

Riparian Boundary issues – Common Law & Statute

MARYLAND Presentation
© 2016 all rights reserved
Kristopher M. Kline, P.L.S., G.S.I.
kkline@buncombe.main.nc.us

Email from Bruce S. Flushman.

- ▶ When one thinks about **ownership of property along waterways**, one may break down the impact of "navigability" in three separate categories: Great clarification here.
- ▶ (1) **ownership of the bed of the waterway** and **geographic extent of the lands subject to the public trust easement**;
- ▶ (2) the extent of **federal regulatory jurisdiction** (federal **Commerce Clause** jurisdiction);

Email from Bruce S. Flushman.

- ▶ (3) **rights of the public to use a waterway without ownership** (floating, swimming, etc.).
- ▶ Federal law governs the first and second. But federal cases in later years have looked beyond boat navigation to evidence such as use of the waterway for transport of timber.

Five common classes of Dispute:

- ▶ 1. **Fee title to the bed of the watercourse**. This comes into play when parties argue over the actual ownership of the bed of a river or lake.
- ▶ 2. **Right to navigate over the water**. This right is analogous to a highway and allows the public to use the watercourse for travel and commerce.
- ▶ 3. **Right to Regulate the watercourse** in some way. U.S.A.C.E., DEHNR, or other state or local agencies are commonly associated with disputes over regulation
- ▶ 4. **Rights Incident to Riparian Ownership**. Wharfage, Access to Navigable channel of major rivers or oceans.
- ▶ 5. **Ownership of the water itself**. The state owns the water, subject to a right of reasonable use by riparian adjoiners.

Three misconceptions:

- ▶ To build a true understanding of the rights associated with watercourses, it is essential to dispel three erroneous concepts often associated with riparian boundary problems.
- ▶ 1. There are more than two categories of waterways; some waters may be navigable to a limited degree.
- ▶ 2. No single definition of "navigable" applies in all circumstances.
- ▶ 3. Definitions created by the U.S. Army Corps of Engineers (U.S.A.C.E.) or other regulatory parameters have no applicability when determining property ownership.

Waters of the State – Property in Virginia (1931)

MANY phases of what might be called Virginia land and water law are apparently in not a very satisfactory, or settled condition. This condition has, we believe, been brought about by attempts to apply fully evolved modern law of real property to rights and interests which had become fully established long before the legal rules were perceived. It was an attempt to apply a new system of law to an old state of facts "upon the theory that the law had always existed in the improved form, which was merely fiction, and was impossible of application in the present instance." (Note to 45 L. R. A. at page 237.)

Wall Street Journal: April 10, 2013 By Cameron McWhirter

- Two centuries ago, surveyors from Georgia and Tennessee marched through the region's mountains and hollows to mark the official border between the two states. They were supposed to follow the 35th parallel, according to an agreement approved in 1802 by Congress...
- That has led to years of water wars between Georgia and Tennessee, as the Peach state's population has exploded, out-stripping its water supply...**

Significance of Common Law: Wis.

City of Milwaukee v. State:
193 Wis. 423; 214 N.W. 820; 1927

All litigated cases must be **decided according to law, either statutory or the common law.** Where the legislature has enacted statutes within the proper field of legislation and not violative of the provisions of the federal and state constitutions, its edicts are supreme, and they cannot be interfered with by the courts;

Significance of Common Law: Wis.

City of Milwaukee v. State:
193 Wis. 423; 214 N.W. 820; 1927

...and **where legal principles have been laid down by the courts** in the proper exercise of their judicial functions and **have continued in force for such a period as to create vested rights,** such principles are **clothed with a force possessed by a statutory enactment,** and should be recognized and applied until the law-making body sees fit either to abrogate or modify them.

What property was
originally conveyed??

Creek as a Monument: Maryland (1)

Keech's Lessee v. Dansby: 1 H. & McH. 20; 1704

- The second line of the defendant's land is expressed in the patent to run west up the creek;
- whereas the plots returned make it appear that the course west does not run up but across the creek, and thereby runs into the plaintiff's land, which is the cause of the difference, and notwithstanding the act of Assembly a and common reason direct,
- that the greater certainty is always to be preferred to the less, and that the natural course of the creek is more certain than the artificial course of the compass;...

Creek as a Monument: Maryland (2)

Keech's Lessee v. Dansby: 1 H. & McH. 20; 1704

- ...besides the several testimonies that the taker up and the son of Ascham always intended and understood their land to be bounded by the creek,
- and not by the artificial line; yet the Jury rejecting law, reason, and the evidence, found for the defendant; that is, that the natural bound should be rejected, and the artificial adopted, ...
- ...so that the defendant is permitted by the verdict to run over the creek and take the plaintiff's land, **which is error.**

How to interpret a Deed: Maryland (1)

Winter v. White: 70 Md. 305; 17 A. 84; 1889

- ▶ In the construction of a deed, as in all other instruments, the intention of the parties must prevail, unless such an intention contravenes some well settled rule of law.
- ▶ The object of the descriptive part of a deed, is to define what the grantor meant to convey and the grantee to receive; and when the intention of the parties is apparent and plain on the face of the deed itself, there is no room for construction.
- ▶ It is equally well established, that the intention of the parties should prevail in expounding deeds, if not repugnant to some principle or maxim of the law, which is to be collected from the whole deed.

How to interpret a Document: Maryland (1)

Sierra Club v. Dominion Cove:
216 Md. App. 322; 86 A.3d 82; 2014

- ▶ In Maryland, when interpreting a contract, courts "seek to ascertain and effectuate the intention of the contracting parties."
- ▶ In ascertaining the parties' intent, Maryland adheres to the objective theory of contract interpretation.
- ▶ The objective theory of contract interpretation requires that a court "must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated."

How to interpret a Document: Maryland (2)

Sierra Club v. Dominion Cove:
216 Md. App. 322; 86 A.3d 82; 2014

- ▶ In addition, when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.
- ▶ In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant."

Intent of Legislative Grants: Maryland (1)

Dundalk v. Smith: 97 Md. 177; 54 A. 628; 1903

- ▶ The State is undoubtedly the owner of the navigable waters within its boundaries and can make a valid grant of privileges or interests in or over them subject to the public rights of navigation ...
- ▶ It is however a familiar proposition of the common law that in a grant by the State nothing passes by implication. The grantee takes only that which is given to him by express terms. This is true of grants by legislative action.

Limits of Legislative Intent: Maryland (2)

Dundalk v. Smith: 97 Md. 177; 54 A. 628; 1903

- ▶ The streams involved in the present suit, Jones' Creek, North Point Creek and Shallow Creek, are said to be unimportant ones, but the principle involved is an important one to a State like ours which has much navigable water within its boundaries.
- ▶ The future development and progress of the commerce of the State may be largely influenced by the judicious management and control of this navigable water and it is therefore important to strictly maintain the doctrine that
- ▶ ... no grant by the Legislature of any right in or control over any portion of it will be upheld which rests upon mere implication or construction or anything short of a clear and direct expression of the legislative will.

Public Trust Doctrine Early Considerations

Public Trust Doctrine:
Michigan Law Review (1970)
Joseph L. Sax. Vol. 68, pg. 471

PUBLIC concern about environmental quality is beginning to be felt in the courtroom. Private citizens, no longer willing to accede to the efforts of administrative agencies to protect the public interest, have begun to take the initiative themselves. One dramatic result is a proliferation of lawsuits in which citizens, demanding judicial recognition of their rights as members of the public, sue the very governmental agencies which are supposed to be protecting the public interest. While this Article was being written, several dozen such suits were initiated—to enforce air and water pollution laws in

Public Trust Doctrine:
Michigan Law Review (1970)
Joseph L. Sax. Vol. 68, pg. 471

ature,¹⁵ and need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties—such as the seashore, highways, and running water—"perpetual use was dedicated to the public,"¹⁶ it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state appar-

Public Trust Doctrine:
Michigan Law Review (1970)
Joseph L. Sax. Vol. 68, pg. 471

Three types of restrictions on governmental authority are often thought to be imposed by the public trust:²⁵ first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses. The

The approach with the greatest historical support holds that certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.⁴³ It is thought that, to protect those rights, it

Public Trust Doctrine: Maryland (1)
Board of Public Works v. Larmar: 262 Md. 24; 277 A.2d 427; 1971

- ▶ ...No exclusive use of the water may be granted; however, the property in submerged land can be transferred by grant.
- ▶ It was owned by the King of England and he had the right to dispose of it, which he did by the fourth section of the charter to Lord Baltimore. *Brown v. Kennedy*, supra. See also *Martin v. Waddell*, 41 U.S. 367 (1842).

Public Trust Doctrine: Maryland (1)
Board of Public Works v. Larmar:
262 Md. 24; 277 A.2d 427; 1971

- ▶ ...No exclusive use of the water may be granted; however, the property in submerged land can be transferred by grant.
- ▶ It was owned by the King of England and he had the right to dispose of it, which he did by the fourth section of the charter to Lord Baltimore. *Brown v. Kennedy*, supra. See also *Martin v. Waddell*, 41 U.S. 367 (1842).

Public Trust Doctrine: Early Ruling (1)
Martin v. Waddell: 41 U.S. 367; 10 L. Ed. 997; 1842

For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

Public Trust Doctrine: Early Ruling (2)

Martin v. Waddell: 41 U.S. 367; 10 L. Ed. 997; 1842

The dominion and property in navigable waters, and in the lands under them, being held by the king...

...as a public trust, the grant to an individual of an exclusive fishery in any portion of it, is so much taken from the common fund intrusted to his care for the common benefit.

In such cases, whatever does not pass by the grant, still remains in the crown

...for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly

Public Trust Doctrine: Early Ruling (3)

Martin v. Waddell: 41 U.S. 367; 10 L. Ed. 997; 1842

although the king is the owner of this great coast, and, as a consequent of his propriety, hath the primary right of fishing in the sea and creeks, and arms thereof, yet the common people of England have regularly a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty."

Great Lakes: Technical issues: Michigan (1)

Glass v. Goeckel: 473 Mich. 667; 703 N.W.2d 58; 2005

- First, wind and barometric forces can raise water at one end of the lake, causing a dip in water level at the opposite end. If the forces raising the water on one end suddenly cease, the entire lake may move in a see-saw fashion, alternatively rising and falling on each end in a "pendulum-like" movement.
- This phenomenon, called "seiche," can last from minutes to hours to days. Second, ice or foreign bodies such as plants may block the normal flow of rivers and channels connected to the Great Lakes, thereby causing an increase or decrease in the water level of connected lakes.

Great Lakes: Technical Issues: Michigan (2)

Glass v. Goeckel: 473 Mich. 667; 703 N.W.2d 58; 2005

- ...most of the Great Lakes basin is rising, as the Earth's crust slowly rebounds from the removed weight of the glaciers that covered the area around 14,000 years ago.
- Because the glaciers were thickest in the northern part of the basin around Lake Superior, this region is rebounding at a faster rate, nearly twenty-one inches a century, than the rest of the basin.
- As a result, the Great Lakes are "tipping" in a way that causes water increasingly to pool in the southern portions of the Great Lakes basin. The shoreline is receding in the northern basin and advancing in the southern basin.

Public Trust Doctrine: Md. (1)

Diffendal v. DENR:

222 Md. App. 387; 112 A.3d 1116; 2015

- "The navigable waterways within Maryland's boundaries and the lands beneath them generally are 'held' by the State for the benefit of the inhabitants of Maryland."
- Under the public trust doctrine, therefore, the State acts as a "quasi trustee for the public benefit and to support the rights of navigation and fishery to which the entire public are entitled therein."
- In its role as "quasi trustee" over the navigable waters, the State has the authority to regulate the use of those waters.

Public Trust Doctrine: Virginia (2)

Taylor v. Commonwealth: 102 Va. 759; 47 S.E. 875; 1904

Ill. Cent. Ry. Co. v. ...Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018, contains an interesting discussion of this whole subject.

...lands covered by tide-waters, within the limits of the several States, belong to the respective States within which they are found with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress...

This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties.

Public Trust Doctrine: Virginia (4)

Taylor v. Commonwealth: 102 Va. 759; 47 S.E. 875; 1904

In *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331, this subject was further discussed by Mr. Justice Gray, who delivered the opinion, in which many authorities are considered, ...

...and the conclusion reached that the lands under tide-waters are **vested in the States for the benefit of the whole people**, within their respective borders, **subject to the rights surrendered by the Constitution to the United States**.

Public Trust Doctrine: Great Lakes (1)

Illinois Central Railroad v. Illinois
146 U.S. 387; 13 S. Ct. 110; 36 L. Ed. 1018; 1892

The question, therefore, to be considered is whether the **legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago**, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

Public Trust Doctrine: Great Lakes (2)

Illinois Central Railroad v. Illinois
146 U.S. 387; 13 S. Ct. 110; 36 L. Ed. 1018; 1892

But **in this country the case is different**. Some of our **rivers are navigable for great distances above the flow of the tide**; indeed, for hundreds of miles, by the largest vessels used in commerce. As said in the case cited: "There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for **admiralty jurisdiction**, nor anything in the absence of a tide that renders it unfit. If it is a **public navigable water**, on which **commerce is carried on between different States** or nations, the reason for the jurisdiction is precisely the same.

Public Trust Doctrine: Great Lakes (3)

Illinois Central Railroad v. Illinois
146 U.S. 387; 13 S. Ct. 110; 36 L. Ed. 1018; 1892

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, ... **But it is a title different in character from that which the State holds in lands intended for sale**. It is different from the title which the United States hold in the **public lands which are open to preemption and sale**. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Public Trust Doctrine: Great Lakes (4)

Illinois Central Railroad v. Illinois
146 U.S. 387; 13 S. Ct. 110; 36 L. Ed. 1018; 1892

But the **decisions are numerous** which declare that such property is held by the State, by virtue of its sovereignty, **in trust for the public**. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. **The trust with which they are held, therefore, is governmental and cannot be alienated**, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

Public Trust Doctrine: Maryland (1)

DENR v. Ocean City: 274 Md. 1; 332 A.2d 630; 1975

- As regards the public's right to use the foreshore, the area extending easterly from the **mean high water mark**, there can be little doubt, *Shively v. Bowlby*, 152 U.S. 1 (1894).
- It has long been held that navigable water and the land under it is held by the State, for the benefit of the public, *Smith v. Maryland*, 59 U.S. 71 (1855);

Public Trust Doctrine: Early Ruling (1)

Shivley v. Bowlby:

152 U.S. 1; 14 S. Ct. 548; 38 L. Ed. 331; 1894

In *The Genesee Chief*, (1851,) 12 How. 443, in which this court, overruling its earlier decisions, held that the admiralty and maritime jurisdiction of the courts of the United States extended to all public navigable waters, although above the flow of the tide from the sea...

Mr. Justice Catron, indeed, in delivering the opinion, spoke of the rule of the common law, that " all grants of land bounded by fresh water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream and entitle him to the accretions,"

Public Trust Doctrine: Early Ruling (2)

Shivley v. Bowlby:

152 U.S. 1; 14 S. Ct. 548; 38 L. Ed. 331; 1894

The rule, everywhere admitted, that where the land encroaches upon the water by gradual and imperceptible degrees, the accretion or alluvion belongs to the owner of the land, is equally applicable to lands bounding on tide waters or on fresh waters, and to the King or the State as to private persons; and is independent of the law governing the title in the soil covered by the water.

Public Trust Doctrine: Early Ruling (3)

Shivley v. Bowlby:

152 U.S. 1; 14 S. Ct. 548; 38 L. Ed. 331; 1894

"It appears to be the settled law of that State that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the State.

This is also the common law with regard to navigable waters; although, in England, no waters are deemed navigable except those in which the tide ebbs and flows.

Public Trust Doctrine: Early Ruling (4)

Shivley v. Bowlby:

152 U.S. 1; 14 S. Ct. 548; 38 L. Ed. 331; 1894

And since this court, in the case of *The Genesee Chief*, 12 How. 443, has declared that **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, and amenable to the admiralty jurisdiction...**

Public Trust Doctrine: Mississippi (5)

Shivley v. Bowlby:

152 U.S. 1; 14 S. Ct. 548; 38 L. Ed. 331; 1894

The question as to whether **the fee of the plaintiff**, as a **riparian proprietor on the Mississippi River**, **extends to the middle thread of the stream, or only to the water's edge**, is a question in regard to a rule of property, which is governed by the local law of Illinois." ... "the Supreme Court of Illinois has established ... that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river," that **it was decided that a deed of land in Illinois, bounded by the Mississippi River, passed the title in fee in the bed of the river to the middle line of the main channel.**

More Recent Interpretations Of the Public Trust Doctrine

Public Trust – Basic Premise: Wis. (1)

City of Milwaukee v. State:
193 Wis. 423; 214 N.W. 820; 1927

...under the decisions of this court can only be justified upon the ground that it promotes public health, then the shores of Lake Michigan can be changed when it becomes necessary, to realize a vast enterprise purely public in its nature, designed to aid and promote navigation and commerce, which lies at the very foundation of the trust theory in this and other states.

