. At trial, defendant was convicted and now appeals.

HELD: The rights of individual riparian owners on a stream or inland lake are equal with each being entitled to a reasonable use of the water, even though this use may prejudice to some extent the quality or quantity of the water. Just what is a reasonable use is a question of degree, which varies with the circumstances of the situation. The Court looks to the facts of the case, such as what the use is for, its extent, duration, necessity, application, the nature and size of the stream, the extent of the injury to the one proprietor and the benefit to the other, and the usages common to the country. The Court finds that defendant has a right to bathe in the lake and that this use is reasonable under the circumstances. The City has no police power to inhibit this right without exercising the power of eminent domain with compensation. However, the Court limits its opinion to the facts of the case, only the defendant bathed, and hints that should a resort open with many people bathing, this might be deemed a change in circumstances sufficient to become an unreasonable use. Reversed for plaintiff.

Kemp v Stradley, 134 Mich 676 (1903)

SUBJECT: Building and leasing wharves - street-end wharves - city charter - wharfage rights

FACTS: Plaintiff is a riparian who owns wharves on either side of a slip at the end of a Street. This slip is the proposed site of a privately-built wharf to accommodate ferry traffic. The City of Sault Ste. Marie owns this slip by reason of the street dedication. The City has entered into a five-year lease of this slip for a private wharf. Plaintiff sues to prevent the wharf-building and the execution of the lease. He claims that the slip is necessary to navigation by the public and that the wharf would prevent public access to the river's navigable waters. The City Charter authorizes the City to establish, construct, maintain and control public wharves. Trial court found for defendant.

HELD: The Court states that it is clearly the law that a City may build a street-end dock, if authorized by its Charter. To distinguish a privately-constructed dock from a dock operated by the City would be overly technical. A city may lease the land and authorize the lessee to build a street-end dock, but such a dock authorized by a charter that calls for the preservation of the right of public passage is not considered to be a part of the highway. The wharf may be run as are other wharves, except that it must always remain open to public use. The City may regulate the wharf traffic or wharfage charges because such wharves are not open to indiscriminate public use as is a highway. Horn v People, 26 Mich 221. Here, the lease is limited to letting all the City's exclusive privileges. These privileges were leased subject to the public passage rights declared by the Charter. Affirmed for the Defendant-City.

McKee v City of Grand Rapids,
137 Mich 200 (1904)

- SUBJECT:** Riparian rights to natural flow - public nuisance - injunction - bridge without draws - pollution
- FACTS:** Plaintiffs are riparian owners seeking to abate an alleged nuisance caused by the defendant City. Plaintiffs claim that the City has dumped sewage and other objectionable material in a navigable steamboat channel bordering plaintiffs' property and that this garbage polluted the water and decreased the property value of plaintiffs' lands. This condition has existed for over fifteen years. In a supplemental bill, plaintiffs sought to enjoin a bridge to be built by the City that would fill the channel with dirt fill. The Court stated that this case turns upon the long and complicated findings of facts. The trial court found that the city was not solely or primarily responsible for the nuisance caused by the stagnate and polluted waters. It found the east channel, the steamboat channel, had been, abandoned to navigation and that any efforts to increase the flow in the channel were impractical. The only alternate means to abate this nuisance would be to completely dirt fill this channel.
- HELD:** The Obstructions that have remained over fifteen years without protest are not removable by a riparian owner's suit because they are barred by the statute of limitations and the doctrine of laches. The Court also found that the City's actions actually increased plaintiffs' property values rather than decreased values. Plaintiffs have shown no special injury and, therefore, may not claim a public nuisance. They are estopped because of lack of protestation and claim of a private nuisance. Case dismissed; no injunction issued; no damages. Affirmed for defendant.

Rickels v Log-Owners' Booming Co,
139 Mich 111 (1905)

- SUBJECT:** Riparian rights - adverse possession - boom companies - dams - overflow causing crop damage
- FACTS:** Plaintiff is a celery-growing riparian who sued for damage done to his crop by high waters allegedly caused by defendant's brush dams. Defendant-boom company denied that its dams caused the damage and placed the blame on exceptional rainfall. Trial court found for defendant.
- HELD:** In order to sustain a claim of prescriptive riparian right, the claimant must show an exclusive enjoyment of the water, adverse to the right of defendant, and without interruption for at least fifteen years. Plaintiff's evidence failed to show such enjoyment for the requisite period. Affirmed for defendant.

Allen v Thornapple Electric Co,
144 Mich 370 (1906)

- SUBJECT:** Riparian rights - dam heights - flowage rights - crop damage
- FACTS:** Plaintiff is an upper riparian upon the Thornapple River who seeks an injunction against defendant's dam located six miles down river. Plaintiff claims that such dam has caused flooding of his bottomlands. Defendant claims flowage rights to eighteen feet from the low water mark. Defendant's dam is fifteen feet high and is extendible to eighteen feet. Plaintiff claims that most of the damage occurs during freshets which occur naturally and periodically, but are allegedly intensified by the damming operations. Trial court found for plaintiff
- HELD:** The Court agrees with the trial court that plaintiff has been damaged by the damming operations even though

the dam is not as high as the low water mark at the lowest point of the upper proprietor's land. The riparian owner is entitled to have the water enter and exit his premises in the natural way at all times, including periods of high and low water. A dam owner who interferes with this right by damming operations down river will be liable in damages. Defendant, since his dam is relatively new, is given the choice of an injunction to limit the dam to fourteen feet, plus \$150 damages, or to pay \$690 for full flowage rights over plaintiff's lands.

66

Ainsworth v Munoskong Hunting and Fishing Club,
153 Mich 185 (1908)

- SUBJECT:** Trespass - injunction against interference - right to hunt on navigable waters
- FACTS:** Plaintiffs are duck hunters who are seeking an injunction against defendant hunting club to prevent interference with their hunting. Plaintiffs were hunting upon navigable waters when agents of defendant harassed them, claiming defendants had exclusive fishing and hunting rights in the area. Plaintiffs claim that the Munoskong Bay is part of the Great Lakes, is navigable, and is owned by the State, being held in trust for the people of the State and their use. Trial court found for defendants.
- HELD:** The Court calls upon its powers in equity to protect the plaintiffs' civil rights. The injury to these substantial and valuable civil rights created an irreparable injury which had an inadequate remedy at law. The Court issued the injunction to protect these rights. The Court draws no distinction between the public's right to fish. To hunt and fish in and upon these navigable Great Lakes waters is a public right which any citizen may avail himself, subject to the game laws of the State. Reversed for plaintiff.

Hartz v Detroit Railway, 153 Mich 337 (1908)

SUBJECT: Ejectment - riparian rights in bed of stream - ownership of river bottom - millpond - ownership of pond bottom - artificial and natural ponds

FACTS: Plaintiff brings an ejectment action. He owns the lands on both sides of the stream and pond. Plaintiff takes by deed that says the land runs "along the bank of said millpond." Trial court found for Plaintiff.

HELD: The Court again follows the common law rule well established in Michigan that the owner of lands abutting on a watercourse owns to the middle of the stream. Butler v RR Co, 85 Mich 246. It makes no difference whether the stream is navigable, nor is there a distinction between natural or artificial streams and ponds. The stream here is not artificial, but the boundaries of the stream have been changed artificially. The Court finds no intention in these deeds by the grantors to retain the submerged land. These deeds conveyed to plaintiff the right to the waterfront and for the use of the water in the stream in its natural state if the artificial pond is discontinued. Affirmed for plaintiff.

Stuart v Greanyea, 154 Mich 132 (1908)

SUBJECT: Fishing rights - navigable waters - riparian rights - statutory construction - Wigwam Bay

FACTS: The parties are adjoining owners of the bay-front land on Wigwam Bay in Saginaw Bay. Plaintiff seeks to enjoin defendant from fishing in certain waters He claims exclusive fishing rights under a 1905 statute (1905 PA 122), which sets a two-mile limit in front of their Saginaw Bay land. The trial court grantee the injunction. The Court is not considering the constitutionality of the statute or the exclusiveness of the rights granted. They are construing the boundary lines only, based upon the statute, assuming

constitutionality and the grant of exclusive fishing rights. Trial court found for Plaintiffs.

HELD: The Court rejects several theories for boundary setting and feels that the law of Blodgett and Davis Lumber Co v Peters, 87 Mich 498 is applicable, but only in the exception to the general rule set out in that case. Blodgett gives the general rule of law, but recognizes a need for flexibility. Such is the case here. In order to give a fair apportionment to each riparian, the circumstances call for a modification of the general rule. The legislation intent of the 1905 Act was to confine the right of each landholder to the limits of preexisting riparian rights and to use the same rules to determine such limits, but to limit the maximum extension to two miles. To assure that every shore owner has a right of access to navigable waters on the Great Lakes, subject to the general right of navigation the Court drew the boundaries in the following manner, according to the 1905 Act: A baseline should be drawn between the headlands of the cove, to which all boundary lines will converge. The baseline should then be divided proportionately to the shore frontage of the owners. In case there is frontage from which straight lines cannot be drawn to bisect the baseline, then secondary baselines should be drawn between inner headlands, if any; if there are no inner headlands, then, to the center of the cove. All baselines should be divided proportionally based upon the shore frontage of the owners. Reversed for defendants.

69

Stock v City of Hillsdale,
155 Mich 375 (1909)

SUBJECT: Riparian rights - diversion - city - prescriptive rights - injunction - damages - mill operation

FACTS: Plaintiff is a mill owner who claims that defendant city is pumping water out of Bawbeese Lake and depriving his mill of sufficient water to operate effectively. The city is an upper riparian and has been taking water from the lake for over twenty years. Plaintiff seeks an injunction

against future increases. The action was filed in 1906, when the volume was 340 million gallons, as compared to the 1892 amount of 144 million gallons per year.

HELD: The Court agreed with the trial court and denied the injunction. Defendant City has no right to divert water from the lake and an action by the lower riparian will ordinarily be allowed. But the facts indicate that the City appropriated the water adversely for over twenty years and had developed a prescriptive right to such water. However, the Court limits this prescriptive right to the amount of water equal to the amount used fifteen years before the time that plaintiff's action is commenced, that is, 144 million gallons per year. The Court considers the harm to the City that would be done by an injunction. The City has spent large sums of money and has used such facilities for over twenty years. The Court denies an injunction; however, it is willing to award damages in gross to plaintiff. Plaintiff has no title to the water, but does have a right to its unimpeded flow. The damages are calculated upon this diminished flow. The Court remands the case for testimony on damages.

70

State v Venice of American Land Co,
160 Mich 680 (1910)

SUBJECT: Patents - estoppel - adverse possession-public trust - Great Lakes

FACTS: State of Michigan, through its Attorney General, seeks to enjoin defendant from taking possession of, platting and selling certain land on Harsens Island. The State claims title because of the Swamp Land Act of 1850 and because the land in question was covered with water at the time Michigan was admitted to the United States in 1837. Defendant claims title through the British Government, and further asserts that the land is not swampland. Defendant also raises an estoppel argument claiming that their grantors have held title for over 100 years. Trial court found for plaintiff.

HELD: The Court on review found that no grant from the British Government was produced and that Indian grantors in the defendant's claim of title are not legally recognized. The platted sections of Harsens Island are held to be within the defendant's title description but the unsurveyed lowland is held to be in the State by virtue of its admission to the United States. Title to submerged lands in the Great Lakes cannot be acquired by adverse possession, because it is held in trust for the public; consequently, the statute of limitations will not run.

71

Fuller v Bilz, 161 Mich 589 (1910)

SUBJECT: Riparian rights - lake plats submerged lots - fraud

FACTS: Plaintiff is the owner of a lot with a road between the lot and the water. Plaintiff owns Lot 28 and bought the lot from Tillotson in 1901. Tillotson had purchased Lot 28 from defendants. Defendants owned a mostly-submerged lot (Lot 54) located between the road and the water.

Tillotson had maintained a small dock on Lot 54 since 1897 which plaintiff had continued to use and maintain until 1908 when defendants disclosed plans for a larger dock. Plaintiff seeks an injunction to enjoin the building of this larger dock and to quiet title. Plaintiff claims that he was fraudulently misled into believing he owned Lot 54, in addition to Lot 28 and, therefore, has riparian rights.

HELD: The Court holds that the plaintiff took title through a 1901 plat. This plat clearly showed that Lot 28 did not touch the water; therefore, plaintiff had constructive notice of the non-riparian character of Lot 28. If there was misrepresentation, the cause of action by plaintiff should be against Tillotson, the grantor, not the defendants. The owner of the shore owns to the center of the lake and may plat and use his lands, subject to the right of other riparians. Plaintiff receives no riparian rights or title to Lot 54 by their deed.

A.M. Campeau Realty Co v City of Detroit,
162 Mich 243 (1910)

SUBJECT: Boundaries - underwater land boundaries - riparian rights - prejudicial error - Detroit River

FACTS: Plaintiff sues to quiet title and to seek an injunction against interference with plaintiff's buildings or wharfs. The disputed boundaries form a triangular parcel on the Detroit River.

Defendant claims that it has title to the disputed area. Plaintiff claims title by a correctly drawn boundary line and by adverse possession. The Court only considers the boundary line question

HELD: The Court again reiterates the Michigan rule that the boundary line between two adjoining riparian owners, as to land covered by water, is not dependent upon the direction of the lines on land, but that the lines from the shore should run, as near as may be, perpendicular to the course of the stream. Here, the lower court decreed that the boundary line of the disputed triangle is a line running approximately to the thread of the stream. This was error, but not prejudicial error to the defendant. Affirmed for plaintiff.

People v Grand Rapids Power Co,
164 Mich 121 (1910)

SUBJECT: Riparian rights - navigable waters - navigability - Board of Supervisor's procedure - dam permission - forfeiture of franchise by non-action

FACTS: In 1902, Erwin petitioned the Board of Supervisors for approval of three dams to be built across the Muskegon River. An amendment to decrease the size of the log chutes was applied for in 1904. Both petition and amendment were approved by the Board with certain time limits on construction. Work was to be commenced on the first dam within two years from April 1, 1903; on

the second dam within four years; and on the third dam within five years; with all three dams completed by April 1, 1909 under threat of voiding the approval and forfeiture. Only one dam was built, started in 1905, completed in 1906, for \$250,000. The defendant purchased the dam from Erwin. In April, 1909 the Board declared all rights forfeited. The Attorney General claims that the approval by the Board was indivisible, and since it was revoked, the dam of respondent is illegal in operation and subject to forfeiture of the franchise. The Muskegon River is naturally navigable only for floatage.

HELD: The Court states that public rights that exist in navigable streams are merely easements and the riparian owner may do as he pleases with the submerged land, provided he does not infringe upon the public enjoyment of the easements. Statutes and the Constitution give the Board of Supervisors the power to authorize dams and bridges, thereby affecting the public right to navigation. The Board is the agent of the general public. The dam constructed does not affect navigation. The Court holds that the time limits are ineffective to allow a forfeiture of the rights in the dam which was constructed on time. The approval was severable; therefore, the dam is allowed because the Board of Supervisors had no authority to impose the forfeiture.

74

Walton Cranberry Co v Seamon,
171 Mich 98 (1912)

SUBJECT: Prescriptive right to flowage - dams - marshes - injunction

FACTS: Plaintiff is a cranberry grower who seeks an injunction to remove the dam of defendant and damages to his crops. Plaintiff claims a prescriptive right to flood the marshland owned by both plaintiff and defendant in connection with his cranberry growing activities. To do so, plaintiff manipulates his own dam causing periodic flooding of the marshlands. Defendant in a cross claim seeks damages for flood damage and an injunction against future flooding by plaintiff. The flooding for cranberries seems to have been

continuous since 1885, but the methods of water use have changed during that period.

HELD: The Court agrees with the trial court that the prescriptive right of flowage depends upon continuity of purpose and use rather than continuity of method. Plaintiffs have established a prescriptive right to flowage in connection with their cranberry crop. The use was continuous, hostile, open, with notice to defendant, and continuing for over fifteen years. Defendant is enjoined from maintaining his dam and must pay \$1,000 flood damages for crop injury caused by the dam.

75

Tebbel v Spencer Electric Light & Power Co,
173 Mich 136 (1912)

SUBJECT: Dams - heads of water - agreement to determine rights - estoppel

FACTS: Both parties own and operate dams on the same river. They are one-half mile apart and have a natural fall of about six feet between them. Plaintiff is the upper riparian who claims that the head of water maintained by defendant's dam is too high, violates an agreement, and backs water up into plaintiff's tail race, thereby lessening his power. Plaintiff claims that the defendant has increased his dam head to eight feet or above eight feet, after using only a seven-foot head for past years. Plaintiff claims that defendant should be estopped to raise his dam that extra foot. Defendant claims his right to an eight-foot head by an 1874 court-enforced agreement between the former dam owners. The trial court found for defendant.

HELD: The Court upholds the 1874 agreement of an eight-foot head at defendant's dam. Defendant still has this right despite the fact that he maintained only a seven-foot head for over twenty years. The non-use of the one foot for that time would not deprive defendant of the right to claim and use it now. The agreement was unconditional and perpetual, so the right continues despite non-use. The Court finds little or no reliance by the plaintiffs in using

their property upon the one foot non-use by defendant. Estoppel requires some evidence of dealing in reliance of apparent existing conditions. The eight-foot head is construed to be a standing head rather than a running head.

76

Kennedy v Niles Water Supply Co,
173 Mich 474 (1912)

SUBJECT: Riparian rights - inland lake - prescriptive use - estoppel

FACTS: Plaintiffs are riparian proprietors upon Barron Lake. They seek an injunction against defendant water company from taking any water from the lake. Defendants have been removing water from the lake for over thirty years by a sunken twelve-inch pipe. Recently six and nine-inch pipes have also been sunk. The nine-inch pipe was sunk lower than the other two pipes. Trial court granted plaintiffs' request for an injunction.

HELD: The majority opinion agrees with the trial court that the riparian owners have a common right, although they have no title to the use of water in its natural state. Unless the common rights of other riparian owners are interfered with, excessive use by a riparian, however long exercised, will not ripen into a prescriptive right. In order to be a prescriptive right, the use must be visible, continuous, notorious, over fifteen years and exclusive. The majority feel that an increase in the depth of the pipes should not be allowed, even though the quantity removed will not increase. The majority maintains the status quo and does not allow an estoppel argument concerning the new pipes.

The minority opinion used facts not pointed out by the majority. The lake has no inlet or outlet. The amount of water removed by defendant has actually decreased materially over the last twenty years. The amount of water taken by defendants is very small compared to the relative size of the lake. The minority feels that the defendant has a right of removal by prescription to a certain volume of

water. The prescriptive easement should be based upon the quantity of water removed rather than the method of removal. Also, the minority feels that plaintiffs should be estopped, by laches, because they sat upon their rights and watched for years as defendant expended money and equipment to remove the water.

77

Brockway v Hydraulic Power and Light Co,
175 Mich 339 (1913)

SUBJECT: Riparian rights - flooding - overflow - flowage rights - injunction - dam height - prescription pondage

FACTS: Plaintiffs are twelve riparian owners on Intermediate Lake who are seeking an injunction to enjoin flooding of their lands caused by defendant's dam. Plaintiffs claim that a newer dam was built by defendant in 1906 at a higher level than the old dam. They received a verdict in the trial court and an order issued to lower the dam by twenty-four inches. There was conflicting evidence at the trial, but defendant's evidence was primarily theoretical, while plaintiffs' evidence consisted of actual observations and experiences, and therefore carried more weight.

HELD: Defendant claims that his damage would be so great in comparison to the damage done to the riparians that there should be no injunction issued in equity. But the Court rejects this theory and holds that the owners of several hundred acres injuriously affected by the new overflow may maintain a suit to enjoin an increase in the prescriptive flowage rights of the dam owner. The Court says it follows the rationale of A.P. Cooke Co v Beard, 108 Mich 17. Prescriptive flowage right cannot be increased by raising the height of the dam or by maintaining the dam more perfectly at the same height resulting in increased pondage.

Lepire v Klenk, 180 Mich 481 (1914)

- SUBJECT:** Easements - navigable waters - canal - obstruction of a public way - injunction
- FACTS:** Plaintiff is a river traveler who travels the water to and from his home. He seeks an injunction to remove an obstruction placed by defendant in a navigable canal. Plaintiff claims that this is a navigable highway and that the public has used these navigable waters for many years. The public has improved and dedicated the canal and it is the only way by which the complainant may reach the lake and river from his home. Trial court issued the injunction as plaintiff requested.
- HELD:** The Court finds that plaintiff has shown an injury to the public as well as a special injury to himself different than the injury to the public. He is entitled to the injunction to restrain defendant from obstructing the canal by willfully sinking barges.

City of Battle Creek v Goguac Resort Association,
181 Mich 241 (1914)

- SUBJECT:** Riparian rights - city water supply - diversion - pollution bathing - drinking water - injunction - estoppel
- FACTS:** Plaintiff seeks an injunction against defendant resort association to enjoin bathing beaches on Lake Goguac. Both parties are equal riparians and own parts of the lake bed. In 1887, the city started taking water from the lake and now takes 3 million gallons per day. Both the city and the resort association had a common grantor in Surby. Surby first sold to the city with the knowledge of its piping plans. Surby was himself a resort owner and later sold to defendants who increased the resort business.

HELD:

The majority opinion agrees with the trial court and grants the city its injunction. The Court reasons that the taking of water by the city is lawful and reasonable and does no injury to any riparians because the city has caused the once outlet-free lake to now be fed by Minges Brook. This brook connection keeps the lake freshly supplied with water and maintains the lake level despite the city's taking. The Court states that no one has a property right in the water. The riparian's rights are usufructuary only, that is, the right of enjoyment without holding title. One riparian may not restrain the use of the water by another riparian owner for non-riparian purposes, unless such use results in injury to the first. Another ground for the injunction is estoppel. The parties had a common grantor in Surby, the resort owner. When defendant resort association purchased, it did so with constructive notice that the city had bought from Surby and actual knowledge of the city's pumping operations. Defendant cannot by polluting the waters make plaintiff's grant valueless. The Court states that the resort association's use is unreasonable and unlawful. It points to the limited decision in People v Hulbert, 131 Mich 156. The resort use, as unreasonable, was foreshadowed in that opinion. The bathing use is considered a health hazard to 30,000 people, so the injunction issues.

There is a dissent which considers the city's taking to be unreasonable and unlawful. Each riparian is entitled to a reasonable use of the water for domestic, agricultural, and mechanical purposes. The parties are equal riparian owners; therefore, the Court should not aid the city in its unlawful and unreasonable use by granting the injunction. Note: This case was decided by an equally-divided four-to-four court, which required the injunction to continue for plaintiff.

80

Slote v Constantine Hydraulic Co.
182 Mich 260 (1914)

SUBJECT: Dams - flowage rights - injunction - damages

FACTS: Plaintiff is a riparian farmer on the St. Joseph River who sought an injunction against defendant water power company. Defendant had the right to build a dam with an eight-foot head and to overflow lands accordingly. In 1904 and 1905 defendant raised its dam thirty inches and some additional lands of plaintiff became submerged. Plaintiff claims thirteen acres at \$100 per acre as damages. Defendant claims four to seven acres at \$75 to \$90 per acre. Instead of issuing the desired injunction, the trial court granted to plaintiff his damages of \$1,300.

HELD: The Court agrees with the trial court decision that the damages were justified under the proofs. Plaintiff not only had additional land submerged, but trees were killed on those lots. The damages were affirmed and justified, despite another suit that required lowering of defendant's dam. Any changes in the equities thus occasioned must be dealt with at the trial court level, not the appellate level.

81

Patterson v Dust, 190 Mich 679 (1916)

SUBJECT: Public beach - anchorage rights - bathing rights - municipal uses - pollution

FACTS: The City of Detroit maintained a park and bathing beach at Belle Isle. Owners of houseboats anchored off the island and dumped their garbage and sewage which polluted the beach. This is a bill against city officials to enjoin them from interfering with anchoring and mooring of boats. City asks in a cross-bill for an injunction restraining complainants from anchoring their houseboats near the island. Decree for defendant city.

HELD: Plaintiffs argue that right of navigation includes a right to moor their houseboats. The city concedes the right to navigate, but denies the right to anchor indefinitely near the swimming beach and pollute the water. Court held that city, as riparian, was entitled to relief. Decree affirmed. The Court states "the authorities are nearly all agreed that a riparian owner has a right to the enjoyment

of the waters that flow past his premises in an unpolluted state.”

82

Long v Schroeder, 191 Mich 147 (1916)

SUBJECT: Dam - prescriptive rights in flowage - injunction - dam height

FACTS: Plaintiff is a riparian owner located on the River Raisin. He seeks an injunction to prevent an increase in the height of a new dam just below plaintiff's land, operated by defendant. There was an old dam which was replaced by a new dam, which plaintiff alleges is higher than the old dam. Plaintiff claims that this increase will submerge more of his lands than are currently overflowed. Plaintiff admits that defendant has obtained a prescriptive right in the flowage, but seeks to enjoin future increase in the dam height and prevent further flowage.

HELD: The Court agrees with plaintiff, on the proofs, as did the trial court. The injunction issued and ordered that the new dam should be lowered by ten inches.

83

Giddings v Rogalewski, 192 Mich 319 (1916)

SUBJECT: Trespass - private lake - meandered waters - navigability - fish and game regulations

FACTS: Plaintiff is a farm owner and brings a trespass action. Upon this land is a twenty to twenty-five acre lake which is eight to ten inches in depth. There are no surface streams in or out of the lake. Defendant claims that he has the right to fish in this lake without fear of a trespass action. He claims under a statute that gives the right to fish in meandered, navigable waters where fish have been introduced by the State. Defendant claims there is an underwater stream by which fish can pass to and from the lake to other bodies of water. Defendant's proofs fail to

establish this subterranean stream. The trial court found for plaintiff and granted nominal damages of \$.06.

HELD: The Court agrees with the trial court that defendant has no right to fish in this small, shallow inland lake without an outlet. Defendant had the burden of showing the lake to be either meandered or navigable in order to be authorized to fish under the statute. He did neither. The Court reaffirms the test of navigability stated in Moore v Sanborne, 2 Mich 520. To be navigable, the waters must be capable of being used by the public as a highway for purposes of commerce, trade, and travel by the usual and ordinary modes of navigation. The small, unmeandered, shallow, and disconnected lake wholly on plaintiff's land is not navigable and an action for trespass will lie, even though plaintiff may be subjected to the fish and game laws of the State. The nominal damages to plaintiff are affirmed.

