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PUBLIC V. PRIVATE: THE STATUS OF LAKES

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IF AN inquiring reporter were to question well-informed, but not legally trained, members of the public as to where the public stands with respect to the use of lakes (other than the Great Lakes) by the public, he might ask:

1. Would the rights of the public be at all affected by whether the lake happened to be circular, rectangular, or perhaps elliptical?

2. Would it be relevant, in deciding whether such rights exist in 1961, to inquire whether in the year 1858, the Ojibways had made use of a particular small lake in northwestern Minnesota for transportation of themselves or their goods?

3. Finally, should the public rights to enjoy waters of a stream or lake be granted or denied according to the availability of proof to indicate the use (or usefulness) of the particular body for the flotation of saw-logs in the 1860's and 1870's?

Very likely the well-informed layman might well be more baffled at the fact of the questions asked than he would be with the precise answers. He would reason, it is suspected, that the reference to long-past customs presupposed a present adherence, in some manner, to such customs. He would be right. The shape of the lake did indeed have an important bearing on the riparian's rights to use all its waters.[1] Minnesota did predicate present-day navigability, i.e. availability of the lake for public fishing, boating and so on, on its usefulness for transportation by Indian tribes in 1858.[2] Wisconsin, with some tendency to question it, has nevertheless reiterated its adherence to the "saw-log" test.[3]

Herein it is proposed to deal with lakes, natural and artificial, other than the Great Lakes, with respect to their use by members of the public for recreation. It is proposed to show something of the background in English and American law, both with respect to use of the waters and use of the underlying bed. In so doing, it will be necessary to assay the nature of that almost mystic concept, "navigability," historically as well as currently.

Why do this? It is commonplace these days to read figures of population projection. Along with this great increase, surely taking place, go other phenomena. For example, the revolution in transportation has been paralleled by a revolution in leisure time. It has been estimated, for example, that leisure-time activities, loosely grouped under "recreation," are now responsible for an annual outlay of $40 billion, eight percent of the gross national product.[4]

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1. Lembeck v. Nye, 47 Ohio St. 336, 24 N.E. 686 (1890).

2. State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954).

3. Olson v. Merrill, 42 Wis. 203 (1877); Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273 (1898).

4. Figures in this paragraph were cited by Seth Gordon, member of the Sugeon

It is certainly not to be doubted that the greater part of outdoor recreation is water-oriented. In 1959, 32 million Americans purchased hunting and fishing licenses. That year these people spent an estimated $3.5 billion. By 1981, 60 million persons will have licenses, and they will be spending $6.3 billion. The boating industry has grown in striking fashion. In 1947, there were 4,440,000 pleasure boats being used on rivers and lakes and coastal areas. Ten years later there were over 7 million, with an annual increase of over one million boats. Skin-diving, an exclusively post-war industry, is now in the $100 million class.

In looking at navigability in the United States, three more or less ill-defined historical eras should be considered:

1. The Colonial and immediate post-Colonial period in which little westward movement had taken place.

2. The nineteenth century, starting with the great push given by development of the Erie Canal, the railroads, river traffic, free land, virgin forests—the era of the frontier.

3. The modern era, starting perhaps in the late part of the last century, an era in which increasing use was being made of watercourses and lakes for purposes other than commerce.

In the first period, the colonies and new states adopted, generally speaking, the English view. The Crown owned the beds of tide waters, including rivers to the extent affected by tides. With this ownership went the right to fish and navigate. This ownership was in a representative, not a proprietary sense, and thus could not be conveyed or leased out. Above salt water, rivers capable of navigation by boats were legally "navigable," but a distinction must be made: the public right to navigate in tidal waters was based squarely on the Crown's ownership of the underlying bed; the public right to navigate on fresh-water streams capable of sustaining such traffic depended on a navigation easement. Those waters flowed over private lands, owned by the riparian proprietors on each side. For this reason, the public never had fishing rights in such streams. Their rights were strictly limited to navigation, i.e. use by boats for purposes of commerce.[5]

In considering the second period two matters must be emphasized:

1. The Federal government early (in 1824) staked out its claim to regulate, under the Commerce Clause, not only commerce between the states, but navigation and, hence, navigable waters whether in or out of a state.[6]

2. In the process of creating new states from territories, the ownership, by Federal Government, of the beds of navigable rivers and lakes, was transferred to the states in their sovereign capacity. Nonnavigable rivers, on the

General's Water Pollution Control Advisory Board, in an article, "Impacts of Pollution on Outdoor America," Outdoor America (Feb. 1961).