Public Trust – quote Illinois: Wis. (2)

City of Milwaukee v. State:
193 Wis. 423; 214 N.W. 820; 1927

In 1892 the state of Illinois, one of the states bordering upon Lake Michigan, was confronted with a situation similar to that which is now before us. It was in that year that the opinion of the supreme court of the United States was rendered in the case of Ill. Cent. R. Co. v. Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018. The opinion in that case is conceded to be the leading expression of the highest court in the land upon the right of a state to grant portions of the submerged lands bordering upon the Great Lakes to a railroad corporation...

Public Trust – quote Illinois: Wis. (3)

City of Milwaukee v. State:
193 Wis. 423; 214 N.W. 820; 1927

"It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

Public Trust = Natural State?: Wis.

City of Milwaukee v. State: (4)
193 Wis. 423; 214 N.W. 820; 1927

But underlying the project as a whole is the necessity of acquiring part of the Steel Company's property so that the municipal harbor may be constructed in aid of navigation; and right here we must not lose sight of the findings of the legislature and of the court that the fill which the city is required to make in the plot represented by the quadrangular area will protect from the action of the waves and water, to a large extent, the municipal harbor, and will therefore be an aid to public navigation.

Public Trust = Natural State?: Wis.

City of Milwaukee v. State: (5)
193 Wis. 423; 214 N.W. 820; 1927

It is not the law, as we view it, that the State, represented by its legislature, must forever be quiescent in the administration of the trust doctrine, to the extent of leaving the shores of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of the white civilization in the territorial area of Wisconsin.

Low Water Mark or...
High Water Mark??

Delaware – Low Water Mark State: (3)

State v. Pa. Railroad: 267 A.2d 455; 1969

In 1851, in *Bickel v. Polk*, 5 Harr. 325, Chief Justice Booth, speaking for the Delaware Superior Court, recognized that the title of an owner of land adjoining tide water "runs to low water mark."

Three years later, the Delaware Court of General Sessions stated in *State v. Reybold*, 5 Harr. 484 (1854), that "a riparian proprietor, or owner of land fronting on a navigable river, holds to the low water mark."

These early decisions of the various Trial Courts of our State have been neither criticized in any later decision nor challenged by appeal over the years,

Delaware – Low Water Mark State: (4)

State v. Pa. Railroad: 267 A.2d 455; 1969

The State attempts to demonstrate that the rule announced in *Bickel*, *Reybold*, and *Harlan* is dictum; that it is historically and legally contrary to the common law of England and colonial Delaware; and that it is not the majority rule prevailing elsewhere.

We do not enter into a discussion of these interesting historical and legal questions. Assuming, arguendo, that the State's contentions are technically and historically correct, our conclusion is unchanged.

Public Trust Doctrine Expanded?: Md. (1)

Clickner v. Magothy River Assn:
424 Md. 253; 35 A.3d 464; 2012

- At the conclusion of the hearing, the trial judge asked for written closing arguments from each party and held the matter sub curia.
- In its closing argument, the Association alleged that an easement existed as a result of implied dedication, custom, prescription, and an expansion of the public trust doctrine.

Public Trust Doctrine: Md. (2)

Clickner v. Magothy River Assn:
424 Md. 253; 35 A.3d 464; 2012

- Both parties recognize that the State of Maryland owns in public trust, for the benefit of its citizens, the navigable water of the Magothy River surrounding Dobbins Island and the subject beach up to the mean high water line.
- "The navigable waterways within Maryland's boundaries and the lands beneath them generally are 'held' by the State for the benefit of the inhabitants of Maryland."

Public Trust Doctrine: Md. (3)

Clickner v. Magothy River Assn:
424 Md. 253; 35 A.3d 464; 2012

- Land bordering on the sea ...or on a tidal river, and lying above ordinary low watermark, but below ordinary high watermark, is known as the [fore]shore, and this, like the land beyond low watermark, belongs prima facie to the state
- ...the theory being that it is land not capable of ordinary cultivation or occupation, and so is in the nature of unappropriated soil."
- Therefore, the mean high water line marks the division between state and private ownership of the shoreline.

Public Trust Doctrine: Md. (4)

Clickner v. Magothy River Assn:
424 Md. 253; 35 A.3d 464; 2012

- Appellants admit that "a significant part of the historic public use of Dobbins Island is protected by the public trust doctrine.
- The public is guaranteed the right to anchor in the cove, swim in the waters, pull kayaks, canoes and other small boats onto the shore, and sit on the sandy beach that lies below mean high tide."

Public Trust Doctrine: Md. (5)

Clickner v. Magothy River Assn:
424 Md. 253; 35 A.3d 464; 2012

- Accordingly, Appellees assert a right to use the area above mean high tide, the dry sand portion of the beach, currently fenced off by the Clickners.
- This area is not subsumed by the public trust doctrine, and has been privately owned since the original grant of the property.
- stating that the public trust doctrine "protects the public in the use of the foreshore only . . ." and that a public right to use the dry sand portion of the beach, therefore, "must find support elsewhere,"

Some States: Low water mark: Virginia (1)

Taylor v. Commonwealth: 102 Va. 759; 47 S.E. 875; 1904

In *Smith v. Maryland*, 59 U.S. 71, 18 HOW 71, 15 L. Ed. 269, Justice Curtis, delivering the opinion of the court, says: "**Whatever soil below low watermark is the subject of exclusive propriety and ownership, belongs to the State** on whose maritime border and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the Declaration of Independence.

But this soil is **held by the State, not only subject to, but in some sense in trust for the enjoyment of certain public rights.**"

Low Water by Legislative act: Virginia (2)

Miller v. State.: 159 Va. 924; 166 S.E. 557; 1932

When the act of 1819 is read without the proviso which we have above italicized, we think it plain that the meaning and effect of this act, in so far as it related to grants made by the London Company, the Crown, or the Commonwealth prior to May, 1780, is this:

Wherever the land granted was bounded by a tidal water so as, under the common law, to pass title to high-water mark, this act extended the limits of the grant to ordinary low-water mark; granted to the grantee, or his successor in title, the fee simple title to the strip of land along his tidal water frontage which lay between high and low-water marks...

Surprising Applications of the Public Trust Doctrine

Texas: Mean High Water – Normally (1)

Luttes v. State: 159 Tex. 500; 324 S.W.2d 167; 1958

- ▶ The basic definition, of course, is that of the celebrated body of Spanish law known as **Las Siete Partidas**, which was evidently
- ▶ written in the 13th century and promulgated some three centuries later, and of which the critical portion of **Partida 3, Title 28, Law 4** A rather literal translation
- ▶ **...and all that place is called shore of the sea inasmuch as it is covered by the water of the latter, however most it grows in all the year, be it in time of winter or of summer."**

NJ Riparian – Public Beach Use(1)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- ▶ Chief Justice Kirkpatrick concluded that **all navigable rivers in which the tide ebbs and flows** and the coasts of the sea, including the water and land under the water, are **"common to all the citizens, and that each [citizen] has a right to use them according to his necessities, subject only to the laws which regulate that use...**
- ▶ Later, in *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 453, 13 S.Ct. 110, 118, 36 L.Ed. 1018, 1043 (1892), the Supreme Court, in referring to the common property, stated that **"[t]he State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers ..."**

NJ Riparian – Public Beach Use (2)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- He observed that the public has a right to use the land below the **mean average high water mark where the tide ebbs and flows**. These uses have **historically included navigation and fishing**. In *Avon* the public's rights were extended "to recreational uses, including bathing, swimming and other shore activities... with *Martin v. Waddell's Lessee... (1842)* (indicating right to bathe in navigable waters). The **Florida Supreme Court has held**:
- The constant enjoyment of this privilege [bathing in salt waters] of thus using the ocean and its fore-shore for ages without dispute should prove **sufficient to establish it as an American common law right**,

NJ Riparian – Public Beach Use (3)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- Extension of the public trust doctrine to include bathing**, swimming and other shore activities **is consonant with and furthers the general welfare**. The public's right to enjoy these privileges must be respected.
- The mean or ordinary high tide is a mean of all high tides over a period of 18.6 years.**
- ...to exercise these rights guaranteed by the public trust doctrine**, the public must have access to municipally-owned **dry sand areas as well as the foreshore**. The extension of the public trust doctrine to include municipally-owned dry sand areas was necessitated by our conclusion **that enjoyment of rights in the foreshore is inseparable from use of dry sand beaches**.

NJ Riparian – Public Beach Use (4)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- In *Avon* we **struck down a municipal ordinance that required nonresidents to pay a higher fee than residents for the use of the beach**. We held that where a municipal beach is dedicated to public use, the **public trust doctrine** "dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible."
- ... the Court depended on the public trust doctrine, impliedly holding that **full enjoyment of the foreshore necessitated some use of the upper sand**, so that the latter came under the umbrella of the public trust.

NJ Riparian – Private Beach Use (5)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- In *Avon* and *Deal* our finding of public rights in dry sand areas was specifically and appropriately limited to those beaches owned by a municipality.
- We now address the extent of the public's interest in privately-owned dry sand beaches**. This interest may take one of two forms. **First, the public may have a right to cross privately owned dry sand beaches** in order to gain access to the foreshore.
- Second, this interest may be of the sort enjoyed by the public in municipal beaches** under *Avon* and *Deal*, namely, the right to sunbathe and generally enjoy recreational activities.

NJ Riparian – Private Beach Use (6)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- Exercise of the public's right to swim** and bathe below the mean high water mark **may depend upon a right to pass across the upland beach**.
- Without some means of access the public right to use the foreshore would be meaningless**.
- To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.

NJ Riparian – Private Beach Use (7)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- This does not mean the public has an unrestricted right to cross at will over any and all property** bordering on the common property. The public interest is satisfied so long as there is **reasonable access to the sea**.
- The bather's right in the upland sands is not limited to passage**.
- Reasonable enjoyment of the foreshore and the sea cannot be realized **unless some enjoyment of the dry sand area is also allowed**. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge.

NJ Riparian – Private Beach Use (8)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- ▶ Archaic judicial responses are not an answer to a modern social problem.
- ▶ Rather, we perceive the public trust doctrine not to be "fixed or static," but
- ▶ ...one to "be molded and extended to meet changing conditions and needs of the public it was created to benefit."

NJ Riparian – Private Beach Use (9)

Matthews v. Bay Head Improvement Association
95 N.J. 306; 471 A.2d 355; 1984

- ▶ Today, recognizing the increasing demand for our State's beaches and the dynamic nature of the public trust doctrine,
- ▶ ...we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public's rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand.

Public Trust Doctrine & Restaurant: Md. (1)

Baltimore Co. v. Maryland Marine Mfg.
316 Md. 491; 560 A.2d 32; 1989

- Since State-owned lands are not subject to the county's zoning authority in the absence of a clear implication or a specific provision that the State is specifically bound by the zoning enabling act, we held that land under water is generally not subject to local zoning regulations.
- "when improvements are made into the navigable waters by a riparian proprietor, the land utilized in their construction, which prior to completion belonged to the State, for all practical purposes becomes a part of the fast land.

Public Trust Doctrine & Restaurant: Md. (2)

Baltimore Co. v. Maryland Marine Mfg.
316 Md. 491; 560 A.2d 32; 1989

- Thus, any limitation upon the county's ability to zone which arises because the land in question belongs to the State does not apply to improvements attached to riparian land."
- Riparian improvements are generally defined as those structures which are connected to waterfront land and built into the water. We have defined them as improvements which...*[KK note: continued]*

Public Trust Doctrine & Restaurant: Md. (3)

Baltimore Co. v. Maryland Marine Mfg.
316 Md. 491; 560 A.2d 32; 1989

- "a proprietor of land bounding on navigable waters, is entitled to make into the same. . . .
- [They] are plainly, we think, such structures as are subservient to the land, and which used in connection with the land, enhance its value or enlarge its commercial or agricultural facilities, or other utility, to an extent the land alone would be incapable of, and in this way 'improve' it. . . .
- Wharves, piers and landings are examples of such improvements."

Public Trust Doctrine & Restaurant: Md. (4)

Baltimore Co. v. Maryland Marine Mfg.
316 Md. 491; 560 A.2d 32; 1989

- Under *Harbor Island*, therefore, a non-chartered county has the authority to reasonably regulate riparian improvements since State-owned submerged land, when covered by a permitted riparian improvement, takes on the characteristics of private land.
- "It should not be forgotten that although the riparian owner has a right to ...make improvements into the water in front of his original land, yet until he does so, the title to the land under the water is in the State ...'[T]he right to make improvements in navigable waters ...[is] a mere privilege ...and ...until the improvement [is] completed, no title [is] acquired by the adjacent owner.'"

Public Trust Doctrine & Restaurant: Md. (5) Baltimore Co. v. Maryland Marine Mfg. 316 Md. 491; 560 A.2d 32; 1989

- That construction of the proposed restaurant would not, within the contemplation of § 9-201, constitute an improvement to preserve access to navigable water or to protect the shore against erosion is, of course, equally clear. Thus, even though Baltimore County may have authority to zone permitted riparian improvements, it is not presently empowered to permit construction of the restaurant in this case.
- We therefore conclude, for the purposes of this case, that Baltimore County is not empowered to provide the required initial authorization for the construction of the proposed non-riparian restaurant use.

Public Trust Doctrine: U.S. Supreme Court Phillips Petroleum v. Mississippi (1988) (1) 484 U.S. 469; 108 S. Ct. 791; 98 L. Ed. 2d 877

- Following an extensive survey of this Court's prior cases, the English common law, and various cases from the state courts, the Court concluded:
- "At common law, the title and **dominion in lands flowed by the tide water were in the King for the benefit of the nation.**
- Upon the American Revolution, **these rights, charged with a like trust, were vested in the original States** within their respective borders, subject to the rights surrendered by the Constitution of the United States.

Public Trust Doctrine: U.S. Supreme Court Phillips Petroleum v. Mississippi (1988) (2) 484 U.S. 469; 108 S. Ct. 791; 98 L. Ed. 2d 877

- "The new States admitted into the Union since the adoption of the Constitution **have the same rights as the original States in the tide waters**, and in the lands under them,

Public Trust Doctrine: U.S. Supreme Court Phillips Petroleum v. Mississippi (1988) (3) 484 U.S. 469; 108 S. Ct. 791; 98 L. Ed. 2d 877

- But it has been long established that the **individual States have the authority to define the limits of the lands held in public trust** and to recognize private rights in such lands as they see fit. *Shively v. Bowlby*,
- ...Some of the original States, for example, did recognize **more private interests in tidelands than did others of the 13** -- more private interests than were recognized at common law, or in the dictates of our public trusts cases.

Public Trust Doctrine: U.S. Supreme Court Phillips Petroleum v. Mississippi (1988) (4) 484 U.S. 469; 108 S. Ct. 791; 98 L. Ed. 2d 877

- That States own freshwater river bottoms as far as the rivers are navigable, however, does not indicate that navigability is or was the prevailing test for state dominion over tidelands.
- Rather, this rule **represents the American decision to depart from what it understood to be the English rule** limiting Crown ownership to the soil under tidal waters
- ...the Court stated that *Barney v. Keokuk, supra*, had **"extended the doctrine to waters which were nontidal but nevertheless navigable**, consistent with [the Court's] earlier **extension of admiralty jurisdiction."**

Public Trust Doctrine: O'Connor Dissent Phillips Petroleum v. Mississippi (1988) (5) 484 U.S. 469; 108 S. Ct. 791; 98 L. Ed. 2d 877

- The public trust doctrine has its roots in English common law. Traditionally, all navigable waterways in England were by law common highways for the public.
- ...Furthermore, the King held title to the soil beneath the sea and the arms of the sea, "where the sea flows and reflows."
- Unfortunately, English cases of the late 18th and early 19th centuries **did not directly address** whether the King held title to lands **underlying tidally influenced, nonnavigable waters.**

Extreme Applications of Public Trust Doctrine

Virginia and Navigable Waterways (1) Crenshaw v. Slate River: 27 Va. 245; 1828

- ▶ **Fresh rivers, of what kind soever, do of common right, belong to the owners of the soil adjacent**, so that the owners of one side, have of common right the propriety of the soil, and consequently the right of fishing **usque ad filum aquae**; and the owners of the other side, the right of soil or ownership and fishing unto the filum aquae, on their side;
- ▶ and **if a man be owner of the land on both sides, in common presumption, he is owner of the whole river**, and hath the right of fishing, according to the extent of his land
- ▶ (quoting: Lord Hale's Tract De Jure Maris)

Navigable Waterways: Virginia

French v. Bankhead: 52 Va. 136; 1854

- ▶ The cases show, what it is difficult for the human mind to resist, **that the parties never mean to leave a narrow strip between the land and the river, merely because some stake or tree, or even all the stakes or trees of the line, stand at a slight distance from the river.** The expression of an intent to run the line along the stream, reaches a distinct natural monument which overcomes the others.
- ▶ That the fact that the marked corner called for stands four rods from the water, does not create any ambiguity in the terms, down the creek with the several meanders thereof. They import the water's edge at low water, which is a decided natural boundary, and must control a call for corner trees on the bank.

Public Trust Smith Mtn. Lake: Virginia (1)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

Central to this dispute is the issue of ownership of land that was flooded to create Smith Mountain Lake, an artificial lake formed when the Appalachian Power Company (APCO) constructed a dam on the Roanoke River as part of a hydroelectric project.