84

Schenk v City of Ann Arbor,
196 Mich 75 (1917)

SUBJECT: Percolating waters - landowner's rights to remove - municipal corporations - diversion of percolating waters - injunction - damages

FACTS: Neither party is a riparian. Defendant needed additional water so they purchased land and sunk wells approximately three miles from the city. Plaintiff sought an injunction to enjoin the city from taking water from such land. He claims that the sixteen-inch diameter well operated by the city, which draws 3,700,000 gallons per day, diminishes the water in his well and those wells of nearby landowners. Defendant relies on the common law right of a landowner to take and use all percolating waters beneath his property that are not classifiable as subterranean waters (defined underground channel or lake). Defendant seeks to use more than the natural flow by utilizing the pumps to remove water.

HELD: The Court finds that under the circumstances the right of landowners, to the injury or detriment of other landowners, to take from his own land such percolating waters is a qualified right. It is qualified by the rule of reasonable user. The municipal corporation has no special privileges that the ordinary private owner might not have. The use by any landowners of the percolated waters under his land is subject to the use being reasonable. The Court follows the rationale of many New York cases. The injunction, however, is still not issued because the well is not currently functioning and plaintiff has been compensated for past actual injuries.

85

Winans v Willetts, 197 Mich 512 (1917)

SUBJECT: Navigability of lake and outlet - trespass - state control of fish - injunction

FACTS: Plaintiff is a riparian owner on Winans Lake who seeks an injunction to prevent future trespasses by defendant fisherman. Winans Lake is a 100-acre lake surrounded by a public highway, with a small outlet, and stocked by public fisheries. Plaintiff claims that he owns or is lessee to all the bed of the lake and has exclusive rights to possession and fishing. Defendant claims that Hull owns about one-third of the shoreline and has allowed fishing by defendants for thirty years. Defendants also claim that one can step directly from the public highway to a boat upon the lake's surface. Defendants further claim a lease by plaintiff to Pleasant Lake Club letting fishing rights. There is no evidence of a meandered shore or of defendants claim that the lake and the outlet is navigable. The outlet leads to a string of small lakes eventually reaching the Huron River. A small boat could be floated from Lake Erie to Winans Lake. Trial court found for plaintiff.

HELD: The Court, however, finds the lake is privately owned and not navigable under Giddings v Rogalewski, 192 Mich 319. Since it is privately owned and not navigable, a trespass action may be sustained, even though entry is made from a public highway.

Strong dissent stresses that the capability of navigation is all important, not the actual use. The lake should be considered navigable and since the stocking of the lake was funded by the public, the statute, 1915 CL 7694, should apply granting the public a right to fish in these waters under Lincoln v Davis, 53 Mich 375.

86

Parsons v E.I. DuPont De Nemours Powder Co,
198 Mich 409 (1917)

- SUBJECT:** Negligence action - navigable waters - riparian rights to discharge - right to passage on ice
- FACTS:** A young boy drowned while skating on the Saginaw River when he fell through the soft ice caused by defendant plant. The Saginaw River is a large, navigable stream which borders the defendant manufacturer, who returns water at this point at a 70 to 80-degree temperature. This is a negligence action by the family of the boy for wrongful death due to a breach of defendant's duty to provide barriers or notices of warning of the ice conditions. At the point of discharge, there was no ice but the waters were covered by tar scum which had the appearance of ice. Trial court granted judgment to defendant on a directed verdict.
- HELD:** The Court finds that the public has a right to use a fluid or frozen navigable river for travel upon the surface with due regard to riparian uses. These navigable rivers are public highways and the right of passage is paramount. The question of duty to warn skaters was a jury question as was the question of defendant's contributory negligence. Reversed for plaintiff.

McMorran Milling Co v C.H. Little Co,
201 Mich 301 (1918)

SUBJECT: Riparian rights - navigable streams - navigation improvements by U.S. - eviction - breach of contract

FACTS: Plaintiff is a riparian owner on the St. Clair River who entered into a 1909 contract to grant to defendant a license to remove sand and gravel from the riverbed for a period of ten years at \$1,400 per year. In 1910, defendant was informed by the War Department that dredging would not be allowed because of its interference with navigation. Defendant stopped dredging and paying under the contract, so plaintiff sues under the contract for money allegedly due because of the breach. The trial court directed a verdict for plaintiff.

HELD: The Court again endorses the Michigan concept that the owner of riparian property holds title to midstream, but subjects this ownership to the federal power to control navigation under the Commerce Clause of the United States Constitution, art I, § 8. The Court cites a string of United States Supreme Court cases that illustrate the absolute power of Congress under the Commerce Clause to improve navigable streams and waters. The riparian's title is a qualified title burdened with a public trust for the use and benefit of public commerce and navigation. The public has an easement of passage over navigable waters, but the United States Government's rights are more powerful and dominant than a mere easement; it is a right paramount to the riparian's rights and can cause eviction. Plaintiff may recover the contract price only up to the eviction date.

Suffrouw v Brewer, 204 Mich 370 (1918)

SUBJECT: Riparian rights in a stream - diversion - prescriptive rights - injunction

FACTS: Plaintiff and defendant are both riparian owners of adjoining parcels. A stream runs through both parcels and was diverted about forty or fifty years ago. Plaintiff seeks an injunction to prevent defendant from diverting a larger portion of the water toward defendant's farm. The trial court found that forty or more years ago the water was divided so that half the water flowed to plaintiff's farm and half to defendant's farm. It was continued in that manner until the recently-attempted diversion by defendant which provoked this litigation.

HELD: The Court agrees with the trial court that the evidence submitted suggested an equal division of the water. Michigan recognizes that a prescriptive right to the flow of water can be acquired by fifteen or more years of use. Plaintiff receives his injunction to prevent further diversion by defendant.

89

Beach v Hayner, 207 Mich 93 (1919)

SUBJECT: Inland lake - riparian ownership - right to use the lake surface - lessees - trespass

FACTS: Plaintiff owns a majority of the riparian property, except for five small parcels on Silver Lake. Silver Lake is an inland lake of about 100 acres. There is no inlet or outlet. Defendants are the tenants of a cottage located on one of the small parcels. They claim the right to travel at will over the surface of the lake. Plaintiff claims they are trespassers. Trial court found for defendants.

HELD: The Court agrees with the logic of the trial court. They find that the lake is not navigable under the doctrines of Giddings v Rogalawski, 192 Mich 319. Where there are several riparian owners to an inland lake, the owners, their lessees or licensees may use the entire surface of the lake for boating or fishing as long as they do not interfere with the reasonable use of the waters by the other riparian owners.

The Court distinguishes the exclusive rights to fowling and fishing. The Court granted an exclusive right to fishing in Sterling v Jackson, 69 Mich 488. This apparently does not extend to exclusive fishing rights on a private, inland lake which is not navigable and owned by several owners.

90

Johnson v Burghorn, 212 Mich 19 (1920)

SUBJECT: Riparian rights on navigable streams - trapping - water-ice - injunction

FACTS: Plaintiff is the riparian owner of an island located in the Grand River. He seeks an injunction enjoining defendant from trapping muskrats upon his land. Plaintiff claims the exclusive right to trap upon such submerged lands and their ice surface. Plaintiff posted signs to put trespassers on notice of his exclusive trapping rights. Defendant claims that the plaintiff's ownership is limited by the public rights of navigation, hunting, and trapping upon the water or ice. The trial court issued an injunction for plaintiff enjoining defendant from hunting, fishing or trapping on plaintiff's land, except the area over and upon navigable waters. Plaintiff appeals.

HELD: The Court quickly limits the scope of the case to the issue of trapping, excluding the hunting and fishing questions. The Court reaffirms the principle of Lorman v Benson, 8 Mich 18, that the riparian owner owns the submerged lands to the thread of the navigable stream. He also owns the ice, subject to the rights of other riparians. The Court broadens the trial court injunction to include the navigable areas, as well as the non-navigable areas. Trapping is a property interest and lies exclusively in the riparian owner allowing him to maintain a trespass action against other trappers because ice must be cut and traps must be anchored in the submerged land.

Douglas v Bergland, 216 Mich 380 (1921)

- SUBJECT:** Riparian rights - right to use submerged land - public rights - right to fish in navigable lake - trespass
- FACTS:** Plaintiff sues for damages for an injury sustained while she fished from defendant's saw mill rollway. Plaintiff claims that she has the right to fish in navigable waters, such as Lake Gogebic, which was stocked with fish at State expense. Trial court found for plaintiff.
- HELD:** The Court finds that due to the nature of the lake there can be no doubt that plaintiff had a right to fish in these waters. But the right to fish in the waters of a navigable lake does not carry with it the right to trespass upon the dry land of a riparian owner and thereby gain access to such lake to exercise the fishing right. The separate tort issues of the status of plaintiff (invitee, licensee, or trespasser) and the duty owned by the defendant are also discussed in the opinion. The Court also reaffirms the notion that a riparian is entitled to use his submerged lands as he may lease, subject to not interfering with the rights of navigation. Reversed for defendant.

Goodrich v McMillan, 217 Mich 630 (1922)

- SUBJECT:** Flowage rights - prescription - easements - dam - right to have artificial lake level maintained
- FACTS:** Plaintiffs are cottage owners who are seeking a mandatory injunction to require defendant to rebuild and maintain a dam upon the Dowagiac River. This dam had been built in 1850 by defendant's grantor and had maintained the lake for nearly seventy years at an artificial level three feet above the lake's natural level. Flowage rights were thus obtained by prescription. The old dam gave out in 1917 and defendant decided not to rebuild. Plaintiffs built a dam, which defendant destroyed. Plaintiffs then built another dam and sought an injunction against further

interference. The plaintiff-cottage owners claim a right to have their lands overflowed and a right to have the artificial height of the lake maintained. They quote Kray v Muggli, 84 Minn 90, which follows a minority stance. Trial court found for defendants.

HELD: The Court adopts the majority view that in order to establish a prescriptive right in overflow, the use must be adverse. The servient estate gains no rights in the flowage because they had the opportunity at any time to have overflow removed. Their use of the overflow was not adverse, but rather, permissive. Defendant has no obligation to rebuild dam.

93

Merkel v Consumers Power Co,
220 Mich 128 (1922)

SUBJECT: Dam - flooding - reasonable use - damages

FACTS: Plaintiff is a farmer who seeks damages to his land and crops located on the AuSable River. Defendant allegedly operated several darns upon the river and in so doing, stored water at various times and later released the water. Plaintiff claims that these releases caused flooding and damage. He claims that this is an unreasonable use by defendant and is therefore the basis for liability. The trial court found for plaintiff.

HELD: The Court agrees with the trial court and upholds the doctrines of previous cases like Dumont v Kellogg, 29 Mich 420. Despite the fact that defendant is a public power company, they have no superior claim to the water. All proprietors have an equal right to use such water, but the use must be reasonable and consistent. The goal is a fair participation and a reasonable use by each riparian. But any injury that is incidental to a reasonable use of the common right will sustain no damages. Here, whether defendant's use was reasonable or not was a question for the jury. They decided for plaintiff and it will not be disturbed.

Affirmed. The right to maintain a dam is not an absolute right, but is qualified by the rights of other riparians.

94

Kavanaugh v Rabior, 222 Mich 68 (1923)

SUBJECT: Great Lakes - riparian rights - ownership of lake bed - accretion - ejection - adverse possession - meander line - public trust

FACTS: Plaintiff owns a lot near Saginaw Bay. There is a 280-foot strip of land between the lots and the present shoreline, but outside the established meander line. Plaintiff brings an ejection action against defendant, who built his cottage upon this strip. Plaintiff claims title by accretion and adverse possession. Defendant denies that plaintiff has title in the strip and claims that title in the beds of the Great Lakes are in the State. Trial court found for plaintiff.

HELD: The Court rejects plaintiff's accretion theory and attributes the strip to the general recession of Great Lakes waters. The receding has exposed the lake bottom. The Court reaffirms the doctrines of People v Silberwood, 110 Mich 103, and Ainsworth v Hunting & Fishing Club, 159 Mich 61; riparian owners along the Great Lakes own only to the meander line, and the title to land outside the meander line, subject to navigation rights, is held in trust by the State for public use. Plaintiff also failed on his adverse possession claim because lands held by the State under an express trust cannot be acquired by adverse possession. Plaintiff may not maintain an ejection action because he has not shown title. Reversed for defendant.

This case expressly overruled by the later case of Hilt v Weber, 252 Mich 198 (1930).

Glidden v Beaverton Power Co.
223 Mich 383 (1923)

- SUBJECT:** Deeds - reservations - riparian rights - flowage rights - non-use of easement
- FACTS:** Plaintiff is the owner of four acres which borders the Tobacco River. He seeks damages for injury to his land caused by the overflow resulting from the maintaining of defendant's dam. Defendants received a directed verdict at trial based upon the flowage rights acquired through their predecessors. Plaintiff acquired title from Barrett in a deed which had no reservations, but Barrett took from a deed from Ross in which flowage rights of any part of plaintiff's land caused by any dam at Beaverton, Michigan were reserved. Ross took title of the flowage rights to a twenty-foot head. Ross was the common grantor of both parties chains of title.
- HELD:** The Court finds that plaintiff was not an innocent purchaser because of his knowledge of the flowage rights and dam situation. Flowage rights may be reserved if expressly excepted in the deed. Here, the Court interprets the "any dam" reservation as an even stronger and clearer reservation than the "twenty-foot" head reservation. This made the reservation doubly certain that flowage rights were to be conveyed. Flowage rights are a valuable property interest in the nature of an easement and may be expressly reserved 'in perpetuity. This easement of flowage may not be destroyed by non-use, but may be destroyed by adverse possession and use of the easement by another. Affirmed for defendant.

McMillan v Etter, 229 Mich 366 (1924)

- SUBJECT:** Right to sever flowage rights from land - dam reconstruction - injunction

FACTS: This case is continued under the same facts as Goodrich v McMillan, 217 Mich 630. Plaintiff seeks injunction to prevent the reconstruction of a dam. Defendant cross-claims for specific performance of a land contract. There are several land contracts and deeds to different parties by McMillan at different times. McMillan acquired prescriptive flowage rights. Trial court held for plaintiff.

HELD: The Court states that these prescriptive rights may be severed from the land rights and may be sold separately. There is a presumption that a silent deed conveys all rights, but the Court finds that this was overcome by the evidence of the case. Witnesses testified that defendant, at the time of signing the land contract, knew that the contract was intended not to convey any water rights. There were no visible signs of water power or a dam site, so there will be no presumption that the flowage rights were included in the contract. Only visible, open, actual, and existing rights will attach to the conveyance and run with the land.

97

St. Helen Shooting Club v Mogle, 234 Mich 60 (1926)

SUBJECT: Riparian rights - exclusive hunting rights - severance of hunting rights from fee - public policy: void as against

FACTS: Plaintiff is a shooting club who seeks an injunction to enjoin defendant's hunting activities on Lake St. Helen. Plaintiff bought exclusive hunting rights in 1904 from the parties' common grantor. Defendant took title to his riparian property, subject to the exclusive hunting privilege of plaintiff. Defendant rents boats to the public which are equipped with blinds. The trial court found for defendant because it believed the contract conveying exclusive hunting rights separate from the fee conveyance was against public policy.

HELD: The Court reaffirms the doctrines of private, exclusive ownership and use stated in Ainsworth v Munoskong Hunting & Fishing Club, 159 Mich 61; Hall v Alford, 114 Mich 165; and Sterling v Jackson, 69 Mich 488. The

common grantor owned all the submerged bed of the lake. The owner, as such, has the exclusive right of hunting on his property. This hunting right is an incorporeal right which grows out of the real estate and may be severed from the ownership of the land. Once sold to someone who has no interest in the fee, it is nonetheless assignable and inheritable. The Court also states that this type of contract is not against public policy. The Court expresses doubt as to this stance, but feels the case law is too far committed to turn back now. Reversed and found for plaintiff.

98

Pleasant Lake Hills Corp v Eppinger,
235 Mich 174 (1926)

SUBJECT: Subaqueous land - riparian rights - adverse possession - stare decisis - injunction - trespass

FACT: Plaintiff corporation seeks an injunction to enjoin a trespass and to quiet title in a strip of land between high and low water marks on Winans Lake. It relies on Winans v Willetts, 197 Mich 512, and thereby claim to be the owner of all subaqueous lands to the high water mark and 900 acres of adjoining property. Defendants are also the owners of lakefront property and despite the small size of their parcel, they insist upon their riparian rights of surface travel and fishing. Plaintiff is the assignee of Burton, who was the vendee in a contract with Winans. Plaintiff, therefore, claims all those rights established in Winans, supra. Plaintiff's claim title to the strip by record title; defendants claim title by adverse possession. Trial court found for plaintiffs.

HELD: The Court quickly disposes of the issue of ownership to the narrow strip of land and recognizes the real issue: use of the lake. They reestablish the doctrine of St. Helen Shooting Club v Mogle, 234 Mich 60 (1926), by stating that riparian rights may be severed and conveyed separately from the fee. The possession, here, by defendants was not such actual, visible, notorious, distinct, or hostile possession as to ripen into title by adverse possession. The

Court emphasizes the \$170,000 that plaintiff spent in reliance upon Winans and, therefore, follows the principle of stare decisis. The waters in question were held to be private and navigable. The injunction issues. Affirmed for plaintiffs.

99

Nedtweg v Wallace, 237 Mich 14 (1927)

SUBJECT: Statute construed - lake bottomlands - Great Lakes - public trust

FACTS: Plaintiff sues in mandamus to compel the Commissioner of Conservation to execute a 99-year lease under 1913 PA 326. The waters on the shore of Lake St. Clair have receded to the point where several thousand acres have been dried and exposed. The State surveyed the lots and began leasing them. Plaintiff applied for a lease to the Commissioner and was refused because it was thought Public Act 326 was unconstitutional because of a breach of the public trust. Trial court found for plaintiff.

HELD: The Court upholds the statute as constitutional and not a breach of the public trust. The State, upon admission to the Union, acquired title to the beds of all navigable waters, subject to the public trusts of navigation, fishing and fowling. This common law trust is unchanging, inalienable and unshirkable by the State. These beds of the Great Lakes involve no riparian or littoral rights and are unfit for navigation, hunting or fishing. They are suitable for residency purposes and, therefore, may be leased by the State in its proprietary capacity under legislative authorization. The beds of navigable waters may pass by grant to individuals, but the sovereign power retains all public rights of navigation. J. Wiest follows the rationale of Illinois Central Railroad v Illinois, 146 US 387, concluding that lands can be disposed of to private parties consistent with the terms of the public trust "which being occupied, do not substantially impair the public interests in the lands and waters remaining." (Also see, State v Venice of America Land Co, 160 Mich 680 (1910), on patents and ownership of unsurveyed bottomlands.)

In a concurring opinion, J. Sharpe extensively quotes both Illinois Central Railroad, *supra*, and People v Silberwood, 110 Mich 103. He states that the Legislature, as the representative of the people, may grant the soil, or confer an exclusive privilege, or authorize a use inconsistent with the public rights, all subject to the general public purpose of government action.

In a strong dissent by J. McDonald, he emotionally calls for the invalidation of Public Act 326 as an unconstitutional violation of the public land for private use. The leasing arrangement here is equivalent to a fee conveyance and deprives the public of the use and enjoyment of the land. The leasing scheme is perpetual, ninety-nine years plus renewal options, with no acreage limitations and no discretion in the Commissioner. The dissent takes a different view of Illinois Central Railroad, *supra*; the grant of public trust lands can only be granted to private parties to use for public purposes. The rule stated by the majority takes away valuable rights belonging to the public and gives them to the wealthy few.

It is difficult to tell the extent of the public use limitation on public trust resource grants by reading Nedtweg. On rehearing, the Court narrows its ruling to relicted, unfit lands. This case must be read with the following companion case of Collins v Gerhardt, 237 Mich 38 (1926).

100

Collins v Gerhardt, 237 Mich 38 (1926)

SUBJECT: Navigability - riparian rights - fishing - trespass - public trust

FACTS: Plaintiff owns riparian lands on both banks of the Pine River. The Pine River is a trout stream which has been stocked by State fisheries. Plaintiff built a fence across the stream and claims an exclusive right to fish, bringing a trespass action against defendant fisherman. Defendant claims the right to fish in navigable, stocked waters and

relies upon the public trust doctrine. Trial court found for plaintiff.

HELD: The Court finds the Pine River to be navigable, based upon its capacity for floatage and public uses, despite non-use for such purposes. Although the title to the navigable stream lies in the riparian owner, it is subject to the public rights, including fishing. To grant to the riparian an exclusive fishing right would be to violate the public trust doctrine. The title to such submerged lands under a navigable stream is a limited title and qualified by the public trust, including navigation and fishing rights in the public. No trespass. Reversed for defendant.

The Court, here, adopts several of the points stressed by J. McDonald in his dissent in Nedtweg v Wallace, 237 Mich 14. The Court discards the private proprietor partisanship in favor of a stance that all public trust resources are subject to a public right.

Wiest J, dissent concludes, "the rights of plaintiff are vested property rights, and cannot be expropriated by legislative permission to the public to enter his close at will."

101

Preston v Clark, 238 Mich 632 (1927)

SUBJECT: Riparian rights - diminished flow - adverse possession - injunction - prescriptive rights - reasonable use

FACTS: Plaintiffs are lower riparian mill owners who seek an injunction to enjoin the defendant from maintaining an upstream dam. The mills and the dam are located on the outlet of Whalen Lake. The dam is two feet high and plaintiffs claim that this diminishes the water to their mill. Plaintiffs claim a prescriptive right to use the water and have the flow undiminished by diversion because it has been this way for over fifty years. The trial court denied the injunction.

HELD: The Court relies on Dumont v Kellogg, 29 Mich 420, in stating that plaintiffs have no right to monopolize the stream under the rule of prescription. The prolonged use must be adverse. A prescriptive right may be acquired by adverse use, but first in time (prior appropriation) alone does not give a prescriptive right no matter how long a period is covered by the use. The right to build a dam is not lost by non-use. To create the prescriptive right, the use must be visible, continuous, notorious, and for the period required. If no prescriptive use is involved, the riparian proprietors are then on equal footing and their use must be reasonable. But if defendant's dam, as here, serves a useful purpose in a reasonable way, the injuries that are inherent in any dam are considered to be merely *damnum absque injuria* (a loss which is not actionable). No injunction issues here.

102

Monroe Carp Pond Co v River Raisin Paper Co,
240 Mich 279 (1927)

SUBJECT: Riparian rights - water pollution - deoxygenation of water
- injunction

SUBJECT: Plaintiff is a fish farmer and lower riparian who seeks an injunction to enjoin defendant paper company from polluting the waters by deoxydation and claims damages for the loss of many carp. Plaintiff claims that the waste put into the river by defendant causes deoxydation of the water, thus making it an unreasonable use. The trial court agreed, but refused to issue the injunction because of the disproportionate injury to defendant. The trial court found that defendant paper company was the cause of 68 percent of the damages and the City of Monroe was the cause of 32 percent. They shared proportionately the costs of a \$23,141.40 verdict. Both parties appeal.

HELD: In affirming the trial court decision, the Court says that the riparian owner's right to use the water is not absolute and is limited by the rights of the other riparians. The upper riparian may render the water unfit for many uses by the lower riparian and still not give rise to a cause of action if

the conditions result from a reasonable use. Reasonableness depends upon the facts of the particular case. Injunctions are discretionary and here, after weighing the equities, the Court refuses to issue the injunction because of the large investment by defendant, the town's reliance upon the industry and the relative smallness of plaintiff's business. Also, plaintiff company was run by a longtime resident who well knew of defendant's pollution and could have anticipated the damage to his fish crop.

103

Kavanaugh v Baird, 241 Mich 240 (1928)

- SUBJECT:** Navigable waters - Great Lakes - title to subaqueous land - relicted land - right of access to navigable waters - public trust
- FACTS:** Plaintiff sues the Director of Conservation to quiet title to a strip of relicted and accreted land between the meander line and the present shoreline of Saginaw Bay, which is a part of Lake Huron. Plaintiff claims ownership by accretion and reliction because he owns the other property up to the meander line. Defendant claims that title is in the State, subject to a public trust. The trial court found for defendant.
- HELD:** The Court disagrees with the trial court's finding that the land was formed solely by accretion and finds instead that it was formed by both accretion and reliction. The Court cites the case of Kavanaugh v Rabior, 222 Mich 68, but decides that the case, although controlling on certain questions, will not be conclusive (*res judicata*) because the same parties are not now litigating. In Rabior, it was held that title to the strip between the meander line and the present shoreline was in the State, since its admission to the Union held in trust for its people rather than in the riparian. This same rule applies here. The trust doctrine is again affirmed. The ownership by the State of the submerged lands under the Great Lakes does not vest in the riparian owner when reliction changes the shoreline by drying once wetlands. The riparian right of owners on navigable waters to have access to navigable waters is

paramount and extends over the State-owned relicted lands. Although title to these relicted lands is in the State, they may not infringe upon this paramount right to access by the riparians.

This case was overruled by Hilt v Weber, 193 Mich 227 (1930).

104

Morgan v Kloss, 244 Mich 192 (1928)

SUBJECT: Navigable waters - navigation rights - riparian rights - bridge over navigable lake - injunction

FACTS: Plaintiffs are riparians on Diamond Lake who are seeking an injunction to restrain defendants from building a bridge to an island in the lake. Defendants own the forty-acre island and plan to subdivide it after the 1,700-foot bridge is constructed. The Board of Supervisors and the State Highway Department have approved. Plaintiffs claim that it will obstruct and destroy navigability. The trial court at first found for defendants, but upon rehearing issued the injunction.

HELD: The Court cites the cases of Collins v Gerhardt, 237 Mich 38, and Nedtweg v Wallace, 237 Mich 14, with approval. While riparians own the bed of an inland lake, this ownership is limited by the public right to free and unobstructed use of navigable waters. There is no right to bridge such navigable inland lake waters and thereby obstruct navigation, unless expressly granted by the State Legislature. There is a statute for bridging navigable streams by private parties, but the Court holds that this does not apply to the navigable inland lake situation presented here. Affirmed for plaintiffs.

