ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL. ROBERT MERRILL, TRUSTEE, et al., Plaintiffs-Appellees, and Homer S. Taft Appellee/Cross Appellant and L. Scot and Darla J. Duncan Appellees, v. STATE OF OHIO, DEPARTMENT OF NATURAL RESOURCES, et al., Appellants/Cross Appellees and STATE OF OHIO, Appellant/Cross Appellee and NATIONAL WILDLIFE FEDERATION, et al., Appellants/Cross Appellees	Case No. 2009-1806 On Appeal from the Lake County Court of Appeals, Eleventh Appellate District Court of Appeals Case Nos. 2008-L-007, 2008-L-008 Consolidated

---

MERIT BRIEF OF INTERVENING PLAINTIFFS-APPELLEES L. SCOT DUNCAN AND DARLA J. DUNCAN

L. SCOT DUNCAN (0075158)
1530 Willow Drive
Sandusky, Ohio 44870
419-627-2945
scotduncan@alum.mit.edu

Intervening Plaintiff-Appellee, Pro Se and Counsel for Intervening Plaintiff-Appellee, Darla J. Duncan

RICHARD CORDRAY (0038034)
Attorney General of Ohio

KATHLEEN M. TRAFFORD (0021753)
Porter, Wright, Morris & Arthur, LLP
41 S. High Street
Columbus, Ohio 43215
614-227-1915
614-227-2100 fax
ktrafford@porterwright.com

Special Counsel for Defendants-Appellants-Cross-Appellees, Ohio Department of Natural Resources and Sean Logan, Director

RICHARD CORDRAY (0038034)
Attorney General of Ohio

BENJAMIN C. MIZER* (0083089)
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY (0063460)
Deputy Solicitor
CYNTHIA K. FRAZZINI (0066398)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
benjamin.mizer@ohioattorneygeneral.gov

Counsel for Defendant-Appellant-Cross-Appellee, State of Ohio

JAMES F. LANG (0059668)
FRITZ E. BERCKMUELLER (0081530)
Calfee, Halter & Griswold LLP
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114-2688
216-622-8200
216-241-0816 fax
jlang@calfee.com

Class Counsel and Counsel for Plaintiffs-Appellees, Robert Merrill, Trustee, et al.

HOMER S. TAFT (0025112)
20220 Center Ridge Road, Suite 300
P.O. Box 16216
Rocky River, Ohio 44116
440-333-1333
440-409-0286 fax
hstaft@yahoo.com

Intervening Plaintiff-Appellee-Cross-Appellant, Pro Se

NEIL S. KAGAN* (*pro hac vice*)
**Counsel of Record*
Senior Counsel
National Wildlife Federation
Great Lakes Regional Center
213 West Liberty Street, Suite 200
Ann Arbor, Michigan 48104
734-887-7106
734-887-7199 fax
kagan@nwf.org
PETER A. PRECARIO (0027080)
326 South High Street
Annex, Suite 100
Columbus, Ohio 43215
614-224-7883
614-224-4510 fax
precariolaw@aol.com

Counsel for Intervening Defendants-Appellants-Cross-Appellees, National Wildlife Federation and Ohio Environmental Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions, Statutes, and Rules

Other Authorities

I. INTRODUCTION

The protection of private property rights has been addressed many times by this Court and those rights have always been supported in unequivocal terms. In *Norwood v. Horney* (2006) 110 Ohio St.3rd. 353, this Court was asked to review a case involving the exercise of eminent domain over a "deteriorating area." The Court held that use of the term "deteriorating area" was too vague and involved speculation about future conditions. In the case at bar, Appellants/Cross Appellees urge the Court to create an amorphous property boundary and to give ODNR the power to interpret the meaning of the word "usual" in its day-to-day responsibility, which requires the location of that boundary. That approach will simply lead to an endless chain of litigation.

In *Norwood*, the Court thoroughly reviewed the concepts governing individual property rights and expressed its view of the importance of private property rights in the following quote:

> "The right of private property is an *original and fundamental right*, existing anterior to the formation of the government itself; the civil rights, privileges and immunities authorized by law, are *derivative*--mere *incidents* to the political institutions of the country, conferred with a view to the public welfare, and therefore trusts of civil power, to be exercised for the public benefit. * * * Government is the necessary burden imposed on man as the only means of securing the protection of his rights. And this protection--the primary and only legitimate purpose of civil government, is accomplished by protecting man in his rights of personal security, personal liberty, and private property. The right of private property being, therefore, an *original right*, which it was one of the primary and most sacred objects of government to secure and protect, is widely and essentially distinguished in its nature, from those exclusive political rights and special privileges * * * which are created by law and conferred upon a few * * *. The fundamental principles set forth in the bill of rights in our constitution, declaring the inviolability of private property, * * * were evidently designed to protect the right of private property as one of the primary and original objects of civil society * * *." (Emphasis sic.) *Bank of Toledo*, 1 Ohio St. at 632. As quoted in *Norwood* at ¶36.

Norwood was the first time this Court had been asked whether a city may appropriate property that the city determines is in an area which may deteriorate in the future. In contrast, the case at bar seeks only confirmation of rights and principles long recognized in Ohio's case

law. Appellees believe these past cases clearly establish the public/private boundary is at the historic low water mark and that the primary rights of the littoral owner include a right to exclude others from land above the water's edge, a right to wharf out, and a right to fill to protect fast lands.

As long time lakefront residents, we hope to allow future generations of our family to enjoy the privacy and safety of our lakefront yard and beach just as all Ohio families enjoy their yards in privacy and safety without the intrusion of strangers or unreasonable regulation.

Among other littoral rights and responsibilities, we are asking the Court to confirm its holding 132 years ago when it addressed the right to exclude in an action brought by our predecessor in title, Rush Sloan, in the case of *Sloan v. Biemiller* (1878) 34 Ohio St. 492. While the issues in *Sloan* did not require the Court to determine the location of the property boundary with precision, the Court did determine that Mr. Sloan had the right to exclude others from the beach above the water's edge and could grant or reserve that right. *Sloan* did, at Syllabus 4, establish the boundary, for that specific purpose, as "the line where the water usually stands when free from disturbing causes." Other Ohio Supreme Court cases, discussed below, addressed other littoral rights in equally clear and straightforward language.

II. LAW AND ARGUMENT

Proposition of Law No. 1: ***The Attorney General has no standing to appeal a judgment against the state of Ohio if that appeal is contrary to the directive of the Governor, and the Attorney General is not representing an administrative agency.***

This issue was fully briefed by the Duncans in response to the Court's request for a supplemental jurisdictional brief on the question. In addition, Duncans anticipate that Mr. Taft will ably and thoroughly brief the Court on this subject in great depth and with clarity.

From Duncans' perspective, the matter is now moot since none of the parties have sought a remand of the case. It should also be possible for the current Attorney General to resume his representation of the Governor and the DNR if they are all in agreement on any matters legitimately before this Court.

As Duncans noted in the supplemental jurisdictional brief requested by this Court, there are no cases, either in this jurisdiction or any other where the exact fact pattern of this case is repeated. Duncans are unaware of any other case in which an Attorney General has been harmoniously representing both the Governor and the State in a lower court and then decided to file an appeal on his own when the Governor decided not to appeal. Particularly troublesome in this case is that the Attorney General is, in essence, seeking to relitigate the case on a fresh legal theory of a non-coterminous boundary of the jus publicum and jus privatum which was never raised in the court below. T.d. 183 Com. Pl. Op. note 9. At the same time, he appears to be attempting to avoid the very issue of the Ordinary High Water Mark which he strongly advocated in the lower courts on behalf of both the Governor and the State. T.d. 183 Com. Pl. Op. ¶5. The majority of foreign jurisdiction case law argues that the Appeals Court was within its right to hold as it did.

If the Attorney General seeks added authority, the General Assembly is readily accessible. Legislative action seems to be a far better approach to expanding the Attorney General's authority than attempting to rehash a moot issue in this case and with these parties.

Proposition of Law No. 2: The State of Ohio must honor all deeds of current littoral owners deriving their title from bona fide purchasers/grantees claiming under valid patents even when those lands are submerged for extended periods of time or permanently. When littoral properties are bounded by the shore of Lake Erie, the boundary shall be interpreted as the historic low water mark, as modified by accretion, reliction, or erosion.

A. Appellants/Cross Appellees base their arguments on misreadings of fundamental laws and gross misapplications of the laws from other jurisdictions.

Appellants/Cross Appellees base their arguments largely on a misinterpretation of the equal footing doctrine while failing to apply key limiting clauses of the Ordinance of 1787 and the Submerged Lands Act of 1953.

1. Federal law governs what passed to the states at statehood.

The question as to the limit of the land conveyed in a federal grant, or the boundary between the upland and the tideland is necessarily a federal question. "It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law." *Borax Consol., Ltd, v. Los Angeles* (1935) 296 U.S. 10 at 22

> "The tideland extends to the high water mark. *Hardin v. Jordan, supra; Shively v. Bowlby, supra; McGilvra v. Ross*, 215 U.S. 70, 79. This does not mean, as petitioners contend, a physical mark made upon the ground by the waters; it means the line of high water as determined by the course of the tides. By the civil law, the shore extends as far as the highest waves reach in winter. Inst. lib. 2, tit. 1, § 3; Dig. lib. 50, tit. 16, § 112. But, by the common law, the shore "is confined to the flux and reflux of the sea at ordinary tides." *Blundell v. Catterall,* 5 B. & A. 268, 292. It is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails." *Borax* at 22 citing to *United States v. Pacheco,* 2 Wall. 587, 590.

In *Borax*, the Court extensively explored the appropriate way to determine the limit of land conveyed in a federal grant. It considered the percentage of time the land was "dry and manorable" as part of its evaluation and finally settled, where the ordinary high water mark is the demarcation on tidal waters, on the mean high water mark as the public lands boundary. *Borax* at 23-25. *Borax* relied heavily on Marmer, Tidal Datum Planes, a publication from the Coast and Geodetic Survey Office. The *Borax* decision has influenced subsequent technical publications of the Coast and Geodetic Survey Office and its successors. One such publication is the Tide and Current Glossary.

The Supreme Court has also held that surveys, and particularly surveys by the Surveyor General and other governmental surveys, are presumptively correct as to public land transfers and not subject to collateral attack before the federal courts. *Knight v. U. S. Land Assn.* (1891), 142 U.S. 161, at 176. "The words `public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." *Borax* at 17, citing *Newhall v. Sanger,* 92 U.S. 761, 763; *Barker v. Harvey,* 181 U.S. 481, 490; *Union Pacific R. Co. v. Harris,* 215 U.S. 386, 388.

2. Within the constraints of federal law, it is Ohio law and not case law from foreign jurisdictions which govern in this case.

The relationship of federal and state law in the determination of matters regarding the public trust in the individual states was recently reiterated, once again, by the United States Supreme Court in *Stop The Beach Renourishment, Inc. v. Florida Department Of Environmental Protection* (2010) 560 U.S.____ Docket 08-1151. In this case, littoral owners had sued the State of Florida to halt a beach renourishment program which, under Florida law, prevented the littoral owners from gaining land in the future under the common law doctrine of accretion. In particular, the Florida Beach and Shore Preservation Act allows the Florida Department of

Environmental Protection to establish an erosion control line. Once that line is set, the common law of accretion and erosion no longer apply. In its opinion, the Court begins:

> "Generally speaking, state law defines property interests, *Phillips* v. *Washington Legal Foundation*, 524 U. S. 156, 164 (1998), including property rights in navigable waters and the lands underneath them, see *United States* v. *Cress*, 243 U. S. 316, 319–320 (1917); *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comm'rs*, 168 U. S. 349, 358–359 (1897). In Florida, the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the lowtide line and the mean high-water line). Fla. Const., Art. X, §11; *Broward* v. *Mabry*, 58 Fla. 398, 407–409, 50 So. 826, 829–830 (1909). Thus, the mean high-water line (the average reach of high tide over the preceding 19 years) is the ordinary boundary between private beachfront, or littoral[1] property, and state-owned land. Fla. Const., Art. X, §11; *Broward* v. *Mabry*, 58 Fla. 398, 407–409, 50 So. 826, 829–830 (1909). See *Miller* v. *Bay-To-Gulf, Inc.*, 141 Fla. 452, 458–460, 193 So. 425, 427–428 (1940) *(per curiam);* Fla. Stat. §§177.27(14)– (15), 177.28(1) (2007)."

The issues in dispute in the Florida case, were entirely statutory in nature, but the same principles apply in the case at bar where the controlling law includes both Ohio statutes and over 160 years of relevant Ohio case law. While Appellants/Cross Appellees offer a plethora of case law from other jurisdictions, very little of it is applicable to the issues at bar under the conditions which exist in Ohio and none of it trumps the settled case law of this jurisdiction.

3. Appellants/Cross Appellees misinterpret the Ordinance of 1787.

The State of Ohio, as a sovereign state, is not free to expand the boundaries of the public trust at will. The redefined boundaries proposed by the Appellants/Cross Appellees would confiscate the holdings of bona fide purchasers and grantees, violating the Ohio and U.S. Constitutions as well as the Ordinance of 1787. The text of the Ordinance of 1787 is reproduced as Exhibit 1 at A-1.

Numerous cases show that the Appellants/Cross Appellees' assertion that it owns all submerged lands under Lake Erie is simply in error. The error is compounded when the Appellants/Cross Appellees now attempt to redefine "submerged lands" to include dry lands

above the water's edge. It is absurd to suggest, as the Appellants/Cross Appellees do, that metes and bounds surveys cannot describe waterfront properties. The water's edge is a "bound." Throughout history, "bounds" have included such natural features as rivers, lakes, and mountain ridges. These features have been used by cadastral surveyors throughout time to describe legal property boundaries. The rules for applying such boundaries are the purview of the sovereign authority first making the survey. Once established, such boundaries do not change and, under the Ordinance of 1787, such boundaries established by previous sovereigns are also inviolate. While the State can apply any of the submerged lands it holds in the public trust to any purpose in the public interest, it cannot infringe on the rights of private property owners whose property is adjacent to submerged public trust lands. If the rights of bona fide purchasers/grantees are to be honored, as required by the Ordinance of 1787, then the Appellants/Cross Appellees' present attempts to redefine Ohio law should be summarily rejected by this Court once again, as it has on numerous prior occasions.

A complete analysis of the equal footing doctrine and its requirements must begin with an examination of the Ordinance of 1787. Appellants/Cross Appellees ignore key provisions of this landmark legislation when developing their historical arguments. The Northwest Ordinance of 1787 is the heart of the federal legislation from which the State of Ohio was born. It was also a primary articulation of the equal footing doctrine. That same doctrine was used for the next hundred years throughout the western states as 33 more states were added to the Union. The following parts of the Act relate specifically to the issues in this case:

Article 1 Sec. 13 contains the equal footing doctrine:

> "for the establishment of States, and permanent government therein, and for their admission to *a share in the Federal councils on an equal footing with the original*

States, at as early periods as may be consistent with the general interest." (emphasis added)

Article 2. of the Act contains the applicable stipulation about honoring bona fide contracts:

> "And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with *or affect private contracts, or engagements, bona fide, and without fraud previously formed.*" (emphasis added)

Article 4. of the Act explains the right of Congress to execute the Quieting Act to confirm the two deeds to the soil of the Connecticut Western Reserve:

> "The legislatures of those districts, or new States, *shall never interfere with the primary disposal of the soil by the United States in Congress assembled,* nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers." (emphasis added)

As the words of Article 1 Section 13 indicate, our forefathers intended the concept of "equal footing" to apply to standing with respect to political standing and sovereignty and not to economic differences. The application of the equal footing doctrine was explored in some depth in *United States v. Gardner* (D. Nev. 1996) 95-17042

> "Moreover, Supreme Court has long held that the Equal Footing Doctrine refers to "those attributes essential to [a state's] equality in dignity and power with other States." Coyle v. Smith, (1911) 221 U.S. 559, 568. The Court has noted that a new state enters the Union "in full equality with all the others," and that this equality may forbid a compact between a new state and the United States "limiting or qualifying political rights and obligations." Stearns v. Minnesota, (1900) 179 U.S. 223, 245. However, "a mere agreement in reference to property involves no question of equality of status." Id. The Court has observed that "[s]ome States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil." United States v. Texas, (1950) 339 U.S. 707, 716. While these disparities may cause economic differences between the states, the purpose of the Equal Footing Doctrine is not to eradicate all diversity among states but rather to establish equality among the states with regards to political standing and sovereignty.
>
> The Equal Footing Doctrine, then, applies to political rights and sovereignty, not to economic or physical characteristics of the states." Id.