Before the land adjacent to the Roanoke River and its tributaries was flooded to create the Lake, certain parcels of land were condemned and APCO obtained flowage easements over other parcels from their respective landowners extending to the 800-foot elevation contour of the proposed Lake.

Public Trust Smith Mtn. Lake: Virginia (2)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

The chancellor held that, under Code § 28.2-1200, the general public is permitted to use all land underlying the surface of Smith Mountain Lake, absent evidence of a special grant or compact. Based on this authority, the chancellor concluded that the Commonwealth owned the partially submerged property at issue, and that the Ramakers were entitled to build a dock over that property.

Public Trust Smith Mtn. Lake: Virginia (3)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

The chancellor concluded that the Ramakers' riparian rights should be fixed in accordance with the principles set forth in *Langley v. Meredith*, 237 Va. 55, 376 S.E.2d 519 (1989), and *Groner v. Foster*, 94 Va. 650, 27 S.E. 493 (1897). In applying the Groner formula, the chancellor used the 795-foot elevation contour as the shoreline or mean low-water mark,

even though the court made no finding that this line was the location of actual mean low water.

Public Trust Smith Mtn. Lake: Virginia (4)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

The Yacht Club argues on appeal that the Commonwealth does not own the partially submerged property at issue, and that the chancellor erred in reaching this conclusion, which was based on his incorrect application of Code § 28.2-1200.

This statute specifically enumerates the categories of bodies of water that are subject to its provisions. The precise words of the statute do not include "lakes" within the listed categories. ...the mention of a specific item in a statute implies that other omitted items were not intended to be included within the scope of the statute.



Public Trust Smith Mtn. Lake: Virginia (5)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

Thus, we conclude that Code § 28.2-1200 does not apply to Smith Mountain Lake because the General Assembly chose not to include "lakes" in its designation of bodies of water whose beds remain the property of the Commonwealth...

We disagree with the Ramakers' argument that Smith Mountain Lake is included within the scope of Code § 28.2-1200 because the Lake is navigable. This argument effectively asks us to add words to the statute, since its plain language does not include any type of lake and makes no exception for lakes that are navigable.



Public Trust Smith Mtn. Lake: Virginia (6)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

The Ramakers contend,...that Code § 62.1-81 supports...

The term "waters of the Commonwealth" as used in this chapter shall mean . . . those parts of streams or other bodies of water in this Commonwealth which either in their natural or improved condition ...are used or suitable for use for the transportation of persons or property in interstate or foreign commerce...

The Ramakers assert that since Smith Mountain Lake is part of a hydroelectric generation project, the operation of which affects interstate commerce, ... the waters of the Lake belong to the Commonwealth.



Public Trust Smith Mtn. Lake: Virginia (7)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

We find no merit in this argument.

After the chancellor erroneously concluded that the Commonwealth owns the partially submerged property pursuant to Code § 28.2-1200, he determined that the Ramakers had riparian rights...

After observing that the mean low-water mark had not been determined in this case, the chancellor substituted in its place the 795-foot elevation contour for the purpose of fixing the Ramaker's riparian rights.



Public Trust Smith Mtn. Lake: Virginia (8)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

The chancellor's designation of a riparian zone permitting construction of a dock extending from the Ramakers' property is contrary to the law because the dock would have to cross the Yacht Club's partially submerged property to reach the dock's designated terminus point in the water.



Public Trust Smith Mtn. Lake: Virginia (9)

Smith Mtn. Lake Yacht Club v. Ramaker
261 Va. 240; 542 S.E.2d 392; 2001

Thus, we hold that a property owner may not build a pier or dock extending into a watercourse across the property of another without that owner's permission.

Since the Yacht Club did not give the Ramakers permission to build a dock across the Club's property to reach the navigable part of the watercourse, the chancellor's determination allowing the construction of such a dock is plainly wrong.



Part II

Rivers and Streams: Early History

Colonies contest River use – Ohio (1)

Hutchinson V. Thompson: 9 Ohio 52; 1839

- At a very early period, **even during our colonial condition**, the citizens of different parts of the country were greatly harassed by the **interfering regulations of the local governments**.
- A difficult controversy once existed on this subject, **between Connecticut and Massachusetts**.
- The former state commanded the mouth of the Connecticut river, and **imposed duties on boats from Massachusetts**.
- And **Massachusetts, in retaliation**, laid an impost on all commodities exported to or from Connecticut.

Colonies contest River use – Ohio (2)

Hutchinson V. Thompson: 9 Ohio 52; 1839

- The conclusion to which I have come is, that **the clause in the ordinances contains a limitation on the power of the general government, as well as a prohibition to the states**. Or if it is not divisible into two distinct parts, that then it contains throughout a prohibition to the states;
- that this prohibition restrains these states from passing laws which should have the effect of regulating its commerce with other states**, or from **imposing discriminating duties** on the citizens of other states, but does not prevent them from legislating concerning rivers which run exclusively within their own limits...

Some early Definitions Of Navigability

NJ Riparian – Ebb and Flow Tide Test

Cobb v. Davenport: 32 N.J.L. 369; 1867

The test by which to determine whether waters are public or private, is the ebb and flow of the tide. Waters in which the tide ebbs and flows – so far only as the sea flows and reflows, are public waters; and those in which there is no ebb and flow of the tide, are private waters.

And all the cases in which **waters above the ebb and flow of the tide, such as the great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation**, are confessedly a departure from the common law.

Pa: Delaware River Status (1)

Carson v. Blazer: 2 Binn. 475; 1810

- The qualities of **fresh or salt water cannot** amongst us, determine whether a river shall be deemed **navigable or not**.
- Neither can the flux or reflux of the tides** ascertain its character.
- Pursuing such rule would**, in the first case render the river Delaware an innavigable stream throughout the confines of the state; and in the second, **would confine its navigable quality to its several courses south from Trenton**.

Selecting Criteria for Navigability (1)

Cobb v. Davenport: 32 N.J.L. 369; 1867

The criterion suggested on the argument, of holding all rivers which are navigable in fact to be public rivers, and those which are not navigable in fact to be private rivers, is wanting in that accuracy and certainty at which the law aims.

It can only be made certain by the addition of some arbitrary rule, such as depth of water, quantity of tonnage, or the like, and even then is still open to the objection that no man can tell whether he is exercising a public right, or trespassing upon a private right, without entering upon an investigation,

Navigable in "popular sense": Maryland (1)

Gray v. Gray: 178 Md. 566; 16 A.2d 166; 1940

- From the above testimony, corroborated as it is by other testimony appearing in the record, it is urged by the caveator that the stream is navigable, ...
- ...and that because of the provisions of the Act of 1862, chapter 129, Code Pub. Gen. Laws, art. 54, sec.48, which specifically provides that no patent for land covered by navigable waters in this state can be issued, the instant application should be denied.

Navigable in "popular sense": Maryland (2)

Gray v. Gray: 178 Md. 566; 16 A.2d 166; 1940

- The solution of the question raised is not without its difficulties. At common law, such waters as are navigable in the popular sense of the word, regardless of whether the tide ebbs and flows in them, are public highways.
- And in 27 R. C. L. p. 1303, it said: "The rule by which to determine whether waters are navigable is variously stated, but clearly enough defined.

Navigable in "popular sense": Maryland (3)

Gray v. Gray: 178 Md. 566; 16 A.2d 166; 1940

- The test of navigability of a river, as stated by the Supreme Court of the United States is that these rivers are navigable in law when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

Shallow areas affected by Tide: Maryland (4)

Gray v. Gray: 178 Md. 566; 16 A.2d 166; 1940

- The opinion of that case quoted with approval the earlier decisions of this court, citing *Browne v. Kennedy*, 5 H. & J. 195, 203, and *Hess v. Muir*, 65 Md. 586, 607, 5 A. 540, 6 A. 673, and held that the area there involved was a tributary of the Patuxent River, and being within the ebb and flow of the tide, must be regarded as a public river or arm of the sea, the soil of which, under the charter granted to Lord Baltimore, became vested in the State of Maryland; where it remained unless included in some grant by the State made prior to the act of 1862.

Technical vs. Popular Navigability: Ohio (1)

Jeremy v. Elwell: 3 Ohio Cir. Dec. 186; 5 Ohio C.C. 379

- "Having no tidal waters in this state, the word navigable, as applied to our rivers, is not used in the technical sense of the common law; but is applied, as in a popular sense, to all rivers that are navigable in fact.
- A river is regarded as navigable which is capable of floating to market the produce of the country through which it passes, or upon which commerce can be conducted; and, from the fact of its being so navigable,...
- ... it becomes in law a public river or highway. The character of a river, as such highway, is not so much determined by the frequency of its use for that purpose, as it is by its capacity of being used by the public for transportation and commerce."

Significance of Fall Line

Falls of the Ohio State Park... (excerpt from state park website)

- ▶ Located on the banks of the Ohio River in Clarksville, Indiana at I-65, exit 0, is the Falls of the Ohio State Park. The 390-million-year-old fossil beds are among the largest, naturally exposed, Devonian fossil beds in the world. ...
- ▶ The "Falls" was originally a series of rapids allowing the Ohio River to drop 26 feet over a distance of two and a half miles. This was the only navigational hazard over the 981 mile-length river formed by rock outcrops. Today much of the original falls have been flooded behind the McAlpine dam.

From "The Discovery, Settlement and Present State of Kentucke."

By John Filson. Published in 1784. (1)

- ▶ The beautiful river Ohio, bounds Kentucke in its whole length, being a mile and sometimes less in breadth, and is sufficient to carry boats of great burthen. Its general course is south 60 degrees west; and in its course it receives numbers of large and small rivers, which pay tribute to its glory. The only disadvantage this fine river has, is a rapid, one mile and a half long, and one mile and a quarter broad, called the Falls of Ohio.

From "The Discovery, Settlement and Present State of Kentucke."

By John Filson. Published in 1784. (2)

- ▶ In this place the river runs over a rocky bottom, and the descent is so gradual, that the fall does not probably in the whole exceed twenty feet. In some places we may observe it to fall a few feet.
- ▶ When the stream is low, empty boats only can pass and re-pass the rapid; their lading must be transported by land; but when high, boats of any burthen may pass.
- ▶ Excepting this place, there is not a finer river in the world for navigation of boats.

Lunar Tide Test – more recent: Maryland (1) Green v. Eldridge: 230 Md. 441; 187 A.2d 674; 1963

- ▶ After a hearing, the Chancellor found that the 1929 deed did not convey a fee simple interest, but granted a right of way only, subject to the terms and conditions expressed therein; ...
- ▶ ...that Duffy Creek and a large part of the marshy area were subject to the ebb and flow of the tide and were navigable in fact when the deed was given, so that title thereto was in the State of Maryland

Lunar Tide Test

Lunar Tide Test – more recent: Maryland (2)

Green v. Eldridge: 230 Md. 441; 187 A.2d 674; 1963

- ▶ The Wagner case, just cited, is the most recent case in which this Court has had occasion **to consider the test or tests for determining whether or not waters are navigable**. Chief Judge Brune, for the Court, made an...
- ▶ ... **exhaustive review of the decisions** and pointed out that although the Court had **originally adopted the ancient tidal** test, i.e., that waters were considered navigable if they were subject to the ebb and flow of the tide, the more recent cases on the subject have also ...
- ▶ ... **recognized the navigable in fact test** -- whether waters in their natural state are in fact navigable -- **without specifically overruling the earlier test**.

Lunar Tide Test – more recent: Maryland (3)

Green v. Eldridge: 230 Md. 441; 187 A.2d 674; 1963

- ▶ We think that under the evidence in the instant case, as in Wagner, **it makes no difference which test is adopted**, so that a **choice between them is unnecessary**.
- ▶ Although there was some dispute as to the exact portion of the marsh and the stream that was subject to the ebb and flow of the tide and was susceptible to light navigation,
- ▶ we feel that there was sufficient testimony to support the Chancellor's finding that the marsh and the stream were tidal and navigable in fact to a point above the strip granted for the right of way.

How to interpret a Document: Maryland (4)

Green v. Eldridge: 230 Md. 441; 187 A.2d 674; 1963

- ▶ We turn now to consideration of the question as to whether the 1929 deed granted a fee simple interest, or only an easement, in the portions of the way which do not traverse navigable water.
- ▶ In determining the nature and extent of an estate or interest granted by a deed, the instrument must be construed so as to best effectuate the intention of the parties.
- ▶ This is accomplished by a consideration of the instrument as a whole, viewing the language employed in light of all the facts and circumstances of the transaction.

Subsequent Legislation

Artificial Fill: Maryland (1)

Board of Public Works of Maryland v. Larmar:
262 Md. 24; 277 A.2d 427; 1971

- ▶ It would appear that artificial fill, in the sense that the fill material is brought over riparian land by mechanical means and dumped into the water or dredged up from the bottom of the sea and placed in front of riparian properties so as to create new fast land, was not within the established meaning of accretion, as it was known at common law.

Public Trust Doctrine: Maryland (2)

Board of Public Works of Maryland v. Larmar:
262 Md. 24; 277 A.2d 427; 1971

- ▶ There is no question but that the waters of Isle of Wight Bay and the land under them are the property of the State.
- ▶ Navigable water and the land thereunder have always been a part of the public domain.
- ▶ There is a distinction, however, in the type of ownership of the two.
- ▶ Since the Magna Charta granted by King John to the Barons at Runnymede on June 15, 1215, the public has had an interest in the navigable stream such as the rights of fishery and navigation, which cannot be abridged or re-strained by charter or grant.

Grants of Navigable River Bed: Maryland (3)

Board of Public Works of Maryland v. Larmar:
262 Md. 24; 277 A.2d 427; 1971

- ▶ For some 200 years, until 1862, the State (and the Proprietor) patented to individuals, subject to the public rights to navigation and fishery, fee simple title to lands under navigable waters.
- ▶ The reported cases in this Court show instances of such patents as early as 1663 ...and as late as 1861
- ▶ However, it would appear that this Court has at times had a second thought concerning the issuing of such patents, as was pointed out in the opinion of this Court written by Judge Smith in *Van Ruymbeke v. Patapsco Industrial Park*, 261 Md. 470, 276 A. 2d 61 (1971):

Grants of Navigable River Bed: Maryland (4)

Board of Public Works of Maryland v. Larmar:
262 Md. 24; 277 A.2d 427; 1971

- ▶ "There is authority in Maryland for the rejection of an under-water patent. In *Day v. Day*, 22 Md. 530 (1865), there was an application for a patent prior to 1862. The land was underwater.
- ▶ "...Rivers or streams within the ebb and flow of tide, to high water mark, belong to the public, and in that sense are navigable waters; all the land below high water mark, being as much a part of the *jus publicum*, as the stream itself. **The owners of adjacent ground had no exclusive right to such lands, nor could any exclusive right to their use be acquired, otherwise than by an express grant from the State.**

Wetlands Act of 1970: Maryland (5)

Board of Public Works of Maryland v. Larmar:
262 Md. 24; 277 A.2d 427; 1971

- ▶ The Wetlands Act of 1970 is a comprehensive act which makes the first substantial changes in the rights granted to riparian owners in over 100 years.
- ▶ It repeals Sections 45, 46 and 47 of the long standing Act of 1862, which as we have heretofore seen was the wellspring of riparian rights during the past century.
- ▶ In addition, it repealed Section 485 of Article 27 of the Maryland Code which controlled the right to "dig, dredge, take and carry away sand, gravel or other materials from the bed of rivers, creeks, or branches" of navigable waters.
- ▶ The repeal of these statutes by the Legislature was unqualified and thus applies to every county and every body of navigable water in the State.

Great Miami River 1 mile below Sydney: (1)

Walker v. Board of Public Works: 16 Ohio 540; 1847

- ▶ **There is another matter to be considered** before we come to the questions arising upon the pleadings, viz: **the effect of a statute declaring an unnavigable stream to be navigable.**
- ▶ It is **worthy of remark**, that in **all the statutes of this description**, enacted hitherto in Ohio, **no provision is made for compensating the owners** of the land, through which such small streams flow, for any injury which may accrue in consequence of thus converting their private property into public highways.

Great Miami River 1 mile below Sydney: (2)

Walker v. Board of Public Works: 16 Ohio 540; 1847

- ▶ **There is no provision made for the purchase of the easement thus dedicated to the public use**, or attempted to be created for the public use.
- ▶ Yet **prior to the passage of these acts, the owners of the lands on both banks of such streams owned the streams and the right to use the water flowing in them, in any manner consistent with the rights of persons above and below them, without let or hindrance.**
- ▶ They might erect dams or other obstructions to direct the water from the bed of the stream to any point of their premises, returning it to its natural channel after using it at their pleasure or convenience.