Gillespie v Dunn, 246 Mich 415 (1929)

SUBJECT: Patents - adverse possession - prescriptive right of flowage
- artificial lake - lake level

FACTS: Plaintiffs are subdivision owners located on an artificial lake caused by a mill. They seek to abate flowage on their land or to have the lake level maintained at a certain level. The dam has been operating and overflowed plaintiffs' land for over fifty years. Defendants, therefore, claim a prescriptive right to flowage. Plaintiffs claim that their land was not granted by the U.S. Government until 1920 and therefore no prescriptive rights could begin to run on the statute of limitations until the government relinquished control. Defendants introduced into evidence an 1892 grant and a 1900 letter which contradict this theory. Trial court found for defendants.

HELD: The Court holds that the validity of a United States patent is under federal jurisdiction, but the question of prescriptive rights is a state question. The Court concludes that defendants do have a prescriptive right to flowage over plaintiffs' lands. Plaintiffs acquired title by adverse possession and a 1925 quiet title action. The flowage by defendants has been continuous for over fifty years and is, therefore, well established. The Court also holds that this artificial lake is actually a mill pond having no natural level and must necessarily fluctuate in levels. Affirmed for defendants.

St. Helen Shooting Club v Carter,
248 Mich 376 (1929)

SUBJECT: Hunting rights - navigable waters - trespass - injunction -
stare decisis

FACTS: Plaintiff shooting club seeks an injunction to enjoin defendants from hunting on Lake St. Helen. The trial court granted the injunction.

HELD: The Court agrees with the trial court injunction protecting the exclusive hunting rights on Lake St. Helen which were upheld in St. Helen Shooting Club v Mogle, 234 Mich 60. The Court quickly dismisses the theory of one defendant that he was not a trespasser because he entered the lake directly from a public highway and, therefore, had the right to hunt. Defendants claim under Collins v Gerhardt, 237 Mich 38, is taken more seriously.

Defendants claim that all navigable streams and lakes of the State are subject to a public trust for navigation, fishing, and hunting. If Lake St. Helen is navigable, the trust should attach and defendants should defeat the exclusive hunting privilege of Mogle. The Court seems to be sympathetic to this theory, but upholds the injunction based upon plaintiff's reliance upon the Mogle case. Plaintiff has acquired new lands and sustained legal fees in reliance upon the exclusive hunting rights of Mogle. The Court applies the doctrine of *stare decisis* since the same property, parties and rights are involved here. The injunction issues to protect the exclusive hunting rights of plaintiff.

107

Putnam v Kinney, 248 Mich 410 (1929)

SUBJECT: Inland lake - riparian rights - highway - public access - meander lines - navigability - trespass - injunction

FACTS: Plaintiff owns all the land surrounding Conover Lake. The lake is meandered without inlet or outlet and is bordered on the south by a public highway used for thirty-five years by the public. Defendants claim a right of access directly from the highway onto the lake. This access has been used for thirty-five years to water horses and launch rowboats. Plaintiff put a fence in the water to block such access and it was removed by unknown persons. Plaintiff seeks an injunction to prevent public access and trespass. Trial court found for defendants.

HELD: The Court cites Beach v Hayner, 207 Mich 93, for the rule of lake access by the public when several riparians own the lake. When there are several owners of an inland lake, the proprietors, their licensees and lessees may use the whole surface for boating and fishing, so long as it does not interfere with a reasonable use by other riparians. But the Court distinguishes the sole owner of an inland lake, because in such a case, no demarcation lines need be drawn to designate boundaries. The Court states that Winans v Willetts, 197 Mich 512, is the governing case. It was held there that the lake was not public, not navigable, and was privately owned. In Winans there was no outlet. Here, there is no outlet; the pond is isolated. Conover Lake is private, not navigable, and has no private access without a trespass. The injunction issues for plaintiff.

108

Manney v Prouse, 248 Mich 655 (1929)

SUBJECT: Navigability - inland lakes - fishing access to watercourse - easement of passage - reasonable use

FACTS: Bill to enjoin defendants from exercising riparian rights. Involved is a small body of water known as Prouse Lake. The Lake is ten acres, spring fed, has no navigable outlet. Practically all of this lake is on plaintiffs' land. At the northerly end, shallow water extends on defendants' eighty acres. Plaintiffs constructed a fence at the north line of their property. Plaintiffs purchased their farm from defendants, who allegedly assured them that all of Prouse Lake was on land being purchased. Plaintiffs do not seek to rescind or ask for damages; they only ask for an injunction. Trial court found for defendants.

HELD: The Court held that defendants are riparians; therefore, they are entitled to use the entire surface for boating and fishing provided they do not interfere with reasonable use by other riparians, as in Beach v Hayner, 207 Mich 93 (1919).

Bauman v Barendreot, 251 Mich 67 (1930)

SUBJECT: Inland lakes - riparian rights - deed without reservation - right to fish - injunction

FACTS: Plaintiff seeks an injunction to enjoin boating and fishing by defendant upon Waldon Lake. Defendant cross-claims for an injunction to enjoin plaintiff's interference. Both parties are riparian owners. Trial court found for defendant. The lake is a twelve-acre lake with an unnavigable inlet and a boatable outlet, and fish have been stocked by the State. The proprietors and the general public have fished here for many years.

HELD: The Court traces the chains of titles and holds that where the deed contains no reservation, riparian rights attach to lots bounded by natural watercourses. The titles and rights that attach to any inland waters are governed by the same rule, i.e., the title to the bed lies in the riparian to midstream or mid lake. Each riparian owner, when owned by several riparians, has the right to fish in any part of the lake. Affirmed for defendant.

Hilt v Weber, 252 Mich 198 (1930)

SUBJECT: Meander lines - boundaries - Lake Michigan - riparian rights - *stare decisis* - public trust

FACTS: Plaintiffs are attempting to foreclose on a land contract. Defendant seeks an accounting, claiming fraudulent misrepresentation in the sale of property near Lake Michigan. The property in question is a strip of relicted land between the meander line and the current shoreline. The meander line is 277 feet from the water's edge, forty-four feet above the water level and located in the woods. Defendant alleges that plaintiffs' agent misrepresented the boundary. The trial court relied on Kavanaugh v Rabior, 222 Mich 68, and Kavanaugh v Baird, 241 Mich 240, and found for defendants.

HELD: The Supreme Court reexamines these Kavanaugh cases and finds that they were decided contrary to the Michigan and federal law. They gave the title in the relicted strip to the State, subject to the public trust. The meander lines are no longer used as boundaries, but merely general, inaccurate representations of the shore. The exception is swamplands, where the meander lines are still conclusive as boundaries. The Michigan Court follows the federal rule, that the riparian owner on the Great Lakes owns to the current water lines, not the meander line. The basis of the riparian doctrine is actual contact of the land with water. The Court overturns the Kavanaugh cases because they amounted to a taking without compensation. The Court lists the general riparian rights of general water usage for bathing and domestic use, wharfage, access to navigable waters, and a right to accretions and relictions. The Court states that defendants suffered no damages from the misrepresentation when the new rules are applied. The foreclosure is decreed. The State, by this ruling, loses title to the relicted lands, but gains the right to tax such lands.

Dissent by C.J. Wiest states that now 1,624 miles of Michigan shoreline held in trust for the use and benefit of the citizens has been lost for all time.

111

Kavanaugh v Baird, 253 Mich 631 (1931)

SUBJECT: Great Lakes - relicted land - riparian rights - meander lines

FACTS: This citation is merely a note of a rehearing of the Kavanaugh case located at 241 Mich 240.

HELD: The Court enters a decree to quiet title in the plaintiff to a relicted strip of land between the meander line and the water line of Saginaw Bay. The Court follows the rationale stated in Hilt v Weber, 252 Mich 198.

112

Bushman v Estleman, 256 Mich 243 (1931)

SUBJECT: Artificial drainage ditch - navigability - private lake - trespass - injunction

FACTS: Plaintiff is the owner of all land around and under Independence Lake. The lake is unmeandered and has no outlet except for a drainage ditch which connects the lake with a pond upon defendant's land nearby. Defendant poled a boat down the ditch to gain access to the lake. Plaintiff claims trespass and seeks an injunction to enjoin defendant's poling a boat through the ditch. The trial court issued the injunction.

HELD: The Court agrees with the trial court injunction. The trial court had found that the ditch was not navigable in fact and this finding is upheld on appeal. The Court follows the traditional tests of navigability set out in Giddings v Rogalewski; 192 Mich 319; Collins v Gerhardt, 237 Mich 38; and Putnam v Kinney, 248 Mich 410. The ditch is not navigable and cannot be used as a public highway. The injunction issues to enjoin the trespass.

113

Rosema v Construction Materials Corp.,
258 Mich 457 (1932)

SUBJECT: Navigable waters - right of boat owners to overlap adjoining land - trespass - injunction - prescriptive rights

FACTS: Plaintiff and defendant are both adjoining riparian owners on the Grand River. The waters are navigable and defendant operates a sand and gravel company with shipping docks. The docks are located on defendant's land and plaintiff has no dock. Daily, the defendant ties up to his dock so that the stern of the ship overlaps plaintiff's property. Defendant's agents daily enter upon plaintiff's land in order to tie up the ships to the dock. Plaintiff seeks an injunction to enjoin defendant's ships from overlapping plaintiff's waterfront and from entering upon

his land to tie up the ships. Trial court issued the injunction.

HELD: The Court stresses that plaintiffs have no dock on the property, nor are they deprived of access to their property. A navigable river is a public highway and is open to all reasonable navigation by anyone. The riparian has a right, therefore, to tie ships of ordinary size to his docks overlapping the adjoining property, provided reasonable access to the river is not prevented. This overlapping creates no prescriptive rights in the dock owner. Reversed, no injunction may issue to prevent the alleged trespass.

The remedy at law (damages) may still be available to plaintiff for trespass.

114

Soo Sand & Gravel Co v M. Sullivan Dredging Co,
259 Mich 489 (1932)

SUBJECT: Gravel taken from bed of Great Lakes - leases - riparian rights - statutory construction

FACTS: Plaintiff alleges that defendant trespassed upon the Lake Superior bottom adjacent to plaintiff's land. Defendant took sand and gravel, relying upon a lease from the Department of Conservation. The statute is claimed to grant an exclusive right to the sand and gravel in the owners and lessees of frontage up to one mile from the water line, subject to the paramount rights of navigation, hunting and fishing. The statute also creates liability and a fine for infringers. The trial court directed a verdict for defendant.

HELD: The Court again states that riparian rights are property and are not generally to be taken by the State without just compensation to the owner. The statutes are construed by the Court to forbid the Department of Conservation to lease the right to take sand and gravel from the Great Lakes bed in front of a private owner's land. The riparian owner may lease or not lease. The State may lease only as long as the public trust is not violated, nor the federal

right in navigation, nor the rights of riparian owners. The lease by the State is void because it infringes upon the riparian owner s rights. Reversed; found for plaintiff.

115

Killmaster v Zeidler, 269 Mich 377 (1934)

SUBJECT: Adverse possession - tacking - navigable waters - accretion
- Great Lakes

FACTS: Plaintiffs seek to set aside deeds and quiet title to a lot on Lake Huron. Defendant cross-claims and asks for a determination of clear title. Defendant's title is based upon the adverse possession of his predecessors. The land in question is accreted land. Trial court found for defendant.

HELD: The Court declares defendant to be the owner of the land, although they will not allow tacking of the different adverse periods of the predecessors in order to allow a claim of adverse possession. But one of the predecessors in defendant's claim of title did hold for the required fifteen-year period, so defendant acquires title through this adverse possession. Defendant therefore being the owner, acquires the accreted strip under Hilt v Weber, 252 Mich 198. Hilt clearly states that accreted bordering the Great Lakes belongs to the titular owner of the adjoining land.

116

Croucher v Wooster, 271 Mich 337 (1935)

SUBJECT: Highway separating lot from lake - riparian rights
- reservations in deed - trespass - injunction - Gull Lake

FACTS: Plaintiff is the owner of a strip of land who seeks to quiet title and an injunction against trespass. The strip is located in front and under the lake, north of the highway. Defendants claim to be riparians on Gull Lake, despite the highway being located between their lots and the lake. The highway was surveyed to be sixty-six feet wide,

leaving no land between the highway and the lake. Trial court found for defendants.

HELD: The deed to defendant had an express reservation in it to reserve the use of the parcel to the grantors, except for residential purposes. The Court construes this attempted reservation to be repugnant to the grant. The land was transferred unencumbered by any reservation in the grantor. Conveyance of the lot abutting a highway which touches a lake carries with it the same riparian rights on the opposite side of the highway as it would have had the lot itself been touching the lake, unless there is an express limitation in the deed. Had there been intervening land between highway and lake, the result would probably have been different. The deed gave to the grantees a common right with other riparians to exercise full riparian rights. Affirmed for defendants.

117

In Re Petition of Lenawee County,
276 Mich 591 (1936)

SUBJECT: Natural water levels - judicial level fixing - bias

FACTS: The Board of Supervisors of Lenawee County petitioned the court to determine the natural level of Devils Lake and Round Lake. Defendant is the village of Addison, who protests the finding by the trial court of 1,043.3 feet above sea level. Defendants claim that the natural level of the lake cannot be fixed by man, but only by nature.

HELD: The Court here upholds the statutory (1929 CL 3837) right of the Circuit Court to fix and determine the natural water level of the lake without exceeding its jurisdiction. Also, the side issue of judicial bias is dismissed as an "ill-founded" charge, despite the judge being a tenant on the lake involved. The statutory term of natural level is construed to be normal level.

Stuart v Detroit Finnish Cooperative Summer Camp Ass'n,
277 Mich 144 (1936)

SUBJECT: Prescriptive rights to flowage - lake level raising - dams - injunction - Sun Lake - Wolverine Lake

FACTS: Plaintiffs are cottage owners on what is now called Wolverine Lake. Wolverine Lake was formed by a 1920 dam agreement between plaintiffs designed to raise the water level in a chain of lakes which was finished in 1922 to form Wolverine Lake. This dam was two miles from the completely separate Sun Lake owned by defendants. Plaintiffs seek to enjoin the defendants from digging a ditch from Sun Lake to a lower lake to promote drainage of the increased water level in Sun Lake caused by plaintiffs' dam on Wolverine Lake. Defendants seek the right to build such a ditch and to enjoin plaintiffs from raising the water level by the dam. Trial court found for plaintiffs.

HELD: The Court speaks to the question of whether the plaintiffs have acquired a prescriptive right to maintain a dam, thereby interfering with the natural level of water upon defendant's land. The case of Preston v Clark, 238 Mich 632, states that in order to gain a prescriptive right, the use must be visible, continuous, notorious, and continue for a fifteen-year period. Here, no prescriptive rights lie in the plaintiffs because the dam was not visible and the defendants merely acquiesced without knowledge of the increased water level caused by plaintiffs' dam. Reversed; found for defendants.

Meridian Township v Palmer,
279 Mich 586 (1937)

SUBJECT: Highways bordering on inland lake - relicted land - riparian rights - public easement of passage - injunction

FACTS: Plaintiff township sues to enjoin defendant property owners from charging admission to enter a strip of lakefront on Lake Lansing and to remove a fence to promote free access. There is a road bordering the lake between the water and the defendants' property. There is a public easement of passage upon this road with a strip twenty to twenty five feet wide of relicted land between the road and the water's edge. Defendants cleared and improved this strip of beach and built a beach house and fence. The township claims that the lake is navigable and that when the road borders navigable waters, any relicted land between the road and water line is subject to the same easement of passage and the right to navigable water access. Trial court found for defendants.

HELD: The Court assumes that Lake Lansing is navigable (despite some contrary evidence) and quotes Hilt v Weber, 252 Mich 198, which states that the strip between high and low marks has no right to public passage. The riparian is given the exclusive use of the bank and the right to erect bathing houses. This bordering road was not dedicated to the public, but only subject to an easement of public passage and that did not extend to the relicted strip of beach, nor did it divest the riparian of his rights of exclusive use. When a road easement is given, the grantors do not part with their riparian rights in the relicted lands. Affirmed for defendants.

120

Halstead v Young, 282 Mich 558 (1937)

SUBJECT: Dams - head of water - flowage rights by prescription - injunction

FACTS: Plaintiff is an upstream riparian who seeks to restrain defendants from raising the water level by using their dam and seeks damages for overflow upon his lands. Defendant dam operators seek to establish their water rights to dam and flood plaintiff's land. Defendants claim a prescriptive right to flowage acquired by deed to an eight-foot head. They then lowered the water in their tail race

by removing stones and debris. Plaintiff claims that this lowering created a nine-foot head and was in violation of flowage rights, resulting in damage.

HELD: The Court reaffirms its definition of "head" given in Tebbel v Spencer Electric, 173 Mich 136, as "the vertical distance from the water in the flume or place from which it is drawn, to the tailwater." However, flowage rights are dependent upon the conditions at the time of the grant. Since plaintiff is upstream of the dam, the water levels have not changed as between the parties. Therefore, the level of the mill pond is what the prescriptive flowage rights are based upon, not the drop between the flume level and the tail race. The Court finds that defendants have indeed acquired prescriptive rights to flowage by adverse use for over fifteen years based upon Williams v Barber, 104 Mich 31; Preston v Clark, 238 Mich 632; and Stuart v Detroit Cooperative Summer Camp Assn', 277 Mich 144.

121

Ruggles v Dandison, 284 Mich 338 (1938)

SUBJECT: Bog land - riparian boundaries - adverse possession - prescriptive use

FACTS: Plaintiff seeks an injunction and a determination of his riparian rights. He is the owner of land adjoining the defendant's land. Upon the defendant's land is a fifteen or twenty-acre lake. Defendant built a fence to deny plaintiff's access to the lake. Plaintiff claims that the water of the lake reached his land and thereby gave him riparian rights. Defendant denies this and claims that if any water reaches plaintiff's land, it is only by artificial means (artificial channels or cattle-trampled bog lands). Plaintiff also claims a prescriptive right to use the lake.

HELD: The Court sifts the conflicting testimony and determines the question of fact as to whether the water extends to the plaintiff's land. The trial court's finding that no water reaches plaintiff's land, except possibly by artificial means, is upheld. The land owned by plaintiff is at most bog land

with the water three inches deep at the deepest point. No riparian rights are gained by channeling artificially to the lake, nor are they obtained by cattle-trampled bogs. The Court finds no adverse possession in plaintiff since there was no evidence of adverse use, only a peaceable passive allowance by defendant. Adverse possession must be for the statutory period actual, open, visible, notorious, continuous, and hostile. Affirmed for defendant.

122

Winans Lake Hills Corp v Moon,
284 Mich 688 (1938)

SUBJECT: Prescriptive rights to boat and fish - permissive use - injunction - Winans Lake

FACTS: Plaintiffs are two corporations who claim ownership of all subaqueous lands under Winans Lake. Defendants at first claimed to own part of the riparian property; but later dropped that claim so that now they only claim by prescriptive rights. Plaintiffs seek to restrain defendants from using the waters, except for watering stock, cutting ice, or domestic use. Defendants claim the rights to fish and boat by prescription. Plaintiffs claim that defendants uses of boating and fishing were permissive and were revoked when defendants continued to rent boats to strangers.

HELD: The Court agrees with plaintiffs that the boating and fishing uses were permissive and not adverse; therefore, no prescriptive rights lie in defendants. The cases of Winans v Willetts, 197 Mich 512, and Pleasant Lake Hills Corp v Eppinger, 235 Mich 174, are cited to show the non-navigable nature of the lake, but they do not speak to prescriptive uses by non-riparians. The injunction sought by plaintiffs issues. Permissive use cannot ripen into prescriptive rights.

Blain v Craigie, 294 Mich 545 (1940)

SUBJECT: Riparian rights - reservation - docks - injunction

FACTS: Plaintiff is an island owner in Lotus Lake who seeks to restrain defendant from maintaining a dock. Plaintiff claims ownership of the subaqueous land beyond thirty-feet from the shore by an alleged reservation in the deed of defendant. Plaintiff's father conveyed a lakefront lot to defendant's predecessor. That deed conveyed lakeside property and continued into the lake thirty-feet from the low water mark and granted boating, fishing and cutting-ice uses. Plaintiff claims this was a sufficient reservation to allow an injunction for trespass when defendant built a 180-foot dock.

HELD: The Court rejects plaintiff's claim of an adequate reservation. The reservation of riparian rights in a deed conveying riparian lands cannot be presumed and must be clearly and expressly reserved in the deed. The Court relies on the strict view of reservation in Richardson v Prentiss 48 Mich 88. Since the reservation was not sufficient here, all riparian rights were passed by the conveyance, making a prescriptive claim superfluous. Injunction denied. Any conveyance of naturally water bounded property carries with it riparian rights, absent a clear and express reservation.

Marr v Hemenny, 297 Mich 311 (1941)

SUBJECT: Dams - prescriptive right to overflow lands - adverse possession - injunction

FACTS: Plaintiff is an upstream riparian who seeks an injunction against defendant maintaining a head of water which increases the overflow on plaintiff's land, plus damages for the overflow. Defendant operates a dam on Spencer Creek and in 1934 replaced the leaky wooden gates with watertight steel gates. These new gates caused the water to

back up in the mill pond at an increased depth, without increasing the head height of the dam. Several acres of plaintiff's farmland was overflowed, but such extent of flowage has not been maintained for fifteen years.

HELD: The Court agrees with the trial court that flowage rights are measured by the land actually flooded and not by the height of the dam whose repaired gates may permit the flowage of a greater area. No prescriptive rights were established, so the injunction and damages issue. Defendant has no right to increase the overflow upon lands of another by repairing his dam gates. The Court specifically rejects the Massachusetts rule that suggests that flowage rights are determined by the dam head height alone.

125

Swartz v Sherston, 299 Mich 423 (1941)

SUBJECT: Inland lakes - riparian rights to entire surface use - adverse possession

FACTS: Plaintiff is a lessee of a riparian on Pleasant Lake who seeks to restrain defendant from using the lake waters. Defendant is a riparian owner and both parties operate beaches and boat liveries. Plaintiff's lessor gave defendant permission to float and anchor boats from plaintiff's lakefront. Dispute followed when plaintiff's lessor built a fence across lake and defendant claims prescriptive rights to anchor docks in plaintiff's leased waters.

HELD: The trial court found that defendant was, in fact, a riparian owner. Therefore, each riparian owner on an inland lake and his lessees and licensees may use the entire surface of the lake, so far as they do not interfere with the reasonable use of the waters by other riparians. See Beach v Hayner, 207 Mich 93. The Court agrees that this rule applies to the defendant riparian. They disagree that any prescriptive rights to anchorage or dockage may ripen from a permissive use, since hostility is necessary to adverse possession. See Ruggles v Dandison, 284 Mich 338.

Therefore, defendant is restrained from anchoring a floating dock on submerged lands of plaintiff.

126

Dohany v City of Birmingham,
301 Mich 30 (1942)

SUBJECT: Riparian rights - raw sewage - city - nuisance abatement - pollution

FACTS: Plaintiff is a riparian owner who seeks an injunction against defendant to restrain them from polluting the watercourse. The trial denied the injunction. The city began dumping raw sewage into the watercourse and plaintiff complained, resulting in the erection of a limited capacity pumping station. This station was adequate to handle the sewage during normal weather, but inadequate during periods of excessive rainfall when raw sewage was again dumped into the stream. The city claims that during these wet periods: the sewage is naturally diluted by the waters to make the pollution non-injurious. No part of the stream lies within the city. Trial court found for plaintiff.

HELD: The majority opinion finds that the city is not a riparian owner since none of the stream lies within its boundary. Plaintiff is a riparian and has the right to abate such a nuisance as periodic pollution by sewers of a non-riparian. The city, as a non-riparian, is not entitled to a reasonable use. Its sewers, as now constructed, are an abatable nuisance. Plaintiff's riparian rights are protected by the Constitution and cannot be taken away, except by due process of law. The city's duty is not limited to fair weather, but extends to all types of conditions. The decree is fashioned to allow the city a reasonable time to make the necessary improvements to handle all the raw sewage before dumping into the watercourse.

Farabaugh v Rhode, 305 Mich 234 (1943)

- SUBJECT:** Reformation of deeds - deed ambiguities - meander line - boundaries - Great Lakes
- FACTS:** Plaintiff and several defendants are embroiled in a boundary dispute caused by old deeds. Plaintiff brings action to quiet title to five small parcels, some of which border on Lake Michigan.
- HELD:** The Court talks at great length about how to construe the deeds and the parties' intentions, but the main doctrines concerning riparian rights are simple reiterations of past doctrines. The meander line of one of the Great Lakes is merely a line of description and does not constitute a boundary. A person who owns to the meander line of a Great Lake owns to the water's edge, including those lands which have accreted or relicted, unless the conveyance indicates a contrary intention. See Hilt v Weber, 252 Mich 198.

Attorney General v Taggart, 306 Mich 432 (1943)

- SUBJECT:** Fishing rights - floatage - navigability - stocked fish - barriers in navigable waters - statutory construction
- FACTS:** Plaintiffs are the Attorney General, the Director of Conservation, and a private fisherman who seek an injunction restraining the riparian defendants from obstructing and dredging in the Pere Marquette River. The river carries forty-one cubic feet of water per second, is thirty feet wide, one foot deep, and has sharp turns. Defendant riparians claim that it is non-navigable and seek to justify their actions of erecting a fence upon the banks and excavating eight feet on each end of the stream to prevent fishermen from wading past their property. Defendants claim that they have not impeded navigation, only trespassing. Plaintiffs, however, claim that the river is navigable, therefore subject to public use and that

fishing rights to the general public attach. Trial court found for defendants.