4. *Appellants/Cross Appellees' reliance on Shively and on the Submerged Lands Act of 1953 is misplaced.*

In support of its Proposition of Law No.2, the Appellants/Cross Appellees cites extensively from *Shively v. Bowlby,* 152 U.S. 1. *Shively* is a very interesting case that has little to do with Ohio's Lake Erie shoreline. The *Shively* case was about land in Oregon. Oregon entered the Union 56 years after Ohio and the property in dispute was on the Columbia, a tidal river.

Shively is probably the most often cited and misunderstood 19th century case on shoreline law because the *Shively* Court did an excellent comprehensive review of cases concerning states' titles to shore lands in a wide range of contexts. From *Shively*, it becomes clear that applying laws from one state in another can be misleading. Some of the references from Shively that do apply to this case are as follows:

> "The foregoing summary of the laws of the original States shows that there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one State to cases arising in another." *Shively* at 26.

> "We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively* at 48.

This last passage from *Shively* was cited with approval 93 years later in *Utah Div of Lands v. United States*, (1987) 482 U.S. 193 at 196. In the later case, the Court defeated the reservation of lands under Utah Lake by the federal government, confirming that Utah had received the lands under the equal footing doctrine. However, the Court was careful to

distinguish the reservation made in the Utah case from an explicit conveyance or quitclaim such as the one made in the Quieting Act quitclaiming the U.S. interest in the title to the soil of the Western Reserve.

The only direct reference to the Great Lakes in *Shively* is at 43,44 where it is said:

> "These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. 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, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend), its survey and grants beyond [*44] the limits of high water. *The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the States in which the lands were situated."* *Shively* at 41-44, quoting from *Barney v. Keokuk*, (1876,) 94 U.S. 324 at 338. (emphasis added)

In addition to this single reference to the Great Lakes, *Shively* makes numerous references to major rivers such as the Mississippi. Most informative was a reference to a Mississippi River case.

> "In *Packer v. Bird*, (1891,) 137 U.S. 661, the general rules governing this class of cases were clearly and succinctly laid down by the court, speaking by Mr. Justice Field, as follows: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, *subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee.* As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream." Quoted in *Shively* at 44. (emphasis added)

The rule established in *Packer v. Bird*, serves to further confirm that interpreting the natural shoreline boundary as the demarcation between continuously and discontinuously submerged lands is correct, especially when considered in combination with the Ohio Court's

holding in *Sloan*. This Court in *Sloan* had independently made a similar holding about impairing the use and enjoyment of the property by the grantee when it held that the littoral owner held the exclusive use of the dry sand beach. *Sloan* at **16.

In the Court below, Taft and the Duncans offered several cases regarding the use of the low water mark boundary on the Ohio River where the Ohio's state boundary terminates and suggested that such cases were indicative of the common law of Ohio that should be applied to this case. Appellants/Cross Appellees argued that Ohio River law was inapplicable to Lake Erie boundary law. T.d. 173 at 7. Appellants/Cross Appellees now argue that river law cited in *Shively* from foreign jurisdictions such as Iowa, Illinois and Missouri should somehow justify the use of the Ordinary High Water Mark as a boundary on Lake Erie. State Merit Brief at 24, NWF/OLG Merit Brief at 7.

From its extensive discussion of *Shively*, which frequently draws on inapplicable passages, the Appellants/Cross Appellees next move into a discussion of the Submerged Lands Act. Unfortunately, the Appellants/Cross Appellees do not recognize that the only effect of the Act relative to the Great Lakes was to confirm existing grants. The purpose of the Submerged Lands Act of 1953 (SLA) was to confirm the title to submerged lands up to the ordinary high water mark to the individual States *or the persons who were on June 5, 1950, entitled thereto under the law of the respective State.* 43 U.S.C. § 1311(a). The Act also specifically states that rights acquired under the laws of the United States are unaffected. 43 U.S.C. §1315. Applicable sections of the SLA are found at Exhibits 4 through 6 at A-9 through A-13.

The Bureau of Ocean Energy Management's website has a crisp summary of why the SLA was enacted at: http://www.boemre.gov/aboutmms/pdffiles/submerged.pdf Last visited August 28, 2010.

"In passing the Submerged Lands Act, Congress sought to return the title to submerged lands to the states and promote the exploration and development of petroleum deposits in coastal waters.

The Submerged Lands Act was enacted in response to litigation that effectively transferred ownership of the first 3 miles of a state's coastal submerged lands to the federal government. In the case *United States v. California* (1947), the United States successfully argued that the three nautical miles seaward of California belonged to the federal government, primarily finding that the federal government's responsibility for the defense of the marginal seas and the conduction of foreign relations outweighed the interests of the individual states.

In response, Congress adopted the SLA in 1953, granting title to the natural resources located within three miles of their coastline (three marine leagues for Texas and the Gulf coast of Florida)."

The text of 43 USC § 1315 clearly articulates that the Appellants/Cross Appellees are wrong in their assessment of how the Act affects the boundary between private property and the public trust.

§ 1315. Rights acquired under laws of the United States unaffected *Nothing contained in this Act [43 USC § § 1301--1315] shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this Act [43 USC § § 1301--1315] and such rights, if any, shall be governed by the law in effect at the time they may have been acquired*: Provided, however, That nothing contained in this Act [*43 USC § § 1301*--1315] is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this Act [*43 USC § § 1301*--1315], or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this Act [*43 USC § § 1301*--1315]. (emphasis added)

The Submerged Lands Act had no effect for the Great Lakes states other than to reconfirm existing public and private rights. Former Ohio Attorney General Lee Fisher correctly explained the impact of the Submerged Lands Act in Ohio in 1993 as follows:

"Pursuant to Ohio law, the state holds title to land under the water of Lake Erie within the boundaries of the state and to all land beyond the natural shoreline that was previously covered by the waters of Lake Erie and is now covered by artificial fill. R.C. 1506.10; State ex rel. Squire v. Cleveland. Accordingly, the state is the beneficiary of the grant pursuant to 43 U.S.C.S. §1311 of "lands beneath navigable waters," 43 U.S.C.S. §1301 (a)(1) (1980), that lie beneath the water of Lake Erie and "all filled in, made, or reclaimed

lands which formerly were lands beneath navigable waters," 43 U.S.C.S. §1301(a)(3) (1980). *The land that lies above the natural shoreline of Lake Erie belongs to the littoral owner. Therefore, the littoral owner is the beneficiary of the grant pursuant to 43 U.S.C.S. §1311 (1980) of land above the natural shoreline up to the ordinary high water mark.*" (emphasis added) (AGO 93-025)

The former Attorney General's Opinion reflects an accurate reading of the Act, provided the term "natural shoreline" is properly interpreted as the line between occasionally submerged and continuously submerged lands and the existence of exceptions are recognized. The pertinent sections of the Act itself include:

> Submerged Lands Act 1301(a)(3)
> (d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, *and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign*: Provided, however, that nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign; (emphasis added)
>
> Submerged Lands Act 1311(a)
> (a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use
>
> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States *or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located,* and the respective grantees, lessees, or successors in interest thereof; (emphasis added)

B. Ohio law does not now, and never has, used the term ordinary high water mark in describing the boundaries of the Lake Erie public trust.

While Appellants/Cross Appellees repeatedly refer to the ordinary high water mark as the settled law in Ohio since 1803, that is simply not the case. While the terms used to define the

public/private boundary can be interpreted in different ways, depending on the context, any past definition of the ordinary high water mark, offered by Appellants/Cross Appellees, and there have been many, is precluded by a lack of reasonableness.

1. The boundaries of the Ohio Lake Erie Public Trust are controlled by Ohio's survey history.

Appellants/Cross Appellees begin their brief with a historical discussion of Ohio's chain of Lake Erie public trust title back to Roman law. However, the Appellants/Cross Appellees fail to present a coherent explanation of Ohio's chain of title since colonial times. Appellants/Cross Appellees also fail to acknowledge that there are clear differences in the chain of title for various segments of the lakefront. Only the western part of the lakeshore was surveyed and sold under the Public Lands Survey System. The U.S. Public Lands in Ohio include only Lucas, Sandusky, and parts of Ottawa counties. Further, Lucas County's shoreline did not even become a part of Ohio until 1836.

The Lake Erie shoreline within the Connecticut Western Reserve was quitclaimed by a single federal patent, authorized by Congress on April 28, 1800 for the purpose of quieting the titles to two grants previously made by the state of Connecticut within its Western Reserve. The entire text of the Quieting Act is included as Exhibit 2 at A-5. The metes and bounds description of the lands included in the Quieting Act was as follows:

> ".....whereby all the right, title, interest and estate of the United States, to the soil of that tract of land lying west of the west line of Pennsylvania, as claimed by the state of Pennsylvania, and as the same has been actually settled, ascertained and run in conformity to an agreement between the said state of Pennsylvania and the state of Virginia, and extending from said line westward one hundred and twenty statute miles in length, and in breadth throughout the said limits in length from the completion of the forty-first degree of north latitude, until it comes to forty-two degrees and two minutes north latitude, *including all that territory commonly called the Western Reserve of Connecticut.*" (emphasis added)

The Western Reserve portion of the lakeshore was initially transferred from the sovereign State of Connecticut to the two groups of original owners as tenants in common for two large tracts long before Ohio's statehood. In combination, these two grants comprise "*all that territory commonly called the Western Reserve of Connecticut.*" These two tracts were surveyed and subdivided privately after their transfer from Connecticut by the owners themselves who, initially, held title as tenants in common. Such private surveys are not subject to the same rules used in the Public Lands surveys. The private surveys were completed between 1795 and 1809. The history of each grant has been well documented in various Ohio court cases. These cases will be individually discussed below. See infra. 21-35

The "Public Lands of the United States" located along the Lake Erie shoreline to the west of the Western Reserve were surveyed, divided and sold by the federal government at various times between 1820 and 1890. Some of the surveys were completed while the Lucas County shoreline was still part of the Michigan territory. Lucas County accounts for about one half of the public lands shoreline in Ohio. See Sherman, C. E., Original Ohio Lands Subdivision, Vol III of the Final Report, Ohio Cooperative Topographic Survey, 1925, Plates 29 and 30 for an explanation of the littoral PLSS sections described in *Crane Creek Shooting Club v. Cedar Point Club* (1891), 46 F. 273. The submerged lands under Lake Erie in the public lands area were "segregated" by the federal surveyors according to the federal survey rules in effect at the time of sale and the "submerged lands portion" passed to the State of Ohio. How it was done is a matter of federal law. *Borax* at 22.

The two landholders in the Western Reserve were the Connecticut Land Company and the Firelands Company. The Connecticut Land Company was incorporated in Connecticut in 1795 and the Firelands Company was first incorporated in Connecticut in 1796 and subsequently

incorporated in Ohio in 1803. The primary purpose of each corporation was to clear the Indian titles and to survey and partition the land that was held by the two corporations for their members/beneficiaries.

As explained above, Congress quieted the title to the Western Reserve in 1800 by quitclaiming any interest the United States may have had at that time to the soil of "*all that territory commonly called the Western Reserve of Connecticut.*"

While the Appellants/Cross Appellees consider Ohio history irrelevant to this case, the Duncans respectfully disagree and urge the Court to consider how Ohio's history differentiates its survey and division from the subsequent survey and sale of public lands in the new states further west. T.d. 173 at 5, 7-9. The following is a synopsis of northern Ohio's land history immediately before and after statehood.

Prior to 1786, all of the original states with initial claims to lands in what was to become Ohio had agreed to cede their western holdings to the federal government. However, Connecticut "reserved" its holdings within 120 miles west of the western boundary of Pennsylvania in its deed of cession in 1786. The southern boundary of the Reserve, based on its grant from the King, was 41 degrees of north latitude and its northern boundary was 42 degrees 2 minutes of north latitude. This northern boundary was well out into the waters of Lake Erie. See Exhibit 11 at A-28 for the full text of the Marshall Report to Congress regarding the Connecticut Western Reserve.

In 1792, the State of Connecticut granted 500,000 acres of its Connecticut Western Reserve to its residents who had suffered losses at the hands of the British in the Revolutionary War. The tract granted became known as the Firelands. The Firelands grant was not described by a true metes and bounds survey, but rather described by total area and boundaries on three

sides. The grant included the westernmost 500,000 acres in the Western Reserve south of Lake Erie. Thus, the Firelands was bounded on the west by the western boundary of the Connecticut Western Reserve; on the south by 41 degrees of north latitude; and on the north by Lake Erie. The eastern boundary was left to be determined based on the total area. It should be noted that the islands in Lake Erie, while located offshore from the Firelands, were owned by the Connecticut Land Company.

Three years after the 1792 Firelands grant, Connecticut sold the balance of the Western Reserve to the Connecticut Land Company on September 9, 1795. The grant from Connecticut to the Connecticut Land Company used the explicit metes and bounds description of the whole Western Reserve (which extended well into Lake Erie) and excluded the lands previously granted within the Reserve. Since the Indian title to the lands east of the Cuyahoga River had been extinguished with the Treaty of Greeneville a month before the Connecticut Land Company's purchase on August 3, 1795, the Company proceeded to survey the lands east of the Cuyahoga River in 1796. (Sherman at 84).

On March 21, 1800, John Marshall communicated to the House of Representatives a report explaining the situation of the Connecticut Western Reserve grantees and urging that the Congress accept a cession of jurisdiction for the Western Reserve and, in turn, quitclaim the United States' interest in the soil of the Western Reserve in trust for the grantees of Connecticut in order to quiet their titles. He explained the situation of the grantees as follows:

> "As the purchasers of the land commonly called the Connecticut Reserve hold their title under the State of Connecticut, they cannot submit to the Government established by the United States in the Northwestern Territory, without endangering their titles, and the jurisdiction of Connecticut could not be extended over them without much inconvenience, Finding themselves in this situation, they have applied to the Legislature of Connecticut to cede the jurisdiction of the said territory to the United States. In pursuance of such application, the Legislature of Connecticut, in the month of October

1797, passed an act authorizing the Senators of the said State in Congress to execute a, deed of release in behalf of said State to the United States of the jurisdiction of said territory. The committee are of opinion that the cession of jurisdiction offered by the State of Connecticut ought to be accepted by the United States, on the terms and conditions specified in the bill which accompanies this report."(Conn West Res, 1 Am. St. Papers, Public Lands 88) The entire document is reproduced as Exhibit 11 at A-28.

On April 28, 1800, in response to Marshall committee's recommendations, Congress passed the "Quieting Act" authorizing the President to issue a patent quitclaiming title to the soil of the Western Reserve and accepting jurisdiction and conditionally authorizing the president to issue a patent in trust to the Governor of Connecticut. President John Adams signed the patent for the Western Reserve on March 2, 1801.

On April 15, 1803, the Ohio General Assembly incorporated the owners and proprietors of the Firelands and authorized them to survey and divide their grant. 1 Laws of Ohio 106, Exhibit 9 at A-16. As the result of the indeterminate nature of the eastern boundary of the Firelands, it was necessary to locate the boundary both on Sandusky Bay and on Lake Erie so that an agreement could be reached between the Firelands Company and the Connecticut Land Company as to the eastern boundary such that the Firelands grantees received a total of 500,000 acres – no more and no less. It was left to the grantees of the two groups to mutually agree on what was land and what was water along the Sandusky Bay and Lake Erie shorelines to establish the eastern edge of the Firelands. That agreement was reached in 1805 before the subdivision surveys west of the Cuyahoga River were begun. The eastern end of Sandusky Bay was set at the western edge of Huron Township. As the result the Firelands included about 1000 acres of marsh containing flag and other aquatic vegetation in East Sandusky Bay. The balance of the Western Reserve was not surveyed until after the signing of the Treaty of Fort Industry on July 4, 1805.

The actual surveying and partitioning of the Western Reserve, including both the Firelands and the Connecticut Land Company holdings, was done in three distinct private survey activities. The federal surveyors subsequently surveyed lands west of the Western Reserve. The four survey phases can be summarized as follows:

First survey - The Connecticut Land Company's holdings east of the Cuyahoga River were privately surveyed and partitioned between 1795 and 1798. The Land Company was a Connecticut Corporation but a copy of its records are on file with the recorder in Trumbull County.

Second survey - The Connecticut Land Company's holdings west of the Cuyahoga River including the Lake Erie Islands, were privately surveyed and partitioned in 1807. The business of the Connecticut Land Company was completed and a final division of property was made in January 1809.

Third survey - The holdings of the Firelands Company were privately surveyed and partitioned in 1808 as previously authorized by the Ohio General Assembly. After the survey and the "classification," or division, of the Firelands was completed, the survey was accepted by the Ohio General Assembly and the records of the Corporation became legal evidence in all courts of evidence on February 20, 1812. (10 Laws of Ohio 163) Exhibit 10 at A-25. Several Ohio Supreme Court cases discussed various aspects of this survey and its authorization and acceptance by the General Assembly. These cases will be discussed below.