5. 1 Farnham, Waters and Water Rights, 176-79, 237-40 (1904).

6. Gibbons v. Odgen, 9 Wheat. (U.S.) 1 (1824).

contrary, covered land in which title was retained by the United States. As land was patented, the fee to beds under nonnavigable waters was conveyed to the patentee.[7]

What necessary connection, if any, lay between title and navigability? The American courts, loosely applying English precedent, took the position that only tidewaters were "navigable." This was true, so they may have reasoned, because public use was dependent upon public ownership of the bed. Thus, the initial tendency was to regard non-tidal waters, all of them, as not navigable, and therefore not available to the public except as required by the overriding provisions of the Commerce Clause.

If in some way "navigability" had been dependent upon title to the bed, then would the matter of title to the beds of watercourses considered navigable by the United States within the Commerce Clause be binding on the newly-created states? The basic principles are simple enough. Laurent put it thus:

> Upon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the boundaries of the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for purposes of navigation in interstate and foreign commerce. But if the waters are not navigable, the title of the United States to lands underlying them remains unaffected by the admission of the new state.[8]

These views have become well settled.[9] But perplexing questions involving title were posed: e.g., would it be any violation of constitutional principles for the states, eager, perhaps, to promote the welfare of their citizens through use of waters for commercial and non-commercial purposes alike, to broaden the concept of "navigability" regardless of bed title? The reasoning might proceed along these lines: navigability, in the federal sense, must be determined only to define the ambit of federal legislative jurisdiction with respect to the regulation of commerce. True, title to the underlying beds will be in state ownership or private ownership depending on a finding of navigability in the federal sense. But does that result necessarily inhibit the state from claiming any waters deemed suitable for purposes other than commerce to be "public" and, subject to rights of access, available for public enjoyment?

Encouragement was given to this line of reasoning by several Federal cases, notably *Hardin v. Jordan*[10] and *Barney v. Keokuk*.[10a] Government surveyors, in *Hardin*, had shown the lake as navigable, but in the lower court, the lake had been found to be non-navigable. As to ownership of the bed, the Supreme Court stated:

7. See Laurent, Judicial Criteria of Navigability in Federal Cases, 1953 Wis. L. Rev. 8, 19.
8. Ibid.
9. United States v. Oregon, 295 U.S. 1 (1935); United States v. Utah, 283 U.S. 64 (1931); United States v. Holt States Bank, 270 U.S. 49 (1926).
10. 140 U.S. 371 (1891).
10a. 94 U.S. 324 (1876).

> In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie.[11]

In *Barney*, the Court referred to *The Genesee Chief*[12] as having declared that, for purposes of admiralty jurisdiction, "the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters."[13] *Hardin* and *Barney* proved but slender reeds. The United States, it became clear, was not barred from disposing of lands below high water mark of navigable streams before admission of the territory as a state.[14] Similarly, it was a federal question, to be decided by the application of federal rules, whether the Arkansas River in Oklahoma was navigable. It was held to be non-navigable and hence an oil and gas lease executed by the state was subject to cancellation.[15] Any doubts as to the pervasiveness of the federal rules have long since been completely dissipated.[16] Meanwhile, there had been some strange developments in Minnesota.

Navigability in Minnesota

Minnesota, "land of 10,000 lakes," home of the Dakotas, the Chippewas, scene of an era of lumbering, was admitted to the Union in 1858. It is not astonishing that such a state became the focal point of the developing federal and state concepts of navigability as well as squabbles over strictly riparian rights and the conflicting interest of the state and private owners in minerals beneath lake beds. Some of these issues were generated in Wisconsin and in Michigan, both generously pock-marked with bodies of water varying in charm and ranging from the prairie pot-hole to rather extensive natural impoundments.[17]

When the federal government patented lands bordering on a lake or river, bounding said lands according to meander lines established by federal surveyors, the United States thereby exhausted its interest in the lands and could not thereafter claim any part of a lake bed relicted by natural causes.[18] If the lake were navigable, then without question the bed remained property of the state. If non-navigable, the riparian owner's title depended on the laws of the state. Hence plaintiff successfully asserted his right to the dried lake bed. Beyond this, *Lamprey* contained a sweeping declaration, remarkable in that day, as to the meaning of navigability in that state:

> Many, if not the most, of the meandered lakes in this state are not adapted to, and probably will never be used to any great extent for,

11. 140 U.S. 371, 384.
12. 12 How. (U.S.) 443 (1851).
13. 94 U.S. 324, 338.
14. Shively v. Bowlby, 152 U.S. 1 (1894).
15. Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77 (1922).
16. See cases cited supra note 9.
17. Actually, Minnesota is estimated to have some 16,000 lakes.
18. Lamprey v. State, 52 Minn. 181, 192, 53 N.W. 1139, 1140 (1893).

> commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated.
>
> If the term 'navigable' is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of the common law, to discard the old nomenclature, and adopt the classification of public waters and private.[19]

This was all very well—at the time. No minion from Washington descended on St. Paul, but questions remained: (1) how far could the state go in imposing its own test on navigability? (2) are the public rights suggested in *Lamprey* confined to easements for use, as in fishing and swimming? (3) may the state, on its ipse dixit, assert title to the bed of lakes it considers "navigable?"

Minnesota had thus innocently embraced the invitation which the United States Supreme Court had issued in *Barney v. Keokuk, Hardin v. Jordan*[20] and earlier decisions to claim for itself the prerogative of establishing a state test for navigability. Other circumstances, as for example the discovery that some of its lake beds contained valuable ore deposits, led to further difficulty—this time involving conflicts with its own citizens. Finally, the problem arose as to the rights of riparian owners compared to those of the general public.

This was the dilemma: could the state, consistently with the federal decisions[21] assert title to the beds of lakes on the basis of suitability of the overlying waters for recreational uses under the liberal *Lamprey* rule?[22] Two cases are here significant: (1) *State v. Longyear Holding Co.*,[23] in which the state, relying on the federal test, successfully asserted claim to an ore bed under Syracuse Lake; (2) *State v. Bollenbach*,[24] a statutory proceeding to condemn an easement for public access to Five Lake, a 228-acre body of water entirely surrounded by private land. The court held Five Lake non-navigable under the federal test (not used for navigation in 1858, year of Minnesota's admission), and hence the proceedings were invalid.

It may be seen that if the broad definition of the *Lamprey* case had been followed, the result of *Longyear* would have been the same, but not that of *Bollenbach*, for obviously Five Lake was suitable for recreation in the form of boating and other uses not connected with commerce. The court, not unmindful of its implied modification of the *Lamprey* test, observed that the latter might "still [have] importance in a situation where the state of Minnesota

19. Id. at 200, 53 N.W. 1143.
20. Supra notes 10 and 10a.
21. Supra note 9.
22. Supra note 19.
23. 224 Minn. 451, 29 N.W.2d 657 (1947).
24. 241 Minn. 103, 63 N.W.2d 278 (1954).

conveys to a private party riparian land which was granted to it by the United States after admission . . . and which borders a body of water non-navigable by the federal test of navigation."[25] Speaking of anomalies, this suggestion of the court opens a strange vista of lakes equipped with two sets of riparian owners: (1) a federal patentee playfully traversing every segment of the surface; and (2) the hapless state grantees confined to the public waters, i.e. that part overlying state-owned bed.[26]

If the state asserts title for the purpose of securing an ore body, should it be precluded from the benefits of a *Lamprey*-type test in determining navigability and, consequently, title? In *State v. Adams*,[27] six actions were involved, brought for the purpose of determining adverse claims to lake beds in the Rabbit Lake basin. The lakes were held non-navigable under the federal test. The court made no mention of *Lamprey*, but went into a fairly detailed historical evaluation of the relevant facts as to the use of the lake for commerce, in 1858, year of the state's admission. On petition for rehearing, the attorney general, not unreasonably, urged that the court reconsider *Bollenbach*. Mr. Justice Thomas Gallagher, speaking for the court, stated the issue as being solely "the ownership of certain lake property as between the state and the riparian owners thereof."[28] Then, concluding a long review of case law, he stated:

> The briefs amici curiae (one of them a former Commissioner of Conservation) . . . deal mainly with the importance of the lakes and streams to the people of the state from a recreational and tourist standpoint. We are not unmindful of this, but *we are not dealing with the rights of the state to exercise control over its waters*, nor is the question whether the *Bollenbach* case was decided on the correct theory before us. It was decided correctly upon the theory upon which the attorney general then chose to submit it. The question of public dedication was not submitted or determined herein. There will be time enough to decide the extent to which the state may exercise control over its waters which may be non-navigable under federal tests when a case involving this issue is presented.[29] (Emphasis added.)