HELD: The Court examines the character of the river very closely and finds it to be a very difficult question whether the river is navigable. They determine that the capacity for floatability of logs is the test of navigability. The Court follows Collins v Gerhardt, 237 Mich 38, which recognizes that floatability determines the public character of the stream. Navigability (floatability) is determined by a close examination of the facts. The facts here are that the stream was not commercially navigable by any kind of boat and that floatage was difficult, even at high water. Historically, any logs floated down the river were aided by the use of dams, but periodically the river is capable of natural floatage. The Court looks also to other factors in making their decision. The public has used the stream for fishing for over fifty years; the State has stocked fish at public expense, MSA 13.1681 (granting right to fish in State-stocked waters); are all factors considered. In upholding the Collins doctrine, the Court disposes of the Moore v Sanborne, 2 Mich 520, test of navigability. No longer is navigability measured by commercial character. All water capable of log floatage is subject to the public interest. Under Moore, public character of water was determined by the public necessity for its use. Under Moore, boatable and floatable waters were distinguished. These concepts under Moore are now obsolete under Collins, which states that if a stream is navigable (floatable), the ownership of the bed by the riparian is subject to the public right of fishing. The Court attempts to limit this holding somewhat by declaring that this case has no affect on small trout streams on private property which have not been used for floatage or boating, nor on private lakes and ponds owned by abutting property owners.

129

Burt v Munger, 314 Mich 659 (1946)

SUBJECT: Private lake - riparian rights - right to use entire surface - right to build a retaining wall - St. Mary's Lake

FACTS: Both parties are riparian owners on St. Mary's Lake. Plaintiff is seeking the right to build a cement retaining wall, fill it and expel stagnant water. The proposed wall and fill is 50 feet by 150 feet. There is no inlet and a small, seasonal, dammed outlet. The high, water of 1943 threatened plaintiff's property and he seeks to prevent destruction by building the wall. Defendant opposes the wall and claims the right to use the entire surface on the lake.

HELD: The Court both agrees and disagrees with the trial court's decision to allow the wall, but not the fill. The Court denies both the wall and the fill under the theory of Beach v Hayner, 207 Mich 93. Where several riparians own the lake, each is entitled to use the entire surface of the water for boating or fishing. The proposed cement wall would be an interference with these riparian rights. The threatened destruction of plaintiff's property is not sufficient to allow an infringement upon the riparian right of defendant to use the entire lake surface.

This holding does not violate the general rule that a riparian may protect his dock for purposes of facilitating his use and enjoyment of the waters of the lake. The Court also reiterates the Michigan rule that riparian owners own the middle of the lake.

130

Saph v Auditor General, 317 Mich 191 (1947)

SUBJECT: Riparian boundaries - meander line

FACT: The case involves many questions of taxation, *res judicata*, and vender-vendee relationships. The only riparian right discussed is the Court's brief mention of Hilt v Weber, 252 Mich 198.

HELD: The Court merely reaffirms that principle that the boundary line of a riparian owner on the Great Lakes is the water's edge and not the meander line.

Jones v Lucas, 326 Mich 455 (1949)

SUBJECT: Cranberry marsh - easement of flowage - water levels - deeds - dominant/servient estates - injunction

FACTS: Plaintiff is a cranberry grower who seeks to restrain defendant from draining the cranberry marsh. Defendant cross-bills to restrain plaintiff from unnecessary flooding of defendant's land. Plaintiff claims to have acquired a dominant estate over defendant's land by a deed from their common grantor. This deed to plaintiff and a similar one to defendant clearly grant the right of flowage over defendant's lands to plaintiff necessary to cranberry growing. This creates a dominant and a servient estate.

HELD: The Court upholds plaintiff's deed given right of flowage. The granting of the dominant estate for cranberry purposes is binding upon the defendant. The Court examines the testimony and proofs concluding that the proposed drainage ditch, by defendant, would drain the adjacent cranberry marsh of plaintiff, as well as the pasture marsh of defendant. Defendant is enjoined from digging this drainage ditch. The easement of flowage is upheld.

Schweikart v Stivala, 329 Mich 180 (1950)

SUBJECT: Ejectment - accretions - riparian rights - Great Lakes - reservation in deed

FACTS: Plaintiff brings an ejectment action, claiming title to a strip of accreted land in front of Lot 57 on Conger Bay, part of Lake St. Clair. Plaintiff was the owner of all the surrounding lands and sold to defendant Lot 57, which is 60 by 168 feet. The accreted strip is 60 by 466 feet. Trial court found for defendant.

HELD: The Court settles the boundary dispute by stating that the plaintiff's burden of proof in an ejectment action is to prove his title or right of possession. Plaintiff failed in this burden of proof. The conveyance by plaintiff to defendant was without reservation of any riparian rights. These riparian rights then passed in full to defendant, including the right to acquire accreted land. Accretions must be contiguous to the land of the party claiming title to the accretion. The riparian estate stops at the water line of the Great Lakes. The title to all submerged land lies in the State, regardless of the depth of water or the non-navigability of the waters. Affirmed for defendant.

133

Hall v Wantz, 336 Mich 112 (1953)

SUBJECT: Navigable waters - riparian rights - Great Lakes - inland lakes - subaqueous ownership - trespass - indefinite anchorage - injunction

FACTS: Plaintiffs are riparian owners on White Lake who seek an injunction to restrain defendant from anchoring a raft indefinitely in the waters above plaintiffs' submerged lands. White Lake is a large, inland, navigable lake with an outlet upon Lake Michigan. Defendant owns and operates a 25 by 40-foot raft covered by a house which he operates as a fishing business. Plaintiffs seek a permanent injunction against indefinite anchorage, claiming a trespass. Trial court found for defendant.

HELD: The Court reiterates that riparians on the Great Lakes have different riparian rights than those riparians on inland lakes. Inland riparian lake ownership carries ownership to the middle of the lake, no matter how deep. This ownership to mid-lake doctrine has overcome some early dicta in Rice v Ruddiman, 10 Mich 125, which suggests that deep water might limit inland lake riparian rights. The Court rests its holding upon Johnson v Burghorn, 212 Mich 19, and Paterson v Dust, 190 Mich 679. These cases hold that a riparian's rights are limited by the public right to navigation, but this does not include the right to anchor indefinitely off the riparian's shoreline.

The non-riparian defendant is a trespasser and injunction sought by plaintiffs issues. Reversed for plaintiffs.

134

Darling Co v Water Resources Commission,
341 Mich 654 (1955)

SUBJECT: Pollution - percolating water

FACTS: Water Resources Commission ordered plaintiff to install a suitable waste treatment and disposal system to prevent electroplating waste discharge into a lagoon that was polluting neighboring wells. Trial court found for defendants.

HELD: The Water Resources Commission is charged with protecting "any waters of the State"; this includes ground water, but does not obviate the need for due process. The Water Resources Commission acted without sworn witnesses, exhibits, findings of fact, and relied upon materials and data that had not been presented and, hence, denied due process of plaintiff. Reversed for plaintiff. Note the burden of proof is on the Commission to establish a violation of a statute relative to the pollution of waters before making an order requiring the violator to install a waste and disposal system.

135

Ottawa Shores Home Owners Association, Inc v Lechlak,
344 Mich 366 (1955)

SUBJECT: Restrictive covenants - use of riparian property - docks - residential use

FACTS: Plaintiff is an association of home owners on the Ottawa River who sue to restrain the commercial uses of defendant. Defendant has operated a bait shop, docking spaces, rental and parking lot since 1947. Defendant, in connection with such business, has constructed two docks which extend 115 feet into the river. Defendant is licensed

and sells primarily to customers who come by water and is himself a member of the association by his deed. This 1947 deed made him a member and authorized the board to set rules and regulations for the best interests of all lot owners. The association was organized in 1951. Plaintiff claims that defendant is bound by the association and its decisions. The trial court agreed, but struck down the deed restrictions as contrary to the conveyance of a fee simple and repugnant to defendant's title. Trial court found for defendant.

HELD: The Court disagrees with the trial court and upholds some of the deed restrictions concerning structures on the land. Defendant's docks are considered structures that violate the deed restrictions. Restrictions not only apply to kinds of structures erected, but also to the use of the property. Defendant owns to mid-stream, so his docks are part of his lots and, as such, are structures which violate certain deed restrictions. Restrictions which are ambiguous or unclear in wording and intent are construed by the general plan, which is residential, concerning Ottawa Shores. Reversed for plaintiff; restrictions upheld.

136

Tobias v Tobias, 345 Mich 263 (1956)

SUBJECT: Boundary dispute - riparian rights - injunction - private inland lake - fishing

FACTS: Plaintiff and defendant are brothers who own adjoining farms. Plaintiff claims to own all the land surrounding White Fish Lake and seeks to exclude defendant. Defendant claims that a portion of the lake touches his land and, therefore, he has equal riparian rights. The dispute arose when defendant let outsiders fish upon the lake. The lake is eight acres in area.

HELD: The Court upholds the trial court's findings of fact that defendant's land does touch the lake and give him riparian rights. A fence was constructed by the parties jointly, but this is not allowed as an estoppel upon defendant, because its purpose was simply to keep the

cattle off the lake and did not interfere with defendant's passage to the lake. As far as riparian rights, the allowing by defendant of fishing guests may result in reduction in the number of fish in the lake, but this does not prevent each equal riparian owner the full exercise of his riparian rights, including guest fishing.

137

Heitsch v Oakland County Drain Commissioner,
346 Mich 381 (1956)

SUBJECT: Equity - injunction - remedy - lake levels

FACTS: Plaintiff owns land on the Huron River and Oxbow Lake. Oxbow Lake was created by a dam over 100 years ago and is two miles upstream from Pontiac Lake, also created by a dam. Plaintiff is seeking a declaratory judgment to determine the validity of the statutes granting authority to establish lake levels, and he seeks injunctive relief. The trial court denied the injunction. The statutes, MCL 281.101 and 281.201, establish lake levels in Oxbow and Pontiac Lake.

HELD: The Court agrees with the trial court's denial of the injunction because of an adequate statutory remedy. The statutes authorize a five-year period and procedure for challenge by interested parties. Equity jurisdiction is denied because of an adequate and unused remedy at law.

138

Kerley v Wolfe, 349 Mich 350 (1957)

SUBJECT: Fence across neck of lake - riparian rights - public trust - navigability - injunction

FACTS: Plaintiffs seek to enjoin interference by defendant with their riparian rights on Lake Narrin. The neck of this squash-shaped lake is extremely shallow. Across this neck the defendant built a fence, cutting off plaintiffs' access from the neck to the main body. Plaintiffs seek abatement

of the fence. Questions at trial were, did plaintiffs ever have riparian rights; and do they have those rights now? Defendant claims that plaintiffs' land does not touch the lake, but rather, is only marshland which is not navigable. Plaintiffs claim that the water is boatable and navigable now and always has been boatable. The trial court abated the fence.

HELD: The Court upholds the trial court's finding that the water is boatable and the fence blocks plaintiffs' passage to portions of the lake. The trial judge personally inspected the shallow area and found the water to be at least eighteen inches deep and boatable. The Court cites Collins v Gerhardt, 237 Mich 38, with approval. If the waters are navigable in fact, they are navigable in law. A riparian's title to subaqueous land is impressed with a public trust as long as the waters are boatable. The public may fish or boat on waters as long as they do not trespass on private lands to gain access. The essence of the doctrine of riparian rights is that no riparian may dispute passage by water of another riparian when the waters are navigable by nature.

139

In re Vacation of Cara Avenue,
350 Mich 283 (1957)

SUBJECT: Dedication of highway - adverse possession - navigable waters - public access - vacation of highway dedication

FACTS: Plaintiffs are lakefront owners, adjacent to Cara Avenue, who are petitioning to have the street declared to be a park, subject to limited use by the subdivision lot owners. The Cass County Road Commissioner and the Attorney General bring objection to the petition. Cara Avenue ends at the shore of Diamond Lake with 137 feet of frontage. Petitioners claim to have improved the area, planting large trees, installing benches, and claim no traffic has used the disputed area. The trial court interpreted the 1909 dedication as an "offer to dedicate" which was abandoned by inaction, and so found for the petitioners.

HELD: The Court, however, finds this case parallel to Rice v Clare County Road Commission, 346 Mich 658, which was decided in favor of the public authorities. The Court says that the dedication was accepted within a reasonable time, as required by statute. The main riparian issue involved is a reaffirmation of the principle stated in Backus v City of Detroit, 49 Mich 110. Where a public highway ends at a navigable body of water, public access to that water is provided. Since defendants have made reasonable objection, the Court denies the petition to vacate the highway and rededicate the land to a park.

140

Drainage Board v Village of Homer,
351 Mich 73 (1957)

SUBJECT: Dams - prescriptive rights - flowage - artificial ponds - Lake Level Act - drains - estoppel

FACTS: Plaintiff is the Intercounty Drainage Board who is seeking a declaration of its rights to eliminate a dam and pond to improve drainage. Defendants are the Village of Homer, the dam operator, and other class representatives. They claim rights to the artificial lake level allegedly gained by estoppel and prescription. The dam created the Homer Mill Pond over 100 years ago by damming the Kalamazoo River and creating an eight-inch head of water. Defendants claim that this dam has created an artificial lake so that the Lake Level Act applies, giving jurisdiction to the Board of Supervisors or Conservation Department. Trial court found for plaintiff.

HELD: The Court relies on the case of Goodrich v McMillan, 217 Mich 630, in denying that the owner of a dam has a duty to maintain his dam. But this property right in the dam operator may be condemned under the general drain law. These prescriptive flowage rights may be challenged by the other riparians during the prescriptive period. Riparian owners are put on notice by the very existence of the dam, that the high water levels are unnatural and may be lowered or returned to their natural level by the dam operator. The artificially created mill pond formed by a

dam cannot be deemed an artificial lake or covered under the Lake Level Act. The Board of Drainage has jurisdiction and gained the rights of flowage by negotiating a conveyance of same from the dam operator. Affirmed for plaintiff.

141

Cutliff v Densmore, 354 Mich 586 (1958)

SUBJECT: Ejectment - boundaries - meander lines - inland lake - relicted land

FACTS: Plaintiffs are the owners of Lot 4 on Burt Lake who bring an ejectment action against the owners of Lot 3. The dispute is due to a change in the shoreline caused by accretion and reliction, resulting in 750 feet less shoreline. Defendant had a surveyor stake out his portion of the accreted land. He divided the new shoreline in the same proportion as was the original shoreline as depicted in the meander line of the government survey. Plaintiff claims title to the land by deed and his suggested division of the new shoreline would give defendant a very small share of the accreted land and deny them access to the water. Trial court found for defendants.

HELD: The Court follows the rule of Hilt v Weber, 252 Mich 198, that where property abuts an inland shoreline, that shoreline, as represented by the meander line, is the boundary of the property, in spite of its later advancement or recession. The owners of inland lakefront property are entitled to a just proportion of the new shoreline based on the meander line. This theory avoids the race to sue in ejectment which would occur under other theories of division. Affirmed for defendants.

142

Poch v Urlaub, 357 Mich 261 (1959)

SUBJECT: Boundaries - ejectment - surveys

FACTS: Parties are engaged in a boundary dispute in which plaintiff sues in ejectment to recover possession of lands on Lake Nettie. Defendant's claim to the land depends upon the validity of an amended boundary line between the lots that was drawn by a 1946 private survey. This private survey relocated the southern boundary of defendant's lot by 300 feet, thus increasing the size of the lot, as opposed to the original boundary line drawn by the government survey in 1856. The trial court gave defendant a directed verdict.

HELD: The Court reverses and remands the case, stating that defendant should not have had a directed verdict because plaintiff had made a sufficient case. The Court is very concerned with technical surveying data in this case, but they set out a few simple principles for drawing the disputed boundary line:

- (1) A private surveyor cannot fix private rights or boundary lines upon his own theories.
- (2) A boundary line, unless fixed by agreement, acquiescence, or adverse possession, is determined by the original government survey.
- (3) When the government survey shows the boundary of a tract as a body of water, that body of water is a natural monument which controls over the meander lines, descriptions; or plats.
- (4) Government survey lines control water frontage on a lake in the absence of private agreement where the lake appears as a natural object in the patents of the land as lots.

143

Cass County Park Trustees v Wendt,
361 Mich 247 (1960)

SUBJECT: Access to lake - bordering highway - barriers - navigable waters

FACTS: Plaintiffs are the Park Trustees for the County Road Commission who seek to abate and remove a fence that separates the highway from navigable waters on Eagle Lake. The blacktop highway separates the defendant's property from the lake. The defendant built the fence to deny public access to the lake from the highway. A previous litigation determined that although defendant held title to all the land beneath the highway; the public easement of passage was established by long use (user).

The trial court, in the present case, found for plaintiff trustees.

HELD: The majority opinion attempts to reconcile the present case with the cases of Meridian Township v Palmer, 279 Mich 586; and Backus v City of Detroit, 49 Mich 110. The majority reaffirms the doctrines of both cases and distinguishes the present case upon its facts. The owners of the soil under a user-highway, bordering on a navigable lake, may not erect a barrier that interferes with public access to the lake from the highway. Affirmed for plaintiffs.

The concurring opinion feels that Meridian and Backus are not compatible. He calls for reexamination of Meridian to make it compatible with Backus. Note that this case may be overruled by Kempf v Ellixson, 69 Mich App 339, where a road that and in some cases the easement includes shoreline, was found not to be a public grant of riparian rights.

144

Obrecht v National Gypsum Co,
361 Mich 399 (1960)

SUBJECT: Navigable waters - Great Lakes beds - alienation - wharfage
- consent - public trust

FACTS: Defendant obtained a quit claim conveyance from the State under the Great Lakes Submerged Lands Act, MCLA 322.701, *et seq.* He constructed a 1,000-foot dock into

Saginaw Bay, part of Lake Huron. Trial court found for defendant.

HELD:

The Court reaffirms the public trust principles of Illinois Central RR v Illinois, 146 US 387 (1892); Nedtweg v Wallace, 237 Mich 14 (1927); and Collins v Gerhardt, 237 Mich 38 (1926). Here, the Court recognizes the procedural mandates of the public trust doctrine that are put upon the State. No one has the right to use or occupy for private purposes public trust resources, unless he has received from the Legislature or its agency express consent. This consent must be based upon a due record finding that no injury will result to the public trust by the transfer to private use. The Court does not pass upon the merits of whether the dock building is a substantive violation of the public trust. They simply invalidate the permits and remand for a hearing on available equitable relief. The public trust resources (lake bottom) cannot be alienated or devoted to public use without a record of findings, except by falling within one of two exceptions. One exception exists when the State has, in due record form, determined that the land should be conveyed to improve the public trust. The other exception exists where the State, in due record form, determines that such land may be disposed of without detriment to the public interest. The Court, here, modifies the strict public purpose rule stated in Nedtweg and Collins by stating the two exceptions that allow nonpublic use or sale. The Court requires strict procedural compliance to guarantee proper and express authority before disposing of public trust lands under the submerged Lands Act. To be a valid disposal of trust lands, there must be some sort of formal determination. Here, there was a lack of procedural determination and the conveyance was invalid, so the Court reverses and remands for equitable regulations for dock operation and the awarding of damages to plaintiff property owners.

Hoover v Crane, 362 Mich 36 (1960)

- SUBJECT:** Inland lakes - diversion of watercourse - irrigation - water removal - reasonable use
- FACTS:** The parties are riparians on Hutchins Lake which has an area of 350 acres. Plaintiff, resort owners, seek to restrain defendant from using the lake to irrigate forty-five acres of a pear orchard. Trial court found for plaintiffs; but defined reasonable use as unlimited in amount until water ceases to drain in the outlet and thereafter limited by metered use to one-quarter inch in depth of the lake.
- HELD:** Resort use and agricultural use of the lake are legitimate purposes. Neither serves to remove water from the watershed. The restrictions on defendant's use is reasonable under the circumstances. The test of reasonable use is what the use is for, its extent, duration, necessity, its application; the nature and size of the lake, the uses to which the water is put, the extent of injury and benefit, and all other factors which may bear upon the reasonableness of use. Affirmed.

Dryfoos v Township of Maple Grove,
363 Mich 252 (1961)

- SUBJECT:** Highway - non-use - dedication - maintenance - injunction - road to lake
- FACTS:** Plaintiff seeks to enjoin the removal of obstructions on a private road to foreclose any public right to the road. Defendant cross-bills to enjoin interference with a public use. The dispute was originally between two neighbors located across the road from each other. Defendant at one time owned all the land, but in 1938 conveyed a portion to plaintiff. Plaintiff blocked the road with posts; defendant and the Highway Commission object. The road is 500 feet long and leads to Lake One. Defendant claims the road has a public nature because of long use. The trial court

found no acceptance of the road dedication by user and found for plaintiff.

HELD: The Court comments upon the sparse evidence submitted by the defendant. The deed from defendant reserved a right to lake access. The only uses of the lake or road shown were permissive uses. No road work had been done since 1943. Currently, both parties have new roads to their respective properties. All this evidence was in the plaintiff's favor. There was no implied dedication by prescription; since there was no exclusive, open, and notorious use by the public. Any dedication must be accepted by the public authorities, by road maintenance. The injunction issues for plaintiff.

147

People, ex rel Director of Conservation v Broedell,
365 Mich 201 (1961)

SUBJECT: Great Lakes - plats - riparian lands - dirt fill - navigable water - public trust - water level - U.S. patent - Submerged Lands Act - estoppel

FACTS: Plaintiff seeks to enjoin an alleged trespass occasioned by defendant's dirt fill. The fill is upon land bordering Lake St. Clair, part of the Great Lakes. Plaintiff Conservation Department claims that the fill is in the Great Lakes, which are subject to the public trust. Plaintiff claims that the lots were submerged lands in 1837 (admission to Union) and, therefore, became State property subject to the public trust under the Submerged Lands Act. Plaintiff claims that in 1956 an ice jam caused low water levels, and during this period the defendant filled. Defendant claims that the land has always been high and dry since 1924, at the time of platting. Defendant urges *de minimus no curat lex* (so little damage that the law will not recognize). Defendant also urges estoppel because the State allowed similar fills by other people. Trial court found for plaintiff.

HELD: The Court rejects the *de minimus* argument because of the precedent it would set. They also reject the estoppel

argument. The Court reviewed much evidence as to exactly where the public trust should begin. Should it begin at high tide, low tide, mean high, or mean low? Should it be a movable border, traveling with the water's edge? The Court feels that it is not forced to answer these questions because of the case-controlling question of United States patents. Defendant claims that this title is through a United States patent of 1811, which predates Michigan's 1837 admission to the Union. Therefore, in 1837 the disputed land would have been patented by the United States to the defendant's predecessors and not subject to the Submerged Lands Act or the Swamp Land Act. The Court remands the case upon this question for completion of the meager record. The case speaks upon the public trust doctrine, but adds little to the doctrine as stated in State v Venice of America Land Co, 160 Mich 680; and Collins v Gerhardt, 237 Mich 38.

148

Klais v Danowski, 373 Mich 262 (1964)

SUBJECT: Submerged lands - Great Lakes - boundaries - U.S. patents - navigable waters - avulsion - reliction - accretion - land contracts

FACTS: Plaintiff sues for specific performance of a land contract and for non-delivery of marketable title. The Department of Conservation intervenes, claiming the land is State property as lake bottom of Lake St. Clair, part of the Great Lakes. The trial court found for plaintiff and denied any State interest. Defendant sold land to plaintiff by land contract with a warranty deed free of all encumbrances. Plaintiff's lots are filled-in lake bottom and the State claims title, thereby clouding plaintiff's title. The State claims that they acquired title by the Submerged Lands Act. Plaintiff claims that the Submerged Lands Act applies only to unpatented lands. He traces title back to a U.S. patent of 1833 (pre-Statehood).

HELD: The Court looks at several different surveys of the land in question, trying to determine where the boundaries of the property were at various times in history. The lake level

varies drastically and so the surveys vary greatly as to the character and shape of the lots. The Court cites People, ex rel Director of Conservation v Broedell, 365 Mich 201, with favor, agreeing with plaintiff that title to patented lands conveyed prior to Statehood does not pass to the State upon admission to the Union. The United States patent rights are not cut off by the subsequent creation of a state. Patent rights are not lost when there is avulsion, accretion, reliction or when inundated land is restored to dry land by artificial means. The patent described the land as extending to posts on the border of a Great Lake and this manifests an intention to include riparian rights. Included in these riparian rights is the right to acquire accretion or reliction-created dry lands. Patentees may gain by accretion or reliction.

In the second hearing of Klais v Danowski, 373 Mich 281 (1964), the State was to repay the plaintiff the money which he had erroneously paid to the State under the belief that the State held title to the land in question.

149

Michigan Central Park Association
v Roscommon County Road Commission,
2 Mich App 192 (1966)

SUBJECT: Dedicated highway - lakeshore boulevard - abutting owners - riparian rights - policing - public beach - inland lake

FACTS: The 1890 plat shows a strip of shoreline labeled Michigan Central Park Boulevard and states that all streets were dedicated to public use. This strip was not used until 1953 when the defendant Road Commission cleared the land, but did not gravel or grade the cleared portion. There have been some cottages built along and within the boulevard as platted. A 1957 litigation sought to enjoin the Commission from improving the boulevard on the theory of an abandoned dedication. It ended in stipulation of dismissal. During that case, defendant graded and graveled the roadway. Here, plaintiff association seeks to restrain defendant from turning the boulevard into a

public beach. Plaintiff claims that if the boulevard is a roadway, it should be maintained as such and not used as a public beach since this would be contrary to the dedicated public use and deprives plaintiff owners of their riparian rights without due process or compensation. Defendant Commission claims the road is dedicated to public use; therefore, the riparian rights are shared with the other lot owners and the general public.

HELD: The Court upheld the trial court findings that the boulevard is a public highway and under the county jurisdiction. They also upheld the finding that plaintiff association and other abutting property owners have riparian rights on Higgins Lake opposite their lots and across the highway. See Croucher v Wooster, 271 Mich 337 (1935). The Court also finds that the Lyon Township Board has no duty to assume policing of the boulevard because of lack of legislative authority in the record. The public beach is enjoined as an improper interference with plaintiff's riparian rights.

150

Winiecke v Scheurer, 3 Mich App 178 (1966)

SUBJECT: Channel lots - riparian rights - littoral rights - injunction

FACTS: Plaintiffs are purchasers of Lot 2 in a platted subdivision. A man-made channel was dug by defendant, which runs on both sides of Lot 2. The grantors, in the deed and in the plat, made certain reservations, such as the right to improve the channel and the right to refuse structures between the lot line and the channel. Plaintiffs built a home, and in 1963 defendants increased the banks of the channel, cutting off plaintiffs' view of the Bay. Plaintiff claims that such interference was an infringement of his riparian rights on the Bay and seeks an injunction to remove the higher banks. Trial court found for defendants.