Fourth survey - The Public Lands of the United States west of the Firelands were surveyed between 1820 and 1890 according to the Public Land Survey System rules in effect at the time of the individual surveys. This survey process will be discussed in more detail below in connection with the Great Black Swamp cases.

The Trial Court recognized the importance of the area history but then held that the boundary was the water's edge and failed to recognize that some deeds, like the Cedar Point original survey description clearly extended to the low water mark and others extend beyond the line where the land is continuously submerged. In some areas of the Firelands, such as Cedar Point, the initial deeds when the land was surveyed for partitioning, referenced the "entire beach", while in other areas, the words used were "to the Lake", "to the shore" or similar terms. In its decision, the Trial Court stated that:

> "the "shore" and the "beach" are synonyms in the context of the issues in this case and that, as a matter of law, they mean "the land between low and high water marks." T.d. 183 Com. Pl. Op. at¶174

For those areas of the Firelands where the original survey descriptions read "to the shore" or "to the lake", the situation was very similar to that of the holders of the Phelps and Gorham grant in the case of *Massachusetts v. New York* (271 U.S. 65(1926). In that case, as the result of an earlier treaty between New York and Massachusetts, Massachusetts held title to a large tract of land in New York extending into Lake Ontario as a private holder. Massachusetts subsequently sold its extensive private holding and transferred title in a deed which read "to the shore" to Phelps and Gorham. After more than a century, Massachusetts claimed that it had retained title to the shore under the terms of the grant. The U.S. Supreme Court held that a grant to and along the shore of Lake Ontario carries to the water's edge at low water. In reaching its decision, it noted that access to the lake was essential for the development of the unsettled lands. *Mass. v. New York* at 91.

The State is free to either grant or reserve public trust territory in the public interest, but it is not free to take private property at its will without compensation. While Ohio has never differentiated between the littoral boundaries in different regions, the courts have recognized that there have been differences in the surveys on the ground. In the following sections, key cases

from each of the survey regions will be discussed and this Court's analysis of the applicable history are presented.

2. *Sloan unequivocally established the littoral owner's right to exclude above the water's edge.*

The *Sloan v. Biemiller* case is of special interest to the Duncans, since their property is part of the parcel owned by Rush Sloan, which was the subject of the case. There is little doubt the original boundary was not as the Appellants/Cross Appellees now propose it to be changed. At the time of the survey, the property was nothing more than a sandbar. It's description in the company's records, as approved and accepted by the General Assembly in 1812, 10 Laws of Ohio 163, is included as Exhibit 12 at A-34, was "the whole of the sandbar or beach lying easterly of the outlet of Sandusky bay."

Seventy years after the private survey and partition of the Firelands described above, Rush Sloan and Andrew Biemiller were before this Court to determine fishing rights in the waters adjacent to Cedar Point and the right of the littoral owner to exclude others from landing on the shore. Sloan had sold Biemiller a portion of the previously described beach, but had reserved for himself the exclusive right to fish (or gather sand) from the beach. He also reserved the right to fish offshore in the lake and the bay near the property. This was the primary source of controversy. The exact location of the shoreline or how it changed was not at issue. It was simply a matter of fishing rights, both from shore and off-shore from a boat, and the right to exclude others from the shore. This Court affirmed the right to exclude others from the beach but denied private ownership of offshore fishing rights.

According to the Court's description, not much had changed in the seventy years since the original Firelands survey. The *Sloan* Court reported:

> "Cedar Point is mostly a sand beach, extending from the main-land in the second section of Huron township, in a northwesterly direction, between Sandusky bay and Lake Erie, some seven or eight miles, the northwest part having some timber and pasture on it; but the Point is principally valuable for getting sand and for fishing purposes." *Id.* at **8

In describing Cedar Point, this Court referenced the map previously presented in *Lockwood* as it appeared in the Court's record and in its decision at 13 Ohio next to page 431. This map (not in the on-line opinion transcripts) was obtained from the Court record and is included as Exhibit 13 at A-36. The *Lockwood* case itself will be discussed below.

In the decision from *Sloan*, as in other Ohio cases, there is no mention of the term "ordinary high water mark" as the Appellants/Cross Appellees claim. Syllabus 4 from *Sloan* states:

> "4. Where no question arises in regard to the right of a riparian owner to build out beyond his strict boundary line, for the purpose of affording such convenient wharves and landing places in aid of commerce as do not obstruct navigation, the boundary of land, in a conveyance calling for Lake Erie and Sandusky bay, extends to the line at which the water usually stands when free from disturbing causes."

Changing technology for commercial fishing was the root cause of the dispute in *Sloan.* For this reason, this Court explains in some detail the history of fishing in the vicinity of Cedar Point which was critical to the case. Prior to 1854, fishing was done exclusively from the shore by means of seines. To fish commercially with seines, it was absolutely essential to work from the shore. As the Court explained, a seine is a large U-shaped net that was placed out into the lake and then hauled into a mechanical capstan on the shore to collect the fish. This made Rush Sloan's property very valuable for seine fishing. See Hatcher, Harlan, The Western Reserve, The Story of New Connecticut in Ohio, 1991, Kent State University Press.

That all changed in the 1860's, when fishermen switched to pound fishing. Pound fishing is a process in which stationary nets anchored to posts driven into the lake bottom trapped the fish in a confined area offshore. The fish were then recovered from the confinement pound by

boat. According to local history, Captain A. Dibble or J. Spencer of Connecticut first introduced the pound net system to these waters in 1856. *Id.*

Since the right to exclude others from the shore was universally recognized both before and after *Sloan*, it was common practice to lease fishing rights along with a lease of land on the shore of Cedar Point during the seine-fishing period. With the introduction of the new technology, the business of fishing changed drastically. Fishing could now be done without shore access and much further off shore. Hatcher further reported that by 1880 there were between 700 and 800 pound nets in use, there were 1500 fishermen employed in Sandusky and that the catch would run from 500 to 1200 tons per day in a good season. *Id.*

Having explained this "changing technology" background, this Court then addressed the two issues in the case. It first decided that the right to fish is not limited to the proprietors of the shores so long as there was no use of the shore. Next, it decided that the shoreline owner could grant or reserve the exclusive rights of landing and occupation of the shore. Of course, this included the right of fishing from the shore. In conclusion, this Court also found that neither the grantee nor the grantor had violated the shore rights of the other as described in the deed and the reservation contained therein. In deciding the above issues, this Court held that "the boundary of land in a conveyance calling for Lake Erie or Sandusky bay extends to the line at which the water usually stands when free from disturbing causes." *Sloan* at Syllabus 4. However, it must be understood that in *Sloan,* this Court was only addressing the boundary of the area from which the littoral owner could exclude the fishermen and whether or not the offshore fishing grounds were owned by the littoral owner. *Sloan* was not concerned with a precise definition of the location of the shore. In fact, the Court noted that the deed it examined "cut into the waters of the lake in places and in places onto the beach". *Id.* at **10.

Sloan clearly answers one of the main issues in this case by holding that the littoral owner can exclude others from landing or otherwise using the shore. It also verified the public's rights to fish in the waters of Lake Erie including the right to set net stakes in the offshore area so long as the fishing was done entirely from the water not from the shore. *Id.* at Syllabus 5.

Sloan was not primarily concerned with finding a precise location of the shore. This Court stated the main question it was addressing in *Sloan* very succinctly as follows:

> "The question here is, whether the right of fishing in the lake and bay is limited to the plaintiff as the proprietor of the shores." *Id.* at 513, **39.

The *Sloan* Court recognized that Biemiller was fishing well offshore in 18 feet of water and at a minimum distance of one hundred rods (1650 feet) from shore. *Id.* at **10. This was not a case about beachwalking in the water or on dry sand. However, it certainly was a case about the right to exclude from private property and this Court simply found that Biemiller never fished even in the proximity of the shore and, therefore, had not violated the restriction in the deed. This Court clearly recognized that the right to exclude from landing could be granted or reserved for any given purpose. At the same time, it also recognized that the specific landing rights reserved by the plaintiff had not been violated by the defendant's actions. This view is an inherent concept in a society that respects both private property rights as well as the law of contracts.

Appellants/Cross Appellees make an unjustified connection between *Seaman v. Smith* (1860) 24 Ill. 521 and *Sloan*, by asserting that *Sloan* followed *Seaman* in defining that the ordinary high water mark was the water's edge. To the contrary, it appears that *Sloan* intentionally avoided and did not quote the very sentences from *Seaman* which the Appellants/Cross Appellees say it adopted. Sloan never used the term ordinary high water mark except in connection with tidal waters but did look favorably on the statement in *Seaman* that

"The portion of the soil which is only seldom covered with water may be valuable for cultivation or other private purposes." *Seaman* at 525. Both *Seaman* and *Sloan* recognized that, unlike the oceans, where levels vary daily, the levels of the Great Lakes don't vary from day to day, but vary significantly from, month to month, year to year, and from growing season to growing season. Both Courts also recognized that there are multiple private uses for which shoreline properties can be adapted. This theme has also been repeated multiple times in the cases discussed below. In today's world, the right to enjoy a lakefront yard in privacy and safety is a highly valued private use. Appellants/Appellees' convoluted analysis of what *Seaman* stands for is simply incorrect. After all, the *Seaman* Court upheld the ejectment by moving the true boundary described in the disputed deed further towards the lake.

Several other early decisions further explain littoral rights and property boundaries in the Firelands. In *Lockwood v. Wildman* (1844) 13 Ohio 430, the Court first looked at the actual early survey of the Firelands and its partitioning. In *Lockwood,* the Court was called on to settle a dispute regarding the final partitioning of an "annexation," or partial section. The annexation had been used to equalize the value of marshland which had been included in the original Firelands Company "classification" of an adjacent section and had made that section less valuable. This was probably the first littoral boundary case considered by the Ohio Supreme Court.

The *Lockwood* Court explained the source of the controversy as follows:

> "The present controversy has arisen from the fact that the fraction lying between township six and the shore of the bay, *including the marsh or lands frequently or constantly covered by the waters of the bay,* has an area of about 4,500 acres instead of 2,783 acres." (emphasis added) *Lockwood* at 445

The syllabus of *Lockwood* contains the following points:

"The directors of the fire-land's company (sic) divided all the lands in the half million tract granted by the State of Connecticut."

"In construing the proceedings of the directors, their intention is to be gathered from a consideration of their entire records."

"*Where doubts exist as to the boundaries of land aparted by the directors, the plats of surveys and field notes referred to in the records may be used as evidence, for the purpose of ascertaining the boundaries established by them.*" (emphasis added) *Lockwood* at **21.

It should be noted that there was no mention of the ordinary high water mark, but rather the Court referred to the records of the directors as an indication of their intention. The Court can best interpret this as a reference to contract law. This Court further explained the background to *Lockwood* in its Opinion as follows:

"This land is a portion of the half million of acres granted in 1792 by the State of Connecticut to those of her citizens who suffered by the burning of Danbury, and several other towns, by the public enemy, during the revolutionary war. In the year 1803, these grantees and sufferers were incorporated by an act of the legislature of this state, which act authorized the appointment of a board of directors for the purpose of locating and surveying the grant, and making partition thereof among the numerous proprietors. In pursuance of their duty under this act, the directors, through Sherman, their agent, on December 16, 1805, entered into a contract with James Clarke, Jr., and John McLane to survey the entire grant. Before this survey could be made, it became necessary to settle a preliminary question with a company, who, under the name of the Connecticut Land Company, in the year 1795, purchased the remainder of the Connecticut Western Reserve, including prior grants, and particularly the grant of the half-million acres to the sufferers. This latter grant was bounded north on Lake Erie, but *it was finally agreed by the agents of both the companies that the waters of the bay should be considered the waters of the lake, and that the northern boundary should be run by competent surveyors under the superintendence of two agents, one appointed on behalf of each company.*" *Id.* at **23, 442. (emphasis added)

While *Lockwood* involved the survey of the south side of Sandusky Bay, including what would later become the City of Sandusky, the map included with the case and presented in the Appendix as Exhibit 13 at A-36, shows not only the area of concern in *Lockwood* but also Cedar Point and the east end of Sandusky Bay. The property of Rush Sloan (including what subsequently was purchased by the Duncans) was the portion of Cedar Point to the northwest of

the marsh shown on the map and this Court in *Sloan* referenced it at **8. Three more Ohio Supreme Court cases involving the east end of Sandusky Bay will be discussed below. All of these cases referenced the same map from *Lockwood* which indicated that the "marsh lands", clearly below the ordinary high water mark by any definition, had been surveyed as "land" in the original Firelands survey and partition and accepted by the Ohio Supreme Court.

The case of *Hogg v. Beerman* (1884) 41 Ohio St. 81 provides additional insight into the surveying practices and authorities in the Firelands area. *Hogg* involves the survey of East Harbor, an area that has since become a part of an Ohio State Park at the western edge of the Firelands. The case involved a request to partition the submerged lands of the harbor and required the Court to look closely at the Firelands survey and decide if the waters and submerged lands of East Harbor were part of Lake Erie or if they were privately owned and subject to private ownership and partition. The Court noted that Section 2 of Danbury Township, which contained East Harbor, was bounded on the west by the United States Land. This Court's analysis included another review of the Firelands survey and the Congressional Act that quieted the titles for the lands granted by Connecticut. This Court described it as follows:

> "In A. D. 1792, Connecticut granted to the people who had suffered loss by the incursions of the British troops during the Revolutionary war, a half million acres of land, bounded *on the north by the shore of Lake Erie*, on the west by the west line of the Reserve thus drawn; on the south by the forty-first degree of north latitude, and extending far enough east to make up the half million acres. The state also directed a survey to be made at the expense of the grantees, to contain within its limits 500,000 acres, and for this purpose, a traverse was run along the shore of the lake. The grantees were then incorporated under the name of "The Proprietors of the Half Million Acres of Land lying south of Lake Erie." The land was laid out into townships and sections, and the Township of Danbury was described as follows: Bounded on the north and east *by the shore of Lake Erie*, southerly and easterly by the shore of Sandusky Bay, and on the west by the United States land. Section Two, which contains East Harbor, was described as bounded on the north by *the shore of Lake Erie*, on the east by Section One, on the south by Sandusky Bay, and on the west by *the Third and Fourth Sections*." (emphasis in original)

> "By the act of April 28, A. D. 1800, Congress authorized the President "to execute and deliver letters patent in the name and on the behalf of the United States, to the governor of the state of Connecticut, for the time being, for the use and benefit of the persons holding and claiming under the state of Connecticut, their heirs and assigns, forever, whereby all the right, title, interest and estate of the United States, to the soil of that tract of land" * * * "including all that territory commonly called the Western Reserve of Connecticut and which was excepted by said state of Connecticut out of the cession by the said state heretofore made to the United States and accepted by a resolution of Congress of the fourteenth of September one thousand seven hundred and eighty-six." The word *soil* was used for the purpose of showing that *jurisdiction* (emphasis in original) was not to be conveyed. Connecticut was required to cede "jurisdiction" to the United States. The state complied, and empowered its governor to accept the patent. Thus, while jurisdiction passed to the United States, ownership of soil -- land and water -- by express conveyance, sanctioned by the sovereign power, vested in the state, (represented by its governor) in trust for its grantees. *The lines of the grant were defined with precision; the northwest corner being far out in Lake Erie, in latitude 42degrees 6'(sic).*" (emphasis added) *Hogg* at **3 to **6.

Another relevant and insightful Firelands case is *East Bay Sporting Club v. Miller* 118 Ohio St. 360. This case was about public access to the marsh located at the east end of Sandusky Bay between the Cedar Point peninsula and the mainland. Most of this land is now submerged, and is owned by Erie County MetroParks. The survey used in the case described the marsh as having flag and other vegetation. See Exhibit 14 at A-38. This land was held for more than a century by private gun clubs. *The East Bay Sporting Club* property, including permanently submerged lands, was purchased by the Nature Conservancy in the 1990's and eventually purchased by the Park District using state and federal funds as well as private donations. See http://eriemetroparks.com/Brochures/WaterTrail.pdf. Last visited August 25, 2010.

East Bay Sporting Club v. Miller was a suit to enjoin sportsmen from hunting and fishing on the property and in the channels running through the flag marsh. The western boundary of the East Bay Sporting Club's parcel was the line established by mutual agreement between the Connecticut Land Company and the Firelands Company as the eastern boundary of Sandusky

Bay. Once again, this Court referred to the *Lockwood* map found opposite 13 Ohio 430 for reference.