Great Miami River 1 mile below Sydney: (3)

Walker v. Board of Public Works: 16 Ohio 540; 1847

- ▶ A right of the owners of the lands on both banks of non-navigable streams to use the water flowing in them, in any manner consistent with the rights of persons above and below them, without let or hindrance, **is a right of property within the protection of the constitution, and that can not be impaired by a legislative enactment which provides no compensation to the proprietor for the injury.**
- ▶ ...although we deny to the legislature the power to change the private rights of the riparian proprietor by so doing, yet for all other purposes consistent with the provisions of the constitution, the statutes should be sustained

Ownership of the Bed

Dispute over Reed Bird Island: Maryland (1) Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- › This is a controversy between the City of Baltimore (the "City") and the successors in interest of the late Harry M. Wagner over the validity of a patent for land described as an island in the Patapsco River in Anne Arundel County.
- › This patent was issued on September 10th, 1909, to one John P. Bruns.
- › The present suit was instituted by the City to have the patent issued to Bruns and the deed to Wagner set aside and declared null and void.
- › The Bay, the harbor and the river for some distance above Reed Bird Island are all within the ebb and flow of the tide.

Historical Context: Maryland (2)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- › The south shore of the Patapsco River in front of which Reed Bird Island developed has been the southern terminus of a highway bridge or bridges across the Patapsco for nearly a century.
- › In 1856 an Act of the Legislature authorized one Richard Owens Crisp to build a bridge...
- › On September 15, 1908, a survey of Reed Bird Island was made by the then County Surveyor of Anne Arundel County on a warrant issued from the State Land Office. His survey stated that the land was not covered by navigable water.
- › The Light Street Bridge was shown on this survey as crossing Reed Bird Island.

Historical Context: Maryland (3)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- › One other fact which it seems appropriate to mention at this point is that in 1900 the Baltimore & Ohio Railroad Company was granted permission by the Corps of Engineers of the U. S. Army to fill in under the bridge of the Railroad's Curtis Bay Branch across the Patapsco, provided that it left a 600 foot opening northwest of Billiken Island.
- › This fill was made in 1900 and it seems to have contributed to the silting up of the river below that point and the building up of both Billiken and Reed Bird Islands.

Historical Context: Maryland (4)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- › The statute which is controlling as to the principal controversy in the present case is Chapter 129 of the Acts of 1862, the three sections thereby enacted now being codified as Sections 45, 46 and 48 of Article 54 of the Code (1951).
- › This statute has been before this Court in a number of cases. In the present case a great deal of argument has been directed to the meaning of "navigable waters" -- whether the term should be construed as including all waters subject to the ebb and flow of the tide or only such waters as are navigable in fact.

How old is the Island?: Maryland (5)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- › The first question to be determined is whether or not Reed Bird Island was covered by navigable waters at the time when the patent for it was granted, September 10, 1909.
- › We think that the testimony was ample to support the Chancellor's conclusion that it was then covered by water.
- › The State Roads Commission's plan in profile of the Hanover Street Bridge above referred to is alone almost conclusive since the testimony makes it clear that the island was gradually building up over a number of years
- › In addition, there is a U. S. Coast and Geodetic Survey chart corrected to November, 1904, which indicates that Reed Bird Island was then below mean low water.

Surveyor Certificate controlling? Maryland (6)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- ▶ There is the statement on the surveyor's certificate that the land was not covered by navigable water. Whether that statement may have been due to his own idea of what constituted "navigable water" we cannot tell.
- ▶ It is possible that at the time he made his survey he thought that no craft could traverse Reed Bird Island or that no craft of sufficient size to be significant could navigate over it.
- ▶ Whatever may have been the basis for the surveyor's conclusion, we think that the evidence in this case is sufficient to sustain the Chancellor's finding that the "island" was covered by water in September, 1909

Tide Test or "Use Test": Maryland (7)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- ▶ If we start, as we think we should, with the premise that Reed Bird Island in 1909 was covered by water, and if we follow the rule as stated in a number of Maryland decisions that the test of navigability is whether or not the waters are subject to the ebb and flow of the tide,...
- ▶ ... there is an end to the case, for it is unquestioned that the Patapsco River is, and in 1909, was subject to the ebb and flow of the tide.
- ▶ In some cases, ... the **general rule of public ownership of the soil** under tidal waters up to the high water mark is stated; **and this rule seems to be correlative with and complementary to the rule that such waters are navigable.**

Tide Test or "Use Test": Maryland (8)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- ▶ The appellants, however, earnestly insist that the rule that navigability exists if the waters are tidal is based upon a misinterpretation of the English law made by Chancellor Kent in *Palmer v. Mulligan* (Cal. 307) which was erroneously accepted by others, including the Court of Appeals of Maryland, in some cases.

Let's Confuse the issue: Maryland (9)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- ▶ *Havre de Grace v. Harlow, supra*, involved the question whether or not the Susquehanna River between tidewater and the Pennsylvania line was navigable. The Court cited the then Federal rule stated in *The Daniel Ball, 10 Wall. 557*, which recognizes that the test of navigability is navigability in fact in the natural state of the river.
- ▶ It was held that the Susquehanna above tidewater did not meet this test. (The rule now recognized by the Supreme Court goes beyond the former rule in that waters which, though not navigable in fact in their natural state, may be made navigable in fact without undue cost, are navigable waters. *U. S. v. Appalachian Power Co., 311 U.S. 377.*)

Let's Confuse the issue: Maryland (10)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- ▶ The Gray Case did undoubtedly discuss navigability in fact, but it can hardly be said to have overruled *Sollers v. Sollers* or *Linthicum v. Shipley*...since it took pains to distinguish them on the ground that in both of those cases "the area for which patents were applied for was entirely submerged, and that over it the tide ebbed and flowed;
- ▶ In the present case, as in many others, it makes no difference in result, we think, whether the tidal or factual test of navigability is adopted.
- ▶ We therefore find it unnecessary to decide whether our ancient rule, which differs from that generally prevailing in this country should be abandoned.

Conclusion: Maryland (11)

Wagner v. Baltimore: 210 Md. 615; 124 A.2d 815; 1956

- ▶ Where a stretch of river is navigable lengthwise, we think that all of the waters between the opposite shores or banks are comprehended within the term "navigable waters" as used in Chapter 129 of the Acts of 1862.
- ▶ It is not necessary to a stream's being navigable in fact that it be capable of carrying large vessels.

Usque ad filum aquoe: Michigan (1)

Richardson v. Prentiss:
48 Mich. 88; 11 N.W. 819; 1882

- The general rule is that where lands are conveyed, bounded by a water-course, the grantee holds to the thread of the river, even although such was not the grantor's intention; and a reservation of a right of way, in a grant of land so bounded, upon the bank of the stream, will not limit the grantee's riparian rights.

Usque ad filum aquoe: Michigan (2)

Richardson v. Prentiss:
48 Mich. 88; 11 N.W. 819; 1882

- "The cases, on the whole, may be said to demonstrate the existence of the rule, that
- ...a grantee bounded on a river, (and it is almost immaterial by what mode of expression,) goes ad medium filum aquoe, unless there be decided language showing a manifest intent to stop at the water's edge;
- and there seems a distinct and strong tendency in the cases to turn every doubt upon expressions which fix the boundary next the river, **in favor of a contact with the water."**

River incident to the bank: Michigan (3)

Richardson v. Prentiss:
48 Mich. 88; 11 N.W. 819; 1882

- "It thus appears to be well established that the bank and the water are correlative, and that one cannot be owned without touching the other; ...
- ...that the bank is the principal object; so that when the law once fixes the proprietorship of that, the soil of the river follows as an incident; or rather, (as it has been said,)
- 'as part of the subject-matter, usque ad filum aquoe.'" id. § 26. And when a grant of land refers to a map, upon which the land is laid down as bounded on a water-course, the grantee is entitled to hold to the center.

Justice Cooley comments: Michigan (4)

Richardson v. Prentiss:
48 Mich. 88; 11 N.W. 819; 1882

- ...in Watson v. Peters 26 Mich. 508, **Mr. Justice Cooley**, in delivering the opinion of the court, said:
- "The owner of city lots bounded on navigable streams, like the owner of any other lands thus bounded, may limit his conveyance thereof within specific limits, if he shall so choose...
- *[KK note: continued]*

Justice Cooley comments: Michigan (5)

Richardson v. Prentiss:
48 Mich. 88; 11 N.W. 819; 1882

- ...but when he conveys with the water as a boundary, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed, which he may grant to others for private occupation, ...
- ...or so occupy himself as to cut off his grantee from the privileges and conveniences which appertain to the shore of navigable water.
- Such privileges and conveniences constitute a part, and in many cases the principal part, of the value of the grant;
- and it is precisely in these cases of city lots that they are of most value, and generally constitute the chief inducement to the purchase;

Rules for Lakes: Michigan (6)

Richardson v. Prentiss:
48 Mich. 88; 11 N.W. 819; 1882

- In *Bay City Gas-Light Co. v. Industrial Works* 28 Mich. 182, Mr. Justice Campbell declared it to be the settled law of this State, ...
- "...that any use of lands under rivers, which is compatible with the full enjoyment of the public ease-ment, belongs with the upland to which it was originally appurtenant, unless sold or granted separately so as to sever it."
- In this State, whatever the law may be elsewhere, these same principles have been applied to lands fronting upon the lakes. *Rice v. Ruddiman* 10 Mich. 125; *Pere Marquette Boom Co. v. Adams* 44 Mich. 403, 6 N.W. 857.

Ownership of the Soil Ohio (1)

Hogg v. Beerman: 41 Ohio St. 81; 1884

- ▶ The question as to the ownership of the soil under the water, is one which each state is at liberty to determine for itself, in accordance with its views of local law and public policy; and if it chooses to concede the right of the riparian owner to the center of the stream, it is not for others to raise objections.

How Many Types of Navigable Waterways

Gaston v. Mace :X-ref to early Maine Ruling (1)

Wadsworth v. Smith: 11 Me. 278; 1834

[KK note: *Gaston v. Mace* is a W.Va. Decision]

- ▶ The general **principle of the common law**, applicable to this subject, is that ...
- ▶ ...above the flow of the tide, rivers become private, either absolutely so, ...
- ▶ ...or subject to the public right of way, according as they are small or large streams. **Those which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right:** ...
- ▶ (continued next slide)

Gaston v. Mace :X-ref to early Maine Ruling (2)

Wadsworth v. Smith: 11 Me. 278; 1834

[KK note: *Gaston v. Mace* is a W.Va. Decision]

- ▶ ...and the private property of the owner of the soil is to be improved in subserviency to the enjoyment of this public right.
- ▶ Such rivers, therefore, **cannot lawfully be so obstructed, even by the owner of the banks** and bed, as to interfere with this public right; -- and **no toll can be exacted** of the citizens for the use of such water as a public highway.

General: 3 Categories – North Carolina (1)

State v. Tyre Glen: 52 N.C. 321; 1859

- ▶ 1. **All the bays and inlets on our coast, where the tide from the sea ebbs and flows,** ...
- ▶ ...and all other waters, whether sounds, rivers or creeks, **which can be navigated by sea vessels, are called navigable, in a technical sense,** are altogether publici juris, and the soil under them, cannot be entered, and a grant taken for it, under the entry law.
- ▶ Where the tide ebbs and flows the shore, between the high and low water, is also within the prohibition of private appropriation,

General: 3 Categories – North Carolina (2)

State v. Tyre Glen: 52 N.C. 321; 1859

- ▶ 2. **All the rivers, creeks, and other water courses, not embraced in the above description,** ...
- ▶ ...but which are, in fact, **sufficiently wide and deep to be navigable by boats, flats and rafts,** are technically styled unnavigable, ...
- ▶ ...and are open to be appropriated by individuals, by grants from the State, under the entry laws.

General: 3 Categories – North Carolina (3) State v. Tyre Glen: 52 N.C. 321; 1859

- 3. All the rivulets, brooks and other streams, which, from any cause, **cannot be used for intercommunication by inland navigation**, are entirely the subjects of private ownership, are generally included in the grants of the soil, and the owners may make what use of them they think proper, whether it be for fishing, milling or other lawful trade or business.

Three Categories of navigability: Maryland (1) Day v. Day: 22 Md. 530; 1865

- The first objection presented by the appellant to the issue of a patent on the certificate of survey in this case, is founded on the Act of 1862, chapter 129, which expressly prohibits the issue of any patent of land covered by navigable waters.
- The survey was made under a common warrant, issued from the Land Office on the 3rd of February 1836

Three Categories of navigability: Maryland (2) Day v. Day: 22 Md. 530; 1865

- The Common Law distinction between **navigable waters, and rivers or streams not navigable**, is founded on the difference of the rights to which they are respectively subject; ...
- ...**the entire property of the former being vested in the public**, while the latter belong to riparian proprietors, **although in some cases subject to a qualified public use**.
- Rivers or streams within the ebb and flow of tide, to high water mark, belong to the public, and in that sense are navigable waters**; all the land below high water mark, being as much a part of the jus publicum, as the stream itself.

Three Categories of navigability: Maryland (1) Delaware & Maryland RR v. Stump: 8 G. & J. 479; 1837

- Hale, in his treatise De Jure Maris... says,
- "Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent**; so that the owners of the one side, have of common right, the propriety of the soil, and consequently the right of fishing, usque filum aquae; and the owners of the other side the right of soil or ownership and fishing unto the filum aquae on their side.
- And if a man be owner of the land of both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length.

Three Categories of navigability: Maryland (2) Delaware & Maryland RR v. Stump: 8 G. & J. 479; 1837

- "There be **some streams or rivers, that are private not only in propriety or ownership, but also in use**, as little streams and rivers that are not a common passage for the king's people.
- Again, there be **other rivers, as well fresh as salt, that are of common or public use, for carriage of boats and lighters**.
- And these, whether they are fresh or salt, whether they flow and reflow or not, are prima facie publici juris, **common highways for man or goods** or both from one inland town to another.

Easement Analogous to Road: Maryland (3) Delaware & Maryland RR v. Stump: 8 G. & J. 479; 1837

- The author must not be understood as meaning that the soil of public rivers is "prima facie publici juris," but only that the public are entitled to the use of the stream for the purposes of navigation and commerce, as is shewn by the following quotation from ch. 2, p. 8, in which he treats of the "rights of prerogative" over such rivers.
- "These public rivers for public passage are called fluvii regales; not in reference to the propriety of the river, but to the public use.

Lord Hale's principles adopted: Maryland (4) Delaware & Maryland RR v. Stump: 8 G. & J. 479; 1837

- ▶ But the property in the soil of all arms of the sea and rivers in which the tides flowed was prima facie in the king.
- ▶ The rule then is well established in England, that the right of property in the soil of navigable rivers is prima facie vested in the crown, ...
- ▶ ...and in that of private rivers, in the riparian proprietors, usque filum aquae.
- ▶ These principles, as well as the reasons on which they were established, have been recognized and adopted in this country in the following cases.

Three categories of Waterways Ohio (6) Hutchinson V. Thompson: 9 Ohio 52; 1839

- ▶ It is **sometimes difficult to determine what is the precise character of a stream**. Rivers were once divided into navigable and not navigable.
- ▶ **They are now generally divided into three classes, the two former, and a third partaking of the character of each of the others, and yet distinguishable from both.**
- ▶ The act of 1817, however, must be considered as affording unequivocal evidence of what was the intention of the legislature with regard to this stream.

Early Virginia Ruling Crenshaw v. Slate River: 27 Va. 245; 1828

- ▶ **Fresh rivers, of what kind soever, do of common right, belong to the owners of the soil adjacent**, so that the owners of one side, have of common right the propriety of the soil, and consequently the right of fishing **usque ad filum aquae**; and the owners of the other side, the right of soil or ownership and fishing unto the filum aquae, on their side;
- ▶ and **if a man be owner of the land on both sides, in common presumption, he is owner of the whole river**, and hath the right of fishing, according to the extent of his land
- ▶ (quoting: Lord Hale's Tract De Jure Maris)

Early Virginia Ruling Crenshaw v. Slate River: 27 Va. 245; 1828

- ▶ At the Common Law, then, we see that **some rivers were public, some private**; and **of those considered private, that some were subject to the servitude of the public interest**, and in that sense common highways by water.
- ▶ **The mark of distinction** between those which are entirely private property, and those which are subject to the public use and enjoyment, consists in the fact, **whether or not they can be used as a common passage for the public.**

Tide Test – more current: Maryland (1) Van Ruymbeke v. Patapsco: 261 Md. 470; 276 A.2d 61; 1971

- ▶ The Patapsco River here admittedly was navigable. In Maryland navigable water is defined as where the tide ebbs and flows.
- ▶ It is not necessary to a stream's being navigable in fact that it be capable of carrying large vessels.
- ▶ The property owner owns to the mean high water mark.
- ▶ **There was no contention here relative to whether the federal navigable-in-fact test was applicable.**

Navigable vs. Non-Navigable: Maryland (2) Van Ruymbeke v. Patapsco: 261 Md. 470; 276 A.2d 61; 1971

- ▶ Chief Judge Boyd *referred to Browne v. Kennedy, 5 H. & J. 195 (1821)*, and said:
- ▶ "Whatever the law was elsewhere that case settled it for this State, and has never been overruled or qualified. It was there held that **Lord Baltimore, [as] proprietor of Maryland, acquired the same right to dispose of land covered by navigable waters** within the Province, under the charter granted to him by the King, **as the King had prior to granting the charter** -- subject to the right of the public to use it for fishing and navigation. The right to grant land covered by navigable waters afterwards became vested in the State -- subject to the same restrictions."