Did these remarks point the way to a solution of the perplexing matter of how to reconcile the legitimate interests of the state in providing public recreation for its citizens without infringing on the by now clear-cut federal decisions? For those decisions had, especially in the *Holt* and *Utah*[30] cases made two matters clear:

1. As to states carved out of the public domain, title to land underlying waters under the federal test of navigability passed to the

25. Id. at 118, 63 N.W.2d 288.
26. Professor Bade had anticipated this result. Bade, Title, Points and Lines, 24 Minn. L. Rev. 305, 324 (1940). If there were more than one federal grantee, there would, of course, be possible conflicts among them.
27. 89 N.W.2d 661 (Minn. 1957).
28. Id. at 679.
29. Id. at 687.
30. Supra note 9.

states by the several acts of admission. Since they did so pass, it was entirely within the state's province to decide whether the lands of a riparian extended to high water mark, low water mark or the thread of the stream or center of the lake.

2. In such states, the title to lands underlying waters non-navigable under the federal test did not and could not vest in the state. The title remained in the United States or vested in the riparian.

Thus, the tantalizing suggestion of Justice Gallagher in *State v. Adams* heralded a future declaration of state—what would be the proper word—supremacy, primacy perhaps, as to waters clearly overlying non-state land, but just as clearly useable for recreation in the many forms mentioned in *Lamprey*. Here one might ask, if the land is not state land, is it private? The answer: it is either private or federal, depending upon the effect which the federal courts give to such patents.

The solution has not been achieved, but is seemingly within the grasp of state authorities: first, reject the common law rule that would restrict riparian owners of the use of their own "pie-shaped" sectors of the waters; second, adopt either by judicial or legislative action, a policy declaring that all waters of the state useful for recreation be considered as subject to a public easement for such purposes. The first requirement has been met in the 1960 decision of *Johnson v. Seifert*.[31] Plaintiff, owner of about five percent of the shore line on two small (each about 35 acres in area), unmeandered lakes,[32] sought an injunction against the maintenance of a boundary fence cutting him off from the main part of the lakes. The court found the lakes suitable for fishing, boating, duck-hunting and other like uses. Plaintiff, seeking the widest possible discussion of the issues, made four contentions: (1) the lakes were navigable—hence the beds were state-owned; (2) if non-navigable under the Federal test, the state test should be applied; (3) regardless of ownership of bed, plaintiff, as a riparian owner, had rights to use the entire surface of the lake, in common with his fellow riparian owner;[33] (4) that he had acquired such rights by prescription. It can be readily appreciated that plaintiff, by the second proposition, hoped for a sweeping clarification of the hint of Justice Gallagher only two years before in *State v. Adams*.[34] This hope was not realized, but in basing the decision on the third contention, the court did the next best (and possibly the only feasible) thing. It overruled a 1902 holding that in nonnavigable lakes, one riparian could not shoot and retrieve ducks in waters fronting the lands of another.[35] The plaintiff, however, was shooting for bigger game: *Bollenbach*.[36] That decision should now be discarded, it was claimed, since

31. 100 N.W.2d 689 (Minn. 1960).
32. Meander lines are used by surveyors to follow the turnings of a shore line of lake or stream. They do not constitute a finding by the Government surveyors that the abutting water is or is not navigable. See Bade, op. cit. supra note 26.
33. Defendant owned all the remaining upland.
34. 251 Minn. 521, 89 N.W.2d 661 (1958).
35. 86 Minn. 317, 90 N.W. 578 (1902).
36. Supra note 24.

reliance had there been placed on the *Lamprey v. Danz*[37] civil law doctrine of use limited by bed ownership. But:

> The citation of the Lamprey case in the Bollenbach case was solely for the proposition that the right to hunt and fish is an incident of ownership of the soil. The quotation from that case was particularly apt because it also involved the question of rights in waters overlying privately owned lakebed land, and thus was in point as authority for the proposition that the waters, as well as the land, were privately owned. But there was no question . . . as to respective *private* hunting and fishing rights of two or more shore owners in an intertract lake since all the land surrounding and underlying the lake was owned by one person.[38] (Emphasis in original.)