In reaching its decision, the Court first confirmed the validity of the Firelands survey noting:

> "*The validity of the title of plaintiff in error to the property described in the petition up to the west line of Huron township is conceded*. While the ownership of this property up to the west line of Huron township is recognized in both Teasel v. West Huron Sporting Club and Stroud v. West Huron Sporting Club, supra, neither of said cases denies the right of fishing or navigation in the waters of the bay lying east of such line. This right of private ownership in land covered by the waters of a navigable landlocked bay or harbor, connected with Lake Erie, subject to the public rights of navigation and fishery, provided the owner derives his title from express grant made or sanctioned by the United States, is recognized in Hogg v. Beerman, 41 Ohio St. 81, 52 Am. Rep., 71, so that, if it be conceded that the plaintiff in error is the owner of the land under the water of Sandusky Bay up to the west line of Huron township, under this rule announced in the Beerman case the rights of the public and the defendants in error of fishing are preserved, in so far as such waters form a part of Sandusky Bay." *East Bay Sporting Club* at 373

The Court then turned its attention to an analysis of the extent of the navigable waters within the privately owned area. For this part of its analysis, the Court relied on a survey made in February 1926. As noted above, a copy of that survey was found in this Court's record and is included as Exhibit14 at A-38. At trial, the surveyors gave elevations and depths for the various channels and marsh areas on the property referenced by this Court in the opinion. The record indicates that the reference datum used for the survey was the actual water level at the time. The 1926 survey showed that the waters were limited to certain non-navigable streams running through the marsh. This Court's analysis of the marsh and the creeks was as follows:

> "While some claim is made that at earlier times these waters were commercially navigable, we are satisfied that no such condition exists at present as to Black Channel and Plum brook. Defendants in error offered testimony tending to show that fishing boats 35 and more years ago traversed Black Channel and took fish from the vicinity of Ned's pond, and that upon another occasion sand was transported from Black Channel to the city of Sandusky. Other witnesses testify that in 1896, 1905, and other dates, they took

fish from Black Channel. We are unable, however, to find that these waters are navigable in a legal sense, *under the conditions now existing*." (*emphasis added) Id.* at 371

Based on this analysis, this Court held that the public had a right to fish in waters over private land contiguous with the open water of Sandusky bay but the marsh areas were private and the public could be excluded because of the low water conditions existing at the time of survey, even though the area had been previously submerged for several decades. The *East Bay Sporting Club* holding confirmed the littoral owner's right to exclude and further explained that it applied to marshlands which were normally submerged for extended periods at times in the past.

While the early littoral cases of the Firelands were primarily related to fishing and hunting, the littoral cases of the Connecticut Land Company holdings arose from a need for industrial access as the Cleveland area became a center of shipping, industry, and commerce at the dawn of the industrial age. As in the Firelands, the precise location of the shoreline was not an issue.

3. *State v. C & P R.R. (1916), 94 Ohio St. 61, unequivocally established the right to wharf out.*

C&P R.R. is another key case in establishing the boundary between the public trust and private littoral lands under Ohio law. While *Sloan* and the other Firelands cases dealt with the land speculation and fishing issues that dominated littoral concerns during the 19th century, The *C&P R.R.* case considered the issues that dominated industrial shoreline activity during the period of industrial expansion in Ohio. The issue in *C&P R.R.* was the littoral owner's right to fill to the federally established harbor line for wharfing purposes.

In 1916, commercial vessels had gotten bigger, with deeper draft, and became more important to the economy of the State and of the region. The federal government, under the

commerce clause, had established a harbor line in Lake Erie about 900 feet from the shoreline and various companies, including C&P R.R., began to fill beyond the shoreline as it existed at the time. The Railroad contended that the fill was for wharfage purposes. The State claimed it was simply a fill to grab land. The State also claimed absolute ownership of the lake to the shoreline while the defendants conceded the State's title to the submerged lands – but only as trustee for the public in the protection of navigation and fisheries and subject to the paramount right of the federal government in regulation of navigation. The defendants also claimed that the right to wharf out was a property right that could not be taken from them without compensation under the constitution. The Court found an appropriate middle ground, holding that the State's title was one in trust, and not an absolute title as the State claimed, and that the railroads had a right to fill beyond the shoreline – but only for certain purposes. The Court found the right to fill for wharfage to reach navigable waters to be a littoral right and, furthermore, that it was a purpose compatible with the public interest.

The *C&P R.R.* Court and all of the participants recognized the importance of the *C&P R.R. case.* The Court noted:

> "Impressed with the importance of the subject, counsel have submitted able and exhaustive briefs on the question. They disclose a wide diversity of view as to public and private rights in subaqueous land below the high-water mark of navigable waters: It may be safely said that there is scarcely any question which has caused greater conflict of opinion or produced more diverse results than that relating to the title of land under water. In many instances different conclusions have been arrived at in the same jurisdiction under various circumstances. Courts have differed in the method of reasoning as well as the grounds upon which they have arrived at their conclusions."

In *C&P R.R.*, the Court arrived at the following holdings related to the case at bar as noted in the syllabus:

> "2. The title and rights of littoral and riparian proprietors in the subaqueous soil of navigable waters, within the limits of a state, are governed by the laws of the state, subject to the superior authority of the federal government."

"3. The title of the land under the waters of Lake Erie within the limits of the state of Ohio, is in the state as trustee for the benefit of the people, for the public uses to which it may be adapted."

"5. The littoral owner is entitled to access to navigable water on the front of which his land lies, and subject to regulation and control by the federal and state governments, has, for purposes of navigation, the right to wharf out to navigable water."

The C&P R.R. Court did not specifically address the appropriateness of other purposes for fill, such as for the protection of fast lands. However, it clearly defined the boundary without reference to the ordinary high water mark and left open the possibility that fill for other "public uses to which it may be adapted" would be in harmony with the law. It should also be noted that, without ruling on the matter, the Trial Court in the case at bar agreed with the Taft Plaintiffs that the littoral owner has a right to fill to protect fast lands T.d. 183 Com. Pl. Op. at ¶223.

While C&P R.R. did not set the boundary of the public trust at the ordinary high water mark, it made it clear that the boundary was necessarily "subject to the superior authority of the federal government." Id. Syl. 2. In other words, any Ohio boundary determination must be below any federal patent or other court approved determination of the boundary for a "tideless ocean." That determination, following *Borax* at 22-25, and applying a tidal range of zero, would be the mean average daily level over some rational time cycle, such as annually.

In the case at bar, *C&P R.R.* was cited by the State in their Trial Court Reply Brief in response to Taft and Duncans reference to the Western Reserve history in the Trial Court. T.d. 168 at 7. The State's trial court Brief in Opposition to Intervening Plantiffs' Supplemental Motion for Summary Judgment included the following paragraph:

"In 1916, the Supreme Court noted that it had received "able and exhaustive briefs" which "disclose a wide diversity of view as to the public and private rights in the subaquaeous land *below the ordinary high water mark* of public waters." *Cleveland & Pittsburgh Railroad Company*, supra, at 68 (emphasis added). In 1948, the Supreme

> Court stated at the onset of its decision in *State ex rel. Squire v. Cleveland, supra*, that it did not "deem it necessary" to "analyze or discuss the vast number of cases cited" in the "voluminous briefs" which had been filed with the Court, because the Court had already determined the public and private rights in Lake Erie. The Supreme Court then reaffirmed its holding in *Cleveland & Pittsburgh Railroad Company*. Likewise, this Court should follow the lead of the Supreme Court and give no credence to Taft & Duncan's latest attempt to resurrect this discredited Connecticut land grant theory, which has twice been eschewed by the Supreme Court in cases directly on point." (T.d. 173 at 7)(emphasis in T.d. 173)

A portion of the State's merit brief before this Court from *C&P R.R.* is included as Exhibit 15 at A-40. The State's brief in *C&P R.R.* advocates the State's position on the public/private boundary in 1916. The State addressed the locations of the high water mark and low water mark in its C&P R.R. brief as follows:

> "The "point of navigation" is a shifting line depending upon the average draft of the craft carrying the bulk of the commerce on the lakes. When the state of Ohio was organized, the canoe that could be drawn upon the beach was such "average craft" and the "point of navigation" was the shore line. Has the right of the property owner from that time to the present grown according to his guess as to what the point of navigation is?"
>
> "The tidal water rule when applied to Lake Erie is conceding more than giving the littoral owner on tidal waters rights to the high water mark, because the water level on the Great Lakes is practically stationary and *the littoral owner's land always in contact with the water." (emphasis added)*(State C&P R.R. merit brief at 117 – see Exhibit 15 at A-44

Thus, the State conceded as a matter of law that upland is "always" in contact with the water itself.

The *C&P R.R.* Court rejected the state's arguments that it held a full proprietary title to the subaqueous soil under the waters of Lake Erie and upheld the railroad's right to wharf out to the harbor line. It also recognized the lack of definitive legislation on the subject. Its final remarks in holding in favor of the railroad were:

> "In this case the defendants aver in their answer that the work complained of was and is for the purpose of enabling them to reach navigation and to perform their duties as common carriers. They insist they have no other object. No other purpose and no other

result is allowable. In the absence of legislation by the state touching the subject and until the enactment of such legislation, this was their right."

"It is to be presumed that the legislature, in the enactment of legislation on the subject, will appropriately provide for the performance by the state of its duty as trustee for the purposes stated; that it will determine and define what constitutes an interference with public rights and that it will likewise, in a spirit of justice and equity, provide for the protection and exercise of the rights of the shore owners." *C&P R.R.* at 84

Several other cases explored the early history of the Connecticut Western Reserve and the operations of the Connecticut Land Company in the industrial area of Cleveland.

In *Palmer v. Cuyahoga County* (Circuit Court , D. Ohio 1983) 18 F. Cas. 1026, 1843 U.S. App. Lexis 539, the Federal Circuit Court, Ohio District, refused an injunction to stop the construction of a drawbridge over the Cuyahoga River. In reaching it's decision, the court examined the relationship between the Cuyahoga River and the Ordinance of 1787 and held:

"The fourth article of the compact in the ordinance of 1787 (United States), declares "that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states, that may be admitted into the confederacy, without any tax, impost or duty therefor." *Id.* at1026

"When the Western Reserve of Connecticut and the jurisdiction over it were ceded to the United States, it became subject to the ordinance of 1787 (United States), the same as every other part of the northwestern territory. Rights acquired under the former laws are governed by those laws. But on its cession to the Union, all the laws of the territory, and especially its fundamental law, became the law of the reserve. By consenting to come under the jurisdiction of the federal government, they became parties to the articles of compact contained in the ordinance." *Id.* at 1027

In *Holmes v. Cleveland C&C R.R.* (N.D. Ohio 1861) 93 F. 100, the Federal Circuit Court, Northern Ohio District, dismissed a bill seeking a partition of accreted lands at the mouth of the Cuyahoga River which the plaintiff claimed under a fraudulent deed. The court reviewed the timeline of the Connecticut Land Company's activities in considerable depth, confirming that surveys took place both before and after Ohio's statehood and explaining the dissolution and

abandonment of the Companies remaining interests. Key dates detailed include the survey east of the Cuyahoga in 1796, the survey west of the Cuyahoga in 1807, and the dissolution of the corporation and abandonment of the submerged lands in 1809. The timeline developed by this Court was as follows:

> "The leading historical facts of this case are believed to be accurately and succinctly stated in the defendants' brief. The Connecticut Land Company was organized in Connecticut in 1795, and became the owner of the Connecticut Western Reserve, and issued to its stockholders certificates of stock for their respective interests therein. This title was made to the state of Connecticut by the United States under the act of April 28, 1800, and was vested in trustees for the purpose of partition and conveyance to purchasers. The company caused all its lands east of the Cuyahoga and the Portage Path to be surveyed into townships in the year 1796, and also selected for sale six townships, including the city plot, which were immediately (except the city plot) surveyed into 100-acre lots, and the whole put in market. In the year 1798, by mutual arrangement between the proprietors of said land company, in pursuance of the original association, partition was made of all the company's lands surveyed as aforesaid except the six townships and the city of Cleveland, and the legal title was secured to the stockholders in severalty. The company, by its agent, continued to control the land in said six townships and the city plot until December, 1802, when, having caused the unsold land thereon to be resurveyed, they in like manner distributed the same among their stockholders, and reserved the legal title to each, and in said partition avowedly included all that remained unsold in said townships and city. In April, 1807, they in like manner divided all their land west of the Cuyahoga and the Portage Path." *Id.* at 102

> "The articles of association did not contemplate a permanent organization of the Connecticut Land Company, but were entered into for the better and more convenient accomplishment of certain necessary and temporary objects, which could not be effected except by a joint action of all the proprietors in some form. These necessary objects, but temporary in their performance, were the extinguishment of the Indian title, the survey of their lands, and the partition of them in severalty among the proprietors. It was the policy and intent of these articles that this trust should continue until the partition could be had, and no longer; and they directed a survey of the whole territory within the term of two years, and that the trustees should convey the whole in severalty to the purchasers and shareholders. The parties to the articles of association, viz. the proprietors, the board of directors, and the trustees, proceeded to carry them into execution. The Indian title was extinguished, the country was surveyed, the directors sold so much of the land as they were required to sell; and in January, 1809, all things being now ready, the proprietors, at a regular meeting, made a final division in severalty of all their lands, and all outstanding claims for lands sold by the directors, and, in a word, all of their common property of which they had any knowledge." *Id.* at 105

By the late 1800's development had moved to the public lands to the west of the Western Reserve. In addition, there were enough wealthy industrialists that the highest and best use of the swamplands, which predominated in the area, was for private hunting clubs.

4. The Black Swamp cases established that the boundary of the Public Trust is the historic low water mark.

For the non-tidal "freshwater seas" of the Great Lakes, vast expanses of shoreline are bordered by marshes that have supported agriculture at least periodically. Federal Government survey instructions made no mention of the term "ordinary high water mark" or "ordinary low water mark" until 1881. At that time the term "low water mark" was introduced as the swampland boundary. Prior to 1881, it was, apparently, left to the surveyor's discretion. After 1894, it was changed to the "ordinary high water mark." George M. Cole Water Boundaries, John Wiley & Sons, 1997 at 109.

While all of the shoreline bordering Lake Erie west of the Western Reserve (approximately 80 miles) was surveyed under the PLSS, the "situation on the ground" was complicated because most of the area was at the edge of the Black Swamp. It will be seen that neither the State nor the Federal surveyors thought the marshlands adjacent to the lake were part of the Lake Erie Public Trust.

The Trial Court in the case at bar specifically noted that it elected not to consider any swampland in developing its opinion. T.d. 183 Com. Pl. Op. at ¶¶25, 209, 244, and notes 24, 25, 104. However, the swamp lands are very important to this case because they provide clear evidence that the line of segregation between the public trust and the public lands was not the ordinary high water mark under any definition of that term proposed by Appellants/Cross Appellees. Since some swamplands were surveyed in 1881, they were clearly surveyed to the

low water mark under the survey rules. For those parcels surveyed earlier, the boundary was left to the discretion of the surveyor.

The coastal area west of the Western Reserve is unique for several reasons. First, about half of the shoreline west of the Western Reserve did not come into the State of Ohio until 1836. Until then, it had been part of the Michigan territory because of the way the Ohio boundary had been described in the State's 1802 constitution. The Toledo War, and the ensuing compromise worked out in Congress, moved the Ohio boundary northward by several miles, adding Lucas County to Ohio from the Michigan Territory and allowing Michigan to become a state. The addition of the Lucas County shoreline approximately doubled the length Ohio shoreline west of the Western Reserve. See Sherman, Op. cit. at 154, plates 29, 30.

Second, most of the public lands shoreline was at the edge of the Great Black Swamp. The Black Swamp was an extensive wetlands in a major migratory bird flyway. This may explain why the "highest and best use" of the area was quickly recognized to be private duck hunting clubs. As described in the history of the area found on the Crane Creek website:

> "The Crane Creek area was originally part of the Great Black Swamp, an enormous flat plain 120 miles long and 30 to 40 miles wide. For many years, the swamp was a tremendous barrier to western settlement. ..... The area gained fame during the late 1800s as one of the best waterfowl hunting areas in the United States. Most of the land in the area was purchased by wealthy sportsmen, so that by as early as 1890, much of the wetland area was being operated for private shooting." See Crane Creek State Park website at: http://www.stateparks.com/crane_creek.html Last visited August 28,2010.

Third, the State of Ohio fought for nearly thirty years after the Swamp Lands Act was passed in 1850 to get title to about 6000 shoreline acres under the Act. While it obviously was marshland, it was never granted to the State under the Swamp Lands Act. See Exhibit 3 at A-7 for the text of the Act. The State wanted to drain it and sell it for farmland, but the federal

government, instead, sold it for the "highest and best use" to private hunt clubs whose rapidly building national reputation created a great demand for the marshlands.

The purpose of the Swamp Lands Act was described in two contemporary United States Supreme Court cases.