Navigable vs. Non-Navigable: Maryland (3)

Van Ruymbeke v. Patapsco:
261 Md. 470; 276 A.2d 61; 1971

- ▶ In *Day v. Day*, 22 Md. 530 (1865), there was an application for a patent prior to 1862. The land was underwater. Before the passage of the Act of 1862 the Commissioner of the Land Office granted the patent, overruling the caveat. The appeal reached our predecessors after the passage of the 1862 act. The Court said:
- ▶ "The Common Law distinction between navigable waters, and rivers or streams not navigable, is founded on the difference of the rights to which they are respectively subject; the entire property of the former being vested in the public, while the latter belong to riparian proprietors, although in some cases subject to a qualified public use.

Navigable vs. Non-Navigable: Maryland (4)

Van Ruymbeke v. Patapsco:
261 Md. 470; 276 A.2d 61; 1971

- ▶ Rivers or streams within the **ebb and flow of tide**, to **high water mark, belong to the public**, and in that sense are navigable waters; ...
- ▶ "...The Act of 1862 was intended to vest these owners of contiguous lands with rights and privileges not recognized by the Common Law, and to that end, the 1st section declares, -- that the proprietor of land bounding on any of the navigable waters of the State, should be entitled to all accretions thereto by the recession of water, whether before or thereafter formed or made, by natural causes or otherwise."

NJ Riparian – Early Ruling (1)

Cobb v. Davenport: 32 N.J.L. 369; 1867

In pursuance of this policy, by the common law all waters are divided into public waters and private waters.

In the former, the proprietorship is in the sovereign; in the latter, in the individual proprietor. The title of the sovereign being in trust for the benefit of the public—the use, which includes the right of fishing and of navigation, is common.

The title of the individual being personal in him, is exclusive – subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact.

Public Right of Navigation

Right of Navigation – recent: Maryland (1)

Becker v. Litty: 318 Md. 76; 566 A.2d 1101; 1989

- ▶ In May 1986, appellee Suzanne Hanks Litty acquired title to Sol's Island, then an essentially uninhabited tract of land accessible only by air or via the waters of Boone Creek.
- ▶ She and her husband, appellee Ernest Litty (the Littys), decided to build a residence on the island. They also decided, it seems, that an aerial or aquatic commute would have its drawbacks.
- ▶ In October 1986, the Littys obtained a United States Coast Guard permit to build a private, one-lane, fixed bridge across the aforesaid 240 feet between Sol's Island and the mainland.

The Complaint : Maryland (2)

Becker v. Litty: 318 Md. 76; 566 A.2d 1101; 1989

- ▶ The Beckers' and their co-parties' properties are located at various spots on the North and Southeast Branches of Boone Creek
- ▶ They alleged that Boone Creek to the south and southeast of Sol's Island was too shallow to permit navigation as a practical matter.
- ▶ Thus, the only way they could move between the branches, and for those whose properties lay on the Southeast Branch, into the Choptank, was through the narrow channel between Sol's Island and the mainland.
- ▶ A bridge with only three feet of vertical clearance would effectively block this navigation.

Rights of riparian Adjoiner: Maryland (3) Becker v. Litty: 318 Md. 76; 566 A.2d 1101; 1989

- ▶ A riparian owner is "one who owns land bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with a body of water, such as a river, bay, or running stream."
- ▶ The Beckers fall within this definition.
- ▶ Riparian owners acquire various rights, both common law and statutory, by virtue of that status.
- ▶ Moreover, Boone Creek is navigable water. It matters not whether we apply the "ebb-and-flow-of-the-tide" test,... or the "navigable-in-fact" test

Right to Navigate: Maryland (4) Becker v. Litty: 318 Md. 76; 566 A.2d 1101; 1989

- ▶ The right to navigate on navigable waters is a public right, not one that attaches only to the owner of riparian property.
- ▶ "The public [has] a right, at common law, to navigate over every part of a common navigable river..."
- ▶ As the Supreme Court of Ohio has put it:

Quoting Ohio: Maryland (5) Becker v. Litty: 318 Md. 76; 566 A.2d 1101; 1989

- ▶ Every riparian owner has the right of ingress and egress between his land and the water.
- ▶ In addition, as a member of the public, he has the right to travel on navigable streams.
- ▶ It is important to distinguish these rights.
- ▶ The right to go from his land to the river and from the river to his land is a private property right of the riparian owner.
- ▶ Navigation on public waters is exclusively a public right.
- ▶ Everyone has an equal right to the use of the water for travel and transportation.

Federal Regulatory Powers: Maryland (6) Becker v. Litty: 318 Md. 76; 566 A.2d 1101; 1989

- ▶ In short, other jurisdictions, like Maryland, hold that a general right to navigation is not a riparian owner's right, but a right of the general public.
- ▶ The Littys' bridge will not deprive the Beckers of their riparian rights of access to the water in front of their properties.
- ▶ They still have that access.
- ▶ The claimed interference with the public right of navigation has been authorized by the Coast Guard and the SHA, two bodies (as we shall see in Part IV of this opinion) empowered to deal with such matters.

Federal Regulatory Powers: Maryland (7) Becker v. Litty: 318 Md. 76; 566 A.2d 1101; 1989

- ▶ We have already pointed out that Boone Creek is subject to tidal influence; it is part of the navigable waters of the United States. 33 C.F.R. § 2.05-25(a)(2) (1988).
- ▶ In pertinent part, the General Bridge Act provides:
- ▶ The location and plans for [bridges over navigable waters] shall be approved by the Secretary of Transportation before construction is commenced, and, in approving the location and plans of any bridge, the Secretary may impose
- ▶ any **specific conditions** relating to the maintenance and operation of the structure which the Secretary may deem **necessary in the interest of public navigation**, and the conditions so imposed shall have the force of law.

Lots of Regulatory Powers: Maryland (8) Becker v. Litty: 318 Md. 76; 566 A.2d 1101; 1989

- ▶ We have held that the Beckers' riparian rights are not interfered with by the Littys' bridge;
- ▶ that the five feet of vertical clearance required by the SHA permit is a valid and binding requirement despite the Coast Guard permit's three-foot provision;
- ▶ and that the Beckers have alleged sufficient standing to seek enforcement of the SHA permit and the Talbot County zoning law (or other local laws) to the extent it or they may apply.
- ▶ Perhaps the most significant of those facts is that the Littys, gambling on their success in the trial court, apparently have proceeded to construct the bridge

Limited right of Navigation: Michigan (1)

Ryan v. Brown: 18 Mich. 196; 1869

- Unless very clearly confined within less limits by the terms of the grant, we have held the settled law of this state recognizes every ownership of lands upon streams as extending over their bed, to the middle of the stream, when it is a river.
- And the complete control of the use of such land covered with water is in the riparian owner, except as it is limited and qualified by such rights as belong to the public at large to the navigation, and such other use, if any, as appertains to the public over the water: *Lorman v. Benson*



New Hampshire case Connecticut R. v. Olcott Falls: (1)

65 N.H. 290; 21 A. 1090; 1889

- ▶ "The channel of a **public navigable river** is properly described as a **public highway**." ...
- ▶ "A stream may be a **public highway for flotage** when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use....
- ▶ It is a public highway by nature, but one which is such only periodically, and while the natural condition permits a public use....
- ▶ The **public right is measured by the capacity of the stream** for valuable public use in its natural condition."



New Hampshire case Connecticut R. v. Olcott Falls: (2)

65 N.H. 290; 21 A. 1090; 1889

- ▶ At Olcott falls the public has a **right of passage for logs** as free and convenient as would be afforded by the river in its natural condition, unless the highway has been wholly or partially discontinued by law.
- ▶ ...The **riparian proprietors, incorporated or unincorporated, in the exercise of their private rights, may change the natural condition of the stream**, so far as changes are possible without an infringement of the public right.



Susquehanna River: Maryland (1)

Havre de Grace v. Harlow:

129 Md. 265; 98 A. 852; 1916

- ▶ The Mayor and City Council of Havre de Grace filed the bill in this case to prevent... the building of a dam or dams across the Susquehanna River by James H. Harlow and Frank J. Hoen,
- ▶ The nature of the particular injury done to the plaintiff as a municipal corporation was two-fold: first, that by the erection of such an obstruction the fishing industry of the municipality would be seriously injured; and, secondly, that such obstruction would destroy the navigable nature of the Susquehanna River, and thereby render unprofitable and perhaps valueless certain wharf property owned by the municipality.



Right of All Citizens: Maryland (2)

Havre de Grace v. Harlow:

129 Md. 265; 98 A. 852; 1916

- ▶ The citizens of Havre de Grace, and the municipality, if it can be assumed that the municipality represents them, has no monopoly in the rights of fishery and navigation.
- ▶ These are common rights to which all citizens of the State are entitled. They are rights enjoyed by all in the navigable waters of a stream, and to a more limited extent in non-navigable waters.



Navigable by Legislation: Maryland (4)

Havre de Grace v. Harlow:

129 Md. 265; 98 A. 852; 1916

- ▶ By an Act of the Legislature of 1797, Chapter 99, it had been declared that: "The bed of the river Susquehanna from the Maryland line to the tidewater, shall be considered a public highway, free for any person or persons whatsoever to work thereon in clearing the obstructions to its navigation."



Natural State of River?: Maryland (5)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- By the Act of 1813, Chapter 116, it was provided: "In consideration of the Act of the Legislature of Pennsylvania, passed February 19, 1801, that the bed of the river Susquehanna from the Maryland line to the Bay of the Chesapeake, is hereby declared, and shall forever hereafter, be a public highway, and that individuals or bodies corporate may at all times remove obstructions in its navigation."
- Both of these Acts reserved certain rights to the proprietors who were said, in an Act of 1783, ..., to "have undertaken to render the river Susquehanna navigable from the line of this State to tidewater."

Obstruction of Navigation: Maryland (3)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- But the Act of 1908, Chapter 268, now in question, provides in express terms in section 6:
- "That in every such dam so constructed by said Company the said Company shall construct and maintain sufficient fishways or ladders to permit the passage of fish from the waters below to the waters above any such dams."
- The constitutionality of the Act is mainly attacked upon the ground that it is an illegal authorization of the obstruction to commerce upon the river.

Not Affected by the Tide: Maryland (6)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- When now we come to the Act of 1908 we find an express grant of power in section 3:
- "To locate and build in, along or across the said river and the bed and shores thereof, and the canals, railroads, ferries and highways thereon, there along or leading thereto, any dam or dams the crest or crests of which **shall not exceed an elevation of one hundred and ten feet above mean low tide at Havre de Grace**, said dam or dams to be located at any point between tidewater and Mason and Dixon's line."
- Power is also given to acquire land by purchase or condemnation for the construction of said dam or dams

Navigable by Segment: Maryland (7)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- In dealing with navigable waters some matters may be regarded as axiomatic; thus, ...
- ...a stream may be navigable in part and non-navigable in part, and the navigability of one part does not of itself render the entire stream throughout the full length of its course a navigable stream; also, ...
- ...a stream which is non-navigable may be made navigable by the removal of those things which constitute obstructions to its navigability; ...
- ...and conversely, a stream navigable at one time may as the result of any one or more of a variety of causes become thereafter non-navigable.

Navigable in Natural State: Maryland (8)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- And, again, any stream though above tidewater, is a navigable water if of sufficient capacity to float the products of the mine, the forests or the tillage of the country through which they float to market...
- The doctrine of the civil law **has been carried to its utmost limit in the United States**, and the rule frequently laid down is, that all streams are to be deemed navigable which are capable **in their natural state** and in their ordinary volume of water to transport to market the products of the fields, forests and mines;

Quoting "Daniel Ball": Maryland (9)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- In the ***Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999**, FIELD, J., said: "Those rivers must be regarded as public, navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition as highways for commerce over which trade or travel are or may be conducted in the customary modes of trade or travel on water."
- Citations might be multiplied almost indefinitely of what constitutes navigable waters, and they are very far from being in harmony when applied to a particular case.

Servitude of Public Interest: Maryland (10)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- ▶ The best solution to the conflicting views which the courts have adopted is to be found in the suggestion contained in *Moore v. Sanborne*, 2 Mich. 519,
- ▶ "that the **servitude of public interests** depends rather on the purpose for which the public requires the use of the stream rather than any particular mode of use."



Test of Navigability: Maryland (11)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- ▶ In many of the cases there has been a disposition to apply as the test of navigability the fact whether the stream in question was or was not navigable in its natural state, and with its ordinary volume of water, for the purposes of transportation.
- ▶ If that test were to be applied in this case, this Court would be compelled to hold the Susquehanna River to be non-navigable, even within the State of Maryland, as in the earliest of the Acts reference is made to the obstructions in the river,



Natural Conditions control: Maryland (12)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- ▶ But in the last analysis what constitutes a navigable river free to the public is a question of fact to be determined by the natural conditions in each case...
- ▶ Where legislative permission to construct a dam across a navigable stream has been granted it gives a right which can not be destroyed by the declaration of a municipal corporation that the dam is a public nuisance
- ▶ Every dam is in a sense an obstruction to navigation, but that fact, even though it be in a navigable river, does not constitute it a nuisance when authorized by law...



Natural Conditions control: Maryland (13)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- ▶ What now shall be said of the Susquehanna River, above tidewater, as a navigable stream...
- ▶ There is no pretense or claim in this case that the Susquehanna is or ever was in its natural state navigable for upstream commerce between the head of the tidewater and the Pennsylvania line.



What was Natural Condition?: Maryland (14)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- ▶ The downstream navigation seems to have been of two classes--canal boats, which had been built further up the stream, which were too wide to admit of their passage through the locks of the canals, ...
- ▶ ... secondly, arks or rafts, which were made of logs or lumber, and which, though drawing at the most between three and four feet of water, could not be brought down when the river was in its normal state of flow, but only at the times of flood, when the water was about four feet above its normal height.
- ▶ The season for these seems to have been approximately two months in the spring of the year



Floating Timber: Maryland (15)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- ▶ That was the bringing down of the logs, most of which appear to have been disposed of at saw mills along the way...
- ▶ A half century and more ago this lumber traffic upon the river is testified to have been very considerable in volume, but that it has gradually and steadily fallen off, ...
- ▶ The extinction of this commerce was due, however, not to the erection of bridges or dams across the river, but to entirely different causes, viz, the formation of considerable bars at the mouths of some of the creeks emptying into the river,



Does Dam change Rights?: Maryland (16)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- › In this connection it is important to note that the mere damming of a river, if it has capacity to float boats used as instrumentality to commerce, does not destroy its navigability, but that such rivers still remain highways for common use.
- › The effect of these dams will necessarily be to cause pools of back water to be formed, across which some ferry boats may be operated; but it has more than once been held that the operation of a ferry across a stream does not constitute such stream a navigable water throughout its length...

Conclusion: Maryland (17)

Havre de Grace v. Harlow:
129 Md. 265; 98 A. 852; 1916

- › After a full consideration of the facts as testified to in this case, and a careful examination of the Act of 1908, this Court is of opinion that the proposed dams, if constructed in accordance with the requirements of the Act, are not such obstructions to the navigable character of the river as to warrant the granting of the injunction ...
- › It is true that the Act of 1908 does not in terms require that the dam or dams to be constructed under its provisions shall be equipped with chutes or have locks constructed by means of which they may be passed by boats or rafts in either direction.

Rights Incident to Riparian Ownership

Public Trust Doctrine: Virginia (7)

Taylor v. Commonwealth: 102 Va. 759; 47 S.E. 875; 1904

...the riparian owner has certain rights...

"First. The right to be and remain a riparian proprietor and to enjoy the **natural advantages** thereby conferred upon the land by its adjacency to the water.

"Second. The **right of access** to the water, including a right of way **to and from the navigable part**.

"Third. The right to **build a pier** or wharf out to navigable water, **subject to any regulations of the State**.

"Fourth. The right to **accretions** or alluvium.

"Fifth. The right to make a **reasonable use of the water** as it flows past or laves the land."

Riparian "Incidental Rights": Maryland (7)

Van Ruymbeke v. Patapsco:
261 Md. 470; 276 A.2d 61; 1971

- › the riparian proprietor, whose land is bounded by a navigable river, whether his title extends beyond the dry land or not, ...
- › ...has the right of access to the navigable part of the river from the front of his lot, and the right to ...
- › ...make a landing, wharf or pier for his own use, or for the use of the public, **subject to such general rules and regulations as the Legislature may think proper** to prescribe for the protection of the rights of the public, whatever those rights may be.
- › This is well established doctrine by both Federal and State courts.

Incidental Rights have value: Maryland (8)

Van Ruymbeke v. Patapsco:
261 Md. 470; 276 A.2d 61; 1971

- › These riparian rights, founded on the common law, are property, and are valuable, ...
- › ...and while they must be enjoyed in due subjection to the rights of the public, they cannot be arbitrarily or capriciously destroyed or impaired.
- › They are rights of which, when once vested, the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation.