The conclusion: that as to lakes navigable or nonnavigable, the riparian owners have the right to enjoyment of all the waters useful for legitimate aquatic activities. Further:

> It is not to be overlooked that the Federal test of navigability is designed for the narrow purpose of determining the ownership of lakebeds, and for the additional purpose of identifying waters over which the Federal government is the paramount authority in the regulation of navigation. Whether waters are navigable has no material bearing on riparian rights since rights do not arise from the ownership of the lakebed but as an incident of the ownership of the shore.[39]

To sum up the Minnesota situation, certain matters seem settled:

1. Insofar as title is concerned, meaning title to lakebeds, no elastic or liberal definition by state courts or legislatures can avail to the prejudice of those who, under Federal tests, have become the owners of the beds of nonnavigable lakes.
2. As to waters navigable under the Federal test, the state may properly assert that title has remained in itself, since it is for the state to determine whether the grants of upland bordering on a lake, meandered or not, carry with them the state's title to the beds.
3. Where navigable waters are concerned, the state's powers, both regulatory as to the use of the waters, and proprietary, as to the bed, are unlimited as to the latter and, as to the former, subject only to the paramount power of Congress to regulate interstate commerce.[40]
4. The state, by its declaration, cannot make the waters of private, nonnavigable lakes public, though there is perhaps a question as to whether this disability is due to lack of access or outright lack of power on the theory that property rights would then be taken.[41]

37. Supra note 35.
38. Supra note 31 at 693-94.
39. Id. at 694.
40. State v. Longyear Holding Co., 224 Minn. 451, 29 N.W.2d 657 (1947).
41. State v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278 (1954). This question was not answered in Johnson v. Seifert, though the best guess would seem to be that in the absence of any existing public rights on the lake—in the form of, say, land already owned by the public fronting the lake—the state would not be in a position to condemn land

5. If the state becomes a riparian owner,[42] the lake, whether navigable or not under the Federal test, becomes available to the public if suitable for public purposes.[43]
6. A riparian owner becomes entitled, if the lake fulfills the requirements of suitability for public use approved in *Lamprey v. State* and *Johnson v. Seifert,* to the use of the entire lake.[44]

Perhaps it should be added that at one time the Minnesota courts held that the state owned the bed of navigable streams and lakes, as well as the rights to the use of the overlying waters in its sovereign capacity.[45] After *Korrer,* however, the legislature declared, in effect, that the state owned the bed in its proprietary capacity as well.[46] Thus, Minnesota, as does New York, recognizes a trust for the public in navigable waters.[46a]

A Word as to Wisconsin and Michigan

Both states have adopted the "saw-log" test of navigability: a stream (and apparently also a lake[47]) is navigable which, in its natural state, is capable of floating saw-logs to mill or market.[48] Apparently such capacity was not determinable as of the date of admission (1848), because evidence in *Olson v. Merrill*[49] indicated no logs were run on Levis Creek before 1863. As to title to lake and stream beds, for some reason rooted, perhaps, in history, Wisconsin courts have said that title to lakebeds is vested in the state,[50] while that of stream and river beds is held by the riparian.[51] But with broad dicta in several authoritative cases, the distinction has little practical meaning to the recreationist, at least insofar as he makes use of the waters and not the bed. In addition Wisconsin relies heavily on the "trust" theory, stating in effect that lake and stream beds, by whomsoever owned, are subject to the overriding

for an access easement even though, on completion, the state would own frontage which would automatically give it riparian rights.

42. Strictly speaking, "littoral" refers to lake shores, "riparian" to shores of streams and rivers. Courts, however, tend to employ the term "riparian" to either.

43. Supra note 2.

44. This is an aspect of the law of riparian rights and is not to be confused with "public" rights. Thus the public might gain access through an interlake channel to lakes whose shores were all privately owned. In such case, if the waters were "public," the use would be sanctioned. The law of riparian rights, properly so-called, has to do with correlative rights as between owners of the shore and includes, aside from recreational use, consumptive usage such as for watering cattle, irrigation and public water supply. Such matters, important as they are, lie beyond the scope of this article.