> "Swamp and overflowed lands are of little value to the government of the United States, whose principal interest in them is to dispose of them for purposes of revenue; whereas the state governments, being concerned in their settlement and improvement; in the opening up of roads and other public works through them; in the promotion of the public health by systems of drainage and embankment,--are far more deeply interested in having the disposal ....." *Mills County v. Burlington & M.R.R. Co*, (1883) 107 U.S. 557 at 566. See also *Wright v. Roseberry* (1887) 121 U.S. 488 at 496.

While the records are somewhat contradictory, it appears that Ohio applied for a total of 54,458.14 acres of Swamp Lands under the Swamp Lands Act of September 28, 1950. Sherman at 158. However, Ohio was only approved for 25,640.71 acres. Knepper, George, The Official Ohio Lands Book, published by the Auditor of State 2002. Of the lands received, most are in the inland portions of the Black Swamp and are very productive farmlands today. *Id.* Of the total swamplands applied for by Ohio, there were 6000 littoral acres along the Lake Erie shoreline. None were granted. *Crane Creek Shooting Club v. Cedar Point Club* (1891) 46 F. 273.

The uncertainty surrounding the "segregation" of submerged lands at the edge of Lake Erie by the initial government surveyors is apparent from the Black Swamp cases such as *Niles v. Cedar Point Club* 175 U.S. 300 (1899). In *Niles*, the court described the controversy as "a dispute between one claimant holding a patent from the United States and the other claiming it by virtue of its contiguity of other land for which a United States Patent was held." The area involved was at the edge of Lake Erie. Separate patents were granted in 1844 and 1881. In 1852, the State of Ohio had applied for a swamplands grant to the same area that included some lands subsequently patented in 1881. The State's application was rejected on the grounds that

some of the lands had already been sold. For the next 30 years, the State continued to protest and even attempted to block the subsequent sales in 1881. However, it was unsuccessful. *Crane Creek Shooting Club.* The location of the range and township definitions provided in *Crane Creek* are more easily understood with the benefit of Plates 29 and 30 from Sherman.

In addition to the two *Cedar Point Club* cases cited in the preceding paragraph, a third case, *James v. Howell* (1885) 41 Ohio St. 696 also involved the same marsh area. James claimed under the same 1841 patent as the Cedar Point Club. Howell was issued a patent to islands in the marsh in 1876, apparently based on the earlier survey.

Titles to the area have long since been settled and virtually all of the land was previously in private hands but has now transferred from private owners to the government for wildlife preserves. There have been numerous transactions at a sizeable cost to the taxpayer. The area involved was described as a "flag marsh" and was similar in physical characteristics to the East Sandusky Bay Metropark described in the discussion of *East Bay Sporting Club v. Miller* above. The term "flag marsh" is a term of art referring to a Moderate hydroperiod marsh which is flooded 6-9 months per year and typically contains a plant called pickerelweed. See http://www.forestencyclopedia.net/p/p253/view Last visited August 25, 2010.

The recognition of the 1881 patent for lands between the ordinary high water mark and the ordinary low water mark clearly demonstrates that the federal government sold lands on the Great Lakes below the high water mark. The confirmation of the partially submerged grants by the United States Supreme Court, also specifically confirms that the Public Land surveyors did, indeed, extend surveys to Lake Erie's Low Water Mark.

A final case involving Black Swamp public lands is *United States v. 461.42 Acres of Land in Lucas County Ohio* 222 F. Supp 55 (1963). This case resulted from the State of Ohio

claiming title to Pintail Marsh, another flag marsh, at the time of appropriation by the United States. Since ownership was claimed by a private owner under a U.S. patent and by the State of Ohio under R.C. §123.03, (The Fleming Act), both were named as defendants in the takings action. The court found:

- The land was mostly marsh land.
- There was a sand beach along part of the water's edge, a dike had been built with artificial fill on top of the beach and the land behind had been drained for farming.
- The dike and beach had been breached by storms on several occasions. It had not been restored after the last breach in 1929, but its location was easily identified.
- The land, and similar adjacent parcels, had been regarded as private land by government authorities.

The court held that the private claimant, and not the State was the true owner. The court also noted that the State had purchased the adjacent marsh which had similar characteristics from a private owner in 1954 for $62,550. *461.42 Acres* at 58.

The Appellants/Cross Appellees cite *461.42 Acres* in the case at bar for the principle that land submerged to avulsion must be restored promptly. In its brief, the Appellants/Cross Appellees incorrectly argue that under Ohio law the owner may use artificial fill to restore the previous line only "*as long as he does so reasonably promptly.*" (State merit brief at 44, citing to *461.42 Acres of Land,* 222 F. Supp. at 56; *Baumhart v. McClure* (6th Dist. 1926), 21 Ohio App. 491, 493-494}. However, the Ohio cases show no time requirement for restoration. In *461.42 Acres of Land,* the land had not been restored for three decades and in *Baumhart v. McClure,* the time between submergence and restoration was indicated to be "forty or fifty years." *461.42 Acres of Land* at 58, *Baumhart v. McClure* at 492

As in the Appellants/Cross Appellees' estimates of the rate of lake level change, ("To be sure, the ordinary high-water mark moves, but only slowly over decades, or even centuries." *Appellants/Cross Appellees merit brief* at 40) the Appellants/Cross Appellees repeatedly misstate the relative timing of shoreline changes and misinterpret the holdings in the cases it cites. For purposes of the case at bar, the more important finding from *461.42 Acres of Land* is that the federal government surveyed the flag marsh as land and did not segregate it as part of the Lake Erie public trust at the time of the original survey, even though it is below the ordinary high water mark.

The preceding analysis demonstrates that the issue in this case is not a simple question of the usual definition of the word usual as suggested by the Appellants/Cross Appellees. State Merit Brief at 23, NWF/OLG Merit Brief at 8. Location of the private/public boundary has implications well beyond the issues of defining submerged lands and beach walking. The original (cadastral) surveys of Ohio's Lake Erie waterfront were done in distinct stages under differing authorizations from Connecticut, Ohio, and the United States. Ohio was the experimental grounds for development of the survey system that was later applied in other states as settlement proceeded westward. Sherman at 5.

5. *The Fleming Act served to reconfirm the case law described in the above cases which spanned the entire Ohio Lake Erie shore.*

The drafters of the Fleming Act, were very wise to define the boundary as the natural shoreline in harmony with the case law rather than redefine it as the ordinary high water mark as the Appellants/Cross Appellees now advocate. The only thing certain about the littoral boundary on the Great Lakes is that bona fide purchasers are entitled to all of what they bought or were granted and that there have been numerous grants/purchases below any reasonable definition of the ordinary high water mark.

The term "natural shoreline" is used in the Fleming Act based on harmonizing Ohio's case law to mean the line beyond which the soil is continuously covered with water. The intent of the Fleming Act was to codify a uniform shoreline law that would incorporate the existing case law and serve the needs of Ohio as it entered the golden age of transportation and production on the Great Lakes. The Act's wording was carefully chosen to harmonize the many cases decided up to that time and to protect the rights of both private property owners and of the public. It was undoubtedly intentional that the language does not mention the ordinary high water mark.

As we have already seen, some of the deeds in the Firelands, including the root deed of the Duncans' property (previously owned by Rush Sloan) referred to "the whole beach" and clearly extends beyond anything that could possibly be construed as the ordinary high water mark. Interpreting the term "natural shoreline" as used in the Fleming Act to mean the line of demarcation between continuously submerged lands and lands which are sometimes dry satisfies intent of a deed calling for the "whole beach." In addition, such a view is compatible with *Sloan* which clearly held that the littoral owner had the right to exclude others from the beach. However, some deeds, including the root deed of what is now the East Sandusky Bay MetroPark in Erie County, have been recognized as valid deeds even though they extend well beyond the low water mark. (See *East Bay Sporting Club v. Miller* above). These should be regarded as exceptions to the Fleming Act from special grants.

6. ***The "water's edge" rule as a limit of the littoral owners right to exclude has been the law in Ohio for over 200 years. It is a simple rule which recognizes the right of the public to use the waters over submerged private lands and the right of the littoral owner to prevent landing or trespassing on the shore above the water's edge.***

It is hard to conceive of a simpler, more easily understood, or more practical definition of the private/public boundary than to say it is at the water's edge. Both the property owner and the recreating public can easily apply the wet foot rule. It is compatible with both the right to exclude as confirmed in *Sloan* as well as the federal limits of navigational servitude. It does not require an understanding of either property law, historic lake levels or anything else of legal or scientific significance. Despite claims to the contrary in the Attorney Generals' Amicus Brief, Wisconsin follows a "wet foot" rule. If your feet aren't wet, you are on private property. The "wet foot" rule, based on *Diana Shooting Club v. Husting* (1914) 156 Wis.261 is explained at: http://dnr.wi.gov/org/water/wm/dsfm/shore/documents/OrdinaryHighWaterMark.pdf. Last visited August 26, 2010.

The working concept of "Wet feet avoid trespassing" is easy to understand and represents a fair statement of the law as it has been practiced in Ohio for 200 years. It also works extremely well with changing levels. Anyone can understand it on any day. For this reason, the Court should reaffirm the decision in *Sloan* that the littoral owner has the right to exclude others from his property above the water's edge but not below.

At the same time, it is clear from cases like *East Bay Sporting Club v. Miller* that Ohio has recognized that littoral ownership extends at least to the historic low water mark and in some cases beyond when supported by a valid patent. From this, it appears essential to decouple the "right to exclude" from the public/private boundary. The federal navigational servitude allows the public to use the actual water to the water's actual edge as long as the water's edge is below the ordinary high water mark.

The problem with using the ordinary high water mark, by any definition and for any purpose, is locating it. This is vividly demonstrated by how the Army Corps of Engineers fails

to provide a methodology to locate the ordinary high water mark for lakes in its regulations. In 33 C.F.R. 329.11 and 329.12, the Corp's jurisdictional limits for rivers, lakes, oceans, and coastal waters is defined as the ordinary high water mark. These sections of the C.F.R. are included as Exhibits 7 and 8 at A-14 and A-15. Detailed, but mutually exclusive, methodologies are given for locating the ordinary high water mark on rivers and oceans. No method is given for lakes. Similar definitional problems are reported in cases such as *United States v. Cameron* (M.D. Fla 1978) 466 .F. Supp. 55 and *Glass v. Goeckel* (2005) 472 Mich. 667. The Corps' confusion on the Great Lakes is evident in a Corps' memo labeled ER 1165-2-302 dated December 16, 1975. This document was previously presented in Appendix (B) The State of Ohio Brief in Opposition to plaintiff's-relators' motion for summary judgment, -T.d. 175. Also in T.d. 168 as Exhibit 4.

Despite the Appellants/Cross Appellees' own exhibits as presented in the lower courts, the Appellants/Cross Appellees now contend that the boundary only changes over "decades or even centuries." Such a view cannot be justified in light of the extensive physical records which show otherwise. For example, see the chart first presented to the trial court by the State of Ohio as Appendix A in T.d. 175. It graphically shows that the levels of the lake are not "changing slowly over decades or centuries" but vary significantly from month to month and year to year. The State's chart in T.d. 175 shows that random level changes of several feet per year are not uncommon. The annual 1.2 foot cycle is analogous to the 19 year lunar cycle in *Borax* at 22-25.

On Cedar Point, a one foot change in lake level exposes or covers more than 30 feet of beach. The concept of "manorability" has been a part of the federal common law since long before *Borax.* (See *Borax* at 25). It was also discussed in *Sloan* where it was called "cultivation or other private purposes." *Id.* at 39. In modern and personal context, lakefront owners would

simply like to enjoy their yards in safety and privacy. This is the appropriate 21st century interpretation of "manorability" in an age where private property is under constant attack.

C. *Nearshore filling for the protection of fast lands with suitable materials is a compatible use of the public trust and is in the best interest of all Ohioans. For decades, the state encouraged, and for several years even partially funded, nearshore fill for the protection of fast lands.*

The Clean Water Act prohibits unsuitable fill from being placed in the waters of Lake Erie. As noted above, the Appellants/Cross Appellees recognize that the littoral owner has the right to use artificial fill to restore lands lost to avulsion. Presumably, the owner also has the right to change the elevation on his dry land. Of course, the requirements of local zoning and nuisance laws would apply at the shoreline just as on non-littoral properties.

The Appellants/Cross Appellees fail to recognize that the waters edge can move lakeward as the result of reliction or accretion and can move landward as the result of submergence, erosion or avulsion. Clearly, if the level of the lake drops, the extent of the littoral owner's property increases. If the lake level rises, the exposed area of his property shrinks. This is not a new concept, but rather, common sense which has been confirmed by the court in *Baumhart v. McClure* (1926) 21 Ohio App. 491. In *Baumhart*, the owner of platted lots in Vermilion reclaimed lots which had been under water for several decades. The court recognized that lake levels fluctuate and land disappears under water not only as the result of erosion and avulsion, but also as the result of submergence when lake levels rise as the result of natural (or unnatural) causes.

In *Baumhart*, the court held that the landowner was able to recover the property when it reappeared. In simple terms, if you know where it was, it is still subject to recovery and you can get it back. This should remain the clear rule of law for Ohio.

In *Lemley v. Stevenson,* 104 Ohio App.3d 126, the court recognized that shore protection was a valid use of the public trust. The concern in *Lemley* was the construction of an offshore structure that was totally in the water but the purpose was to protect fast lands.

> "The purpose for the lease of submerged land in the case before us was to preserve a historic dock or pier and to prevent erosion to the shoreline. This is a use of the trust land for a public benefit." *Id.* at 135.

It is nonsensical to say that it is in the public interest to allow offshore breakwalls but not onshore revetments when the purpose of each is to protect fast lands. It also makes no sense to say that the placement of fill along the shore (either on dry land or in the nearshore water) to protect fast lands should somehow transfer title of the land under and beyond the fill to the state. Such a policy can only lead to bad decisions like the one in *Beach Cliff v.Ferchill* (8th Dist. 2003) 2003-Ohio-2300.

In the *Beach Cliff* case, the plaintiff's rights to recover previously submerged lands which later reappear, as explained in *Baumhart v. McClure,* were clearly trampled. In *Beach Cliff* the State claimed public trust ownership of a section of a beach because of pre-existing fill. The land was subsequently leased to the owner of an adjacent property inland of the beach for constructing a structure into the lake. The Beach Cliff Association's mile long beach had been platted in 1927 for the use and enjoyment of the owners in the large adjoining subdivision. *Beach Cliff* at ¶2. The court agreed with the Beach Cliff Association that, as a minimum, there was an issue of material fact as to whether the property was submerged in 2000. The court reviewed several reports supplied by ODNR that indicated that fill had been placed on the property as early as 1956 and noted references to either the appearance or continuation of the fill in the ensuing years. The court concluded its opinion by holding:

> "It is ODNR's position that, despite any reemergence of the beachfront property, the property has been artificially filled, thereby satisfying the definition of "territory" sufficient for the issuance of a submerged land lease. We agree." *Beach Cliff* at ¶22.

The decision destroyed the integrity of a community's mile long beach and the ability of the community association that owned it to provide access to the water for the hundreds of families who had used it for seven decades. It was never clear if the fill had been placed on the uplands or in the water. In any event, it had been placed for the purpose of preventing erosion of fast lands. *Beach Cliff* at ¶14. It is difficult to reconcile this decision with the opinion in *Lemley* that noted that prevention of erosion to the shoreline is a use of the trust land for a public benefit.

Past practices by both the state and federal governments encouraged littoral owners to protect their fast lands. In May, 1935, Ohio created a Beach Erosion Board for the purpose of studying Ohio beach erosion in cooperation with the Army Corps of Engineers. The Division of Shore Erosion was established in 1949. The history of the Division is explained at http://www.ohiodnr.com/portals/0/publications/stewardship/chapt_10_coastal.pdf Last visited August 26, 2010.

From this history, it is clear that the placement of fill to protect fast lands on private property was not only approved by the State but also, in some cases, funding assistance to private parties was provided by the State. It is not in the public interest to destroy a community beach using a pretext of fill placed 50 years ago, especially when the fill was possibly placed under the recommendations of the Division of Shore Erosion.

D. The State has always and should continue to recognize the existence of continuously submerged lands held under valid patents. However, the basic concept of the natural shoreline being the demarcation between the continuously submerged and the periodically submerged lands as articulated in the Fleming Act is the one and only general rule which is universally understandable.

All parties agreed in the Trial Court that the public and private rights derived under state law are co-terminus. T.d. 183 Com. Pl. Op. at note 9. While it is true that there are overlapping public rights over privately owned submerged lands deriving from the navigational servitude of the federal government, they are limited to the water and do not extend to the dry sand as the Appellant/Cross Appellees now claim. *Sloan* was very clear that the littoral owner had the right to grant or to reserve the right to the shore, including the right to land or walk.