What rights exist for Public Use?? Ohio (1)

Pollock v. Cleveland Ship Building Co.
56 Ohio St. 655; 47 N.E. 582; 1897

- ▶ The principle clearly deducible is, that as to **navigable rivers, the private right of the riparian owner to the land, ordinarily covered by water, is in all cases subordinate to the paramount public right of navigation, and its incidents.**
- ▶ The converse is expressed by Christiancy, J., in *Rice v. Rudiman*, 10 Mich., 125, thus: "In other words, all the private or individual use and enjoyment of which the land is susceptible, subordinate to, and consistent with, the public right, belong to the riparian owner as against any other person seeking to appropriate it to his individual use."

What rights exist for Public Use?? Ohio (2)

Pollock v. Cleveland Ship Building Co.
56 Ohio St. 655; 47 N.E. 582; 1897

- ▶ Among the rights of the public is that of **mooring vessels for the purpose of repairs, and of putting in engine, boilers and machinery, after such vessels have been launched.**
- ▶ Such use, reasonably enjoyed, is not a trespass upon the lands of a riparian owner, in front of whose river bank, outside of the dock line, such vessels are moored, and such owner will not be entitled to an injunction forbidding such use, unless special injury to his property is shown.

What rights exist for Public Use?? Ohio (3)

Pollock v. Cleveland Ship Building Co.
56 Ohio St. 655; 47 N.E. 582; 1897

- ▶ **But the right of the public does not extend to use of lands of the owner not covered by water.**
- ▶ And where a builder of vessels so moored carries lines from them across the river bank of such riparian owner, against his objection, and fastens them upon the land of such builder, and insists upon the right to continue such acts, the riparian owner may be entitled to an injunction, although his land is unimproved, and such acts produce no actual present damage.

What rights exist for Public Use?? Ohio (4)

Pollock v. Cleveland Ship Building Co.
56 Ohio St. 655; 47 N.E. 582; 1897

- ▶ **Summary: the ship building company's act of carrying lines across the property owner's bank, to which the property owner had an absolute right which was not qualified by any public use, constituted trespass** which the property owner was entitled to enjoin. The court noted that such trespass could grow into a prescriptive right, the risk of which should not be imposed upon the property owner. The court also noted that there was no hardship upon the ship building company to require it to obtain a right to such use of the property owner's bank by negotiation.

Deed Interpretation – Recent: Maryland (1)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003

- ▶ Ordinarily, the construction of a deed is a question of law for the court[.] ... In construing the language of a deed, the basic principles of contract interpretation apply."
- ▶ "These principles require consideration of "the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution[.]""
- ▶ "The court is supposed to give effect to the intention of the parties, gleaned from the text of the entire instrument, unless that would violate a principle of law."

Deed Interpretation – Recent: Maryland (2)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003

- ▶ Moreover, when "interpreting a deed whose language is clear and unambiguous on its face, the plain meaning of the words used shall govern without the assistance of extrinsic evidence."
- ▶ "We must consider the deed as a whole, viewing its language in light of the facts and circumstances of the transaction at issue as well as the governing law at the time of conveyance."

Riparian Rights – Recent: Maryland (3)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003

- ▶ The term "riparian rights" indicates a bundle of rights that turn on the physical relationship of a body of water to the land abutting it.
- ▶ These rights are significantly different from each other in many respects, and yet they share a common name just as riparian landowners attempt to share the common benefits that arise from adjacency to defined bodies of water.

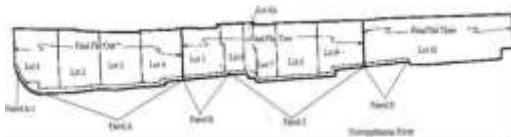
Riparian Rights – Recent: Maryland (4)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003

- ▶ This bundle includes at least the following rights:
 - ▶ (i) of access to the water;
 - ▶ (ii) to build a wharf or pier into the water;
 - ▶ (iii) to use the water without transforming it;
 - ▶ (iv) to consume the water;
 - ▶ (v) to accretions (alluvium); and
 - ▶ (vi) to own the subsoil of nonnavigable streams and other "private" waters.

Riparian Rights – Recent: Maryland (5A)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003



Riparian Rights – Recent: Maryland (5B)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003



Merger & Rights Incident: Maryland (6)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003

- ▶ 'Under the doctrine of merger of estates in land, a lesser estate is merged into a greater estate whenever both estates meet in the same person.'
- ▶ Conrad/Dommel argues that riparian rights do not constitute a "separate," or "lesser" estate, like, for example, easements, and therefore that the doctrine of merger is inapplicable.
- ▶ "Merger is the absorption of one estate in another, and takes place usually when a greater estate and a less coincide and meet in one and the same person without any intermediate estate, whereby the less is immediately merged or absorbed in the greater"

Merger & Rights Incident: Maryland (7)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003

- ▶ To constitute a merger, it is necessary that the two estates be in one and the same person, at one and the same time, and in one and the same right...
- ▶ ...the learned author states: "It is a well-settled rule of law that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate,...
- ▶ the less is immediately annihilated, or, in the law phrase, it is said to be 'merged,' that is, sunk or drowned in the greater."

Merger & Rights Incident: Maryland (8)

Conrad/Dommel v. West Development:
149 Md. App. 239; 815 A.2d 828; 2003

- ▶ The riparian rights associated with Parcels A-1, B, C, and D, were severed by the May 20, 1993 deed and conveyed from UDI to TLC.
- ▶ These rights were reunited with the riparian land on September 29, 1994, when UDI conveyed Parcels A-1, B, C, and D to TLC in fee simple.

Beds and Shores of Inland Lakes

U.S. Supreme Court on Indiana Lakes: (1)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ This is an action of ejectment brought by Gertrude H. Hardin, the plaintiff in error, to recover possession of certain fractional sections of land lying on the west and south sides of a small lake in Cook County, Illinois...
- ▶ The lake is two or three miles in extent, and the main question in the cause is, whether the title of the riparian owner on such a lake extends to the centre of the lake, or stops at the water's edge.
- ▶ The court below decided that the plaintiff's title only extended to low-water mark...
- ▶ The question is of much importance, and deserves a careful consideration.

U.S. Supreme Court on Indiana Lakes: (2)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ It will be observed that the government surveys made in 1834-5 upon which the patent was issued, not only laid down a meander line next to the lake, but also ...
- ▶ ...described said lines as running "along the margin of the lake;" and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake;
- ▶ and the lake itself on said plat was marked with the words "Navigable lake," although the fact found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh-water lake or pond.

U.S. Supreme Court on Indiana Lakes: (3)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant.
- ▶ This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois.
- ▶ If the boundary of the land granted had been a fresh-water river, there can be no doubt that the effect of the grant would have been such as is given to such grants by the law of the state, extending either to the margin or centre of the stream, according to the rules of that law.

U.S. Supreme Court on Indiana Lakes: (4)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water.
- ▶ The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.

U.S. Supreme Court on Indiana Lakes: (5)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ It has frequently been held, both by the Federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary.
- ▶ Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.



U.S. Supreme Court on Indiana Lakes: (6)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ This right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England.
- ▶ In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State;
- ▶ but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised.



U.S. Supreme Court on Indiana Lakes: (7)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ This right of the States to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the Crown in England.
- ▶ In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State;
- ▶ but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised.

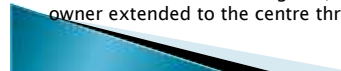


U.S. Supreme Court on Indiana Lakes: (8)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ As was well said by the Supreme Court of Illinois in Middleton v. Pritchard, ... "Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee, and that it intended all that might pass by it. What will pass then by a grant bounded by a stream of water? At common law, this depended upon the character of the stream, or water. If it were a navigable stream, or water, the riparian proprietor extended only to high-water mark. If it was a stream not navigable, the rights of the riparian owner extended to the centre thread of the current



U.S. Supreme Court on Indiana Lakes: (9)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ At common law, only arms of the sea, and streams where the tide ebbs and flows, are deemed navigable. Streams above tide water, although navigable in fact at all times, or in freshets, were not deemed navigable in law.
- ▶ To these, riparian proprietors bounded on or by the river, could acquire exclusive ownership in the soil, water and fishery, to the middle thread of the current; subject, however, to the public easement of navigation.



U.S. Supreme Court on Indiana Lakes: (10)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ That the common law is the true and only law of Illinois on the subject of land titles, and especially as to the rights of riparian owners, and the construction of deeds and grants of land bounded by streams and permanent bodies of water (except the great navigable lakes before referred to) is so clearly shown by the statutes and by the whole course of the decisions of the Supreme Court of that State, that it hardly needs any argument to support the proposition.



U.S. Supreme Court on Indiana Lakes: (11)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ Illinois was a portion of the Northwest Territory which Virginia always claimed as a part of her domain until she ceded it to the United States, and which received from that State many of its original settlers, who regarded Virginia as their parent State, and had a strong attachment for its institutions and laws, and may be said to have carried those laws with them.

U.S. Supreme Court on Indiana Lakes: (12)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ Except with regard to Lake Michigan, which is a navigable lake and one of the internal seas of the country, it cannot be pretended that the common law relating to grants of land abutting on streams and permanent bodies of water, and to the rights of riparian owners, are of such a local character peculiar to England as to be inapplicable to the State of Illinois.
- ▶ The disposal of the present case, therefore, seems to us to require, further, only an answer to the single question, "What is the common law in regard to the title of fresh-water lakes and ponds?" And on this subject we think there can be but very little difference of opinion.

U.S. Supreme Court on Indiana Lakes: (13)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ We will only refer to a single other case, decided in Illinois itself in 1867, *Beckman v. Kreamer*, 43 Illinois, 447
- ▶ By the common law, a right to take fish belongs so essentially to the right of soil in **streams or bodies of water, where the tide does not ebb and flow**, that if the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only."

U.S. Supreme Court on Indiana Lakes: (14)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ The Supreme Court of Michigan in a recent case (*Clute v. Fisher*, 65 Michigan, 48, since followed by *Stoner v. Rice*, 121 Indiana, 51) held ...
- ▶ ...that the riparian owner of a fractional lot bounded by a non-navigable lake only takes so much of the lake bottom as is required to fill out the section or quarter section of which he owns the fraction;
- ▶ in other words, that his common law right is limited by the sectional lines of the survey.

U.S. Supreme Court on Indiana Lakes: (15)

Hardin v. Jordan:

140 U.S. 371; 11 S. Ct. 808; 35 L. Ed. 428; 1891

- ▶ It was conceded, however, that if the lake were so large that the lines of the granted sections would not embrace the whole lake bottom, then the riparian ownership would be extended to the centre so as to include the whole bottom.

Significant U.S. Supreme Court Decisions

Genessee Chief v. Fitzhugh:
U.S. Supreme Court.
53 U.S. 443; 13 L. Ed. 1058; 1851

- It is evident that **a definition that would at this day limit public rivers** in this country **to tide-water rivers is utterly inadmissible**. We have **thousands of miles of public navigable water**, including lakes and rivers in which there is no tide.
- And **certainly there can be no reason for admiralty power** over a public tide-water, **which does not apply with equal force to any other public water used for commercial purposes and foreign trade**. The lakes and the waters connecting them are undoubtedly public waters; and we think **are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States**.

The Daniel Ball: U.S. Supreme Court.
77 U.S. 557 (1871) – 19 L.Ed. 999 (1)

- Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water**, and some of them are navigable for great distances by **large vessels, which are not even affected by the tide at any point during their entire length**.
- A different test must, therefore, be applied** to determine the navigability of our rivers, and that is found in their navigable capacity. **Those rivers must be regarded as public navigable rivers in law which are navigable in fact**. And they are navigable in fact when they are used, or are susceptible of being used...[continued]

The Daniel Ball: U.S. Supreme Court.
77 U.S. 557 (1871) – 19 L.Ed. 999 (2)

- ...in their ordinary condition, **as highways for commerce**, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. (**)
- And they constitute navigable waters of the United States** within the meaning of the acts of Congress, **in contradistinction from the navigable waters of the States**,
- when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries** in the customary modes in which such commerce is conducted by water.

The Daniel Ball: U.S. Supreme Court.
77 U.S. 557 (1871) – 19 L.Ed. 999 (3)

- If we apply this test to Grand River, the conclusion follows that it must be regarded as a navigable water of the United States**.
- From the conceded facts in the case the stream is capable of bearing a **steamer of one hundred and twenty-three tons burden, laden with merchandise and passengers, as far as Grand Rapids**, a distance of **forty miles** from its mouth in Lake Michigan.
- And by its junction with the lake** it forms a continued highway for commerce, both with other States and with foreign countries...

The Montello:

87 U.S. 430, 441–42 (1874)

- In **The Montello**, the Supreme Court **clarified that "customary modes of trade and travel on water" encompasses more than just navigation by larger vessels**:
- The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of **being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway**.
- In that case, the Court held that early fur trading using canoes sufficiently showed that the Fox River was a navigable water of the United States.

Waters of the United States U.S.A.C.E.
33 CFR Part 328

- The term **"waters of the United States"** means
- 1. All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
- 2. All interstate waters including interstate wetlands;
- 3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

Navigable Waters of the United States U.S.A.C.E. 33 CFR 329, Appendix D

- ▶ A water body qualifies as a **"navigable water of the United States"** if it meets any of the tests set forth in 33 C.F.R. Part 329 (e.g., the water body is (a) **subject to the ebb and flow of the tide**, and/or (b) the **water body is presently used, or has been used in the past, or may be susceptible for use** (with or without reasonable improvements) to transport interstate or foreign commerce).
- ▶ If the federal courts have determined that a water body is navigable-in-fact under federal law for any purpose, that water body qualifies as a "traditional navigable water" subject to CWA jurisdiction

U.S.A.C.E and Private Ownership: Section 329.11 – Geographic and jurisdictional limits of rivers and lakes

- ▶ Ownership of a river or lake bed or of the lands between high and low water marks will vary according to state law; ...
- ▶ ...however, **private ownership of the underlying lands has no bearing on the existence or extent of the dominant Federal jurisdiction over a navigable waterbody.**

Montana PPL V. Montana: U.S.A.C.E. (1) 132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ Returning to the **"navigability in fact"** rule, the Court has explained the elements of this test. A basic formulation of the rule was set forth in *The Daniel Ball*, 77 U.S. 557, 10 Wall. 557, 19 L. Ed. 999 (1871), a case concerning federal power to regulate navigation:
- ▶ **"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."**

Montana PPL V. Montana: U.S.A.C.E. (2) 132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ The **Daniel Ball** formulation has been invoked in considering the navigability of waters for purposes of **assessing federal regulatory authority** under the Constitution, **and** the application of **specific federal statutes**, as to the waters and their beds.
- ▶ ...It has been used as well to determine questions of title to water beds under the equal-footing doctrine. ... **It should be noted, however, that the test for navigability is not applied in the same way in these distinct types of cases.**

Montana PPL V. Montana: U.S.A.C.E. (3) 132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ The **segment-by-segment approach to navigability** for title is well settled, and it should not be disregarded. A key justification for sovereign ownership of navigable riverbeds is that a **contrary rule would allow private riverbed owners to erect improvements on the riverbeds that could interfere with the public's right** to use the waters as a highway for commerce.
- ▶ While the **Federal Government and States retain regulatory power** to protect public navigation, **allocation to the State of the beds underlying navigable rivers** reduces the possibility of conflict between private and public interests.

Montana PPL V. Montana: U.S.A.C.E. (4) 132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ ...By contrast, segments that are **nonnavigable at the time of statehood** are those over which commerce could not then occur. Thus, there is no reason that these segments also should be deemed owned by the State under the equal-footing doctrine.

Montana PPL V. Montana: U.S.A.C.E. (5)

132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ In reaching its conclusion **that the necessity of portage does not undermine navigability**, the **Montana Supreme Court misapplied** this Court's decision in *The Montello*, 87 U.S. 430, 20 Wall. 430, 22 L. Ed. 391. See 355 Mont., at 438, 229 P. 3d, at 446. The consideration of portage in...
- ▶ **The Montello was for a different purpose. The Court did not seek to determine whether the river in question was navigable for title purposes** but instead **whether it was navigable for purposes of determining whether boats upon it could be regulated by the Federal Government.**
- ▶ **The primary focus** in *The Montello* was not upon navigability in fact but upon whether the river was a "navigable water of the United States."

Montana PPL V. Montana: U.S.A.C.E. (6)

132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ Having clarified that **portages may defeat navigability for title purposes**, and do so with respect to the Great Falls reach, the Court sees **no evidence** in the record that could demonstrate that the Great Falls reach was navigable. Montana does not dispute that **overland portage was necessary to traverse that reach**. Indeed, the State admits **"the falls themselves were not passable by boat at statehood."** ... And the trial court noted the falls had **never been navigated**. Based on these statements, this Court now concludes, contrary to the Montana Supreme Court's decision, that ... the **17-mile Great Falls reach**, at least from the head of the first waterfall to the foot of the last, is not navigable **for purposes of riverbed title** under the equal-footing doctrine.