HELD: The Court hears the appeal *de novo* (anew), but gives great weight to the trial judge's findings of fact. These findings included the fact that the plaintiffs knowingly

purchased a channel lot, so that no littoral or riparian rights passed to them by the conveyance. Channel lots carry no riparian rights upon conveyance. No injunction issues. Affirmed for defendant.

151

People, ex rel Director of Conservation v Pephi,
3 Mich App 389 (1966)

SUBJECT: Great Lakes Submerged Lands Act - patented lands - unpatented lands - landfill - injunction

FACTS: The trial court has issued a temporary injunction against defendant's landfill in Lake St. Clair. They later dissolved plaintiff's temporary injunction, and plaintiff appeals. Defendant received his title through a chain of title which is traceable to a patent issued before Michigan entered the Union. Defendant relies upon Klais v Danowski, 373 Mich 262 (1964), which states that the Submerged Lands Act has no application to patented lands granted prior to statehood.

HELD: The Court points to 1965 PA 292 and to the Submerged Lands Act, stating that this amendment makes the statute applicable to patented lands as well as unpatented lands. This amendment makes the injunction a moot question. The injunction remains dissolved.

152

Turner Subdivision Property Owners Association
v Schneider, 4 Mich App 388 (1966)

SUBJECT: Riparian rights - contact with water - easements of access to water - injunction

FACTS: Plaintiff Association seeks an injunction against defendants to restrain them from interfering with its use of a lakefront lot for recreational purposes. Defendants own a lot which is separated from the water by plaintiff's lot, but the deeds by which defendants take title include

riparian rights. Defendants claim riparian rights over the lot owned by plaintiff. Trial court found for plaintiff.

HELD: The Court states that the basis of the riparian rights doctrine is actual contact with the water. Contact with water is necessary to true riparian rights. Here, defendants are not riparian owners because there is no contact with water by their lot, since plaintiff's lot intervenes. The riparian rights granted to defendants in their deed are construed by the Court to be misnomer and, at most, convey an easement of direct access to the lake. The Court quotes Hilt v Weber, 252 Mich 198 (1930), with approval, but states that it has no application where the land claiming riparian rights is separated from the water by an intervening lot. The injunction issues. Affirmed for plaintiffs.

153

Arnold v Ellis 5 Mich App 101 (1966)

SUBJECT: Continuing trespass - flowage rights - pond levels - boundaries - statutory construction - dam head height - injunction - deed reformation - Inland Lake Level Act of 1961

FACTS: Plaintiffs and defendants are in a water level and boundary dispute. Plaintiffs took title to their land, subject to rights of flowage. Defendants own and operate a pond created by their dam across Mill Creek. Defendants raised the dam to 788.62 feet above sea level, causing water to seep through a dike and flood plaintiffs' land. The trial court set the level of the dam at 786 feet above sea level, based upon a 1914 survey, and ordered the removal of a fence constructed by defendants upon the land of plaintiffs. The trial court also reformed a land contract between defendants and their bank to conform to the newly-set boundaries of defendants' land.

HELD: The first and main problem is the trial court's jurisdiction to set inland lake water levels. The Inland Lake Level Act of 1961 creates an optional jurisdiction in the County Board of Supervisors; Drain Commissioners, and

Conservation Department. If none of these boards accept jurisdiction; the Circuit Court may act. The jurisdiction given to the Board of Supervisors; Drain Commission and Conservation Department is not exclusive. The Court finds that the trial court correctly issued the injunction sought by plaintiffs and correctly set the water level of the pond based upon the 1914 survey. However, the deed reformation and boundary setting portions of the trial decree are reversed.

154

Thompson v Enz, 379 Mich 667 (1967)

SUBJECT: Watercourses - riparian rights - canal - easements - reasonable use

FACTS: Defendant corporation owns 1,415 feet of footage on Gun Lake and proposes to subdivide this property into 150 lots, most of which will border on an artificial canal running from the lake. Plaintiffs are other riparians upon Gun Lake who are seeking a declaratory judgment of their riparian rights. The trial court gave summary judgment to plaintiffs. The Court of Appeals reversed. The Supreme Court reverses again, holding for plaintiffs. The Attorney General intervenes as *amicus curiae* because the State is a riparian owner. Defendant corporation seeks to establish riparian rights in the owners of back lot canals and a declaration that such subdivision is a reasonable use.

HELD: The Court first addresses the issue of riparian rights on a canal. Riparian land must include or be bounded by a natural watercourse. Riparian owners have a right to the enjoyment of the natural flow with no artificial hindrances. Land abutting on an artificial waterway acquires no riparian rights. Such land has no natural riparian rights and the only way to gain riparian rights is by prescription. Riparian rights are not severable, nor assignable apart from the land bordered by a natural waterway, but easements and licenses do exist and are often granted to non-riparian owners. The Court states that there are two types of riparian uses: natural purposes

for drinking or domestic use, and artificial purposes for commercial or recreational use. An artificial purpose must be for the benefit of the riparian land and reasonable as to other riparian proprietors. Reasonableness is a question of fact.

The trial court did not hear evidence on the reasonableness of the subdivision use, and the Supreme Court remands for more information. The Court must consider the attributes of the watercourse, size, character, primary uses, the ratio of people to water area, the water level reduction, potential pollution; necessity of use, the purpose, all the consequential effects of the use, and must balance the equities of profits to defendant corporation against the annoyance caused to riparian plaintiffs. See Thompson v Enz, 385 Mich 103.

155

Weisenburger v Kirkwood, 7 Mich App 283 (1967)

- SUBJECT:** Boundaries - acquiescence - riparian lands -relicted lands
- FACTS:** Plaintiff and defendant are adjoining lot owners on Bills Lake. They are in dispute as to their common boundary line and also the boundary line upon relicted land to the shoreline. The deeds are ambiguous as to the borderline between the lots. The Court draws the new boundary line in accord with the deeds, mars, surveys, and all other evidence of the parties' intentions.
- HELD:** The main riparian question is settled by the Court's restating the doctrine of Cutliff v Densmore, 354 Mich 586 (1958). In that case, it was held that owners of inland lakefront property are entitled to the just proportion of the land created by reliction. The trial judge used the Supervisor's plat and calculated 33.75 percent to plaintiff and 66.25 percent to defendant. The exact location of the boundary upon this relicted land can be found only after surveying the bay or cove, and so the trial judge was correct in not locating the line with such a survey. The boundary line upon relicted land depends upon the lake

shore's shape. The Court remands to determine the boundary line to the relicted land.

156

In re Martiny Lakes Project,
381 Mich 180 (1968)

SUBJECT: Lake levels - artificial inland public lake - navigable stream - statutory intent - Inland Lake Level Act of 1961 - flowage rights - dams - prescription

FACTS: Two cases have been combined here for review purposes. Case No. 49,859 involves the power of the Board of Supervisors to establish the normal height of the Martiny Lakes Project. The level was established by the trial court at 993.8 feet above sea level and the watercourse was found non-navigable. The court interpreted the Inland Lake Level Act of 1961, 1961 PA 146; MCLA 281.61, because the Winchester Dam created a large artificial inland public lake by damming the west branch of the Chippewa River.

HELD: The Court holds that the Inland Lake Level Act of 1961 applies to an artificial public lake and that lake levels are controlled by such act. In the act, navigable streams means those streams that are adapted in their natural condition to any valuable boat or vessel navigation. The Court reaffirms the right of the Board of Supervisors to petition for a determination of the lake levels under the act. Navigability is a question of fact to be decided by the trier of fact. The Court upholds the trial court's decision that the public recreation uses are superior and conform to the legislative intent, rather than the wildlife uses, consulting from a lowered lake. The river was found to be non-navigable. Case No. 50,223 is settled by the Court's majority opinion, stating that the riparian plaintiffs could not maintain an equity action to prevent the lowering of the lake because they had surrendered certain rights by flowage easement.

The dissent stated that a river used for fishing, wading, and canoeing is navigable in fact, and thus navigable in law. Since it is a navigable stream, it comes within the

exception of the Inland Lake Level Act. Therefore, determination of the level of an artificial, dam-created lake level cannot be made under the act.

The term "navigable streams" in the Inland Lake Level Act of 1961, MCLA 281.61, refers to strictly navigable and not floatable streams.

157

Henson v Gerlofs, 13 Mich App 435 (1968)

SUBJECT: Marketable Title Act - public easement to lake by prescription - injunction

FACTS: Plaintiffs seek to enjoin defendant's filling operations and removal of fill already in place. Plaintiffs claim as riparians and members of the public. The trial court found legal title to the disputed areas to be in defendant by reason of the Marketable Title Act, 1945 PA 200; MLA 565.101. Plaintiffs show an unbroken chain of title back to a patent of 1835, but defendant claims to have had marketable title for over forty years. This marketable title in defendant is subject to an easement to the public gained by prescription.

HELD: The Court upholds defendant's title based upon the Marketable Title Act since the fundamental purpose of the statute is to erase all ancient conveyance mistakes. But the Court disagrees with the scope of the public easement by prescription as being too broad. The Court narrows the injunction to restrain defendants from future dumping of fill on the lakeshore or in the lake only to those areas where the public easement exists, since the remainder of the property is subject to the Inland Lakes and Streams Act, 1965 PA 291. The Court also refuses to force defendant to remove that fill already deposited since it was not clearly shown to be an interference with the riparian rights of navigation.

Aalsburg v Cashion, 14 Mich App 91 (1968)

SUBJECT: Boundaries - adjoining lots- acquiescence -accreted lands -
apportionment

FACTS: The three parties are riparian owners of adjoining lots and are in dispute concerning use and occupation of accreted lands between the lots and the current shoreline. Plaintiffs seek to restrain defendants from interfering with the use and enjoyment of their claimed beach lands. All parties offer different methods of apportionment to divide up the 150 to 200 feet of accreted land. The deeds of each riparian give each the land to the lake and riparian rights. The trial court apportioned the lines concluding that the parties had set boundaries by acquiescence from 1926 to 1942 and extended the side lot lines to where the 1942 shoreline was, and then extended the line to the stipulated center point of Silver Lake.

HELD: The Court disagrees with the trial court's findings of acquiescence between 1926 and 1942. The testimony was that there was no actual agreement and that the parties all used the land as they wished with little, if any, regard for the boundaries.

The Court then traces the titles back to the common grantor to construe his intent in the 1925 set of deeds. The Court adopts and modifies the rules of Weisenburger v Kirkwood, 7 Mich App 283 (1967), because the lake is nearly circular and the parties have stipulated as to the center point. The present shoreline is divided by extending the northern-most side lot line to the present lakeshore, and then extending the line to the center of the lake. The same type of line should be drawn from the southernmost side lot line. The present shoreline which is within this segment is then divided among the lot owners in direct proportion to the front footage of their respective original lots. This apportionment considers both the deeded intent of the common grantor and does equity to each of the parties.

Oliphant v Frazho, 381 Mich 630 (1969)

- SUBJECT:** Filled bottomlands - Great Lakes - patented lands - estoppel
- FACTS:** Plaintiffs seek to enjoin defendant from dredging a canal. State of Michigan intervened as party defendant and cross-plaintiff to assert its claim to ownership of certain land which was part of submerged bottomland of Lake St. Clair. Trial court found for plaintiffs. The Court of Appeals reversed for defendant.
- HELD:** The State is estopped from obtaining ownership of this once submerged land which has not been filled. The State participated in platting; recording conveyances, taxation, approval by the Auditor General, as well as non-action in claiming title for seventeen years. The Court noted that homes were built, streets paved, water and sewers installed, and taxes collected, and now the State wants \$65,000, which has "aptly been characterized as ransom money". Reversed and found for plaintiffs.

Township of Grosse Ile v Dredging Co.,
15 Mich App 556 (1969)

- SUBJECT:** Zoning ordinance - public trust - dumping - dike - fill - non-conforming use - riparian rights
- FACTS:** Plaintiff township and intervening Department of Natural Resources seek to enjoin dredging and fill operations by the riparian defendant corporation upon the Detroit River. Defendant owns Stoney Island in the Detroit River. In 1925 the War Department of the United States approved the fill operations and in 1935 gave permanent approval. In 1958 plaintiff passed a zoning ordinance which zoned Stoney Island for light manufacturing and one-family residences. The ordinance allowed a one-year filling period for non-conforming uses. The ordinance also prohibited any fill or dumping

operations without a permit. After eighteen months, defendant received a permit for a valid non-conforming use, which allowed "dredging and allied activities", but the township denied permission to build or repair a dike. Defendant continued in 1962 to dump onto and extend the dike. The trial court issued an injunction against filling beyond a stipulated line, but stated that the dike was a nuisance and ordered its removal and abatement within thirty days.

HELD: The proposed dike and fill operations by defendant may be enjoined by enforcing the zoning ordinance or by invoking the public trust doctrine. The trial court stated that the injunction could stand upon either theory. The Court of Appeals seems to agree. The certificate of a valid non-conforming use is not an approval of filling and dike operations on a large scale over a prolonged period (two million yards over fifty years). The Board of Zoning was also justified in denying the permit for fill and dike operations as being contrary to the zoning ordinance and best interests of the people of Grosse Ile Township.

As far as the public trust theory, the title to riparian lands upon a navigable river is subject to the public trust of navigation and fishing. What constitutes a violation of this trust is a question of fact. The State must show a real and substantial relationship to a paramount trust purpose before enjoining an encroachment in navigable waters by a riparian. But the State need not show a substantial value for public use to establish an encroachment on the public trust. The trial judge viewed the area and found an infringement. The Court of Appeals upholds this finding. Both theories, zoning ordinance or public trust, may support the injunction.

161

Yonker v Oceana County Road Commission,
17 Mich App 436 (1969)

SUBJECT: Public road - user - dedication - acceptance - vacation -
public welfare - lake access - width of highway - scenic
view

FACTS: Plaintiffs are lot owners abutting a road that borders the shoreline of Silver Lake. Plaintiffs petition for the vacation of the road and a declaration of no use by the public. The objectors to the petition are the township, the Oceana County Road Commission, and the State. The road is county-maintained and provides access to the lake and a scenic view.

The trial court denied the petition for vacation, finding that the road touches the water in portions, gives a scenic view, and was dedicated by continual use of over fifty years and was accepted by public maintenance. The dedication by user was sixty-six feet, authorized under MCLA 221.20. In order to justify denial of the petition, defendants must show "reasonable objections."

HELD: The Court holds that denial of access to the lake, including a scenic view, can be a basis for a reasonable objection. The Court holds that In re Vacation of Cara Avenue, 350 Mich 283 (1957), applies even though the road ended at the lake and here the road touches the lake's border. The Court rejected plaintiffs' arguments of increased litter, danger from vehicular traffic, and traffic enforcement problems. However, the Court disagreed with the road determination by the trial court. The width of a road established by user, outside of a plat, is determined by the extent of the user for the prescribed period of time; here we believe that width to be thirty feet, not sixty-six feet.

162

Pigorsh v Fahner, 22 Mich App 108 (1970)

SUBJECT: Navigability - inland lake - Wood Lake - riparian rights - public highway - riparian rights to exclude the public

FACTS: Plaintiffs are the sole riparian owners on Wood Lake and are seeking to enjoin use of the road and the lake on their property. The Department of Conservation intervenes as a defendant. The trial court issued the injunction and only the State appeals. Wood Lake is a 74-acre lake off U.S. 131 that has no inlet nor outlet and is completely surrounded

by the plaintiffs' land. The road leads from U.S. 131 and is an unplatted; undedicated, dirt road, twelve to fourteen feet wide, which ends fourteen feet from the water. The road has been used by strangers since 1953 at an increasing rate. Plaintiffs seek the right to exclude the public from the road and the lake. In 1966 plaintiffs built a fence which was promptly destroyed by township officials. Plaintiffs filled part of the shore and lake without a permit and the Department of Conservation intervenes under 1965 PA 291 (Inland Lakes and Streams Act). The trial court issued the injunction for plaintiffs; finding the road to be private, the lake to be non-navigable under 1965 PA 291, and non-navigable for recreational purposes.

HELD: The Court rejects the Attorney General's argument that the lake is navigable under Moore v Sanborne, 2 Mich 520 (1853), because it is capable of floating logs. The Court, instead, interprets the "navigability" phrase of 1965 PA 291 to mean any valuable boat or vessel navigation under Shepard v Gates, 50 Mich 495 (1883); and In re Martiny Lakes Project 381 Mich 180 (1968). Since Wood Lake is not suited for any valuable boat or vessel navigation, it is not subject to 1965 PA 291. The Attorney General, therefore, has no standing to object to plaintiffs' landfill under 1965 PA 291.

The Court also speaks to the alleged right of the public to use the lake for recreational purposes. The Court follows a string of cases, Attorney General, ex rel Director of Conservation v Taggart, 306 Mich 432 (1943); Winans v Willetts, 197 Mich 512 (1917); Putnam v Kinney, 248 Mich 410 (1929); and Giddings v Rogalewski, 192 Mich 319 (1916), all of which uphold the riparian's right to exclude the public from a private lake. A body of water is not considered navigable merely because it is boatable or capable of being used for a particular purpose. The true test is whether the water can be used as a highway for commerce, trade, or travel, affording a common passage for transportation and the usual modes of navigation. The Court expressly avoids the public road issue, but settles the public use of the lake issue in plaintiffs' favor. The right of exclusion of the general public from the lake is upheld. See Pigorsh v Fahner, 386 Mich 508 (1972).

Hanson v Way Estate, 25 Mich App 469 (1970)

SUBJECT: Riparian rights - boundary lines - submerged lands - island
- adverse possession

FACTS: Plaintiff brings an action to quiet title to an island located in the Grand River. The trial court determined that plaintiff held title in parcel D by warranty deed and title in Parcel B by adverse possession; but denied his title to Island C, which lies entirely on plaintiff's side of the river's main thread. Plaintiff appeals.

HELD: The Court holds that a riparian proprietor is a person who is in possession of such riparian land. Such possession is the basis for the rights and privileges in the water to which the land is riparian. The Court quotes Clark v Campau, 19 Mich 324 (1869), in determining the riparian boundaries. Where the stream is straight, the lines are drawn from the corner shoreline perpendicular to the midstream. The island lies within these boundaries on plaintiff's side of the stream. The title to islands is usually in the owner of the bed of the waters out of which they arise, provided there has been no separation of such ownership by grant, reservation, or otherwise. The title of plaintiff gained by adverse possession vests full legal title in the possessor. The riparian rights are the same if gained by deed or adverse possession. Plaintiff holds title to island.

Sheridan Drive Association v
Woodlawn Back Property Owners Association,
29 Mich App 64 (1970)

SUBJECT: *Res judicata* - riparian rights - public highway - public
access - injunction - trespass

FACTS: The lots of both plaintiffs and defendants were on a plat in 1902 which dedicated all streets. Plaintiffs claim riparian

rights in the lake and the right to exclude the defendants from using the beach within the road bed for recreational purposes. Plaintiffs claim trespass and usurping of their riparian rights. Defendants are back lot owners, not touching the highway nor the water. Defendants claim Fox v Phillips, Roscommon County Circuit Court, No 1138, involving some of the same parties and issues, is *res judicata* and binding upon the parties in this current matter. The Court rejects this *res judicata* claim because the main issues were different, i.e., rights of defendants to use road as opposed to plaintiffs' riparian rights. The trial court found that there was no intervening land between the highway and the lake.

HELD: The Court of Appeals applies Croucher v Wooster, 271 Mich 337, and holds that the owner of the land separated from a lake only by a public road has riparian rights in the lake. This principle was applied to Higgins Lake in Michigan Central Park Association v Roscommon Count Road Commission, 2 Mich 110 (1882). The plaintiffs have a right to exclude defendant back lot owners from the lake across the road. However, the Court quotes Backus v City of Detroit, 49 Mich 110 (1882), where the right to public access is granted at the point where a street ends at a watercourse. One whose property is separated from a navigable lake solely by a public highway has riparian rights in the lake, but the general public has a right to access where dedicated streets were platted to the shore of the lake. Cross streets platted to the road abutting a lakeshore do not give the public a right to access.

165

Thompson v Enz, 385 Mich 103 (1971)

SUBJECT: Watercourses - estoppel - canals - riparian rights - injunction

FACTS: Plaintiffs are riparian owners in Gun Lake who seek a declaratory judgment of their riparian rights in lands bordering Gun Lake. Defendants are subdivision builders. The facts are basically the same as in Thompson v Enz, 379 Mich 667 (1967), except that the majority opinion finds

two new facts to consider: (1) defendant received formal approval from all local governments and silent approval from the Department of Natural Resources, and relying on such, proceeded to build the canals, spending much money; and (2) the passage of a statute (1968 amendment to the Inland Lakes and Streams Act of 1965). The Department of Natural Resources intervenes as a plaintiff. Trial court found for plaintiffs.

HELD: The majority opinion considers the project to be an unreasonable use of the lake because of the added pollution and boatage on the lake. But the Court refuses to deny the completion of the canal project because of the reliance by defendants on the formal approvals and the amount of money already spent. Plaintiffs are estopped by their conduct in failing to bring suit. Plaintiffs stood by idly, with knowledge of the excavation, and because of this, defendants relied on the silent acquiescence by plaintiffs. The statutory policy enacted while the litigation was pending did not oust the Court's jurisdiction, but it does call upon the Court to follow that policy where equity permits. Canal construction is allowed. Reversed for defendants.

166

Pigorsh v Fahner, 386 Mich 508 (1972)

SUBJECT: Trespass - inland lake - subaqueous land - navigable waters - Inland Lakes and Streams Act of 1965 - injunction

FACTS: Plaintiffs are riparian owners of all property around Wood Lake and seek to enjoin trespasses upon their property, thus excluding the general public from the lake. The Department of Natural Resources intervenes as a defendant and cross-claims for removal of a fence built by plaintiffs between the road and the lake. The Department of Natural Resources claims that if the lake is navigable in fact (which it is), it is also navigable in law. This navigable nature, plus the Inland Lakes and Streams Act of 1965, should be construed to overturn the old case law.

The trial court and the Court of Appeals both found for plaintiffs.

HELD: The majority opinion rejects the interpretation suggested by the Attorney General and follows the rationale of Putnam v Kinney, 248 Mich 410 (1929) and Giddings v Rogalewski, 192 Mich 319 (1916). The Court holds that to adopt the view suggested by the Attorney General would create a conflict with Article 2 of the 1963 Constitution, which prohibits property taking by the State without just compensation. The Court upholds the right of the owner of lakefront property with no navigable inlet or outlet, to exclude anyone from his property and thus deny public access. Neither the size nor the navigable nature of the lake make any difference as to the right to exclude. Affirmed for plaintiffs.

167

Bauerle v Charlevoix County Board of Road Commissioners,
388 Mich 520 (1972)

SUBJECT: Inland lake - riparian use - trespass - ponds - injunction - Board of Road Commissioners

FACTS: Plaintiff is one of two riparian owners upon a small pond of three to four acres. A road led to the pond and was incorporated into the county system in 1935. It is debated whether the road ended at the pond or continued to Walloon Lake. In 1967 the defendant Road Commission extended the road through the pond, dumping fill, stumps, and debris. Plaintiff sues for trespass and damages.

HELD: The Court quotes with favor from Beach v Hayner, 207 Mich 93 (1919); and Burt v Munger, 314 Mich 659 (1946). These cases state that where there are several riparian owners, such owners, their lessees and licensees, may use the entire surface of the lake for boating and fishing so long as they do not interfere with the reasonable uses of other riparians. The Court concludes that plaintiff was a riparian owner, the pond is navigable, and the Commission's action, therefore, constituted a trespass.

The Court orders that restoration to the pre-extension status should begin at once. Defendant Commission is enjoined from further interfering with the plaintiff's riparian rights. The case is remanded for consideration of the damages for six years of interrupted riparian rights and for the trespass.

168

People v Babcock, 38 Mich App 336 (1972)

SUBJECT: Consolidation - navigable waters - Great Lakes - landfill - submerged lands - public trust

FACTS: We have consolidated two cases involving similar fact situations and issues. Plaintiffs are individuals, the State and Department of Conservation who seek to enjoin defendants' landfill on Lake St. Clair. Defendants claim that the Great Lakes Submerged Lands Act, MCLA 322.701, was unconstitutional. Trial court found for plaintiffs.

HELD: The Court talks at great length about the procedural problems of consolidation. They then proceed to hold that there are no riparian rights in submerged contiguous lands under the Great Lakes, thus recognizing State v Venice of American Land Co, 160 Mich 680 (1910) and Obrecht v National Gypsum Co, 361 Mich 399 (1960). Defendants are prohibited from their filling operation in Lake St. Clair.

There was no finding as required by Obrecht that the lands in question were of no substantial public value or that the public interests would not be impaired. Defendants' action will necessarily interfere with the public rights of boating and fishing on the entire surface of the lake in its natural condition. The doctrine of *de minimus non curat lex* (the law does not take notice of trifling matters) was not applicable to excuse the violation of the public trust. Mere diminution in size, no matter how slight, of a public trust resource violates the public trust. The State holds the lands submerged under the Great Lakes in trust for the public, and only a procedural record finding of no public value or non-impairment of public interests can justify a

conveyance of use of such public lands to private individuals. See People v Reghi, 3 Mich App 389 (1966) for companion case.

169

Pepper v Naimish, 39 Mich App 597 (1972)

SUBJECT: Right of access - contiguous lakes - burden of proof - injunction

FACTS: Parties are owners of adjacent parcels of land. Defendants' lands are contiguous to Duck Lake. Plaintiffs' lands have a similar body of water. Plaintiffs seek an injunction against defendants to enjoin interference with their right of access to the larger lake. The trial court found for defendants, denying the injunction.

HELD: The issue is whether in their natural state the lake and the body of water on plaintiffs' land were once contiguous. Plaintiffs had the burden of proof to show no separation of the two bodies of water. This is a question of fact and the trial judge felt that plaintiffs had not met their burden. Plaintiffs stress the correct rule: when one owns property on a small body of water which is connected to a larger body of water, when the water level is at its legal or normal level, he has riparian rights in the larger body of water. See Kerley v Wolfe, 349 Mich 350 (1957). Plaintiffs simply failed in their proofs and the trial judge found that the two bodies of water were separated by a natural barrier and were never contiguous. The Court of Appeals agrees.