The State's claim that there is a link between beachwalking and the right of the public to land a boat in distress is a red herring. State Merit Brief at 47. The law of torts is clear that necessity has always been available as a defense for the tortfeasor who has intentionally interfered with property. A boat in distress can always land in an emergency and invoke the defense of necessity to limit liability. See, for example, *Ploof v. Putnam, 81 Vt. 471, 71 A. 188 (1908).* Under the necessity defense, the tortfeasor is responsible only for any damage he causes to a wharf (or other private property), inflicted during an emergency but has no further liability. Landing on a beach in an emergency is unlikely to be subject to any claim for damages. In practice, most beachfront owners will rush to the assistance of any craft in an emergency as many boat owners can attest.

Appellants/Cross Appellees now urge the Court not to formulate a bright line definition for the public/private boundary but rather to replace existing Ohio law with some ancient Roman public trust doctrine and to let the State determine the usual meaning of the term "usual." Rather than deal with theoretical "ancient doctrines", which have sparked much controversy and have never been applied in Ohio, the Duncans are confident this Court can reach a just decision based on the settled law of its own past cases. In addition to its shore-related cases reviewed above, this Court has a long record of honoring private property rights including such landmark cases as

Norwood v. Horney (2006) 110 Ohio St.3d 353 and *Eastwood Mall, Inc. v. Slanco* (1994) 68 Ohio st.3d 221.

For 200 years Ohio case and statutory law has been perfectly clear about the boundary between private property and the public trust and the rights of both the public and the littoral owners. Past cases in Ohio have clearly demonstrated that:

- The public/private property boundary is located at the demarcation between the continuously submerged lands and lands which are submerged intermittently. The demarcation may also be called the historic low water mark.
- The littoral owner's rights include:
    - The right to exclude others from the shore,
    - The right to place fill to protect fast lands, and
    - The right to build beyond the natural shoreline for navigational purposes or to protect fast lands, but not to simply extend their property.
- The public's rights include the right to fish and recreate in the waters over submerged private lands.

These property boundaries and rights of Ohio's littoral owners and other citizens have worked well for over 200 years. They represent common sense and are easily understood by both the property owner and the public. They should not be changed based on the current whim of an administrative department or an overreaching Attorney General.

III. APPROPRIATE ACTION BY THIS COURT

The case law cited by all parties is clear and the propositions advanced by the Appellants/Cross Appellees are not in agreement with that well-settled law. The Duncans are confident that this Court will thoughtfully address all of the issues raised and ensure a proper balance of public interests and private property rights.

Ohio has a long tradition of upholding private property rights and has never denied the property rights of littoral owners as the Appellants/Cross Appellees are advocating. This Court should reaffirm that the boundary between private property and the Lake Erie public trust is at the historic low water mark and that the littoral owner can exclude the public from the beach above the water's edge. *Stare decisis* would allow for no other conclusion.

Respectfully submitted,

L. Scot Duncan (0075158)
1530 Willow Drive
Sandusky, Ohio 44870
419-627-2945
scotduncan@alum.mit.edu

Appellee, Pro Se, and Counsel for
Appellee, Darla J. Duncan

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Merit Brief Of Intervening Plaintiffs-Appellees L. Scot Duncan And Darla J. Duncan was served upon the following counsel by electronic mail, on 16th day of September, 2010:

Richard Cordray
ATTORNEY GENERAL OF OHIO
Benjamin C. Mizer
Solicitor General
Stephen P. Carney
Deputy Solicitor
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
benjamin.mizer@ohioattorneygeneral.gov

Neil S. Kagan
NATIONAL WILDLIFE FEDERATION
Great Lakes Natural Resource Ctr
213 West Liberty Street
Suite 200
Ann Arbor, Michigan 48104
kagan@nwf.org

Peter A. Precario
326 South High Street
Annex, Suite 100
Columbus, Ohio 43215
precariolaw@aol.com

Kathleen M. Trafford
Porter Wright Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
ktrafford@porterwright.com

James F. Lang
Fritz E. Berckmueller
CALFEE, HALTER & GRISWOLD LLP
1400 McDonald Investment Ctr.
800 Superior Avenue
Cleveland, Ohio 44114-2688
jlang@calfee.com

Homer S. Taft
20220 Center Ridge Road
Suite 300
P.O. Box 16216
Rocky River, Ohio 44116
hstaft@yahoo.com

L. Scot Duncan

XXXII Journals of the Continental Congress 334, Ordinance of 1787 (The Confederate Congress, July 13, 1787)

An Ordinance for the government of the territory of the United States northwest of the river Ohio.

§ 1 Be it ordained by the United States in Congress assembled, That the said territory, for the purpose of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

§ 2 Be it ordained by the authority aforesaid, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, their children and the descendants of a deceased child in equal parts, the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall, in no case, be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate; and this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her in whom the estate may be, (being of full age,) and attested by three witnesses; and real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved, and be recorded within one year after proper magistrates, courts, and registers, shall be appointed for that purpose; and personal property may be transferred by delivery, saving, however, to the French and Canadian inhabitants, and other settlers of the Kaskaskies, Saint Vincents, and the neighboring villages, who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them, relative to the descent and conveyance of property.

§ 3 Be it ordained by the authority aforesaid, That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein, in one thousand acres of land, while in the exercise of his office.

§ 4 There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceedings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

§ 5 The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

§ 6 The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

§ 7 Previous to the organization of the general assembly the governor shall appoint such

Exhibit 1 (1 of 4)

magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

§ 8 For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

§ 9 So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: Provided, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase, until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: Provided, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: Provided also, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

§ 10 The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

§ 11 The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, resident in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of the council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

§ 12 The governor, judges, legislative council, secretary, and such other officers as Congress shall appoint in the district, shall take an oath or affirmation of fidelity, and of office; the governor before the President of Congress, and all other officers before the governor. As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

§ 13 And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide,

also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

§ 14 It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide, and without fraud previously formed.

ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States, and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall nonresident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

ARTICLE V

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: Provided,

however, And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: Provided, The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: Provided always, That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

Be it ordained by the authority aforesaid, That the resolutions of the 23d of April, 1784, relative to the subject of this ordinance, be, and the same are hereby, repealed, and declared null and void.

Done by the United States in Congress assembled, the 13th day of July, in the year of our Lord 1787, and of their sovereignty and independence the twelfth.

II Statutes at Large 56,

Chap. XXXVIII. An Act to authorize the President of the United States to accept, for the United States, a cession of jurisdiction of the territory west of Pennsylvania, Commonly called the Western Reserve of Connecticut. April 28, 1800

Purchase of books for the use of Congress.

Sec. 5. *And be it further enacted*, That for the purchase of such books as may be necessary for the use of Congress at the said city of Washington, and for fitting up a suitable apartment for containing them and for placing them therein, the sum of five thousand dollars shall be, and hereby is appropriated; and that the said purchase shall be made by the Secretary of the Senate and the Clerk of the House of Representatives, pursuant to such directions as shall be given, and such catalogue as shall be furnished by a joint committee of both houses of Congress to be appointed for that purpose; and that the said books shall be placed in one suitable apartment in the capitol in the said city, for the use of both houses of Congress and the members thereof, according to such regulations as the committee aforesaid shall devise and establish.

Post 129.

Appropriations how to be paid.

Sec. 6. *And be it further enacted*, That the several appropriations aforesaid shall be paid out of any monies in the treasury of the United States not otherwise appropriated.

Approved, April 24, 1800.

Statute I.

April 28, 1800.

Chap. XXXVIII.—*An Act to authorize the President of the United States to accept, for the United States, a cession of jurisdiction of the territory west of Pennsylvania, commonly called the Western Reserve of Connecticut.*

The President may issue letters patent releasing the right of the United States to the soil of the Western Reserve.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President of the United States be, and he hereby is authorized to execute and deliver letters patent in the name and behalf of the United States, to the governor of the state of Connecticut for the time being, for the use and benefit of the persons holding and claiming under the state of Connecticut, their heirs and assigns for ever, whereby all the right, title, interest and estate of the United States, to the soil of that tract of land lying west of the west line of Pennsylvania, as claimed by the state of Pennsylvania, and as the same has been actually settled, ascertained and run in conformity to an agreement between the said state of Pennsylvania and the state of Virginia, and extending from said line westward one hundred and twenty statute miles in length, and in breadth throughout the said limits in length from the completion of the forty-first degree of north latitude, until it comes to forty-two degrees and two minutes north latitude, including all that territory commonly called the Western Reserve of Connecticut, and which was excepted by said state of Connecticut out of the cession by the said state heretofore made to the United States, and accepted by a resolution of Congress of the fourteenth of September, one thousand seven hundred and eighty-six, shall be released and conveyed as aforesaid to the said governor of Connecticut, and his successors in said office, for ever, for the purpose of quieting the grantees and purchasers under said state of Connecticut, and confirming their titles to the soil of the said tract of land.

Provided Connecticut shall cede to the United States certain western lands;

Provided however, That such letters patent shall not be executed and delivered, unless the state of Connecticut shall, within eight months from passing this act, by a legislative act, renounce for ever, for the use and benefit of the United States, and of the several individual states who may be therein concerned respectively, and of all those deriving claims or titles from them or any of them, all territorial and jurisdictional claims whatever, under any grant, charter or charters whatever, to the soil and jurisdiction of any and all lands whatever lying westward, northwestward, and southwestward of those counties in the state of Connecticut, which are bounded westwardly by the eastern line of the state of New York, as ascertained by agreement between Connecticut and New York, in the year one thousand seven hundred and thirty-three, excepting only from such renunciation the claim of said state of Connecticut, and of those claiming from or under the said state, to the soil of said tract of

land herein described under the name of the Western Reserve of Connecticut.

And provided also, that the said state of Connecticut shall, within the said eight months from and after passing this act, by the agent or agents of said state duly authorized by the legislature thereof, execute and deliver to the acceptance of the President of the United States, a deed expressly releasing to the United States the jurisdictional claim of the said state of Connecticut, to the said tract of land herein described under the name of the Western Reserve of Connecticut, and shall deposit an exemplification of said act of renunciation, under the seal of the said state of Connecticut, together with said deed releasing said jurisdiction, in the office of the department of state of the United States, which deed of cession when so deposited shall vest the jurisdiction of said territory in the United States: *Provided*, that neither this act, nor any thing contained therein, shall be construed so as in any manner to draw into question the conclusive settlement of the dispute between Pennsylvania and Connecticut, by the decree of the federal court at Trenton, nor to impair the right of Pennsylvania or any other state, or of any person or persons claiming under that or any other state, in any existing dispute concerning the right, either of soil or of jurisdiction, with the state of Connecticut, or with any person or persons claiming under the state of Connecticut: *And provided also*, that nothing herein contained shall be construed in any manner to pledge the United States for the extinguishment of the Indian title to the said lands, or further than merely to pass the title of the United States thereto.

and execute a deed relinquishing her jurisdictional claim to the Western Reserve.

Saving certain constructions.

APPROVED, April 28, 1800.

STATUTE I.

April 29, 1800.

CHAP. XXXIX.—*An Act to provide for rebuilding the Lighthouse at New London; for the support of a Lighthouse at Clark's Point; for the erection and support of a Lighthouse at Wigwam Point, and for other purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That under the direction of the Secretary of the Treasury, there shall be purchased for the use of the United States, so much land contiguous to their territory, now occupied for the lighthouse at New London, as shall be sufficient for vaults and any other purpose, necessary for the better support of the said lighthouse: *Provided*, that the legislature of the state of Connecticut shall cede to the United States the jurisdiction of such additional territory.

Lighthouse at New London.

SEC. 2. *And be it further enacted*, That the Secretary of the Treasury shall be, and he is hereby authorized, at his discretion, to procure a new lantern with suitable distinctions, and to cause convenient vaults to be erected, and the said lighthouse at New London to be rebuilt.

SEC. 3. *And be it further enacted*, That the lighthouse lately erected at Clark's Point, so called, at the entrance of Accushnet river, within the town of New Bedford, in the state of Massachusetts, shall and may be supported at the expense of the United States: And the Secretary of the Treasury shall and may appoint a keeper thereof, and take further order respecting the same as in other cases: *Provided*, that the property and jurisdiction of the said lighthouse, and sufficient territory for the accommodation thereof, shall be fully ceded and legally vested in the United States.

Lighthouse at Clark's Point.

SEC. 4. *And be it further enacted*, That under the direction of the Secretary of the Treasury, there shall be provided and maintained at the expense of the United States, not exceeding six buoys to be placed within Buzzard's Bay, upon the most dangerous ledges there, in such manner as the safety of navigation in that bay requires.

Buoys to be placed within Buzzard's Bay.

IX Statutes at Large 519,
Chap. LXXXIV An Act to enable the State of Arkansas and other States to reclaim the "Swamp Lands" within their limits, September 28, 1850

CHAP. LXXXII.—*An Act to authorize the Appointment of Indian Agents in California.* Sept. 28, 1850.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be authorized to appoint, with the advice and consent of the Senate, not more than three agents for the Indian tribes within the State of California. Such agents shall perform the duties now prescribed by law to Indian agents, and shall receive an annual compensation of three thousand dollars each.

President authorized to appoint three Indian agents for California.

APPROVED, September 28, 1850.

CHAP. LXXXIII.—*An Act for the Payment of a Company of Indian Volunteers.* Sept. 28, 1850.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of War be, and he is hereby, authorized and required to cause to be paid to the spy company of Indian mounted volunteers (Shawnees and Delawares) called and mustered into the service of the United States by Colonel W. S. Harney, United States army, on the first day of June, eighteen hundred and forty-six, and discharged the thirty-first day of August, eighteen hundred and forty-six, one day's pay and allowances for every day held in service under said muster, and the usual travelling allowances, according to rates established for volunteers under existing laws; and the sum of four thousand dollars is hereby appropriated for this object, out of any monies in the treasury not otherwise appropriated.

Secretary of War authorized to pay a spy company of Indian Volunteers, mustered by Colonel Harney into the service of U. S.

APPROVED, September 28, 1850.

CHAP. LXXXIV.—*An Act to enable the State of Arkansas and other States to reclaim the "Swamp Lands" within their limits.* Sept. 28, 1850.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

Swamp and overflowed lands unfit for cultivation granted to Arkansas.

SEC. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

Secretary of the Interior to make out list and plats of said land, and when requested, to grant a patent vesting the same in the State of Arkansas.

Proviso.

SEC. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

When the greater part of a subdivision is unfit for cultivation, it shall be included in said plats; if the greater part be not of that character, it shall be excluded.

Exhibit 3 (1 of 2)

Provisions of this act extended to other States possessing such lands.

Sec. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated.

Approved, September 28, 1850.

Sept. 28, 1850.

1852, ch. 19.

Chap. LXXXV. — *An Act granting Bounty Land to certain Officers and Soldiers who have been engaged in the Military Service of the United States.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That each of the surviving, or the widow or minor children of deceased commissioned and non-commissioned officers, musicians, or privates, whether of regulars, volunteers, rangers, or militia, who performed military service in any regiment, company, or detachment, in the service of the United States, in the war with Great Britain, declared by the United States on the eighteenth day of June, eighteen hundred and twelve, or in any of the Indian wars since seventeen hundred and ninety, and each of the commissioned officers who was engaged in the military service of the United States in the late war with Mexico, shall be entitled to lands, as follows: Those who engaged to serve twelve months or during the war, and actually served nine months, shall receive one hundred and sixty acres, and those who engaged to serve six months, and actually served four months, shall receive eighty acres, and those who engaged to serve for any or an indefinite period, and actually served one month, shall receive forty acres: *Provided*, That wherever any officer or soldier was honorably discharged in consequence of disability in the service, before the expiration of his period of service, he shall receive the amount to which he would have been entitled if he had served the full period for which he had engaged to serve: *Provided*, The person so having been in service shall not receive said land, or any part thereof, if it shall appear, by the muster rolls of his regiment or corps, that he deserted, or was dishonorably discharged from service, or if he has received, or is entitled to, any military land bounty under any act of Congress heretofore passed.

Certain classes of persons in the military service of the U. States during the war of 1812, the war with Mexico, or Indian wars, or their widows or minor children entitled to lands, in proportion to certain periods of service.

Proviso.

Further proviso.

The period during which any officer or soldier was a prisoner to the enemy to be added to his time of actual service.

Sec. 2. *And be it further enacted*, That the period during which any officer or soldier may have remained in captivity with the enemy shall be estimated and added to the period of his actual service, and the person so detained in captivity shall receive land under the provisions of this act in the same manner that he would be entitled in case he had entered the service for the whole term made up by the addition of the time of his captivity, and had served during such time.