Montana PPL V. Montana: U.S.A.C.E. (7)

132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ **The Montana Supreme Court further erred** as a matter of law in its reliance upon the evidence of **present-day, primarily recreational use of the Madison River**. Error is not inherent in a court's consideration of such evidence, but the evidence must be confined to that which shows the river could sustain the **kinds of commercial use that, as a realistic matter, might have occurred at the time of statehood.**
- ▶ **Navigability must be assessed as of the time of statehood, and it concerns the river's usefulness for "trade and travel," rather than for other purposes.**

Montana PPL V. Montana: U.S.A.C.E. (8)

132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ Evidence of **present-day use** may be considered to the extent it informs the historical determination **whether the river segment was susceptible of use for commercial navigation at the time of statehood.**
- ▶ For the susceptibility analysis, it must be determined whether trade and travel could have been conducted **"in the customary modes of trade and travel on water,"** over the relevant river segment "in [its] **natural and ordinary condition.**"

Montana PPL V. Montana: U.S.A.C.E. (9)

132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ At a minimum, therefore, the party seeking to use **present-day evidence for title purposes must show:**
- ▶ (1) the **watercraft are meaningfully similar** to those in customary use for trade and travel at the time of statehood; and
- ▶ (2) the river's post-statehood **condition is not materially different** from its physical condition at statehood.
- ▶ ... If modern watercraft permit navigability where the historical watercraft would not, or if the river has changed in ways that substantially improve its navigability, then the evidence of present-day use has **little or no bearing on navigability at statehood.**

Montana PPL V. Montana: U.S.A.C.E. (10)

132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ **The public trust doctrine** is of ancient origin. Its roots trace to **Roman civil law** and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country.
- ▶ **the public trust doctrine remains a matter of state law,**
- ▶ Under accepted principles of federalism, the **States retain residual power to determine the scope of the public trust over waters within their borders,**
- ▶ while federal law determines riverbed title under the equal-footing doctrine.

Montana PPL V. Montana: U.S.A.C.E. (11)

132 S. Ct. 1215; 182 L. Ed. 2d 77; 2012

- ▶ The **Montana Supreme Court's ruling that Montana owns** and may charge for use of riverbeds across the State was **based upon an infirm legal understanding** of this Court's rules of navigability for title under the equal footing doctrine. As the Court said in *Brewer-Elliott* "It is not for a State by courts or legislature, in dealing with the general subject of beds or streams, **to adopt a retroactive rule for determining navigability** which . . . **would enlarge what actually passed to the State**, at the time of her admission, under the constitutional rule of equality here invoked."

Accretion, Erosion And Avulsion

Building up of Shore: Maryland (1)

Linthicum v. Coan: 64 Md. 439; 2 A. 826; 1886

- ▶ "The principle seems to be well settled that where a tract of land lies adjacent or contiguous to a navigable river or water, any increase of soil formed by the waters gradually or imperceptibly receding, or any gain by alluvion in the same manner, shall, as a compensation for what it may lose in other respects, belong to the proprietor of the adjacent or contiguous land."
- ▶ Alluvion is a secret increase which is so gradually added, that it cannot be known at what moment it is added.

Avulsion: Maryland (2)

Linthicum v. Coan: 64 Md. 439; 2 A. 826; 1886

- ▶ It is contradistinguished from those large additions which are made to the land when the sea suddenly recedes, or when it casts up, by its immediate and manifest force, large quantities of earth and sand.
- ▶ The rights of the riparian proprietor do not depend at all upon the question whether the amount of increase can be definitely measured by fixing accurately the original location of the bank of the river.
- ▶ If the increase were not perceptible, after it had accrued, it would hardly be necessary that the title to it should be determined by the law.

Imperceptible...: Maryland (3)

Linthicum v. Coan: 64 Md. 439; 2 A. 826; 1886

- ▶ In dealing with this case the Supreme Court discard altogether the use of the word "imperceptible." They say...
- ▶ "the question is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil.
- ▶ No other rule can be applied on just principles.
- ▶ Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain."

NJ Riparian - Accretion and Avulsion (1)

Ocean City Association v. Shriver:
64 N.J.L. 550; 46 A. 690; 1900

- ▶ The **call in the deed for Ocean avenue as a boundary carried the grantee's title to the middle line of the avenue.** *Salter v. Jonas, 10 Vroom 469.*
- ▶ The **avenue as delineated on the map is a fixed monument in the description in the deed,**
- ▶ ...and in that respect **it differs from a boundary on the ocean**, where, by force of the description itself, the **title of the grantee will advance or recede as the line of high water changes** from time to time, and he will hold by the same boundary, **including the accumulated soil that has arisen from alluvial formations.**

NJ Riparian – Accretion and Avulsion (2)

Ocean City Association v. Shriver:
64 N.J.L. 550; 46 A. 690; 1900

- ▶ The doctrine of **dereliction and accretion** depends upon principles that are **peculiar to that subject**.
- ▶ The right to alluvion **depends upon the fact of the contiguity of the estate to the water**, and to give a right to accession and accretion there must be an estate to which the accession can attach.

NJ Riparian – Accretion and Avulsion (3)

Ocean City Association v. Shriver:
64 N.J.L. 550; 46 A. 690; 1900

- ▶ ...The doctrine whereby title is acquired by **accretion is founded on the principle of compensation**. The proprietor of lands having a boundary on the sea is **obliged to accept the alteration of his boundary** by the changes to which the shore is subject.
- ▶ **He is subject to loss by the same means that may add to his territory**; and, as he is without remedy for his loss, so he is entitled to the gain which may arise from alluvial formations.

NJ Riparian – Accretion and Avulsion (4)

Ocean City Association v. Shriver:
64 N.J.L. 550; 46 A. 690; 1900

- ▶ To entitle a proprietor to the right of accretion he **must be a riparian owner and his land must adjoin** the line of ordinary high tide.
- ▶ ...this court held that **a strip of land four feet in width interposed between the lands of an adjacent proprietor and the water deprived the latter of the rights of a riparian owner**, although that strip was conveyed for use and enjoyment for purposes of fishing.
- ▶ So, also, **if a strip of land, however small, intervene between** the premises conveyed and the water at **ordinary high water** the owner will not be entitled to the accretion...

NJ Riparian – Accretion and Avulsion (5)

Ocean City Association v. Shriver:
64 N.J.L. 550; 46 A. 690; 1900

- ▶ It is well settled at common law that where lands of **riparian owners are separated by a river** -- each being a riparian owner but on different sides of the stream -- **the river is the common boundary, and if its course be changed by alluvial formations ...**
- ▶ ...the owners of such lands **will hold to the same boundary, including the accumulated soil**. In such cases "the filum aquoe is the common mark or boundary, though it borrow great quantities of land, sometimes of one side, sometimes of the other, and give them to the opposite shore."

Accretion – natural v. Artificial: Maryland (1)

U.S.A. v. 222 Acres: 306 F. Supp. 138; 1969

- ▶ Under Maryland law waters are considered navigable for the purposes of this rule if they are subject to the ebb and flow of the tide.
- ▶ The owner of fast land bordering on navigable water has a common law right to land formed by the gradual and imperceptible accretion of alluvion to the littoral land or by reliction. 13 But it has generally been held that the doctrine of accretion does not extend to land "reclaimed" by such owner through filling in land under water and creating new dry or fast land.

Right to Accretion: Maryland (5)

Van Ruymbeke v. Patapsco:
261 Md. 470; 276 A.2d 61; 1971

- ▶ By the common law it is well settled, that where land lies adjacent or contiguous to a navigable river, in which there is an ebb and flow of the tide, ...
- ▶ ...any increase of soil formed by the gradual and imperceptible recession of the waters, or any gain by the gradual and imperceptible formation of what is called...
- ▶ ... alluvion, from the action of the water in washing it against the fast land of the shore, and there becoming fixed as part of the land itself, shall belong to the proprietor of the adjacent or contiguous land.

Nature of Accretion: Maryland (6)

Van Ruymbeke v. Patapsco:
261 Md. 470; 276 A.2d 61; 1971

- And the right to accretion, thus formed, is considered as an interest appurtenant to the principal land, and belonging, in the nature of an incident, to the ownership of that, rather than as something acquired by prescription or possession, in the ordinary legal sense of those terms.

Accretion – Rationale: Maryland (1)

Rayne v. Coulborne:
65 Md. App. 351; 500 A.2d 665; 1985

- there are a number of reasons supporting the doctrine of accretion.
- First, where lands are bounded by water, it may well be regarded as the expectancy of the riparian owners that they should continue to be so bounded. Second, the quality of being riparian, especially to navigable water, may be the land's 'most valuable feature' and is part and parcel of the ownership of the land itself. . . .
- Riparianness also encompasses the vested right to future alluvion, which is an 'essential attribute of the original property.'

Accretion – Rationale: Maryland (2)

Rayne v. Coulborne:
65 Md. App. 351; 500 A.2d 665; 1985

- By requiring that the upland owner suffer the burden of erosion and by giving him the benefit of accretions, riparianness is maintained.
- Finally, there is a compensation theory at work.
- Riparian land is at the mercy of the wanderings of the river.
- Since a riparian owner is subject to losing land by erosion beyond his control, he should benefit from any addition to his lands by the accretions thereto which are equally beyond his control.

Rationale behind Accretion/Erosion Md.

White v. Pines Comm.: 403 Md. 13; 939 A.2d 165; 2008

In assessing the changes that have occurred in riparian rights down the corridor of years it is well to keep in mind an appreciation for **the basic rationale behind the rule of law** which gave to the riparian owner the rights to land surfacing through the process of accretion or reliction. In its nascency, the **sole purpose of the rule was to assure to the riparian owner that he would never be cut off from his access to water.**

If an intervening party were permitted to gain title to accretions or to land exposed by the subsidence of water, the riparian landowner would be deprived of his valuable water-access rights."

Avulsion & Accretion: U.S. Supreme Court (1)

Nebraska v. Iowa:
143 U.S. 359; 12 S. Ct. 396; 36 L. Ed. 186; 1892

- In *New Orleans v. United States*, 10 Pet. 662 717, this court said: "**The question is well settled at common law**, that the person whose land is bounded by a stream of water **which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil.** No other rule can be applied on just principles.
- Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and, as he is without remedy for his loss in this way, he cannot be held accountable for his gain."

Avulsion & Accretion: U.S. Supreme Court (2)

Nebraska v. Iowa:
143 U.S. 359; 12 S. Ct. 396; 36 L. Ed. 186; 1892

- It is equally well settled**, that where a stream, which is a boundary, from any cause **suddenly abandons its old** and seeks a new bed, **such change of channel works no change of boundary**; and that the **boundary remains as it was, in the center of the old channel**, although no water may be flowing therein. **This sudden and rapid change of channel is termed, in the law, avulsion.** In *Gould on Waters*, sec. 159, it is said: "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the **original thread of the stream continues to mark the limits** of the two estates."

Avulsion & Accretion: U.S. Supreme Court (3)

Nebraska v. Iowa:

143 U.S. 359; 12 S. Ct. 396; 36 L. Ed. 186; 1892

- These propositions, **which are universally recognized as correct where the boundaries of private property touch on streams, are in like manner recognized where the boundaries between States or nations** are, by prescription or treaty, found in running water.
- With such conditions, whatever changes happen to either bank of the river by accretion on the one or degradation of the other, that is, by the gradual, and, as it were, insensible **accession or abstraction of mere particles**, the river as it runs continues to be the boundary.

Avulsion & Accretion: U.S. Supreme Court (4)

Nebraska v. Iowa:

143 U.S. 359; 12 S. Ct. 396; 36 L. Ed. 186; 1892

- ...if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, ...suffers injury by the loss of territory greater than the benefit of retaining the natural river boundary, and that boundary remains in the middle of the deserted river bed.
- For, in truth, **just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands**,
- ...so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary.

Accretion and Avulsion - Ohio (1)

Limle v. Robinson: 4 Ohio App. 236; 1915

- Controversies growing out of the **shifting of earth by the action of the waters** in running streams gave rise to the doctrines of accretion and avulsion.
- In cases of accretion, **owing to the difficulty of tracing the original source**, the law awards it to the owner of the land to which it becomes attached, while in cases of avulsion the original owner still holds the title.

Accretion and Avulsion - Ohio (2)

Limle v. Robinson: 4 Ohio App. 236; 1915

- Accretion is said to be the deposit by gradual and imperceptible process,
- while **avulsion involves the transfer of a considerable quantity of earth beyond or over the channel of the stream**.
- Accretion is the **usual and ordinary** case of the shifting of earth by the action of the waters and
- avulsion is of a somewhat extraordinary nature.

Accretion and Avulsion - Ohio (3)

Limle v. Robinson: 4 Ohio App. 236; 1915

- Avulsion may exist, first, where a **stream changes its course**, and, second, where a **considerable quantity of earth is carried en masse across the channel** and attached to the opposite shore.
- As applied to the second class: **Avulsion is the removal of a considerable quantity of earth from the land of one proprietor and its deposit upon or annexation to the land of another suddenly and by the perceptible action of the water**.
- Where the change to the channel of a river is **made suddenly and violently, and is visible, and the effect is certain**, it is said to be by avulsion.

Accretion and Avulsion - Ohio (4)

Limle v. Robinson: 4 Ohio App. 236; 1915

- In *Coulthard v. Davis*, 101 Iowa 625, 70 N.W. 716, it is held: "Land detached from one side of a river by a sudden change in the channel, and left connected with land on the other side, in such manner as to be capable of identification, is not an accretion."
- The question of identification must necessarily play an important part in applying the doctrine of avulsion. **For without identification there can be no avulsion in a legal sense**.

Accretion and Avulsion – Ohio (5)

Limle v. Robinson: 4 Ohio App. 236; 1915

- ▶ "That while the **disappearance, by reason of this process, of a mass of bank may be sudden and obvious**, there is **no transfer of such a solid body of earth to the opposite shore, or anything like an instantaneous and visible creation of a bank on that shore**.
- ▶ The **accretion**, whatever may be the fact in respect to the diminution, is **always gradual and by the imperceptible** deposit of floating particles of earth. There is, except in such cases of avulsion as may be noticed hereafter, in all matter of increase of bank, always a mere gradual and imperceptible process.

Accretion and Avulsion – Ohio (6)

Limle v. Robinson: 4 Ohio App. 236; 1915

- ▶ There is **no heaping up at an instant**, and while the eye rests upon the stream, of acres or rods on the forming side of the river. **No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place**. The falling bank has passed into the floating mass of earth and water, and **the particles of earth may rest one or fifty miles below, and upon either shore**.

Accretion as separate Title: Md. (1)

Van Ruymbeke v. Patapsco:
261 Md. 470; 276 A.2d 61; 1971

- ▶ If the land in question was formed by gradual **accessions** extending from the shore into the river, it would belong to the riparian proprietor... **But the leading characteristic of alluvion is the gradual extension of the land from the shore into the water**; and when this is the case, it is irrelevant to consider the causes which, operating beneath the surface of the stream, have brought about the result.
- ▶ On the other hand, if land was formed in the river, and extended inwards towards the shore, it would be the property of the plaintiff, with all its accretions.

Accretion as separate Title : Md. (2)

Van Ruymbeke v. Patapsco:
261 Md. 470; 276 A.2d 61; 1971

- ▶ **Accretion means a gradual or imperceptible building up of the land underwater until it is no longer covered** by the ebb and flow of tide to the high water mark. It may occur from the **deposition of materials by the river itself** or from the deposition of materials by **drainage courses entering the river** from other fast land or both.
- ▶ When and if fast land emerges to connect to existing fast land, **it becomes, by operation of law, the property of the riparian owner** of such existing fast land to the point of its maximum advancement even if that maximum advancement continues until it meets the fast land of another riparian owner.

Surveying Principles For Riparian Boundaries

Role of the Surveyor: Michigan (1)

Poch v. Urlaub: 357 Mich. 261; 98 N.W.2d 509; 1959

- In **Diehl v. Zanger, ...**, **Justice COOLEY said**
- "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors.
- This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities.
- Indeed the mischiefs that must follow would be simply incalculable, and **the visitation of the surveyor might well be set down as a great public calamity.**"

Limitations of the Surveyor: Michigan (2)

Poch v. Urlaub: 357 Mich. 261; 98 N.W.2d 509; 1959

- "Surveyors and commissioners of highways have no greater right than other persons to determine starting-points and boundaries; they cannot disturb vested rights in land or settle controversies as to titles and their ex parte action is entitled to no special authority in regard to true lines and the fact of encroachment."
- "We have had frequent occasion to condemn the assumptions of surveyors in determining lines and landmarks according to their own notions. They have no such right, and their assumptions are not lawful. There are few evils more annoying to public or private peace than the intermeddling with land boundaries, and the disturbance of peaceable possessions."

Monuments (Lakes) Control: Michigan (3)

Poch v. Urlaub: 357 Mich. 261; 98 N.W.2d 509; 1959

- In *6 Thompson on Real Property, § 3332, p 529*, it is said:
- "As a general rule where by the original survey and government plat a tract of land appears to have as its boundary a body of water, such body of water is a natural monument, and will constitute the boundary, however distant or variant from the position indicated for it by the meander line, and hence will control as a call of the survey over either distances or quantity of land designated in the conveyance or on the government plat."