45. Bradshaw v. Duluth Imperial Mill Co., 52 Minn. 59, 53 N.W. 1066 (1892); State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914).

46. See Bade, op. cit. supra note 26, at 322.

46a. A similar trust is recognized in New York: Brookhaven v. Smith, 188 N.Y. 74 (1907) (Great South Bay—tidewater); Barnes v. Midland R.R. Terminal Co., 193 N.Y. 378, 85 N.E. 1093 (1908) (New York Bay); Knight v. Ciarlone, 200 N.Y.S.2d 805 (Sup. Ct. 1959).

47. Cf. Nekoosa-Edwards Paper Co. v. Railroad Comm., 201 Wis. 40, 46-47, 228 N.W. 144, 147 (1930).

48. Olson v. Merrill, 42 Wis. 203 (1877).

49. Ibid.

50. State v. Public Service Comm., 275 Wis. 112, 81 N.W.2d 71 (1957).

51. Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).

trust for the public use of the overlying waters for such activities as they legitimately serve.[52]

Wisconsin has indicated some limitation on the doctrine that "navigable waters are public waters." Though a small pond had become navigable under the broad test by reason of the construction of a dam, the consequent raising of the water level and use by the public for a number of years, this "dedication" did not amount to the granting of a public right to harvest ice.[53] Thus, Waite speculates, such winter sports as skating and ice-boating would be subordinated to the littoral, lakebed owner's right to harvest ice.[54] The court, in *Haase*,[55] rejected the palpably untenable contention that by continued public use, the title to the bed had vested in the state.

The significance of these cases, which are indeed only a sampling, is clear: Wisconsin, with 2000 lakes of various sizes, shapes and depths, is intent on preserving and perhaps extending the public rights, easements or "trust" in its useable and accessible bodies of water. Parenthetically, it should perhaps be mentioned that the broad sweep of *Muench*[56] and its predecessors depended, apparently, on a 1911 enactment (the Water Power Act) containing a section declaring that "all rivers, streams, sloughs, bayous and marsh outlets, . . . which are navigable in fact for any purpose whatsoever are hereby declared navigable."[57] Though it pertained to the building of bridges and dams in such waters, *Muench* and other cases declared that this statute had obviated recourse to the saw-log test. But in 1960, the legislature deleted the phrase "for any purpose whatever," so, presumably, Wisconsin is back to the saw-log test.[58]

Michigan, without benefit of any trust theory, reaches a similar position by extending public rights to all inland waters capable of navigation (including boating and fishing).[59] Bed ownership makes this difference: the riparian, who owns the bed, has the right to attach traps for fur-bearing animals to the sub-aqueous lands or the ice covering the lake.[60] In *Hall v. Wantz*,[61] plaintiff sought an injunction against the maintenance of an anchored raft some 600 to 1000 feet from plaintiff's shore and between it and the lake's center. The raft was more or less permanently anchored in that area and provided the physical trappings (fishing wells and the like) for, and was operated as, a floating fish pier. This, said the court, was enjoinable as an

52. See Muench v. Public Service Comm., 261 Wis. 492, 511-12, 53 N.W. 514, 519-20 (1952) for modern discussion. Also see Waite, Public Rights in Navigable Waters, 1958 Wis. L. Rev. 336 at 339-43 and passim.

53. Haase v. Kingston Cooperative Creamery Ass'n, 212 Wis. 585, 250 N.W. 444 (1893).

54. Waite, op. cit. supra note 52, at 349.

55. Supra note 53.

56. Supra note 52.

57. Wis. Stat. § 30.10(2).

58. Wis. Stat. § 30.10(2), as amended (Supp. 1960).

59. Hall v. Wantz, 336 Mich. 112, 57 N.W.2d 472 (1953) (inland lake connected by a channel to Lake Michigan); Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117 (1946) (lakes); Rice v. Ruddiman, 10 Mich. 125 (1862) (inland waters generally).

60. 212 Mich. 19, 179 N.W. 225 (1920).

61. Supra note 59.

interference with property rights. The court, however, did not hold that anchorage of any kind was forbidden, only that quasi-permanent anchorage could not be considered as an exercise of the navigation easement.[62]

What is the Shape of the Lake?