Those entitled to land under this act to receive a certificate from the Department of the Interior for land which may be located at any land office of the United States.

Sec. 3. *And be it further enacted*, That each commissioned and non-commissioned officer, musician, or private, for whom provision is made by the first section hereof, shall receive a certificate or warrant from the Department of the Interior for the quantity of land to which he may be entitled, and which may be located by the warrantee or his heirs at law, at any land office of the United States, in one body and in conformity to the legal subdivisions of the public lands, upon any of the public lands in such district then subject to private entry; and upon the return of such certificate or warrant, with evidence of the location thereof having been legally made to the general land office, a patent shall be issued therefor. In the event of the death of any commissioned or non-commissioned officer, musician, or private, prior or subsequent to the passage of this act, who shall have served as aforesaid, and who shall not have received bounty land for said services, a like certificate or warrant shall be issued in favor, and enure to the

The widow of any officer, etc., killed in battle, to receive the benefit of this

43 USC § 1301
United States Code (USC)
Title 43 - PUBLIC LANDS
Chapter 29 - SUBMERGED LANDS
43 USC § 1301 Definitions

---

43 USC § 1301. Definitions

SUBCHAPTER I - GENERAL PROVISIONS

When used in this subchapter and subchapter II of this chapter -

(a) The term "lands beneath navigable waters" means -

(1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;

(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

(d) The terms "grantees" and "lessees" include (without limiting the generality thereof) all political subdivisions, municipalities, public and private corporations, and other persons holding grants or leases from a State, or from its predecessor sovereign if legally validated, to lands beneath navigable waters if such grants or leases were issued in accordance with the constitution, statutes, and decisions of the courts of the State in which such lands are situated, or of its predecessor sovereign: Provided, however, That nothing herein shall be construed as conferring upon said grantees or lessees any greater rights or interests other than are described herein and in their respective grants from the State, or its predecessor sovereign;

(e) The term "natural resources" includes, without limiting the generality thereof, oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life, but does not include water power, or the use of water for the production of power;

(f) The term "lands beneath navigable waters" does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in

connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any State to any person;

(g) The term "State" means any State of the Union;

(h) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation.

(May 22, 1953, ch. 65, title I, Sec. 2, 67 Stat. 29; Pub. L. 99-272, title VIII, Sec. 8005, Apr. 7, 1986, 100 Stat. 151.)

43 USC § 1311
United States Code (USC)
Title 43 - PUBLIC LANDS
Chapter 29 - SUBMERGED LANDS
43 USC § 1311 Rights of States

---

43 USC § 1311. Rights of States

SUBCHAPTER II - LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases

(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) Leases in effect on June 5, 1950

The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: Provided, however, That, if oil or gas was not being produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: Provided, however, That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with

the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

(d) Authority and rights of United States respecting navigation, flood control and production of power

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Ground and surface waters west of 98th meridian

Nothing in this subchapter or subchapter I of this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

(May 22, 1953, ch. 65, title II, Sec. 3, 67 Stat. 30.)

43 USC § 1315
United States Code (USC)
Title 43 - PUBLIC LANDS
Chapter 29 - SUBMERGED LANDS
43 USC § 1315 Rights acquired under laws of United States unaffected

---

43 USC § 1315. Rights acquired under laws of United States unaffected

SUBCHAPTER II - LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

Nothing contained in this subchapter or subchapter I of this chapter shall affect such rights, if any, as may have been acquired under any law of the United States by any person in lands subject to this subchapter or subchapter I of this chapter and such rights, if any, shall be governed by the law in effect at the time they may have been acquired: Provided, however, That nothing contained in this subchapter or subchapter I of this chapter is intended or shall be construed as a finding, interpretation, or construction by the Congress that the law under which such rights may be claimed in fact or in law applies to the lands subject to this subchapter or subchapter I of this chapter, or authorizes or compels the granting of such rights in such lands, and that the determination of the applicability or effect of such law shall be unaffected by anything contained in this subchapter or subchapter I of this chapter.

(May 22, 1953, ch. 65, title II, Sec. 8, 67 Stat. 32.)

---

33 C.F.R. 329.11
Geographic and jurisdictional limits of rivers and lakes

a. **Jurisdiction over entire bed.** Federal regulatory jurisdiction, and powers of improvement for navigation, extend laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark. Jurisdiction thus extends to the edge (as determined above) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation or other barriers. Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.
    1. The **"ordinary high water mark"** on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas.
    2. **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.
b. **Upper limit of navigability.** The character of a river will, at some point along its length, change from navigable to non-navigable. Very often that point will be at a major fall or rapids, or other place where there is a marked decrease in the navigable capacity of the river. The upper limit will therefore often be the same point traditionally recognized as the head of navigation, but may, under some of the tests described above, be at some point yet farther upstream.

33 C.F.R. 329.12
Geographic and jurisdictional limits of oceanic and tidal waters

a. **Ocean and coastal waters.** The navigable waters of the United States over which Corps of Engineers regulatory jurisdiction extends include all ocean and coastal waters within a zone three geographic (nautical) miles seaward from the baseline (The Territorial Seas). Wider zones are recognized for special regulatory powers exercised over the outer continental shelf. (See 33 CFR 322.3(b)).
    1. **Baseline defined.** Generally, where the shore directly contacts the open sea, the line on the shore reached by the ordinary low tides comprises the baseline from which the distance of three geographic miles is measured. The baseline has significance for both domestic and international law and is subject to precise definitions. Special problems arise when offshore rocks, islands, or other bodies exist, and the baseline may have to be drawn seaward of such bodies.
    2. **Shoreward limit of jurisdiction.** Regulatory jurisdiction in coastal areas extends to the line on the shore reached by the plane of the mean (average) high water. Where precise determination of the actual location of the line becomes necessary, it must be established by survey with reference to the available tidal datum, preferably averaged over a period of 18.6 years. Less precise methods, such as observation of the "apparent shoreline" which is determined by reference to physical markings, lines of vegetation, or changes in type of vegetation, may be used only where an estimate is needed of the line reached by the mean high water.

b. **Bays and estuaries.** Regulatory jurisdiction extends to the entire surface and bed of all waterbodies subject to tidal action. Jurisdiction thus extends to the edge (as determined by paragraph (a)(2) of this section) of all such waterbodies, even though portions of the waterbody may be extremely shallow, or obstructed by shoals, vegetation, or other barriers. Marshlands and similar areas are thus considered "navigable in law," but only so far as the area is subject to inundation by the mean high waters. The relevant test is therefore the presence of the mean high tidal waters, and not the general test described above, which generally applies to inland rivers and lakes.

CHAPTER XXIX.

An act to incorporate the owners and proprietors of half million acres of land, lying south of Lake Erie, in the county of Trumbull.

Preamble.

Whereas, the general assembly of the state of Connecticut, at their session holden in Hartford, in said state, on the second Thursday of May, *anno domini*, 1792, by their resolve, released and quitclaimed to certain persons therein named, and to their legal representatives where they are dead, and to their assigns forever, five hundred thousand acres of land, then belonging to said state, lying west of the state of Pennsylvania, bounded northerly on the shore of Lake Erie, beginning at the west line of said land, then belonging to said state of Connecticut, and extending eastwardly to a line running northerly and southerly, parallel to the west line of said land, then belonging to said state, and extending the whole width of said land, eastwardly of said west line, so far as to make the quantity of five hundred thousand acres, to be divided among the persons therein named and their legal representatives, when they were dead, in proportion to the several sum or sums annexed to their respective names, as a compensation for their losses, sustained by the incursions and depredations of the British army in the towns of Green-

wich, Fairfield, Danbury, Ridgefield, Norwalk, New Haven and East Haven, New London and Groton, in said state of Connecticut. And whereas the general assembly of said state, at their sessions holden at New Haven in said state of Connecticut, on the second Thursday of October, *anno domini*, 1796, incorporated the owners and proprietors of said half million acres, with full power to do and transact all business of said company necessary to be done; and whereas said state of Connecticut, by their proper deed, have since duly ceded to the United States all their juridical right in and to said half million acres, which cession has been duly accepted by the Congress of the United States, and said land annexed to the government of the state of Ohio. And whereas said half million of acres of land are now within the limits of the county of Trumbull, in said state, and are still subject to Indian claims of title; wherefore, to enable the owners and proprietors of said half million acres of land to purchase and extinguish the Indian claim of title to the same (under the authority of the United States when the same shall be obtained) to survey and locate the said land and to make partition thereof, to and among said owners and proprietors, in proportion to the amount of losses which is or shall be by them, respectively owned: Therefore,

Preamble continued.

Sec. 1. *Be it enacted by the general assembly of the state of Ohio*, That the own-

ers and proprietors of said half million acres of land be, and they hereby are, ordained and constituted a body politic and corporate, in fact and in name, by the name of "The proprietors of the half million acres of land, lying south of Lake Erie, called sufferers' land," and by that name they, their heirs and asssigns, may and shall have succession, capable of suing and being sued, of pleading and being impleaded.

Body politic and corporate established.

Name and style.

Sec. 2. *And be it further enacted*, That there be a board of directors for said owners and proprietors, consisting of nine persons, one of whom is to represent each of the respective suffering towns aforesaid, except the town of New London, which town shall have two votes in said directors, and in case of the absence of one of the directors from said town, the attending directors shall give the two votes; any five of whom shall have power to do the business of the said company, and also have power to appoint a chairman, clerk, treasurer and collector or collectors, and said directors, clerk, treasurer and collector or collectors, shall be by some magistrate, justice of the peace or notary public, severally sworn to a faithful discharge of their respective offices, all of whom shall continue in office until others are appointed and sworn in their room, and that said treasurer and collector or collectors, shall become bound to said directors in such penal sum as said directors think necessary

Nine persons to represent the suffering towns.

Five of whom may do the business of the company, etc.

to be sworn.

To give bond.

by bond with surety, conditioned for the faithful performance of their respective offices; and that said directors, for and in behalf of said proprietors, be and they are hereby authorized (whenever and as soon as they shall obtain permission under the authority of said United States to hold treaty) to adopt and prosecute measures to extinguish the Indian claim of title in and to said half million acres of land; to survey and locate the same into townships or otherwise, and to make an exact partition thereof, to and among the owners and proprietors thereof and their assigns, in proportion to the amount of the loss or losses by them respectively owned, at the time of making such partition, in such way and manner as said board of directors shall order; and they are hereby authorized to fill all vacancies in said offices; and that to defray all necessary expenses of said company in purchasing and extinguishing the Indian claim of title, surveying, locating and making partition thereof as aforesaid, and all other necessary expenses of said company, power be and the same is hereby given to and vested in, said directors and their successors in office, to levy a tax or taxes (two-thirds of the said directors present agreeing thereto) on said land, and have power to enforce the collection of the same: *Provided*, That no tax shall be levied but by a vote of two-thirds of the directors present.

Authorized to extinguish the Indian claim when the U. S. gives permission.

To survey the land.

To fill vacancies and levy taxes.

Proviso.

Persons chosen.

Sec. 3. *And be it further enacted*, That Jabez Fitch of Greenwich, Taylor Sherman of Norwalk, Walter Bradley of Fairfield, Philip B. Bradley of Bridgefield, James Clark of Danbury, Isaac Mills of New Haven and East Haven, Elias Perkins and Guy Richards of New London, and Star Chester of Groton, be and they are hereby constituted and appointed the first directors for said company, and may hold their first meeting, after passing of this act, at such time and place as any five or more of said directors shall appoint: *Provided*, such director so agreeing to such first meeting shall give the rest of said directors at least six days notice by summons or other actual notice, previous to said first meeting of said directors, and that said directors, so assembled, being sworn as aforesaid, shall proceed to the choice of a chairman, clerk and other officers, for the purpose aforesaid, and shall have power to adjourn from time to time and from place to place, and to warn future meetings of said directors, at such time and place, and in such manner as they may think proper.

Notice of meeting to be given.

When assembled to be sworn.

Power of the directors.

15

After the first meeting, the manner of choosing directors.

Sec. 4. *And be it further enacted*, That from and after the first meeting of said directors, the directors shall be chosen once in two years or biennially, from the said towns severally, by the proprietors of said lands holding losses sustained in said towns, each

town to choose one director, except the town of New London, which is to choose two directors, and the time and manner of holding and voting in said election shall be regulated by the said directors, at their first meeting.

Sec. 5. *And be it further enacted*, That it shall be the duty of said clerk to truly enter and record, all votes and doings of said directors, and that he shall, on application, give true copies thereof, and the same being duly certified under his hand and seal, shall in all cases be received and allowed as evidence. Duty of the clerk.

Sec. 6. *And be it further enacted*, That when any tax or taxes be laid as aforesaid, it shall be the duty of the treasurer to grant warrants to said collector or collectors to collect the same, and to account for and pay over the avails thereof, as said directors shall order, and that all sales of lands for taxes to the company shall be made in towns where the losses are sustained. Duty of the treasurer.

Sec. 7. *And be it further enacted*, That it shall be the duty of the collector or collectors to execute all warrants to him or them directed by said treasurer, for collection of any tax or taxes laid by said board of directors. And said collector or collectors, shall give due and reasonable notice of the time when said tax or taxes are or shall be payable to the treasurer of said directors, by advertising the same at Duty of the collectors.

least three weeks successively, in at least one newspaper published in each of the counties of Fairfield, New Haven and New London, in said state of Connecticut, and by giving any further notice in or without said state of Connecticut, as said directors may order, and that said tax or taxes shall be assessed on the original rights or losses, in proportion to each person's respective share or loss, as set in said grant: *Provided*, That said lands only shall be subject to the payment of said tax or taxes; and that when any tax or taxes, after the time limited for the payment thereon remains unpaid, it shall be the further duty of said collector or collectors to give notice of time and place, in manner aforesaid, that he or they shall proceed to sell, at public vendue, so much of the original loss and right of such delinquent proprietor, as will be sufficient to pay said tax or taxes, and all reasonable charges arising thereon, and said notice to be at least sixty days previous to any sale being made by any collector.

The directors may institute suits, etc.

Sec. 8. *And be it further enacted*, That said directors and their successors shall have authority, and are empowered to institute any prosecution, real, personal or mixed, as the case may require, against any person or persons, who shall at any time enter on the said lands, or any part of them, or commit any act of trespass thereon, and pursue such action to final judgment and execution, and to adjust

and settle the accounts of the former incorporation and to bring the officers and servants of said former incorporation to accouut and final settlement by suits at law or otherwise.

Sec. 9. *And be it further enacted*, That all sales of rights, or parts of rights, of any owner or proprietor in said half million acres of land made by any collector as aforesaid, shall be good and valid so as to secure an absolute title in the purchase, unless the said owner and proprietor shall redeem the same within six calendar months next after the sale thereof, by paying the tax or taxes for which the said right or rights or parts thereof, had been sold, with twelve per cent. interest thereon and costs of suit.

Sales by collectors valid, unless redeemed in six months.

Sec. 10. *And be it further enacted*, That said directors shall have power and authority, and the same is hereby given to them and their successors, to do whatever shall to them appear necessary and proper to be done, for the well ordering and interest of said owners and proprietors, not contrary to the laws of this state.

Power of the directors.

Sec. 11. *And be it further enacted*, That it shall be the duty of the said directors to state the accounts of said corporation, annually, and leave the same in the hands of the treasurer for the inspection of any of said proprietors, and supplies of money which shall remain in the hands of the treasurer after the

Further duty of the directors.

Surplus money, how appropriated.

Indian title shall be extinguished and said land located and partition thereof made, shall be used by said directors, for the laying out and improving the public roads in said tract, as this assembly shall direct.

Continuance.

Sec. 12. *And be it further enacted*, That this act shall be and remain the public act during the pleasure of this assembly.

MICHAEL BALDWIN,
Speaker of the house of representatives.

NATH. MASSIE,
Speaker of the senate.

April 15th, 1803.

10 Laws of Ohio 163

Chapter LX, An Act providing for the deposit of the records of the proprietors of the half million of acres of land lying south of Lake Erie, called "Sufferer's Land," making them legal evidence, and for other purposes, February 20, 1812

have expired, no further re-valuation shall take place, and the rent shall then be at the rate of six per cent. per annum, on the last appraisal.

This act to take effect and be in force from and after the first day of March next. Commencement.

MATTHIAS CORWIN,
Speaker of the House of Representatives.
THOS. KIRKER,
Speaker of the Senate.

February 20, 1812.

CHAPTER LX.