170

Booker v Wever 42 Mich App 368 (1972)

SUBJECT: Riparian rights - inland lake - boundaries - relicted land - irregular shape of lake - acquiescence

FACTS: Plaintiffs seek a declaratory judgment to determine the title to a relicted strip of land and to establish a common boundary line between adjoining lots of plaintiffs and

defendants on Wolf Lake. Defendants placed railroad ties on what they allege is the property line as claimed by their riparian rights. Plaintiffs dispute this line. The trial court found for defendants. Plaintiffs dispute on appeal three subjects: the shape of the lake, acquiescence; and rule of apportionment based upon lake shape.

HELD: Plaintiffs claim that the shape of the lake is round and the *filum aquae* rule (thread of the stream) should apply in apportioning the relicted lands. The Court looks to the lake's history. A government survey of 1837 showed a pear-shaped lake as being patented by the United States Government to the State of Michigan. Sometime later, a causeway road was built across the neck of the pear-shaped lake. Today, the cut off top portion above the neck is merely marshland. Plaintiffs claim that this marshland is no longer part of the lake, thus giving the lake a round shape. The riparian rights were vested when the lake was pear-shaped, at the time of patent.

The Court agrees that the facts are inadequate to establish acquiescence. Defendants' act of placing railroad ties was a unilateral act done only five years ago. Acquiescence is not applicable here.

Ownership of relicted land is determined by the method applicable for irregularly shaped lakes. If the lake was irregularly-shaped when the United States parted with title, even though the shape of the lake may have changed, riparian rights are fixed at that time. For the purpose of determining riparian rights in relicted land, the lake is pear shaped, and hence, the irregular shape rules apply. The rule for apportioning relicted land is to divide the relicted land in proportion to the shoreline owned.

171

Opal Lake Association v Michaywe Limited Partnership,
47 Mich App 354 (1973)

SUBJECT: Injunction - anticipatory nuisance - riparian rights -
estoppel - reasonable use

FACTS: Plaintiff is a non-profit association of riparian Owners of Opal Lake who seek an injunction to restrain development of a proposed lake access site. Defendants are the developer and the Department of Natural Resources. The developer owns 800 feet of shoreline and 2,000 acres in the area; they propose to construct 2,250 residential lots, 1,300 condominiums and 300 mobile home sites. All these people and their guests would have access to the lake through a clubhouse constructed on the 800 feet of shoreline. The access right would be granted as members of the Michaywe Owner's Association, which would attach to any lot or condominium owner. The trial court issued the injunction, but shaped the decree so as to allow the development only under certain restrictions. Opal Lake is a 120-acre lake with two and one-half miles of Shoreline and 240 feet of public access. Plaintiff claims that this development will overburden the lake and seek a total halt to all proposed development. The trial court development restrictions included that only fifty cars could be parked, only fifteen non-power boats, and 120 people could use the facility at any one time. Both parties appeal.

HELD: The cross-appeal is discussed first. The Court rejects the defendant-developer's argument that the cause of action is in the form of a nuisance and, therefore, a court of equity will not enjoin an anticipatory nuisance. The Court sees the cause of action to be in the nature of a declaratory judgment and not a nuisance. The Court agrees with the trial court's injunction and illustrates that delay by the plaintiff in seeking injunctive relief could result in an estoppel under Thompson v Enz, 379 Mich 667 (1967). The cross-appeal is denied; the injunction was properly issued in equity.

The appeal by plaintiff is discussed next. Plaintiff seeks a shut-down of the development. The Court views this stance as untenable because of the rule that on an inland lake where there are several riparian owners, the entire surface of the lake can be used by the proprietors, their lessees, and licensees, so long as they do not interfere with the reasonable use of the water by other riparians. See Bauerle v Charlevoix Road Commissioners, 388 Mich 520

(1972) and Beach v Hayner, 207 Mich 93 (1919). Plaintiff may not preclude a reasonable use by defendants. The use, as restricted by the trial court's injunction, is reasonable. The only criticism the Court of Appeals has, as to the trial court injunction, is the burden of enforcement. The Court suggests that rather than having only 120 people use the facility at any one time, putting the enforcement burden on plaintiffs, why not restrict access to only a certain number of lots and thus place the enforcement burden upon these lot owners. The Court remands for a determination of what the number of lots with access should be in order to be a reasonable use.

172

Attorney General, ex rel Director of the
Department of Natural Resources v Hallden,
51 Mich App 176 (1974)

SUBJECT: Navigable waters - public fishing rights - trespass - recreational use

FACTS: Plaintiffs, the Attorney General and the Department of Natural Resources, are seeking to enjoin the defendant riparian owners from interfering with boaters and waders passing on the St. Joseph River. Defendants strung a chain across the river to prevent boaters and waders from passing. Plaintiffs claim a right under MCLA 307.41 to fish in a navigable stream. The State has planted fish and the public has used this portion of the river for boating, fishing and canoeing. The river is seventy-nine feet wide and twenty-two inches deep. The statute only applies to "navigable" streams, so the question is whether the stream is navigable. Plaintiffs urged, and the trial court agreed, that recreational uses can support a finding of "navigability."

HELD: This case is an attempt to clarify and modernize the definition of a navigable watercourse. The Court recognizes that economic values have changed and so should the law. The Court notices the shift in focus from the uses of the lumber industry with floatage of logs to the

modern recreational uses of the waterways. There are two classes of navigable rivers; strictly navigable (boats), and floatable (logs), but public fishing rights attach to either class. Commercial navigation tests and log floating tests of navigability are considered too narrow today. Recreational uses alone will support a finding of navigability under this expanded definition. Members of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below the high water mark on waters capable of being navigated by oar or motor-propelled small craft. Michigan joins the growing trend of states accepting this recreational use test of navigability. Affirmed for Plaintiffs.

173

People, ex rel Director of the
Department of Natural Resources v Murray,
54 Mich App 685 (1974)

SUBJECT: Navigable waters - submerged lands - conveyances - patents - estoppel - Marketable Title Act

FACTS: Plaintiff is the Department of Natural Resources who seeks to enjoin defendant from filling operations in Mallard Bay and seeks removal of two fences used as boundaries by defendant. Defendant claims the property and traces his chain of title back to a United States patent of 1891. Plaintiff argues that the land is submerged; that the water above this land, is navigable; and that the land is on the water side of the high water mark and was not included in the United States patent. Plaintiff claims that even if the land was included in the United States patent, it was after Michigan's statehood and, therefore, invalid. The trial court found for plaintiff and also made a finding of navigable water above the submerged lands.

HELD: The Court finds it unnecessary to consider the question of whether the patent was granted before or after Michigan became a State because they feel that the patent did not cover the disputed land. In Hilt v Weber, 252 Mich 198 (1930), it was said that "a patent from the government was

entitled to carry title from the water's edge." Here, the fractional part conveyed was only to the water's edge. The patent did not cover the submerged lands and the State obtained title to this navigable water when it was admitted to the Union. The Court also rejects a claim by defendant that the State should be estopped by their actions of plat approval. The Court finds Oliphant v Frazho, 381 Mich 630 (1969), inapplicable because the reliance and the State action were less compelling here than in Oliphant. Also, the Court declares that the Marketable Title Act, MCLA 565.104, will not be held applicable against the State's interest because title to lands beneath navigable water passed to the State upon admission to the Union.

174

Kurrle v Walker, 56 Mich App 406 (1974)

SUBJECT: Riparian rights - bayou - access to pond - navigable - nuisance - abatement - equity - damages - injunction

FACTS: The parties are adjacent property owners on a bayou. Plaintiffs seek damages for denial of pond access and an injunction against all structures in the bayou waters. Defendant has constructed a fence and a \$250,000 marina on the bayou which denies plaintiffs' access to a navigable pond. Plaintiffs claim that this is an interference with their riparian rights and that they have a right of access to all of the pond's surface.

HELD: The Court agrees that plaintiffs are riparians on navigable waters and thus have surface rights. The Court has the power to order the fence and structures removed, but refuses to exercise such power. Since the marina was constructed on defendant's own land, there is no action for trespass, but rather, only for nuisance. This nuisance may be abated in a court of equity only when legal remedies are inadequate. Since the marina cost \$250,000 and the Court is seeking to do equity, it refuses a complete abatement of the marina as a nuisance. Plaintiffs' use of the bayou was strictly for navigation, so the Court orders removal of the fence to allow access, but refuses to order

the complete abatement of all structures. The Court remands the case for determination of damages due plaintiffs for the "minor" losses of fishing and recreational uses, which can be calculated in damages at law.

175

NeBoShone Association, Inc v State Tax Commission,
58 Mich App 324 (1975)

SUBJECT: Property taxation - valuation - navigable waters - restraints on sales

FACTS: Plaintiff is a non-profit corporation which holds 1,775 acres through which runs the Pine River. It is an undeveloped area used as a hunting and fishing preserve. The Pine River is a navigable, heavily-canoed and fished river. There are six cottages on the land occupied by different members of the association. Plaintiff appeals the tax assessments for 1971 and 1972. There are many tax and evidentiary rules to be gained from reading this case, but the main riparian question is simply one of riparian ownership. The association claims that the Pine River is owned and used by the public and this prevents the Tax Commission from placing a valuation on the river frontage.

HELD The Court rejects this claim. A person who owns lands on both sides of a navigable river owns the entire soil under the water, but does not own the water or the fish in the water. The general public may use the river without trespassing. The ownership, however, is completely in the riparian and does not prevent the sale of such property nor its taxation.

176

Early v Baughn, 61 Mich App 244 (1975)

SUBJECT: Inland lakes - canals - Inland Lakes and Streams Act - Department of Natural Resources permit

FACTS: Plaintiffs, an individual and an association, are riparians on Mud Bay who seek to enjoin the completion and force the refilling of canals dug from a lake. Defendants are developers who dug their canals under the authority of a Department of Natural Resources permit issued under the Inland Lakes and Streams Act of 1965. The parties have stipulated to the facts. Plaintiffs seek to have the defendants' canal-bordered lots declared to be non-riparian. Defendants claim that plaintiffs should be estopped because they stood by and watched defendants spend large sums of money. Both parties agree that Pierce v Riley, 35 Mich App 122 (1971), and Thompson v Enz 385 Mich 103 (1971), are applicable. The trial court found for defendants.

HELD: The Court states that Mud Bay is attached to Portage Lake and, therefore, the "reasonableness" of the increase in lake traffic or bay traffic varies with the frame of reference. If the increase were solely on Mud Bay, it would be substantial, but if the traffic increase were spread out upon the connecting Portage Lake, it would be minimal. The Inland Lakes and Streams Act of 1972 was in effect for the trial court's opinion, but not at the commencing of the case. The Court, therefore, holds the cause in abeyance until the Department of Natural Resources decides upon the permit application of defendants which they must file under the Inland Lakes and Streams Act of 1972. Defendants are ordered to apply within thirty days.

177

Comstock v Wheelock, 63 Mich App 195 (1975)

SUBJECT: Access to watercourse - street abutting inland lake - user

FACTS: Plaintiffs seek an injunction against defendants to prevent defendants from interfering with public access to a lake and from constructing a structure on defendants' lakeside property. Trial court found for defendants.

HELD: Trial court was correct in granting defendants accelerated judgment because plaintiffs failed to state a cause of action

in that public and not private rights were asserted by the plaintiffs. As a second ground of decision, the Court stated that plaintiffs were barred by laches. Plaintiffs claim public rights vested under MCLA 221.20; MSA 9.21, the "highway by user" statute in that the public has used this road abutting Long Lake for a period exceeding the ten-year statutory period. A boathouse was maintained, a lifeguard stationed, and the road was snowplowed and brined. Court answered that the public may have no prescriptive right in the property for recreational purposes as in Pigorsh v Fahner, 22 Mich App 108 (1970).

178

Kempf v Ellixson, 69 Mich App 339 (1976)

SUBJECT: Access to watercourse - street abutting inland lake - prescriptive rights anchorage - bathing rights - dedication of highway - ownership - public beach - wharfage - public highway - trespass

FACTS: Plaintiff seeks an injunction to prevent trespass upon riparian rights. Sam-O-Set Boulevard, a dedicated public highway within the jurisdiction of the Roscommon County Road Commission, separates plaintiff's land from Higgins lake. Trial court granted the injunction after finding that plaintiff did have riparian rights in the subaqueous soil of Higgins Lake.

HELD: An express limitation is required to prevent riparian rights from attaching to lots abutting a waterfront highway, as in Croucher v Wooster, 271 Mich 337 (1935). The appellants claim that the highway is a public recreation area is without merit because a public easement cannot be established by prescription. Some action by representatives of the public is required as in Bain v Fry, 352 Mich 299 (1958). Three cases were consolidated into this one; therefore, findings or determinations were not made in regard to private prescriptive easements.

Again, the Court found riparian rights attach where no appreciable amount of land intervenes between the water and the highway, and such rights are shown even where

the highway right-of-way extends into the lake itself. Note that the public has riparian rights where the crossroads to Sam-O-Set Boulevard are platted to the water; if the crossroads are only platted to the boulevard itself, no public easement exists.

179

Michigan Conference Association of Seventh-Day Adventists
v Commission of Natural Resources,
70 Mich App 85 (1976)

- SUBJECT:** Navigable waters - access to watercourse - inland lakes - access by highway
- FACTS:** Plaintiff's land completely encloses the 103-acre Shellenbarger Lake. The lake has one outlet that flows to the AuSable River. The land on both sides of the creek is also owned by the plaintiff. A foot path was constructed over the creek to complete a hiking trail around the lake. This created an obstruction preventing fishermen from canoeing up the creek to the lake. The Crawford County Prosecutor informed plaintiff that the bridge was in violation of MCLA 281.735, et seq. Plaintiff seeks an injunction and a declaratory judgment, both of which the Circuit Court granted.
- HELD:** The Court follows Pigorsh v Fahner, 386 Mich 508; Putnam v Kinney, 248 Mich 410; and Winans v Willetts, 197 Mich 512, holding that Shellenbarger Lake is not a public, navigable body of water, but a privately-owned lake and plaintiff may exclude others from the lake. Navigability is not necessarily determined by the navigability of the outlet. Even if the outlet creek were navigable and access by water to the lake thus available, the lake would still be private. Affirmed for Plaintiff.

Pierce v Riley, 81 Mich App 39 (1978)

SUBJECT: Riparian rights - inland lake - easement of right of way - channel lots - injunction

FACTS: Plaintiffs are riparian owners who seek a declaratory judgment to determine their riparian rights, and an injunction against defendants, who are also riparian owners abutting Stony Lake. Defendants propose to subdivide such land into ninety-one lots, only one of which will border on the lake, giving the ninety back lots an easement of right-of-way to Stony Lake. Stony Lake is 278 acres having 138 owners with frontage. Plaintiffs claim that such a subdivision with easements will result in an unreasonable burden upon other riparian owners. Defendants claim this would be a proper exercise of their riparian rights. Trial court found for defendants. Court of Appeals remanded for further consideration in light of Thompson v Enz, 379 Mich 667, ruling in Pierce v Riley, 16 Mich App 419. Trial court again dismissed plaintiffs' complaint, and again the Court of Appeals reversed the trial court in Pierce v Riley, 35 Mich App 122, holding that defendants' use was unreasonable. Supreme Court denied application for leave to appeal. Trial court again refused plaintiffs' complaint to have defendants fill in the dredged area and to remove the docks. Court of Appeals again reversed the trial court and ordered the filling of the channel in Pierce v Riley, 51 Mich App 504. Supreme Court reversed the Court of Appeals on June 27, 1974, ordering the Circuit Court to hold the cause in abeyance pending findings of fact and a decision on the application by defendants pursuant to MCLA 281.951 and the Inland Lakes and Streams Act by the Department of Natural Resources in Pierce v Riley, 392 Mich 765 (1974).

HELD: Defendants' proposed use is unreasonable despite the Department of Natural Resources granting a permit to operate a marina, restricting defendants' use of the lake to Holiday Shores Subdivision owners, families, and guests, and limiting the number of boat slips from 100 to 60. The number of families having access to the lake would have increased 66 percent. Neither we nor plaintiffs are bound

by the Department of Natural Resources' findings as to present reasonableness. We order defendants to fill the channel. Defendants chose to place the economic burden on themselves by dredging the channel before the reasonableness question was decided; therefore, it would be inappropriate for this Court to take the hardship into account.

181

Opal Lake Assoc v Michaywe, Ltd Partnership,
47 Mich App 354 (1973)
63 Mich.App 161 (1975) (on remand)

SUBJECT: Keyhole/funnel development

FACTS: Plaintiff is an association made up of members owning riparian land on Opal Lake which consists of approximately 120 acres of water and 2 1/2 to 3 miles of shoreline. Defendant owns 800 feet of frontage on Opal Lake and approximately 1990 acres in the area. Defendant planned to grant access to its 800 feet of lake frontage to all purchasers in its development which was to include 2200 residential lots and as many as 1300 condominium units. Plaintiffs sought to halt all development on the 800 feet by defendant.

HELD: The trial court found that the proposed development was an unreasonable use of riparian rights and adopted specific use restrictions which were to be enforced by defendant. On appeal, plaintiff sought to set aside all uses allowed by the trial court. The Court of Appeals affirmed the limited uses, but remanded for consideration of who was best suited to enforce the injunction. On remand, the trial court adopted additional restrictions, required defendant to post a \$5000 bond and adopted other restrictions to protect plaintiff's rights. On appeal, the Court of Appeals affirmed with minor changes, including increasing the bond to \$10,000.

Tennant v Recreation Development Corporation,
72 Mich App 183 (1976)

SUBJECT: Apportionment of accretion on inland navigable waters.

FACTS: Plaintiffs brought this action in equity to establish ownership of a small peninsula of land that had formed by accretion. The parties were abutting riparian or littoral property owners. The alluvion which formed by the process of accretion is contiguous to the defendant's property and proceeds laterally in front of plaintiff's property, separated by a bay of water which is approximately 700 feet across. The trial court adjudged the defendant to be the owner of the disputed parcel of land.

HELD: The general rule is that beds of navigable inland lakes are owned by the adjoining riparian or littoral owners in approximate proportion to their lake front ownership; such apportionment is possible and permissible notwithstanding the fact that the body of water may have an irregular shape. Another general rule holds, however, that accretions belong to the land from which they begin; for one to successfully assert title to an accretion, it must be contiguous to the land of the one asserting title. This case demonstrates the conflict which arises when the alluvion formed by the process of accretion begins to accumulate in a lateral direction impinging upon the riparian or littoral ownership and attendant rights of adjacent riparian property owners. In such cases, the rule that alluvion formed by accretion belongs to the owner of the lands to which it is contiguous must yield if application of the rule would destroy or substantially impair the riparian right of access to open water of another owner, the right of access to navigable waters being the most important riparian right as it constitutes the chief source of value of riparian property. The appellate court proportioned the peninsula by extending the lot lines separating the respective properties perpendicularly to the shore of the lake, giving plaintiff title to that portion of the peninsula which extended in front of plaintiff's land.

Superior Public Rights, Inc v DNR, 80 Mich App 72 (1977)

- SUBJECT:** Easements - state-owned Great Lakes bottomlands - public trust - Great Lakes Submerged Lands Act -attorney fees
- FACTS:** Plaintiff seeks to invalidate DNR agreement which permitted private use of public trust lands. Plaintiff is a non-profit corporation whose members use the trust lands in question for recreational purposes. Agreements in questions are: (1) a 1971 agreement between DNR and railroad permitting railroad to occupy Great Lakes bottomland for docking and unloading facilities; (2) easement granted from DNR to generating company for use of state-owned Great Lakes bottomland for construction and operation of new intake and discharge system. Circuit Court judgment was in favor of defendants.
- HELD:** Court of Appeals held that nothing in the record indicated burden of proof was improperly placed upon plaintiff and that neither the Great Lakes Submerged Lands Act ("GLSLA") nor the rules promulgated under the Administrative Procedures Act allocate burden of proof between parties of a hearing. Court chose not to reverse trial court's interpretation that burden of proof was actually placed upon railroad at the DNR hearing. Court held that due process was satisfied by virtue of newspaper and published notice by U.S. Army Corps of Engineers. The court found that the requirements of the GLSLA comply with the common law public trust requirements as to the disposition of trust lands, and found that the DNR considered sufficient evidence in granting agreements to use public trust lands and in determining fair cash market price for use of trust lands. The court held that MEPA specifically authorizes apportionment of attorney fees and costs and remanded for the trial court to exercise its discretion.

McCardel v Smolen, 404 Mich 89 (1978)

SUBJECT: Riparian rights - scope of plat dedication

FACTS: Plaintiffs are front-lot owners in a subdivision on Higgins Lake in Roscommon County. Defendants are back-lot owners. The undeveloped beach property was designated as a "boulevard" in the plat of the subdivision and was dedicated to the use of the public. The trial court held that only front-lot owners could construct docking facilities and permanent mooring devices in front of their lots, but that members of the public and back-lot owners could lounge, picnic, and have access to the lake via the boulevard.

HELD: Since back-lot owners did not appeal from the Court of Appeals determination that only front lot owners could erect or maintain permanent mooring facilities on the lakeshore, the Supreme Court did not address this issue. Although bathing, swimming, and temporarily anchoring boats in front of plaintiffs property may be riparian or littoral rights, plaintiffs do not have the right to exclude the general public from also engaging those activities in the waters in front of their property, since the lake is a navigable body subject to the public trust. The question of the public and back-lot owners right to enter and leave the water from the boulevard or to lounge and picnic on the boulevard does not depend on the ownership of riparian or littoral rights, but rather on the scope of the dedication of the plat and the plat proprietors intent. The matter was remanded to the circuit court for consideration of the scope of the plat proprietor's dedication.

Three Lakes Association v Kessler, 91 Mich App 371 (1979)

SUBJECT: Riparian rights - unreasonable use - keyhole development

FACTS: Plaintiff Three Lakes Association (Three Lakes) is a nonprofit corporation interested in Protecting and

Preserving Torch Lake. Defendants are associated with White Sands Estates, a 25-acre subdivision near Torch Lake and comprised of 47 residential lots and Troy Park, an area dedicated for the use of all the lot owners. The trustees of defendant White Sands Estates Property Owners Association own a strip 42 feet by 165 feet abutting the lake on one end and Troy Park on the other, which the White Sands Estates lot owners intend to use as an access to Torch Lake. Plaintiff sued the White Sands Estates Property Owners Association, its trustees and others to enjoin the transfer of access to the backlot owners, claiming that the planned use would be unreasonable and in derogation of the common plan of single-tier, single-family shoreline development and would result in an adverse environmental effect on the lake. The circuit court held that the ownership of the access strip vested its beneficial use in all the owners of the subdivision property and that there was no unlawful attempt to create riparian rights in lands not abutting the lake. The court found no common plan of development and no generalized nuisance. It did find, however, that intensive use could represent a localized nuisance to riparian owners close to the access strip and ordered that no motor vehicles or boat launchings be permitted, that a maximum of 12 persons could use the access at one time and that only one dock, consistent with the other docks in the area, could be constructed and maintained. Plaintiff appealed. The Court of Appeals allowed several owners of riparian land near the access strip to intervene as appellants.

HELD: The several riparian owners on an inland lake and their lessees and licensees may use the surface of the whole lake, for boating and fishing, so far as they do not interfere with the reasonable use of the waters by other riparian owners, and, normally, any reasonable use cannot be precluded. The definition of "reasonable use" of water by riparian owners, their lessees and licensees, depends on the facts of each case. A court, in determining what constitutes "reasonable use", should consider the following: the size, character and natural state of the water course; the type and purpose of the proposed uses and their effect on the water course; and the benefit to the user as opposed to the injury to other riparian owners. A court

in granting equitable relief is not bound by the prayer for relief but may fashion a remedy as warranted by the circumstances. However, an injunction which will be ineffectual or which leaves too many questions or difficulties as to the intended enforcement should not be granted. An injunction fashioned by the trial court setting forth restrictions on the use of lake frontage by a land development company which seem reasonable on their face but present difficulties in their intended enforcement by leaving too many questions open about the final remedy will not be affirmed by the Court of Appeals. Remanded for further proceedings.

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Williamson v Crawford, 108 Mich App 460 (1981)

SUBJECT: Riparian rights - right to accretion - prescriptive easements

FACTS: Plaintiff owns lot 26 facing Lake Orion. Defendants own five lots, 27-31, adjacent to and west of plaintiff's property and operate a party store which has been in existence since 1940 on the lot immediately adjacent to plaintiff's lot. A highway runs between the parties' property and the lake. The original plat shows no land between the highway and the lakeshore, although there is a small area of land designated "park" running between the lakeshore and the road starting immediately to the east of lot 26 and running eastward. Over the years, land came into existence between the highway and the lakeshore in front of the parties' lots as a result of accretion and filling done during a sewer construction project. A previous owner of defendant's property constructed a dock into the lake stretching from the land located between the highway and the lake in front of plaintiff's lot. The dock has been used through the years for access to defendant's party store. Plaintiff sought to quiet title to the land in front of her lot between the highway and the lakeshore on which defendant's dock was located. Defendants counterclaimed to quiet title or, in the alternative, to establish a prescriptive easement for ingress and egress over the subject property. The trial court found the existence of a

prescriptive easement and determined that the subject property belonged to neither party but was an extension of the land designated as "park" originally lying eastward of the subject lots. Plaintiff appealed.

HELD: The Court of Appeals reversed. The court noted the general rule that riparian land must border on the water, recognizing, however, that a parcel of land bordering on a highway contiguous to a lakeshore is also riparian. Since the original plat showed no land between the highway and the lake, the lots in question are all riparian. Since land formed by accretion belongs to the adjacent riparian owners, the Court of Appeals held that the subject land was not park but rather belonged to plaintiff since it was accreted immediately opposite her parcel between the highway and the lakeshore. The Court noted the lack of authority in Michigan on the question of lands created artificially by a third party, and decided that such lands should be treated the same as lands which are created by natural alluvion. The Court of Appeals found it impossible from the record to determine if a prescriptive easement had been established, noting that a prescriptive easement claimant must establish a use which is actual, open, notorious, continuous, and hostile for a statutory 15-year period, and that mutual use of an area will not mature into a prescriptive easement until the mutuality has ended and the adverse and hostile use continues for a statutory period.