If it becomes pertinent to delimit accurately the metes and bounds of a littoral owner's title to subaqueous land, it is at once apparent that considerable difficulty could be encountered, especially in a rather large lake surrounded by many small lots individually owned. That difficulty was avoided in *Hall v. Wantz* only because a number of adjoining owners joined as plaintiffs, thus making it clear that if the raft were shoreward of the lake's center, it was floating over the land of at least one or more of the plaintiffs.[63] In *Lembeck v. Nye,*[64] the Supreme Court of Ohio adopted the so-called common law rule as to ownership of nonnavigable inland lake. The defendant, owner of a small portion of the frontage (plaintiff owned the rest) was enjoined from using the lake for boat hire and fishing. The court noted that Chippewa Lake was not circular and, without considering the problem of a rounded end, intimated that in a long lake the stream test could be applied without difficulty—referring to the rule that each riparian owns to the thread of the stream (filum aquae).[65] Otherwise, the court intimates, the center, rather than the thread, would be decisive; hence the respective interests would take the appearance of a pie, cut in pieces of various sizes.

Pie-cutting formulas would now seem obsolete in Ohio, however, where the Supreme Court, in two recent pronouncements, has overruled its former position as to the test of navigability. The Federal test (suitability as highways for commerce) has been supplanted by one recognizing "availability for boating or sailing for pleasure and recreation as well as for pecuniary profit."[66] The Supreme Court of Ohio has relied, in the *Coleman* case,[66a] on *United States v. Appalachian Electric Power Co.*,[67] sometimes called the New River case. Referring to the latter, the court said:

> [I]t was held that lack of commercial traffic is not a bar to a conclusion that the stream is navigable, where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation; that the navigability of a stream is to be

62. 336 Mich. 112, 57 N.W.2d 472 (1953).
63. Ibid.
64. 47 Ohio St. 336, 24 N.E. 686 (1890).
65. Bade, op. cit. supra note 26, at 341-42, has stated the rules appertaining to round lakes. Straight lines would be projected from the boundaries of the shore properties, i.e. starting at the points where the lateral boundaries of the tracts intersect the meander lines, and thence converging, in straight lines on the center of the lake. However unworkable, these pie-cutting rules are still operative in those jurisdictions recognizing bed ownership in either navigable or nonnavigable lakes except those owned by the state.
66. Coleman v. Schaefer, 163 Ohio St. 202, 126 N.E.2d 444 (1955); approved in Mentor Harbor Club, Inc. v. Mentor Lagoons, Inc., 170 Ohio St. 193, 163 N.E.2d 373 (1959).
66a. Coleman v. Schaefer, ibid.
67. 311 U.S. 377 (1940).

> determined on the basis, not only of its natural condition, but also of its possible availability for navigation after the making of reasonable improvements.[68]

It will be recalled that in *State v. Adams*,[69] decided in 1954, the Minnesota court had before it the New River case; yet *Adams* went on the matter of navigability under the traditional Federal commercial test. Actually, New River was cited and quoted, but only with respect to what the United States Supreme Court had said about waterways which, though not suitable as highways for commerce in their ordinary state, could be improved and made so.[70] It may well be doubted, however, that New River was intended to operate as a drastic change in the concept of navigability.[71]

Trends Toward Common Use

Johnson v. Seifert[72] is symptomatic of a trend away from the common law doctrines that would restrict use of lake waters on the basis of bed ownership. The modern cases have either rejected the common law approach outright in favor of common use, or have, as in Ohio, employed a broad definition of "navigable," thus opening, by implication, previously "non-navigable" lakes to common use regardless of bed ownership. Michigan is said to be the first state adopting the so-called civil law rule permitting common use.[73] In recent years, the position has been explicity adopted in Florida,[74] Mississippi,[75] Virginia,[76] Washington,[77] Arkansas,[77a] and Minnesota.[78]

On the other side of the ledger, Pennsylvania has recently affirmed its continued adherence to an established common law policy.[79] New York courts of the trial and intermediate appeal levels appear to have approved the common law rule, though there seems to be no square holding. For example, *Tripp v. Ritchter*[80] held that an owner of a small portion of the bed of a pond did not have common rights with the owner of the greater part of the bed.