Cooley on Monuments: Michigan (4)

Poch v. Urlaub: 357 Mich. 261; 98 N.W.2d 509; 1959

- "In *Gilman v. Riopelle, 18 Mich 145, 164, 165*, **Justice COOLEY said:**
- "'Where definite and permanent boundaries are given, the deed must be held to convey all the land within those boundaries, notwithstanding the quantity is much greater than that mentioned. This is on the familiar principle that the incorrect portion of the description is to be rejected where that which remains is sufficient, and that definite and permanent monuments are to control distance and quantity.'"

Stability of Boundary Lines: Michigan (5)

Poch v. Urlaub: 357 Mich. 261; 98 N.W.2d 509; 1959

- "'Our general views with regard to the effect of patents granted for lands around the margin of a nonnavigable lake, and shown by the plat referred to therein to bind on the lake, were expressed in the preceding case of *Hardin v. Jordan*, and need not be repeated here.
- We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes after selling and granting the lands bordering thereon, or represented so to be.
- It is nothing more or less than taking from the first grantee a most valuable, and often the most valuable part of his grant."

Meander Lines: Michigan (6)

Poch v. Urlaub: 357 Mich. 261; 98 N.W.2d 509; 1959

- "In the case of *Palmer v. Dodd*, ...this Court said:
- "'The meanders have no significance as boundaries, and are not intended as such. They are run simply to afford a means of computing the area contained in the fraction which the United States requires payment for on sale of the public domain.' * * *
- "In the case of *Brown v. Parker*, ...this court said:
- "'The meander lines of rivers and inland lakes, where the title to the bed is in the riparian owner, are of comparatively little significance, and it has frequently been said that they were not run to bound the possessions of the riparian owner, whose title might extend beyond them.'"

Waterway controls course and Distance (1)

Turpen v. O'Dell: CASE NO. 97 CA 2300 - 1998

- ▶ Ohio follows the rule that gradual riverbed changes affect the riparian boundary, but sudden changes do not affect the boundary.
- ▶ Where, in a deed of conveyance, the middle of a known stream is called for as the boundary line between adjacent proprietors, the **thread of such stream, notwithstanding it may change in its location by attrition and accretion, will control the courses and distances** named in the conveyance, and will continue to be the boundary line between the lands of the respective proprietors.

Strip & Gore Doctrine Riparian Boundaries

Virginia: Strip & Gore Doctrine

French v. Bankhead: 52 Va. 136; 1854

- ▶ The cases show, what it is difficult for the human mind to resist, **that the parties never mean to leave a narrow strip between the land and the river, merely because some stake or tree, or even all the stakes or trees of the line, stand at a slight distance from the river.**
- ▶ **The expression of an intent to run the line along the stream, reaches a distinct natural monument which overcomes the others.** That the fact that the marked corner called for stands four rods from the water, does not create any ambiguity in the terms, down the creek with the several meanders thereof. They import the water's edge at low water, which is a decided natural boundary, and must control a call for corner trees on the bank.

Strip and Gore Doctrine (NY) (1)

Starr v. Child, 20 Wend. 149; 1838 N.Y.

- ▶ Upon construction of law, which does not require express words for the grant of every part, **as houses, fences, mines, or the elements of water or air, which all pass by the word "land;"** ...
- ▶ ...and, as a grant of land by certain boundaries, prima facie passes all such parts to the grantee, usque ad caelum et ad infernos; so, within the same principle, it passes the adjoining fresh-water stream, *usque ad filum aquae*.

Strip and Gore Doctrine (NY) (2)

Starr v. Child, 20 Wend. 149; 1838 N.Y.

- ▶ The passing of the one kind may just as well be questioned as another, not only in the eye of the law, but of common sense and reason.
- ▶ Within the first maxim it is said, one shall not build so as to overhang another's premises, darken his lights, or confine the air; ...
- ▶ ...and surely it would be more absurd for the law to give a man the shore or side of a fresh-water river; and yet, **by saving the bed to the grantor, make the owner of the land a trespasser, every time he should slake his thirst or wash his hands in the stream.**

Strip & Gore concept: Maryland (1)

Linthicum v. Shipley: 140 Md. 96; 116 A. 871; 1922

- ▶ It is conceded by caveatee that a grant, by the owner of the bed of a non-navigable stream, of land bounding thereon, conveys, even without express language, ownership to the middle of the stream, *Day v. Day, 22 Md. 530; Browne v. Kennedy, 5 H. & J. 195 at 196.*
- ▶ Besides, the prima facie presumption is that riparian proprietors on non-navigable streams own the soil covered by such rivers ad filum medium aquae. This presumption was probably negated as to Cook and Hancock by the evidence that their lines run to definite points in the water short of the center; but it holds good as to Shipley.

Strip & Gore – Ponds: Maryland (2)

Linthicum v. Shipley: 140 Md. 96; 116 A. 871; 1922

- ▶ It is further urged by caveatee that there is a distinction, as to the rights of riparian owners, between a non-navigable stream and a natural pond, and that a boundary upon a natural pond or lake carries title, not to its center, but only to low water mark; and he cites five cases from Maine, Massachusetts, New York and Ohio, to support this view.
- ▶ The Massachusetts ordinance of 1647 made every lake of more than ten acres extent public.
- ▶ The same may be said of Maine decisions, that State being governed by said ordinance of 1647, ... as that State was originally a part of Massachusetts.

Strip & Gore – Ponds: Maryland (3)

Linthicum v. Shipley: 140 Md. 96; 116 A. 871; 1922

- ▶ While it cannot be denied that the subject of the ownership of the beds of small lakes has been somewhat confused by conflicting decisions, we are not impressed with the reasonableness of the distinction contented for, and the weight of authority is against it.



Strip & Gore Rationale: Maryland (1)

Bowie v. Western Maryland Railroad:
133 Md. 1; 104 A. 461; 1918

- ▶ "Reasons for These Rules--The natural presumption where a deed conveys land bordering on a stream or highway is, that the grantor means to convey what he owns, and not to reserve a strip of land of no value to him, but the loss of which to the grantee might be productive of great injury.
- ▶ He has power by apt words to reserve what and as much as he pleases, or so to frame the language of his conveyance as to limit the land conveyed to the line of the stream or high-way, without extending further, and in all such cases, courts are bound to give effect to his expressed intention.



Strip & Gore Rationale: Maryland (2)

Bowie v. Western Maryland Railroad:
133 Md. 1; 104 A. 461; 1918

- ▶ But in the absence of words showing such an intention, it is not presumed that the grantor intended to retain in himself the fee to the street or stream when he has parted with the adjoining land.
- ▶ Therefore it may be said to be a universal rule, that a deed giving a stream as a boundary will convey title to the center of the stream or to low or high water mark, depending upon how far the grantor's title extends.



Strip & Gore Rationale: Maryland (3)

Bowie v. Western Maryland Railroad:
133 Md. 1; 104 A. 461; 1918

- ▶ By such a description the grantor will convey all that he owns, unless a contrary intent appears from the language of the deed. The deed is taken most strongly against the grantor in the application of this rule and courts will not favor the presumption that he has retained title to the bed of the stream."



Strip & Gore Rule: Maryland (4)

Bowie v. Western Maryland Railroad:
133 Md. 1; 104 A. 461; 1918

- ▶ "A grant bounding on a stream or on tide water will be held to carry all the land owned by the grantor, in the absence of anything to show an intention not to do so. If the grantor owns to the thread of the stream, the grantee will also do so."
- ▶ Although some of these cases are controlled by statutes or ordinances, the principles are discussed.
- ▶ The language of the deed from Gould to Tyson seems to us to clearly convey the right of Tyson's successors to the middle of the bed of the stream.



Cooley: Strip & Gore: Michigan (1)

Watson v. Peters: 26 Mich. 508; 1873

- The defendant was in possession of block one, and of lots one and two, on block two, on said plat of Portsmouth, ...
- ...claiming title thereto through conveyances from the original proprietors, and the land demanded lies between the lots so possessed by him and the main channel of the Saginaw river.
- By the plat the blocks mentioned front on the river and the westerly line of the blocks on the plat is drawn along the shore line of the river.



Cooley: Evidence shows...: Michigan (2)

Watson v. Peters: 26 Mich. 508; 1873

- From the evidence it appears that the original plat shows a middle ground in front of these blocks, without particularly designating its nature, or showing any definite purpose of the proprietors in respect thereto.
- But it also appeared from the testimony, that all the lands described in the declaration in this cause, had always been covered by the waters of said river, to the depth of from one to three feet, ...
- ...excepting only at times when the waters of said river were moved by heavy winds toward the Saginaw Bay, and there by reduced below their ordinary depth, and then only at low stages of water in said river.

Cooley: Nature of channel: Michigan (3)

Watson v. Peters: 26 Mich. 508; 1873

- It further appeared in evidence, that the Saginaw river at the point aforesaid, and above and below the same,
- is several hundred feet in width, and navigable for vessels drawing at least twelve feet of water, and...
- ... that the main channel thereof is west of the said middle ground, and that the water in the bayou, so called, is shallow at the upper or south end thereof, ...
- ...and has never been navigable for boats or vessels at that point, drawing more than three feet of water, and is sometimes nearly dry;

Cooley: Plaintiff claims...: Michigan (4)

Watson v. Peters: 26 Mich. 508; 1873

- The plaintiff does not dispute that, in general, the grant of lands bounded upon a stream of water, will convey to the grantee the land under the water to the center of the stream.
- This, however, he insists, is not such a case. Howard and Williams make a plat of their lands, upon which they mark off blocks and lots, and in each case draw distinct lines to indicate the boundaries.
- The case of *Child v. Starr*, 4 Hill, 369, however, has some bearing.

Cooley: Conclusion: Michigan (5)

Watson v. Peters: 26 Mich. 508; 1873

- The owner of city lots bounded on navigable streams, like the owner of any other lands thus bounded, may limit his conveyance thereof within specific limits, if he shall so choose,
- but when he conveys with the water as a boundary, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed, which he may grant to others for private occupation, or so occupy himself as to cut off his grantee from the privileges and conveniences which appertain to the shore of navigable water. Such privileges and conveniences constitute a part, and in many cases the principal part, of the value of the grant

Cooley: Conclusion: Michigan (6)

Watson v. Peters: 26 Mich. 508; 1873

- ...and it is precisely in these cases of city lots that they are of most value, and generally constitute the chief inducement to the purchase; and the chief, or at least a very important element, in determining the price.
- These cases, therefore, of all others, are those in which the reason of the rule which infers an intent to convey the land under the water, is most apparent and forcible.
- And the rule itself is too valuable, and too important, to be varied by so immaterial a circumstance as that the boundary on the water is defined by a line

Odd Cases...

Contiguous with the Water: Wis. (1)

Prieue v. Wisconsin: 93 Wis. 534; 67 N.W. 918; 1896

"In *Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387, 36 L. Ed. 1018, 13 S. Ct. 110, it was held, among other things, that 'riparian rights are incident to riparian ownership, and existing with it, and passing with the transfer of the land. The land must not only be contiguous to the water, but in contact with it.

That proximity without contact is insufficient. The riparian right attaches to land on the border of navigable water, without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage.'

Two Guiding principles: Michigan (4)

Baum v. Babel: 488 Mich. 136; 793 N.W.2d 633; 2010

- In summary, Michigan's jurisprudence governing the riparian rights of front-lot owners provides several constant and guiding principles.
- First, front-lot owners whose property is separated by a public road running parallel to the water are deemed to have riparian rights, "such rights being derived from the common law as judicially construed by the courts of this state."

Two Guiding principles: Michigan (5)

Baum v. Babel: 488 Mich. 136; 793 N.W.2d 633; 2010

- Second, "[t]he ownership of the walk and alleys and the scope of the dedication of these lands are interrelated, but distinct inquiries."
- As we have seen throughout our law, all cases involving the public dedication of land "must be considered with reference to the use for which they are made"

Bridges vs. Navigable Waters: Maryland (1)

Talbot County v. Queen Anne's County:
50 Md. 245; 1879

- ▶ As to the position of the appellants that the State has no power to authorize or require the erection of a bridge over a navigable river or stream that may in any manner interfere with the navigation thereof, it is only necessary to remark, that it is ...
- ▶ ...now settled by repeated decisions of the Supreme Court of the United States, that, in the absence of any restrictive legislation on the subject by Congress, ...
- ▶ ...the State may authorize bridges over navigable streams, by statute so guarded as to protect the substantial rights of navigation.

The Potomac River—Actual Boundary (7)

Virginia v. Maryland:

540 U.S. 56; 124 S. Ct. 598; 157 L. Ed. 2d 461; 2003

- ▶ In 1874, Virginia and Maryland submitted the boundary dispute to binding arbitration before a panel of "eminent lawyers" composed of Jeremiah S. Black, James B. Beck, and Charles J. Jenkins. Maryland v. West Virginia, 217 U.S. 577, 579, 54 L. Ed. 888, 30 S. Ct. 630 (1910).
- ▶ On January 16, 1877, the arbitrators issued their award (hereinafter Black-Jenkins Award or Award), placing the boundary at the low-water mark on the Virginia shore of the Potomac.

The Potomac River—River Bed (8)

Virginia v. Maryland:

540 U.S. 56; 124 S. Ct. 598; 157 L. Ed. 2d 461; 2003

- ▶ Although Maryland was thus granted ownership of the entire bed of the River, Article Fourth of the Award further provided:
- ▶ "Virginia is entitled not only to full dominion over the soil to low-water mark on the south shore of the Potomac, but has a right to such use of the river beyond the line of low-water mark as may be necessary to the full enjoyment of her riparian ownership."
- ▶ "...without impeding the navigation or otherwise interfering with the proper use of it by Maryland, agreeably to the compact of seventeen hundred and eighty-five."

Thread v. Thalweg: Maryland (1)

DENR v. France: 277 Md. 432; 357 A.2d 78; 1976

- ▶ At the outset, it seems to us that no analogy can be drawn to the common law rule pertaining to non-tidal stream boundaries in undertaking to fix a boundary upon navigable waters. Although it is true "that a grant, by the owner of the bed of a non-navigable stream, of land bounding thereon, conveys, even without express language, ownership to the middle of the stream."
- ▶ a person owning land, abutting on navigable water, where the land under the navigable water is owned by the state, owns title only to the high water mark -- subject of course to certain riparian rights as an incident to his ownership of such land.



Thread v. Thalweg: Maryland (2)

DENR v. France: 277 Md. 432; 357 A.2d 78; 1976

- ▶ Although we recognize that the term "channel," in connection with water courses, has at times been referred to as "the bed in which the main stream of a river flows," or "the hollow bed where a natural body, or stream of water runs or may run," ...
- ▶ ... where navigable waters are concerned, the term more appropriately refers to that portion of the waters on which vessels move and "the deeper part of a river, where the main current flows, or which affords the best passage" for vessels.



Thread v. Thalweg: Maryland (3)

DENR v. France: 277 Md. 432; 357 A.2d 78; 1976

- ▶ It was undoubtedly in recognition of such water-borne commerce that the General Assembly, in enacting Ch. 92 of the Act of 1704, intended to carry the jurisdiction of counties, bordering on navigable rivers, ...
- ▶ ...to the channel of such rivers, where a "Ship or Vessel shall ride at Anchor," and to provide for the service of process upon vessels, within the navigable portions of such rivers, i.e., the channels, by an officer of either of the bounding counties.



Thread v. Thalweg: Maryland (4)

DENR v. France: 277 Md. 432; 357 A.2d 78; 1976

- ▶ In a most noteworthy case where a similar issue was raised, concerning the boundaries of the States of Iowa and Illinois, upon the Mississippi River,...
- ▶ ...the United States Supreme Court held that their boundary was not the geographic midline between the banks of that river, but rather was the thalweg, or the middle of the main navigable channel of that river.



Thread v. Thalweg: Maryland (5)

DENR v. France: 277 Md. 432; 357 A.2d 78; 1976

- ▶ It appears to us that ... "the preservation by each ... of its equal right in the navigation of a stream" and the preservation of the "free navigation of the river" were of primary importance in the Province in 1704, when the 11 existing counties, all upon tidewater, were bounded by navigable rivers and were economically dependent on those rivers as "highways of water" for their economic survival. It thus seems clear that it was the intent of the General Assembly, ...to extend, and to insure, the jurisdiction of every county, bounding on a navigable river, to the thalweg, or the middle of the main navigable channel of every such river which constituted a boundary between counties.



United States v. Appalachian Elec. Power Co. 311 U.S. 377; 61 S. Ct. 291; 85 L. Ed. 243 (1940) (1)

- ▶ Although navigability to fix ownership of the river bed or riparian rights is determined as the cases just cited in the notes show, as of the formation of the Union in the original states or the admission to statehood of those formed later, ...
- ▶ ...navigability, for the purpose of the regulation of commerce, may later arise.
- ▶ An analogy is found in admiralty jurisdiction, which may be extended over places formerly nonnavigable.



United States v. Appalachian Elec. Power Co.
311 U.S. 377; 61 S. Ct. 291; 85 L. Ed. 243 (1940) (2)

- The **legal concept of navigability embraces both public and private interests.**
- **It is not to be determined by a formula which fits every type of stream under all circumstances and at all times.**
- Our past decisions have taken due account of the changes and complexities in the circumstances of a river. **We do not purport now to lay down any single definitive test.**