187

Bott v Natural Resources Commission, 415 Mich 45 (1982)

SUBJECT: Navigable waters - log floating test - recreational floatability test

FACTS: This case involved two consolidated Court of Appeals decisions. In the one case, plaintiff owned all of the land surrounding a 35-acre lake which had no inlet and one outlet. Plaintiff also owned all of the land on either side of the outlet to the point where it connected with a second lake, which had numerous riparian owners and may have had a public access site. In the second case, plaintiffs

owned all of the land on either side of a small stream connecting two lakes. One lake was spring-fed and had only one outlet, the subject stream. At issue in each case was whether or not the streams were subject to the public trust as being "navigable" waters. In the first case, the trial court found that the lake owned by plaintiffs was a private lake from which the public could be excluded, but expressed no opinion on the navigability of the creek. The Court of Appeals affirmed. In the second case, the trial court found that the stream in question could be floated by recreational boats and therefore determined that the river was navigable. The Court of Appeals affirmed.

HELD:

In a 4-2 decision, the Supreme Court found that neither stream was navigable, applying the log floating test. The court indicated each was too small to have recreational value *per se*, their only value being as access to lakes (with recreational value) which were otherwise, not accessible. The court determined that a dead-end lake, *e.g.*, a lake that does not have both a navigable inlet and outlet, is not navigable. If the littoral land is in unified ownership, the landowner has the sole right to use the lake. If the littoral land is not in unified ownership, the owners have the right to share reasonable use of the water., but the rights of the public are not co-extensive with the rights of the littoral owners. The court rejected the recreational boating test and stated that in order to be navigable and subject to the public trust, waters must be, at a minimum, capable of floating logs or timber for commercial purposes. Use of a recreational boating test would result in a taking of private property without just compensation since it would authorize the public to physically invade waters which were previously closed to the public. The court suggested three different methods of determining whether a stream is capable of floating logs; (a) historical evidence that the waterway was used for floating logs, (b) obtaining a number of large logs and floating them down the stream in question, and (c) surveying the body of water and comparing its dimensions (width, depth, flow rate) to the reported dimensions of streams already found to be navigable.

Two justices dissented, adopting as their opinion, an opinion written by Justice Blair Moody, Jr., prior to his

death. The dissent, relying on the concept of navigability announced in Moore v Sanborne, 2 Mich 519 (1853), would have adopted the recreational boating test for navigability. Moore represented a pragmatic judicial response in recognition of the public need for use of inland waters as it existed at that time, in expanding the narrow definition of navigability to include log floating. The dissent would apply to that same pragmatic judicial response in recognition of a public need to expand navigability to include recreational boating.

188

Boekeloo v Kuschinski, 117 Mich App 619 (1982)

SUBJECT: Apportionment of lands lakeward of the meander line on Great Lakes.

FACTS: Plaintiffs are owners of land which has as its northern boundary the shoreline of Lake Michigan. Defendants own the land immediately adjacent to that owned by the plaintiffs and which also has Lake Michigan shoreline for a northern boundary. Plaintiff filed this action to determine ownership of the land between the meander line and the water's edge. The trial court apportioned the beach on equitable principles, by drawing a line between the mutual corners of the two parcels perpendicular to the water's edge.

On appeal, defendants admitted that there was no evidence on the record to show that the actual water's edge at the time of statehood was the meander line shown on the government survey.

HELD: The Court of Appeals, on the basis that there was no evidence that the disputed parcel was in fact accretion, reversed the trial court and apportioned the subject parcel by extending the government lot lines which separated the two parcels in a straight northerly direction to the water's edge, essentially giving plaintiffs all of the disputed parcel. The court held that a mere meander line on a government survey is not evidence of the water's edge sufficient to demonstrate that accretion had occurred

after the survey. Lacking evidence of accretion, the court applied the rule that in those portions of fractional townships where appropriate corner locations have not been or cannot be fixed, boundary lines shall be ascertained by running lines due north and south or east and west as the case may be, from established corners to the water course, Indian boundary line, or other external boundary of such fractional township. The court noted, however, that if a case should occur where the enforcement of this rule would do great injustice to one of two parties, equitable principles may be used to reach a just result.

189

Michigan ex rel Allegan Prosecutor v The Summer School of Painting at Saugatuck, 126 Mich App 81 (1983)

SUBJECT: Navigability of inland waterways - log flotation test - dead end lakes.

FACTS: The Allegan County prosecutor brought an action seeking a mandatory judgment enjoining defendants from interfering with public use of the waters of Oxbow Lake. Before 1909, Oxbow Lake had been a part of the Kalamazoo River. However, between 1909 and 1911, the United States government changed the mouth of the Kalamazoo River. Over time, the western part of the old channel, now Oxbow Lake, connecting it to Lake Michigan and the northern part connecting it to the Kalamazoo River naturally closed. Defendants argue that the lake is a private lake with no navigable entrance, surrounded entirely by private Property and that the public has no right to trespass thereon. The trial court held that Oxbow Lake was a Public lake and that the former river channel which was now a swamp provided a navigable means of access to Oxbow Lake applying the recreational boating test. The trial court enjoined defendants from interfering with Public use of Oxbow Lake. On appeal, the Court of Appeals held that the swamp or channel between the Kalamazoo River and the lake is navigable, again applying the recreational boating test, but held that the lake was non-navigable because it was a dead end lake

having only a navigable outlet and not both a navigable inlet and outlet. Both parties sought leave to appeal to the Supreme Court, which, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for reconsideration in view of Bott v Natural Resources Commission.

HELD: On remand, the Court of Appeals reversed its earlier use of the "recreational use" test in favor of the "log flotation" test set out in Bott. The court found that the swamp was not navigable under the log flotation test and that Oxbow Lake was a private dead end lake. The court found that defendants had the right to exclude the public from boating in Oxbow Lake and the former stream channel.

190

Cook v Grand River Hydroelectric Power Company,
131 Mich App 821 (1984)

SUBJECT: Dams - flowage rights - Marketable Record Title Act - prescriptive rights to flowage - estoppel - Environmental Protection Act

FACTS: Plaintiffs are property owners who purchased properties abutting the Thornapple River in Kent County upstream from the La Barge Dam between 1971 and 1980. In 1980, defendant bought the dam and all rights appurtenant thereto from Consumers Power Company. Consumers had ceased using the dam to generate electricity in 1968 and in 1970 had ceased using the dam gates, leaving them open. In preparation for the re-establishment of the dam as a hydroelectric power-producing facility in 1982, defendant closed the dam gates, raising the level of the water to approximately 2-3 inches above the dam's spillway. The closing of the dam gates caused flooding on plaintiffs' properties. They commenced an action in the circuit court seeking injunctive and monetary relief. The trial court dismissed the plaintiffs' claims finding that the defendant had the right to impound water and, further, that defendant had flowage easements over plaintiffs' properties, permitting it to flood portions of their properties by operating the dam. The Court also rejected

plaintiffs' claimed violations of MEPA. Plaintiffs appealed.

HELD:

The Court of Appeals affirmed. The record established that defendant had acquired valid flowage easements over the plaintiffs' properties. Even if the marketable record title act extinguished the express flowage easements acquired by defendant's predecessor in interest, an issue the court declined to decide, defendant still had a right to flow waters over plaintiffs' properties because defendant had acquired prescriptive flowage easements over the properties.

Defendant acquired all prescriptive rights appurtenant to the dam from Consumers. The operation of the dam by Consumers from 1927 until the time it opened the dam's gates in 1970, and the resultant flooding of plaintiffs' properties, constituted an open, notorious, and continuous use of the properties of the plaintiffs for a period in excess of the requisite 15 years for a prescriptive easement. Even if the express easements had been extinguished by the marketable record title act, the use of the properties was also adverse. In addition, any prescriptive flowage easements acquired by defendant were not abandoned since there was no evidence of continuous non-use of the easements for 15 years.

The Court of Appeals also affirmed the finding of no basis for estoppel. There was no intentional or negligent action by Consumers inducing plaintiffs into believing that no one had the right to flood their properties and there was no evidence that Consumers made any representations to anyone to the effect that the dam would never be operated.

The Court of Appeals also determined that the trial court properly found that, based on the testimony, the dam's operation was not likely to pollute, impair, or destroy the environment and did not err in dismissing plaintiffs' claim based on MEPA.

Stidham v Algonquin Lake Community Association,
133 Mich App 94 (1984)

- SUBJECT:** Riparian rights in subterranean waters affected by dam - Inland Lakes and Streams Act
- FACTS:** The Algonquin Lake Community Association operates a dam which controls the level of the water in Algonquin Lake. In 1978, 1979, and 1980 the association obtained permits from the Department of Natural Resources to lower the lake level. In 1982 the association proceeded to lower the lake without obtaining a permit. Stidham runs a gravel business near the lake and obtains water to wash the gravel from a well. In 1982 Stidham obtained a temporary restraining order to prevent further lowering of the lake level, then filed an amended complaint for damages, alleging that the 1980 lowering of the lake caused him to replace his well and interrupted his business. He further alleged that the association had unreasonably interfered with his right to use nearby subterranean water. The circuit court granted the association's motion for summary judgment and dismissed the action. Plaintiff appealed.
- HELD:** The existence of the Inland Lakes and Streams Act does not affect the plaintiff's common-law rights regarding riparian rights, nor does the approval of the DNR *ipso facto* make the defendants' actions reasonable. Ownership of a dam does not impose a duty on the owner to maintain the artificial water level. However those injured by the lowering of the water might maintain an action if they can show that they have acquired a prescriptive right to the maintenance of the water level. The plaintiff did not allege facts showing that he had acquired a prescriptive right to the maintenance of the lake level. The general allegation that defendant knew that lowering the lake level affects the subterranean water level did not establish a prescriptive right to maintenance of the lake level. On the fact set forth in plaintiff's complaint, defendant breached no duty owed to plaintiff when it lowered the lake level.

Thom v Rasmussen, 136 Mich App 608 (1984)

SUBJECT: Public use, including dock construction, of waters adjacent to a platted alleyway dedicated to the use of the public.

FACTS: Plaintiffs brought an action seeking damages and a permanent injunction to prohibit defendant from erecting and maintaining a dock at the end of a six-foot wide alleyway which runs between plaintiffs' properties to Devil's Lake. The alleyway was platted and dedicated to the use of the public and connects drives, which were also platted and dedicated to the public, upon which platted back lots are located. Defendant owns four back lots upon which there are cottages available for rent. A dock has been maintained at the end of the alleyway for at least 25 years.

HELD: The right of the public to erect and maintain a dock at the end of a platted passageway which terminates at the edge of a lake does not depend on riparian ownership, but rather, on whether the scope of the dedication of the platted land encompasses the right to erect and maintain a dock. The scope of the dedication for the subject alleyway encompassed the right of the public to erect and maintain a dock at the end of the alleyway. The fact that defendant as an individual member of the public, as opposed to some municipal body, erected and maintained the dock is of no consequence, since the dock was available to the public in general. The defendant is not required to secure a permit from the Department of Natural Resources pursuant to the Inland Lakes and Streams Act, since the dock in question is a seasonal structure erected for private noncommercial recreational use. While defendant's actions may be motivated by the desire to provide lake access and docking for the renters of his back-lot cottages, the dock does not thereby become a commercial structure, since the dock is available to the general public and no specific fees are charged for the use of the dock.

People v Massey, 137 Mich App 480 (1984)

SUBJECT: Great Lakes bottomlands - abandoned property of historical or recreational value - receiving and concealing stolen state-owned property - federal admiralty/maritime law -preemption - public trust

FACTS: Defendant was convicted by a jury in the circuit court of receiving and concealing stolen property having a value over \$100. The property involved was a wood stock anchor which the defendant took from the bottom of Lake Michigan. The anchor falls within the classification of abandoned property of historical or recreational value found on the bottom of the Great Lakes which pursuant to state law is the property of the State of Michigan. Defendant was sentenced by the trial court to pay a fine of \$1,000 and was ordered to pay costs of \$1,276.83. Later, the trial court entered an order setting aside defendant's conviction and granting his motion to quash on the basis that the state statute was preempted by federal admiralty law. The People appealed and the Attorney General intervened.

HELD: On appeal the jury conviction was reinstated. The statute declaring abandoned property of historical or recreational value on Great Lakes Bottomlands to be state property is constitutional and does not interfere with federal maritime or admiralty law.

Thies v Howland, 424 Mich 282 (1985)

SUBJECT: Riparian rights - plats - easements - construction of docks

FACTS: The parties are owners of real property located in a subdivision on the south shore of Gunn Lake in Barry County. The plat of the subdivision indicates a 12 foot wide "walk" that runs along the lakeshore. Plaintiffs own lots located in the first row separated from the lake only by the walkway. Defendants own backlots in the subdivision

12-foot wide alleys were platted after every fourth lot in the first and second rows allowing back-lot owners to have access to the lakeshore. One of these alleys originally passed between lots 16 and 17, owned by plaintiffs. However, a prior owner of these lots had built a cottage which encroached upon the alley. In a 1975 consent judgment entered into by the parties' predecessors in title, an 8-foot wide easement was created across the west side of lot 16. In 1978, plaintiffs constructed a seasonal dock extending from the shore into the lake immediately in front of the western portion of their Property. In 1979, defendants constructed a seasonal dock at the end of the easement across lot 16, approximately 12 to 16 feet from plaintiff's dock. Plaintiffs filed suit seeking to enjoin defendants from maintaining the dock and anchoring their boats in the lake. Defendants counter-claimed, seeking to enjoin plaintiffs from interfering with defendant's use of the easement or, in the alternative that defendants be permitted to use the alley between lot 16 and 17. The trial court concluded that defendants could use the lake for recreational activities such as boating, fishing, and sunbathing and could anchor their boats as long as they did not interfere with plaintiff's reasonable use and enjoyment of their property, but that defendants could not erect a dock. The Court of Appeals affirmed, in an unpublished Opinion, but modified the injunction to prevent defendants from anchoring their boats off the terminus of the easement.

HELD: The Supreme Court affirmed. Land which includes or is bounded by a natural watercourse is defined as riparian. The plat's dedication of the lakefront walkway to "the joint use of all of the owners of the plat" granted back-lot owners, including defendants, only an easement along the lakeshore, and not an estate in land. The court found that the riparian rights were vested in plaintiff front-lot owners. The Supreme Court also determined that the plat proprietor intended that back-lot owners enjoy rights similar to those enjoyed by members of the public in navigable waters and that such right did not include the right of permanent anchorage. The court thus found that defendants could not permanently anchor their boats nor construct docks or other permanent anchorage in front of plaintiff's lots. Addressing the easement which had been

created across plaintiff's land, the court determined that the easement, by its express terms did not grant back-lot owners the right to construct a dock or to permanently anchor boats off the terminus of the easement.

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Rush v Sterner, 143 Mich App 672 (1985)

- SUBJECT:** Rehabilitation of dam - Marketable Record Title Act - Environmental Protection Act - Inland Lakes & Streams Act
- FACTS:** Plaintiffs brought an action seeking an order preventing defendants from rehabilitating an unused dam across Prairie Creek. Rehabilitation of the dam would flood a portion of plaintiffs' property. Plaintiffs argued that any right on the part of the defendants to flood plaintiffs' property was extinguished by operation of the provisions of the marketable record title act, that impoundment of waters behind the rehabilitated dam would violate the provisions of Michigan's Environmental Protection Act ("MEPA"), and that the defendants' reconstruction efforts on the dam were in violation of the licensing provisions of the Inland Lakes and Streams Act. The trial court dismissed plaintiffs' action. Plaintiffs appealed.
- HELD:** The marketable record title act will extinguish an easement right created by deed where a person has an unbroken chain of title for the statutory period and there has been neither hostile Possession of the easement nor some physical facility evidencing the easement interest; the marketable record title act applies where a right of flowage is an "excepted and reserved" interest under the deed, even though there is no specific mention that the right of flowage is an easement right.
- A private individual lacks standing to challenge in a direct action in circuit court the failure of another individual to comply with the licensing requirements of the Inland Lakes and Streams Act, since the power to enforce the provisions of that act lies with the Department of Natural Resources.

Although the trial court had stated that plaintiffs had no standing to raise MEPA, the court actually ruled that plaintiffs had not made a *prima facie* case under MEPA. A court, in determining whether the impact of a proposed action on wildlife is so significant as to constitute an environmental risk which justifies judicial intervention pursuant to MEPA should evaluate the environmental situation prior to the proposed action and compare it with the probable condition of the environment if the proposed action is undertaken; the court should consider: (1) whether the natural resource is rare, unique, endangered or of historical significance; (2) whether the resource is readily replaceable; (3) whether the proposed action will have any significant consequential effect on other natural resources; and (4) whether the direct or consequential impact on plants or animals will affect a critical number, considering the nature and location of the wildlife affected. Esthetic considerations alone are not determinative of whether there is a significant environmental impact such as will justify judicial intervention pursuant to the provisions of MEPA. Conversion of a "marginal" trout stream (one which was periodically treated to eliminate other species and planted with trout by the DNR) to a warm water stream did not violate MEPA.

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Densel v Ann Arbor, 144 Mich App 667 (1985)

SUBJECT: Navigable waters - recreational land users act

FACTS: Plaintiff was fishing on the Huron River approximately 100 feet downstream from defendant's dam when the dam opened and released water. The force of the rushing water caused plaintiff's boat to overturn, injuring plaintiff. Plaintiff sued, alleging that defendant had negligently breached its duty to exercise reasonable care by failing to place signs warning the public of the dangerous condition of the dam. Defendant sought summary judgment claiming that plaintiff's claim was barred by the recreational land user's statute, MCL 300.201; MSA 13.1485,

because Plaintiffs had not, and could not, allege that defendant was guilty of gross negligence or willful and wanton misconduct. The act states in relevant part, "No cause of action shall arise for injuries to any person who is on the lands of another without paying . . . a valuable consideration for the purpose of fishing . . ." Plaintiff argued that the act did not apply because plaintiff had a right to fish on the Huron River which he alleged was navigable. The trial court determined that the river was not navigable and that the act barred plaintiff's recovery unless plaintiff could show gross negligence or willful and wanton misconduct. Summary judgment was then granted in defendant's favor. Plaintiff appeals.

HELD: The Court of Appeals reversed and remanded. The court was unable to tell from the trial court's ruling, the facts upon which the trial court had concluded that the river was not navigable, but stated that the record indicated that the trial court had not applied the correct legal standard in reaching its conclusion. The court therefore remanded so that the trial court could properly evaluate the question of navigability pursuant to the standards set forth in Bott v Natural Resources Commission, 415 Mich 45; 327 NW2d 838 (1982). The court further indicated that if the Huron River was determined by the trial court to be navigable that the defendant was not entitled to the protection of the recreational land user's act. The court held that if the river is navigable, plaintiff had a right to be in the stream fishing, and that therefore he was not a "person who was on the lands of another." The court noted that although defendant owned the land on both sides of the river, plaintiff had a right pursuant to the public trust in the navigable stream to be where he was.

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In the matter of Four Mile Lake, 150 Mich App 222 (1986)

SUBJECT: Lake levels - county drains - assessments

FACTS: The Washtenaw County Board of Commissioners petitioned the circuit court for determination of the normal height and level of the water in Four Mile Lake

pursuant to the Inland Lake Level Act. The DNR and various farmers intervened. The DNR wished to keep the lake level high to preserve fisheries and wetland values and the farmers wanted the lake level lowered to improve the operation of an agricultural drain. The trial court adopted the the drain commissioner's proposal of setting the lake level high, ordering the installation of a pump to remove water from the drain and charging all costs thereof to the Four Mile Lake Special Assessment District-primarily DNR land. The DNR appealed.

HELD: The Court of Appeals concluded that the legislature intended to give a trial court wide discretion in establishing a lake level and to allow it to weigh competing interests of the parties affected and the interests of the public. The Court of Appeals affirmed the determination of the trial court setting a high lake level and installing a pump to eliminate the problems caused by the high lake level. The court also affirmed the determination that the costs of the pump would be born by the lake level special assessment district even though the pump was located outside of the district, since the pump was necessitated as a result of the high water level.

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West Bay Exploration Co v Amoco Production Co, (on remand)
155 Mich App 429 (1986)

SUBJECT: United States survey - section line as line surveyed across lake rather than as line meandered around lake.

FACTS: Plaintiffs brought suit to quiet title to mineral rights to certain lands located in Kalkaska County. The trial court entered a judgment in favor of plaintiffs, finding that the United States survey established, contrary to defendant's claim, that the section line between Section 13 of Cold Springs Township and Section is of Blue Lake Township crossed Big Twin Lake. Defendant claimed that the section line was established by the meander line along the shore of the lake and that the lake was not therefore in either section 13 or section 18.

HELD: The Court of Appeals affirmed the trial court's determination that the section line crossed Big Twin Lake. The court noted that from the 1839 survey it appeared that Big Twin Lake and Little Twin Lake were considered by the surveyor to be one lake and that a point referred to in the field notes was a spit of land at the narrows which connects Little Twin Lake and Big Twin Lake. The surveyor's notes on the survey map showed, according to the Court of Appeals, that from the spit of land and the meander post on the south side of Big Twin Lake, the surveyor proceeded to survey the section line between section 13 and section 18 over the lake to a meander point on the north side of Big Twin Lake by means of trigonometry. The court found the survey map and accompanying field notes conclusive to establish that the section line was not meandered along the shoreline and instead crossed Big Twin Lake.

199

Fox & Associates, Inc v Hayes Twp, 162 Mich App 647 (1987)
Leave to appeal granted, 430 Mich 858 (1988)

SUBJECT: Riparian rights - funnel or keyhole development - local zoning authority to limit funnel development on lakes

FACTS: Plaintiff, owner of real property in Hayes Township, Charlevoix County, including frontage on Lake Charlevoix, proposed to develop a residential condominium development on the property. The township rejected the proposal because it failed to comply with the zoning provisions regulating funnel developments and the amount of dock space which may be installed per front foot of property on the lake. Plaintiff brought an action in the circuit court against Hayes Township alleging, among other things, that the zoning provisions in question were invalid because they were not authorized by the Township Rural Zoning Act MCL 125.271, *et seq.*; MSA 5.2963(1), *et seq.* ("TRZA"). The court denied plaintiff's motion for partial summary disposition, finding that the restrictions in question were a reasonable exercise of the legislative authority granted by the TRZA as they regulated, but did not prohibit, development to

achieve a valid public interest- namely, conservation of water, a natural resource. Plaintiff appealed by leave granted.

HELD: The Court of Appeals reversed, with one of the three judges dissenting. The court noted that the question appears to be one of first impression. The court then held that the TRZA applies only to the zoning of land and not to the zoning of water and other riparian rights. On appeal, plaintiff had raised a second argument arguing that the zoning ordinance was preempted by the Inland Lakes and Streams Act, MCL 281.951, *et seq.*; MSA 11.475(1), *et seq.* The court noted that plaintiff's preemption argument appeared at first blush to be valid, but found it unnecessary to consider the preemption argument in view of the court's ruling on the TRZA. The Michigan Supreme Court has granted leave to appeal limited to the issue whether under the TRZA a township has the authority to enact a zoning ordinance which limits boat dockage and funnel development by riparian owners.

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Blue Water Isles Co v Department of Natural Resources,
171 Mich App 526 (1988)

SUBJECT: Inland Lakes and Streams Act - Wetlands Protection Act - inverse condemnation

FACTS: Plaintiff applied for a permit under the Inland Lakes and Streams Act ("ILSA") MCL 281.951, *et seq.*; MSA 11.475(1), *et seq.*, to dredge and fill 442 acres of coastal marshlands located in the delta of the St. Clair River for residential and commercial development. The DNR denied the permit application. Following denial of the application, a circuit court action for injunctive relief was consolidated with a Court of Claims action seeking monetary damages for inverse condemnation. The circuit court ruled in defendants' favor and found that no substantial reduction in the value of plaintiff's marshland had occurred as a result of the permit denial and that there existed alternative uses of the marshland which would be of

substantial value to the plaintiff and yet not destroy the marsh. The circuit court also found that the ILSA served a legitimate public purpose, that of protecting essential aquatic resources, and was therefore constitutional.

HELD: The Court of Appeals affirmed, finding that the DNR had not denied plaintiff due process by making a formal decision to deny all future permits in the area; that the permit denial by one division of the DNR department did not deny plaintiff its right to an unbiased decision maker when a second division was seeking to acquire St. Johns Marsh; and that simultaneous application of the ILSA and the Wetland Protection Act was not inappropriate. Although Section 6(1) of the Wetland Protection Act indicates that a permit is not required under the act for activities which require a permit under the ILSA, the court held that that does not mean that the two acts cannot be applied simultaneous, but rather, that a second permit would be superfluous where one was already required. The court upheld consideration of the ILSA, the Wetland Protection Act, and MEPA in reviewing the one permit application.

The Court of Appeals noted that under Michigan law a "taking" of private property for public use is not restricted to cases involving absolute conversion of private property, but also includes cases where the value of the property is destroyed by the action of the government or where the landowner is excluded from use or enjoyment of his property or from any of the appurtenances thereto. The court noted that whether the impact of government action on a specific piece of property requires the payment of just compensation is essentially an ad hoc factual inquiry including such factors as economic impact, the regulation's interference with reasonable investment backed expectations, and the character of the government action. A land use regulation may be justified where the government's action is reasonably necessary to the effectuation of a substantial public purpose. The court concluded that the statutes under which the DNR reviewed plaintiff's application and the DNR's denial of plaintiff's request were reasonably related to the preservation of the state's natural resources and the protection of the public trust in the lakes and streams and

that the denial had not substantially depreciated the value of plaintiff's property. The appellate court also noted that the trial court had properly considered existence of various alternative uses for the property which would not destroy its marshland characteristics.

201

Gregory v LaFaive, 172 Mich App 354 (1988)

SUBJECT: Reestablishment of United States' surveys - division of accretion

FACTS: Plaintiffs, owners of property located on the shore of Big Chief Lake, brought an action in the circuit court against defendants, owners of lakefront property adjoining the plaintiffs' property. Plaintiffs' quiet title action was prompted by a discrepancy as to the precise location of the boundary line dividing the properties and accretion to the properties resulting from a changed shoreline. A modern survey of the properties indicated a boundary line different from that which was indicated on the original plat of the area as recorded by the United States Surveyor General following a government survey in 1849. The court entered judgment for defendant based on the modern survey. Plaintiffs appealed.