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68. 163 Ohio St. 202, 205, 126 N.E.2d 444, 446 (1955).
69. 251 Minn. 521, 89 N.W.2d 661.
70. Ibid.
71. In the New River case, it was not necessary for the Court to extend basic concepts of navigability for this reason: Congress has plenary power to regulate interstate commerce and hence navigable waters. If, to carry out this power, it is necessary to regulate or interfere with non-navigable watercourses, this may be done. The principle has been repeated many times. United States v. Grand River Dam Authority, 363 U.S. 229 (1960); Oklahoma v. Atkinson, 313 U.S. 508, 523 (1940); United States v. Utah, 283 U.S. 76, 90 (1931); United States v. Rio Grande Irrigation Co., 174 U.S. 690, 706 (1899).
72. Supra note 31.
73. Beach v. Hayner, 207 Mich. 93, 173 N.W. 487 (1919).
74. Duval v. Thomas, 114 So.2d 791 (Fla. 1959); 9 Kans. L. Rev. 91 (1960).
75. State Game & Fish Comm. v. Fritz Co., 187 Miss. 539, 193 So. 9 (1940).
76. Improved Realty Corp. v. Sowers, 195 Va. 317, 78 S.E.2d 588 (1953).
77. Snively v. Jaber, 48 Wash.2d 815, 296 P.2d 1015 (1956); Johnson, Riparian and Public Rights to Lakes and Streams, 35 Wash. L. Rev. 580 at 605 (1960).
77a. Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955).
78. Johnson v. Seifert, supra note 31.
79. Lakeside Park v. Forsmark, 396 Pa. 389, 153 A.2d 486 (1959).
80. 158 App. Div. 136, 142 N.Y.S. 563 (3d Dep't, 1913).

SOME PARTING THOUGHTS

It may be doubted that the transplanted Puritans who promulgated the Great Ponds Ordinance of Bay Colony in 1641 were prompted solely (if indeed at all) by the sporting aspects of "fishing and fowling." They had left England only a few years before, to get away from monopolies and privileges for the few. In this ordinance—the "Body of Liberties" as it was called—their purpose was to once and for all abolish the forest laws, the game laws and laws permitting exclusive fisheries. Yet surely when they decreed that Great (meaning ten acres or more) Ponds should be available for those purposes, it seems likely that here was a way provided for a man to enrich his soul as well as his larder. The ordinance even provided—as modern legislators might well note—that members of the public not owning riparian land could nevertheless gain access over the lands of another if, in so doing, there was "no trespass upon any man's corn or meadow."[81]

The westward movement, starting late in the eighteenth century, was not energized by those seeking common rights. They heralded the days of rugged individualism, accompanied by the devastation of forests by fire and axe. Land had to be cleared and drained. Every man should prosper on his 160-acre homestead—the desert would bloom. But it did not always work out that way. Floods came, farms were washed away. There were drouths, grasshopper infestations, blizzards such as that of '86 which wiped out countless small homesteaders in the Dakotas and Montana.

Now we seem to be coming back to first principles. Instead of forest laws to keep the forests for the privileged few, we have national parks and national forests for all. Instead of game preserves, we have hunting by license open to all on public ranges. Fishing has become a major industry, the most popular pastime in America. And now everywhere the trend is towards preservation and wise use of our great, though diminished heritage of forest and mountain, lake and stream.

Has the law kept pace with these trends? Does it serve those who would protect, as it once served those who would despoil these resources? Largely, yes. The stumbling blocks to progress, due in part to federal decisions of the last century and in part to conflicting economic pressures on the community, have been overcome for the most part. Possibly one of the greatest unresolved problems is that of access. How to legally provide for the public to get in to waters which are "public," i.e. susceptible of use for recreation, without trespass to private property? For example, Minnesota, fabled "land of 10,000 lakes," actually has, according to estimates, some 16,000 lakes of ten or more acres. Designated access, however, is limited to 342 lakes and streams.[82] Even so, sport fishermen, one million strong, resident and non-resident, spent an estimated $1,000,000, in the state in 1957.

81. For text of the pertinent parts of the ordinances and background, see Slater v. Gunn, 170 Mass. 509, 513, 49 N.E. 1017, 1019 (1898).

82. Cited in Brief for Amicus Curiae (Minnesota Division, Izaak Walton League of America) in Johnson v. Seifert, supra note 31.