HELD: The Court of Appeals reversed and remanded, holding that the location of a boundary line appearing on an official plat of the United States government survey, approved by the surveyor general, is controlling when government lands have been disposed of in conformity to such line.

Attorney General, ex rel Department of Natural Resources
v Sanilac County Drain Commissioner,
173 Mich App 526 (1988)

- SUBJECT:** Application of Inland Lakes and Stream Act to streams which are also drains designated under drain codes predating the Drain Code of 1956.
- FACTS:** Section 4g of the Inland Lakes and Streams Act, MCL 281.954(g); MSA 11.475(4)(g), indicates that a permit under the act is not required for “[m]aintenance and improvement of all drains legally established or constructed prior to January 1, 1973, pursuant to Act No. 40 of the Public Acts of 1956” Defendant drain commissioner commenced clean out and maintenance of the Elk Creek drain without benefit of a permit under the Inland Lakes and Streams Act (“ILSA”). The Elk Creek drain is a county drain which was lawfully established in 1948, pursuant to the Michigan Drain Code of 1923. The Attorney General sought injunctive and declaratory relief against further activities within the stream prior to receipt of an ILSA permit. The trial court denied the relief sought by the Attorney General ruling that the drain was exempt from the Act pursuant to Section 4g set out above. The Attorney General appealed.
- HELD:** The Court of Appeals affirmed the lower court decision. The court held that the statute was clear and unambiguous and that a permit is not required for maintenance and improvement of “all drains legally established or constructed prior to January 1, 1973,” specifically rejecting the Attorney General’s argument that the “pursuant to” language of Section 4g limited the exception to those drains legally established or constructed following the enactment of the Drain Code of 1958.

Thomas Twp v John Sexton Corp of Michigan,
173 Mich App 507 (1988)

- SUBJECT:** Application to drain private, artificial lake to build sanitary landfill - Inland Lakes and Streams Act - MEPA - standard of review - local/state-wide perspective
- FACTS:** Defendant owned a 62-acre artificial lake consisting of a clay pit which filled with surface water runoff and rain after a clay mining operation ceased. The water body had an average depth of 15' and no inlet or outlet. Defendant owned the surrounding land. Defendant sought a permit to drain the lake so that it could use the site for a solid waste landfill. Plaintiff intervened in the proceedings. Plaintiff wanted to acquire the site for recreational purposes. The parties disagreed strongly as to the recreational value of the lake. After a hearing, the administrative law judge ("ALJ") proposed issuance of an Inland Lakes and Streams Act ("ILSA") permit subject to defendant obtaining a permit under the Solid Waste Management Act. The Natural Resources Commission adopted the proposal. On appeal, the circuit court reversed. Defendant appealed.
- HELD:** The Court of Appeals reversed the trial court and affirmed the ALJ. Appropriate review on the ILSA permit is the "substantial evidence" standard, with review de novo on the MEPA claim. The trial court had reversed on the basis that the ALJ had improperly minimized the recreational value of the site. The Court of Appeals determined that the ALJ's analysis withstood the substantial evidence test and that the lower court had erred in displacing the ALJ's choice between two reasonably differing views. With respect to MEPA, the ALJ had applied a state-wide perspective. The lower court applied a local perspective and reversed, ruling that given the lack of inland lakes in this area of the state, the pit was a rare resource. The Court of Appeals reversed on this issue applying a state-wide perspective.

Bond v DNR, 183 Mich App 225 (1989)

SUBJECT: Wetlands Protection Act - takings - Shorelands Protection and Management Act

FACTS: The plaintiff bought two contiguous parcels of land, both of which border the St. Mary's River. On one of them he built his house, on the other he planned to build a residential housing development. He received a permit from the county drain commissioner, and began to construct a drainage ditch. DNR informed the plaintiff that he needed a permit from it as well. After application, the DNR informed the plaintiff that the twenty acres he sought the permit for was a protected environmental area under the Shorelands Protection and Management Act, MCL 281.631, *et seq.*, and the majority of the same 170-acre parcel was wetlands under the Wetlands Protection Act, MCL 281.701, *et seq.* Because of these designations, the DNR denied the permit application. The plaintiff filed suit based on two theories. First, he claimed that the designations of his property as both an environmental area and as a wetland amounted to a compensable taking by inverse condemnation, and second, that such taking was a *de facto* taking under the Uniform Condemnation Procedures Act. Plaintiff did not challenge the validity of the environmental statutes. The trial court found that a taking had occurred, and awarded the plaintiff damages for the current market value less the price paid for the property. The DNR appealed.

HELD: Because the plaintiff did not challenge the validity of the statutes in the lower court, the only issue for appeal is whether the government action constituted a taking. The requirement that a person apply for a permit before modifying a wetland does not, of itself, constitute a taking. Here, the plaintiff is free to submit further applications for uses consistent with the wetlands designation. He is not deprived of all economically viable use of his land. The economic impact of the designations and denial of the permit to dredge is not so severe as to constitute a taking.

Square Lake Hills Condo Ass'n v Bloomfield Township,
437 Mich 310 (1991)

SUBJECT: Wharfage Rights - navigation - townships - township ordinance act

FACTS: The plaintiff bought Square Lake Apartments, Inc., converted them into condominiums, and put up a small boat dock off the easement it was granted to the water. It advertised the condos as giving year-round lake access for recreational use. Bloomfield Township enacted several ordinances that limited the use of inland lakes by riparians and non riparians alike. The plaintiff filed suit challenging the ordinances. The trial court found that townships were not permitted to regulate boat launching and docking by ordinance under either the Township Rural Zoning Act or the township ordinance act, according to Fox & Associates v Hayes Twp, 162 Mich App 647 (1987). The Court of Appeals affirmed the trial court, and the township appealed. On appeal the issues were: (1) whether the delegation of powers in the township ordinance act allows a township to regulate boat launching and docking by ordinance, and (2) whether the Township Rural Zoning Act ("TRZA") allows a township to regulate boat launching and docking by ordinance.

HELD: In 1959 the Legislature amended the township ordinance act to include the authority to adopt ordinances that regulate the public health, safety, and welfare. This was evidence of the Legislature's intent to increase the powers of a township. In 1989 the act was amended to add the phrase "including, but not limited to" in order to establish that areas not specifically mentioned in the act could also be included in the township's power to regulate. The ordinance that regulates boat docking and launching on inland lakes within Bloomfield township falls into such outside areas, and is therefore a perfectly reasonable use of police power. It is not a zoning ordinance because it does not regulate the actual use of the land, but only an activity on the land and attached water. The TRZA was not addressed because the township failed to enact the ordinance subject to its provisions.

Attorney General ex rel Natural Resources Commission v Balkema,
191 Mich App 201 (1991)

SUBJECT: Inland Lakes and Streams Act - lakes - defined - Michigan Environmental Protection Act

FACTS: The defendant, Balkema, sought to drain and fill an area of lower land. The DNR filed for injunctive relief, based on the Inland Lakes and Streams Act ("ILSA"), MCL 281.951, *et seq.* The trial court denied the injunction, dismissed the complaint, and ordered the DNR to pay Balkema damages and costs. The DNR appealed on four grounds: (1) that the trial court erred in dismissing its claim under ILSA; (2) that the trial court erred in dismissing its claim under the Michigan Environmental Protection Act ("MEPA"), MCL 691.1201, *et seq.*; (3) that the court lacked the authority to require posting of a bond in exchange for the preliminary injunction; and (4) that the court erred in awarding damages to Balkema.

HELD: The subject area contains three older lakes as defined by ILSA; each having water, definite beds, and sloping banks. The lower court's failure to recognize the subject area as having lakes constituted reversible error. Under MEPA the appropriate determination is whether the impairment or destruction of a natural resource constitutes an environmental risk. The subject area contains a unique type of vegetation, attracts more waterfowl than any other southwest Michigan inland area, and is home to the largest concentration of black tern, a species that is slowly disappearing. Draining the subject area would damage these capabilities, as well as lessen the capacity of the system to act as a sediment trap and natural pollutant filter. The lower court's dismissal of the DNR's MEPA claim was in error. The imposition of a bond by the court for a grant of a preliminary injunction was improper. Since the claims of the DNR were improperly and prematurely dismissed, the award of damages to Balkema was also in error. However, even if the dismissal were premature, the DNR was acting in its governmental

function, and therefore might be immune from tort liability.

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Hess v West Bloomfield Township, 439 Mich 550 (1992)

SUBJECT: Township Rural Zoning Act - wharfage rights

FACTS: A neighborhood association filed a petition with the township for approval of a special use permit for a common area within the neighborhood as a neighborhood beach. The planning commission recommended approval of the plan, so long as no boats were to be launched or moored at the dock. The township board granted the approval for the special use permit, and contrary to the recommendation of the commission, allowed two boats to be moored at the dock. About ten years later, when all the back lots had been developed, the association sought approval to amend the special use permit to increase the dock capacity from two to eleven. The commission recommended that the petition be denied, and the board adopted that recommendation. Plaintiffs filed suit, including several counts, the first of which was that there was no authority in the zoning ordinance to regulate the docking of boats. The only consideration in this case is whether the enabling provision of the Township Rural Zoning Act ("TRZA") vested the township with the authority to regulate the construction of a dock and the ability to limit the number of boats that could be moored there.

HELD: The TRZA makes express reference to "land development" and "use of land," but never refers to riparian rights or water. MCL 8.3i defines "land," "lands," "real estate," and "real property" as lands, tenements and real estate, and all rights thereto and interests therein. Land that is bounded by water is defined as riparian, and certain rights are inherent in that land. Therefore the term "land," as used within the TRZA, includes those rights or interests that attach to the ownership of land, which extends to riparian rights, and thus TRZA permits townships to regulate riparian rights, such as dockage of boats, as part of their zoning power.

Attorney General v Consumers Power Company, 202 Mich App 74 (1993)

SUBJECT: Water - pollution - Great Lakes - water power company

FACTS: The defendants constructed a hydroelectric plant, referred to as the Ludington Pumped-Storage Facility, on the shore of Lake Michigan. The State of Michigan entered into a lease agreement with the defendants to accommodate construction of the plant. The plant uses turbines to pull water up into a reservoir, and then gravity forces the water back out into Lake Michigan when gates are opened, and the turbines generate electricity. In the process substantial numbers of fish were being chewed up in the turbines, and then being discharged into Lake Michigan. The plaintiff argued that because the fish resources and Lake Michigan are held in trust by the state for the people of Michigan, it can bring a civil action to protect those resources. The defendant argued that the Federal Power Act ("FPA") preempts any state claims.

HELD: Section 10 of the FPA preserves the right to bring an action for damages to property, due to the construction, maintenance, or operation of the facility, against a federal licensee. Therefore, the plaintiff's state-law claim against defendant was not preempted by the FPA.

Flanders Industries, Inc. v State of Michigan, 203 Mich App 15 (1993)

SUBJECT: Water - pollution - Great Lakes - Michigan
Environmental Response Act - Great Lakes
Submerged Lands Act

FACTS: The plaintiff purchased a plant owned previously by a furniture manufacturer that had discharged paint sludge into Lake Michigan, and onto the bottomlands of Green Bay, a portion of which it had obtained from the state pursuant to the Great Lakes Submerged Lands Act

("GLSLA"). The plaintiff was unaware of the contamination until the DNR informed it that it was considered a potentially responsible party ("PRP"). The plaintiff filed suit three years later seeking declaratory judgment under GLSLA that it was not a PRP and that the DNR was liable in contribution because the state owned the bottomlands prior to Heywood-Wakefield.

HELD: The MERA must be interpreted to minimize delay in removing environmental contamination. A litigant has no right to judicial review of the DNR's clean-up plan before the DNR initiates the cost recovery action; until such time, no actual controversy exists. The MERA limits governmental liability where the ownership was acquired through an act of law. Because the state acquired title to the bottomlands of the Great Lakes when it entered the union, the acquisition was an involuntary act of law. Since the State of Michigan is specifically exempted from owner liability under MERA, there can be no contribution claim against it for this bottomlands clean-up.

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Peterman v Department of Natural Resources, 446 Mich 151 (1994)

SUBJECT: Erosion - fast land - takings

FACTS: The DNR built a boat launch next to the plaintiff's land. In order to protect the launch from sand build-up, dissipate energy from the waves, and reduce the amount of damage ice would cause to the ramp, the DNR also built breakwaters on each side of the ramp. By trapping the sand, the breakwaters also prevented sand from being deposited on the plaintiff's property, allegedly causing the shoreline to erode back into the fast lands. This erosion apparently caused the loss of the beach, grass, and a large tree. The plaintiffs built a seawall to prevent further erosion, and sued for intentional trespass, nuisance, and a taking without just compensation.

HELD: By its very statehood, each state has the power of eminent domain. Michigan recognizes that while it has the authority to exercise eminent domain, it cannot deprive a

person of his property without due process of law and proper compensation. Such actions can result in an inverse condemnation action. Because the right to enjoy one's property can be interfered with outside of a physical trespass, intrusion is not required for a taking to occur. Merely setting in motion the acts that create the taking could be enough. However, damages to riparian property because of navigational improvement are not always compensable takings, since the title to the riparian land is held subject to the public navigability, and the state's authority to improve that navigability. The limit of this navigability is the ordinary high water mark. Therefore, erosion of the fast lands of a riparian owner is a compensable taking. The erosion of a riparian owners' beach is also compensable where there is no essential nexus between the improvements to navigability and the erosion of the beach.

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Fox v Ogemaw County, 208 Mich App 697 (1995)

SUBJECT: Dams - nuisance

FACTS: The plaintiff was the developer of several lots on an artificial lake created by the backwaters of a dam maintained by the county. The dam burst, and the lake disappeared, exposing stumps of trees, and creating a breeding ground for mosquitoes and flies. The plaintiff filed suit for trespass-nuisance.

HELD: The loss of lake water from the plaintiff's real estate, by definition, was not an invasion of her property and, therefore, did not constitute a nuisance. Nor was the exposure of the tree stumps. Neither was the reversion of the property to its natural, lakeless, state, or the consequent restoration of the insect breeding habitat.

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Anson v Barry County Drain Commissioner, 210 Mich App 322 (1995)

SUBJECT: Inland Lake Level Act - purpose

FACTS: The water level of Pine Lake exceeded 891 feet, contrary to what the court had set in 1969 as the maximum level of the lake under the Inland Lake Level Act. The plaintiffs were waterfront property owners who had lost beach front and shoreline when the water rose above 893 feet, and sought to have the judgment of 1969 enforced. The trial court voided the 1969 judgment and dismissed plaintiffs' claims.

HELD: The purpose of the Inland Lake Level Act is to provide for the control and maintenance of inland lake levels for the benefit and welfare of the public. It is clear that the legislature intended courts to exercise continuing jurisdiction to decide whether a departure from a previously established level is necessary for the benefit and welfare of the public, and to provide for such a departure.

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West Michigan Dock & Market Corporation v Lakeland Investments,
210 Mich App 505 (1995)

SUBJECT: Inland Lakes & Streams Act - definition - riparian owner - reasonable use

FACTS: The plaintiff and the defendant owned adjacent property on Muskegon Lake, and were in dispute over who owned a boat slip between their respective properties. The dispute arose over who owned the bottomlands of Muskegon Lake, and where the respective property lines extended into the lake.

HELD: Muskegon Lake meets the definition of an inland lake under the Inland Lakes and Streams Act, and thus title is not held in the state, as would be the case if it were part of the Great Lakes. Title of riparian owners extends to the middle line of the lake. If a lake is oblong, the property line extends perpendicularly to the long axis of the lake.

Mumaugh v McCarley, 219 Mich App 641 (1996).

SUBJECT: Relicted lands - boundary determinations

FACTS: The waters of Lake Huron dropped, exposing more shoreline, and in the process reducing the amount of waterfront property each riparian owner held. The township requested that the boundary lines for the plat be redrawn. In doing so, the surveyor determined that one owner was no longer riparian, and that others had lost their shoreline to varying degrees. The owners filed a takings claim, and the trial court parceled out the lands. The parties appealed the trial court's decision.

HELD: The key consideration in apportioning relicted land should be fairness. Each riparian owner should receive a portion of the newly exposed lakeshore in proportion to their prior ownership. Fairness dictates that each parcel of land should have its shoreline frontage reduced proportionally.

Dobie v Morrison, 227 Mich App 536 (1998)

SUBJECT: Riparian rights - access to watercourse

FACTS: The original plattors of the subdivision dedicated a piece of land between their property and the lake for use as a park by owners of property in the subdivision that have no lake frontage. The plattors then sold their property to the current owners, who sought to quiet title to the land. The owners who have no lake frontage challenged the action. The trial court held that the successors in interest were the riparian owners, subject to the easement of the "back-lotters." Both appealed the decision.

HELD: Riparian rights can exist without actual contact with the water, if the land between is a right of way for others, such as a highway or a walkway. A park is not the same as a right of way. However, the plattor's intent should be a factor in determining what rights remain in the land.

Where the intent was not to give fee title over, an easement is created. Under an easement, the use of the land must be within the scope of the grant, and must not unreasonably interfere with the use and enjoyment of the property by the grantees, or their successors in interest.

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Cipri v Bellingham Frozen Foods, 235 Mich App 1 (1999)

SUBJECT: Water - pollution

FACTS: The plaintiff owned a lake fed by a spring and some small streams. The defendant sold corn husks to a farm that was near one of the streams. The husks decomposed, producing leachate which flowed into the lake and killed all the aquatic life. The trial court granted partial summary judgment, and the Court of Appeals reversed. On remand the trial court granted judgment to defendants with regard to plaintiff's Michigan Environmental Protection Act ("MEPA") and Michigan Environmental Response Act ("MERA") claims. (Both acts were repealed and replaced by the Natural Resources and Environmental Protection Act.) The Court of Appeals heard the second appeal under MEPA and MERA, since the case was governed by the statutes in effect at the time of the events.

HELD: When a trial court's findings of fact are not clearly erroneous, an appellate court will not overturn the decision. Findings of fact are not clearly erroneous when considerable evidence supports the conclusion that a lake is recovering naturally and restoration is not required under MEPA. Where a company arranges to dispose of a product that it has no use for by giving it to a party that has a use for it, strict arranger liability attaches under MERA.

Burt Township v Department of Natural Resources, 459 Mich 659 (1999)

SUBJECT: Township Rural Zoning Act - boat launch

FACTS: The DNR obtained title to two parcels in Burt Township, on which it sought to put a boat launch. Burt Township sought to require the DNR to comply with its zoning requirements. The DNR began construction of the boat launch, and the township filed suit. The trial court held that the DNR had to comply with the zoning requirements, but that the township could not prohibit the boat launch. The Court of Appeals affirmed the trial court.

HELD: The legislature has given the townships authority to regulate the use and development of boating and recreational facilities through the Township Rural Zoning Act ("TRZA") and the Township planning act. ("TPA"). The legislature granted the DNR, through the Natural Resources and Environmental Protection Act ("NREPA"), the power and jurisdiction to manage boating and recreational facilities within its control. However, nothing in the NREPA exempts the DNR from the TRZA and TPA requirements. Therefore, the DNR is subject to local zoning ordinances when constructing recreational and boating facilities.

GLOSSARY

- accretion** - addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of owner
- adverse possession** - the right of an occupant of land to acquire title against the real owner, where possession has been actual, continuous, hostile, visible, and distinct for the statutory period.
- amicus curiae** - a friend of the court, implies friendly intervention of counsel to remind court of a legal matter which may have escaped its notice
- boom** - an enclosure formed by piers and a chain of spars to collect or store logs or timber
- breach** - the breaking or violation of a law, right or duty, either by commission or omission
- chain of title** - a history of conveyances and encumbrances affecting the title
- conveyance** - the means or medium by which title to real estate is transferred
- creek** - a small stream of water which serves as the natural drainage course for a drainage basin of small size, a relative term, as a creek in a humid region would be called a river in an arid region
- declaratory judgment** - one which simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done
- defendant** - the person defending or denying; the party against whom relief or recovery is sought in an action or suit
- dominant estate** - that to which a servitude or easement is due, or for the benefit of which it exists

- easement** - a right in the owner of one parcel of land, by reason of such ownership, to use another's land for a special purpose not inconsistent with the property in the owner
- ejectment** - an action for the recovery of possession of land, and for damages for the unlawful detention of its possession
- enjoin** - to require a person, by writ of injunction from a court of equity, to perform, or to abstain or desist from, some act
- equity** - a system of jurisprudence that supplies a specific and preventive remedy where courts of common law only give subsequent damages, i.e., injunctions
- estoppel** - when a person's act or omission stops or closes his mouth to allege or plead the truth because such conduct caused the other party to detrimentally rely upon these actions
- fee simple** - the largest estate or ownership in real property; free from all manner of conditions or encumbrances
- flowage** - the natural flow of water from an upper estate to a lower one is a servitude which the owner of the latter must bear, even though the flow is not in a natural watercourse with well-defined banks
- fowling** - to seek for, catch, or kill wild fowl for game or food
- fraud** - the misrepresentation of a material fact that requires the inducing of reliance, unless intentionally stated
- freshet** - a stream of fresh water that flows into the sea; or a rise, flood or overflowing of a stream caused by heavy rains or melted snow; a sudden inundation
- grant** - transfer of real or personal property by deed or writing
- grantee** - one to whom a grant is made
- grantor** - the person by whom a grant is made
- injunction** - a prohibitive writ issued by a court of equity forbidding or permitting an act which causes irreparable harm and may not be adequately redressed by an action at law

- laches** - a question of equity where delay in action or omission causes prejudice to another, thereby estopping the action
- lake** - an inland body of water, fresh or salt, of considerable size, occupying a basin or hollow on the earth's surface. It may or may not have a current or single direction of flow.
- lessee** - one to whom a lease is made
- lessor** - one who grants a lease
- license** - to confer a privilege, right, or power; to act or use land of another without possessing any estate or interest therein
- littoral rights** - refers to the rights which accompany the ownership or lease of lands abutting a sea or lake
- mandamus** - we command; the name of a writ which issues from a court of superior jurisdiction and is directed to a private or municipal corporation, its officers or executives; commanding the performance of a particular act
- marsh** - a tract of soft wetland, usually vegetated by weeds, grasses and occasionally small shrubs
- meander line** - a traverse of the margin of a body of water along the locus of the bank or shoreline at the elevation of mean or ordinary high water
- negligence** - when a duty owed is breached by an act or omission which causes damages, liability may attach to the breaching party if a reasonably prudent person would not have acted in this manner
- patented lands** - land that can trace its title back to an original government land survey for the conveyance of some portion of the public domain
- percolating water** - subsurface water that passes through the soil or rocks along the line of least resistance which does not of itself form a part of any definite body of subsurface water or flow in any subterranean channel

- plaintiff** - one who brings an action, complains, or sues in a personal action and is so named on the record
- pond** - a body of water of limited size, either naturally or artificially confined and usually smaller than a lake
- pondage** - the holding back of water above the dam to equalize daily or weekly fluctuations of stream flow, to provide for fluctuations in the load demand
- pool** - a small and rather deep body of relatively quiet water, as a pool in a stream
- prescription** - a name given to a mode of acquiring title to legal rights incident to the ownership of property without obtaining ownership of the property
- private nuisance** - a wrongful act which destroys or deteriorates the property of an individual or interferes with the lawful use or enjoyment thereof
- public nuisance** - same as private nuisance, but injury occurs to the community at large
- public trust** - a method of ownership of natural resources whereby the State holds legal title for the benefit of the public, enunciated and defined in Illinois Central R Co v Illinois, 146 US 387 (1892)
- quiet title** - a proceeding to establish the plaintiff's title to land by bringing into court an adverse claimant and there compelling that person to either establish their claim or be forever after estopped from asserting it
- relicted land** - a recession of the sea or other water leaving land uncovered
- replevin** - a personal action to recover possession of goods unlawfully taken
- res judicata** - a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment

- riparian right** - the right of a person owning property on the bank of a body of water to have access to and use of the shore and, water; most properly refers to river or stream banks as littoral refers to a sea or lake
- river** - a large stream of water that serves as the natural drainage channel for a drainage basin of considerable area; a comparative term related to basin size rather than water volume
- servient estate** - one which is burdened with a servitude, that which a service is owing
- stare decisis** - to abide by, or adhere to, decided cases; policy of courts to stand by precedent and not to disturb a settled point
- statute of limitations** - a statute describing limitations to the right of bringing an action whereby no suit shall be maintained unless brought within a specific period after the right occurred
- stream** - a course of running water usually flowing in a particular direction in a definite channel and discharging into some other stream or body of water
- subterranean stream** - a stream flowing through large openings in rock, such as caves or caverns, within a well-defined area having a measurable velocity flowing in a definite direction
- subterranean water** - water that occurs in open spaces within the rock materials of the earth's crust
- surface water** - all water appearing on the surface or water appearing on the surface with no permanent source of supply or regular course
- swamp** - an area of moist or wetland, with water standing on or just below the surface of the ground, usually covered with a heavy and dense growth of vegetation, usually applied to large fresh water areas
- tail race** - a channel that conducts water from a water wheel

- tidal marsh** - low, flat marshlands traversed by interlacing channels and tidal sloughs and usually inundated by tides
- tort** - a private or civil wrong or injury arising from a violation of a duty imposed by general law
- trespass** - doing of an unlawful act or of a lawful act in an unlawful manner to injure another's person or property; held to have occurred, even if a blade of grass is bent
- use** - the actual exercise or enjoyment of any right of property
- usufractory** - the right of enjoying a thing, the property of which is vested in another, to obtain the profit, utility, and advantage which it may produce, without altering the substance of the thing
- vacation** - the legal abandonment of public lands to adjacent land owners
- water** - a transparent, odorless, tasteless, liquid which is a compound of hydrogen and oxygen (H₂O) that freezes at 32° F (0° C) and boils at 212° F (100° C); constitutes precipitation, oceans, lakes, rivers, and other such bodies; may exist as solid, liquid, or gas, and is normally found in the lithosphere, hydrosphere, and atmosphere; may contain other solids, liquids, or gases in solution or suspension
- water course** - a natural or artificial channel for the passage of water; a running stream of water; a natural stream fed from permanent or natural sources flowing in a particular direction in a definite channel, having a bed or banks and usually discharging into some other stream or body of water