AN ACT *providing for the deposit of the records of the proprietors of the half million of acres of land lying south of Lake Erie, called "Sufferer's Land," making them legal evidence, and for other purposes.*

WHEREAS it is represented to this general assembly, by the directors of the proprietors of the half million acres of land lying south of Lake Erie, called "Sufferer's Land," incorporated by that name, by an act of the general assembly of this state, passed the fifteenth day of April, one thousand eight hundred and three, that by virtue of the authority vested in them by said act, the said proprietors have extinguished the Indian claim of title to said land, surveyed and located the same into townships and sections, made an exact partition thereof to and among the proprietors, and used the surplus monies, which remained in the hands of their treasurer after the Indian title was extinguished and partition of said lands was made, amounting to about two thousand six hundred dollars, for laying out and improving the public roads in said tract, Preamble.

and have now fully done and completed all and singular the matters and things which the interest of said proprietors required, and agreeably to the provisions and requirements of said act of incorporation. And whereas it is further represented by the said directors, that in transacting the business of said company, under the provisions of the act aforesaid, they have caused their clerk to make and keep a true entry and record of all the votes and doings of the directors, agreeably to the requirements of said act, and that said company have in consequence thereof two record books, one of which contains the votes and proceedings of the directors, and a record of the field minutes of the survey of said land; and the other, a complete partition of the whole of said half million of acres, both which record books are certified to be the records of said company by Isaac Mills, esq. their clerk, and deposited in the hands of the recorder of Huron county, where the directors of said company pray they may be and remain as part of the records of said county.—THEREFORE,

Certain records to remain recorded in Huron county.

Sect. 1. *Be it enacted by the General Assembly of the state of Ohio*, That the record books, aforesaid, containing the votes and proceedings of the directors of said company, and records of the field minutes of the survey of said half million of acres, and the record of partition thereof, be kept by the recorder of Huron county and his successors in office, and that said record books be and remain a part and parcel of the records of said county, and that any certified copies therefrom, which may hereafter be made by the recorder of said county, may be used and read as legal evidence in all courts of record or elsewhere; and it shall be the duty of the recorder of Huron county,

A certified copy to be evidence in any court.

to give a certified copy of any part of said records, to any person demanding the same, for which he shall be entitled to the same fees as are provided by law for copies of other records.

Sect. 2. *And be it further enacted*, That the expenditure of said sum of two thousand six hundred dollars, surplus money, in laying out and improving the public roads on said lands as beforementioned, be, and the same is hereby ratified and confirmed. The expenditure of two thousand dollars on roads, ratified.

This act to take effect from and after the passage thereof. Commencement.

MATTHIAS CORWIN,
Speaker of the House of Representatives.
THOS. KIRKER,
Speaker of the Senate.

February 20, 1812.

CHAPTER LXI.

AN ACT *regulating the times of holding Judicial Courts.*

Sect. 1. *Be it enacted by the General Assembly of the state of Ohio*, That the supreme court shall commence its sessions and be holden as follows, viz. In the county of Fairfield, on the twenty-fourth day of March; in the county of Licking, on the fourth day of April; in the county of Knox, on the ninth day of April; in the county of Coshocton, on the twelfth day of April; in the county of Tuscarawas on the fifteenth day of April; in the county of Wayne, on the nineteenth day of April; in the county of Stark, on the twenty-second day of April; in the county of Portage, on the twenty fifth day of April; in the county of Cuyahoga, on the twenty ninth day Supreme court when to be holden in each county.

I American State Papers: Public Lands 83,
No.51. Connecticut Western Reserve,
Communicated to the House of Representatives, March 21, 1800

6th Congress. No. 49. 1st Session.

RENEWAL OF A MILITARY LAND WARRANT.

COMMUNICATED TO THE HOUSE OF REPRESENTATIVES FEBRUARY 21, 1800.

Mr. Davis, from the committee to which was referred the petition of John Mountjoy, made the following report:

That it appears to the committee that the petitioner was a captain in the service of the United States, in the revolutionary war with Great Britain, and entitled to bounty land. It appears, also, by an extract from the office of the Secretary of War, that the land warrant of the petitioner was cut out of the book; a receipt, dated the 26th day of February, 1793, and not signed, was left in the office. The land warrant, No. 2,492.

The committee are of opinion that, in consequence of the neglect, or the misconduct of an officer in the War Office, no loss ought to fall on the innocent party.

Resolved, therefore, That the Secretary of War be directed to give to John Mountjoy, late a captain in the service of the United States, a land warrant, No. 2,492, for three hundred acres of bounty land.

6th Congress. No. 50. 1st Session.

CONFIRMATION OF AN INDIAN GRANT.

COMMUNICATED TO THE HOUSE OF REPRESENTATIVES FEBRUARY 24, 1800.

Mr. Harrison, from the committee appointed to inquire whether any and, if any, what alterations are necessary in the laws authorizing the sale of the lands of the United States northwest of the Ohio, and to which was referred the petition of Isaac Zane, have taken into consideration the said petition, and make thereon the following report:

That the petitioner states that he was made a prisoner by the Wyandot Indians, when an infant of nine years of age; with which nation he has ever since remained, having married an Indian woman, by whom he has many children; that his attachments to the white people have subjected him to numberless inconveniences and dangers during the almost continual wars which existed between the United States and the Indians until the peace of Greenville, in 1795.

That, previous to that period, a tract of land on which he now lives had been assigned to him by the Wyandot Indians, and that no idea was entertained, when that treaty was made, that the land which had been given him would fall within the boundary of the United States, (which now appears to be the case,) and, of consequence, that no provision was made in that treaty in his favor. All of which, the committee have reason to believe, is perfectly true; and it farther appears from a certificate given by Governor St. Clair, the agent for Indian affairs in the Northwestern Territory, that, at a conference with the chiefs of the Wyandot nation, in the month of October, 1798, the said chiefs declared it to be the wish of their nation that a tract of land four miles square, at a place called the Big Bottom, on Mad river, a branch of the Great Miami, should be confirmed to the said Zane, this land having been set apart for him previous to the treaty of Greenville. Having taken these circumstances into consideration, and having been creditably informed that the petitioner has, in the course of the Indian war, rendered great and repeated services to the frontier settlements, by giving information to them of any hostile design meditated against them by the Indians, at the no small risk of his life; and having, as far as his power extended, protected and sustained the unfortunate persons who were occasionally carried into captivity; the committee have concluded that the petitioner ought to have confirmed to him a tract of land equal, in some degree, to the intentions of the Indians, and to the services rendered by the petitioner to the United States; they, therefore, recommend to the House the adoption of the following resolution:

Resolved, That a committee be appointed to bring in a bill authorizing the President of the United States to convey, in fee simple, to Isaac Zane, two thousand five hundred and sixty acres of land, to be laid off in a square, two miles each way, at a place called the Big Bottom, on Mad river, a branch of the Great Miami river, and where the said Zane now lives.

6th Congress. No. 51. 1st Session.

CONNECTICUT WESTERN RESERVE.

COMMUNICATED TO THE HOUSE OF REPRESENTATIVES MARCH 21, 1800.

Mr. Marshall, from the committee to which was referred the consideration of the expediency of accepting, from the State of Connecticut, a cession of jurisdiction of the territory west of Pennsylvania, commonly called the Western Reserve of Connecticut, with directions to report by bill or otherwise, made the following report:

That, in the year 1606, on the 10th of April, James I, King of England, on the application of Sir Thomas Gates and others for a license to settle a colony in that part of America called Virginia, not possessed by any Christian prince or people, between the thirty-fourth and forty-fifth degrees of north latitude, granted them a charter. In order to facilitate the settlement of the country, and at the request of the adventurers, he divided it into two colonies. To the first colony, consisting of the citizens of London, he granted, "That they might begin their first plantation and habitation at any place on the said coast of Virginia or America, where they shall think fit and convenient, between the said four-and-thirty and one-and forty degrees of the said latitude; and they shall have all lands, &c., from the said first seat of their plan-

Exhibit 11 (1 of 6)

tation and habitation, by the space of fifty miles, of English statute measure, all along the said coast of Virginia and America, towards the west and southwest, as the coast lieth, with all the islands, within one hundred miles, directly over and against the same sea coast; and also all the lands, &c., from said place of their first plantation and habitation, for the space of fifty like English miles, all along the said coast of Virginia and America, towards the east and northeast, or towards the north, as the coast lieth, with all the islands, within one hundred miles, directly over and against the said sea coast; and also all the lands, &c., from the same fifty miles every way on the sea coast, directly into the main land, by the space of one hundred like English miles; and that no other subjects should be allowed to settle on the back of them, towards the main land, without written license from the council of the colony."

To the second colony, consisting of Thomas Hanham and others, of the town of Plymouth, King James granted the tract between the thirty-eighth and forty-fifth degrees of north latitude, under the same description as the aforesaid grant was made to the first colony. To these grants a consideration was annexed, that a plantation should not be made within one hundred miles of a prior plantation.

By the same charter, the King agreed that he would give and grant, by letters patent, to such persons, their heirs and assigns, as the council of each colony, or the most part of them, should nominate or assign, all the lands, tenements, and hereditaments, which should be within the precincts limited for each colony, to be holden of him, his heirs and successors, as for the manor of East Greenwich, in the county of Kent, in free and common soccage only, and not in capite. And that such letters patent should be sufficient assurance from the patentees, so distributed and divided amongst the undertakers for the plantations of the several colonies, and such as should make their plantations in either of the said several colonies in such manner and form, and for such estates, as shall be ordered, and set down by the council of said colony, or the most part of them, respectively, within which the same lands, tenements, or hereditaments, shall lie or be; although express mention of the true yearly value or certainty of the premises, or any of them, or of any other gifts or grants, by the King, or any of his progenitors, or predecessors, to the guarantees was not made, or any statute, &c., to the contrary notwithstanding.

On the 23d of May, 1609, King James, on the application of the first colony for a further enlargement and explanation of the first grant, gave them a second charter, in which they were incorporated by the name of "The Treasurer and Company of Adventurers and Planters of the city of London, for the first colony of Virginia."

In this charter, the King grants to them all the lands, &c., in that part of America called Virginia, from the point of land called Cape or Point Comfort, all along the sea coast, to the northward, two hundred miles; and from the said Point of Cape Comfort, all along the sea coast, to the southward, two hundred miles; and all that space and circuit of land lying from the sea coast of the precinct aforesaid up into the main land throughout, from sea to sea, west and northwest; and also all the islands within one hundred miles along the coast of both seas of the precinct aforesaid.

On the 12th of March, 1611-12, on the representation that there were several islands without the foregoing grant, and contiguous to the coast of Virginia, and on the request of the said first colony for an enlargement of the former letters patent, as well for a more ample extent of their limits and territories into the seas adjoining to and upon the coast of Virginia, as for the better government of the said colony, King James granted them another charter. After reciting the description of the second grant, he then proceeds to give, grant, and confirm, to the Treasurer and Company of Adventurers and Planters of the city of London for the first colony of Virginia, and their heirs, &c., "all and singular those islands, whatsoever, situate and being in any part of the ocean, seas, bordering on the coast of our said first colony in Virginia, and being within three hundred leagues of any of the parts heretofore granted to the said Treasurer and Company in said former letters patent as aforesaid, and being within the one-and-fortieth and thirtieth degrees of northerly latitude, with all the lands, &c., both within the said tract of land on the main, and also within the said islands and seas adjoining, &c. *Provided, always*, That the said islands, or any premises herein mentioned, or by these presents intended or meant to be conveyed, be not actually possessed or inhabited by any other Christian prince or state; nor be within the bounds, limits, or territories, of the northern colony, heretofore by us granted, to be planted by divers of our loving subjects in the north part of Virginia.

On the 16th day of July, 1634, James I granted a commission for the government of Virginia, in which it is alleged that the charters to the Treasurer and Company of Adventurers and Planters of the city of London, for the first colony of Virginia, had been avoided upon a *quo warranto* brought, and a legal and judicial proceeding therein by due course of law.

On the 20th day of August, 1624, James granted another commission for the government of Virginia, in which it is alleged, "Whereupon we, entering into mature and deliberate consideration of the premises, did, by the advice of our lords of the privy council, resolve, by altering the charters of the said company, as to the point of government, wherein the same might be found defective, to settle such a course as might best secure the safety of the people there, and cause the said plantation to flourish; and yet, with the preservation of the interests of every planter and adventurer, so far forth as their present interests shall not prejudice the public plantations; but because the said Treasurer and Company did not submit their charters to be reformed, our proceedings therein were stayed for a time until, upon *quo warranto* brought, and a legal and judicial proceeding therein, by due course of law, the said charters were, and now are, and stand avoided."

On the 13th of May, 1625, Charles I, by his proclamation, after alleging that the letters patent to the colony of Virginia had been questioned in a legal course, and thereupon judicially repealed, and judged to be void, declares that the government of the colony of Virginia shall immediately depend on himself, and not be committed to any company or corporation.

From this time Virginia was considered a royal government, and it appears that the Kings of England, from time to time, granted commissions for the government of the same.

The right of making grants of lands was vested in and solely exercised by the Crown.

The colonies of Maryland, North and South Carolina, Georgia, and part of Pennsylvania, were erected by the Crown within the chartered limits of the first colony of Virginia.

When the King of France had dominions in North America, the land in question was included in the province of Louisiana, but no part of it was actually settled by any of his subjects. After the conquest of the French possessions in North America by Great Britain, this tract was ceded to the King of Great Britain, by the treaty of Paris, in 1763.

In the year 1774, the parliament of Great Britain passed an act, declaring and enacting, "That all the territories, islands, and countries, in North America, belonging to the Crown of Great Britain, bounded on the south by a line drawn from the Bay of Chaleurs, along the high lands which divide the rivers that empty themselves into the River St. Lawrence, from those that fall into the sea, to a point in forty-five degrees of north latitude, on the eastern bank of the River Connecticut, keeping the same latitude directly west, through the Lake Champlain, until, in the same latitude, it meets the River St. Lawrence; from thence, up the eastern branch of said river, to the Lake Ontario; thence, through the Lake Ontario and the river commonly called Niagara; and thence, along by the eastern and southeastern bank of Lake Erie, following the bank until the same shall be intersected by the northern boundary, granted by the charter of the province of Pennsylvania, in case the same shall so be intersected; and from thence, along the said northern and western boundaries of said province, until the said western boundary strikes the Ohio. But in case the said bank of the said lake shall not be found to be so intersected, then, following the said bank, until it shall arrive at the point of the said bank, which shall be nearest to the northwestern angle of the said province of Pennsylvania; and thence, by a right line, to the said northwestern angle of said province; and thence, along the western boundary of said province, until it shall strike the River Ohio, and along the bank of the said river westward, to the banks of the Mississippi; and northward, to the southern boundary of the territory granted to the merchants, adventurers of England, trading to Hudson's bay; and, also, all such territories, islands, and countries which have, since the 10th of February, 1763, been made part of the government of Newfoundland, be, and they are hereby, during his majesty's

pleasure, annexed to, and made part and parcel of, the province of Quebec, as created and established by the said royal proclamation of the 7th of October, 1763.

"*Provided, always*, That nothing herein contained, relative to the boundary of the province of Quebec, shall in anywise affect the boundaries of any other colony.

"*Provided, always, and be it enacted*, That nothing in this act contained shall extend, or be construed to extend, to make void, or to vary, or alter, any right, title, or possession, derived under any grant, conveyance, or otherwise howsoever of or to any lands within the said province or provinces thereto adjoining; but that the same shall be in force and have effect as if this act had never been made."

In the year 1620, on the 3d of November, King James gave a charter to the second colony of Virginia. After reciting the grants made to the first colony of Virginia, and stating an application from the second colony for a further enlargement of privileges, he proceeded to declare "that the tract of land in America, between the fortieth and forty-eighth degrees of north latitude, from sea to sea, should be called New England; and for the planting and governing the same, he incorporated a council at Plymouth, in the county of Devon, and granted to them and their successors," all that part of America, lying and being in breadth, from forty degrees of northerly latitude, from the equinoctial line, to forty-eight degrees of the said northerly latitude inclusively, and in length of, and within all the said breadth aforesaid, throughout all the main lands, from sea to sea, together with all the firm lands, &c., upon the main, and within the said islands and seas adjoining. *Provided*, The said islands, or any of the premises before mentioned, and intended by said charter to be granted, be not actually possessed or inhabited by any Christian prince or state, nor be within the bounds, limits, or territories of the southern colony, granted to be planted in the south part. King James, by said charter, commanded and authorized said council at Plymouth, or their successors, or the major part of them, to distribute and assign such portions of land to adventurers, &c., as they should think proper.

In the year 1628, 4th March, the council of Plymouth, pursuant to the authority vested in them by their charter, granted to Sir Henry Roswell, and others, a tract of land called Massachusetts; and King Charles I, on the 4th of March, 1629, confirmed the sale, and granted them a charter. After reciting the description of the grant to the council of Plymouth, and their grant to Sir Henry Roswell and others, he grants and confirms to them, all that part of New England in America, which lies and extends between a great river there, commonly called Morromack river, alias Merrimack river, and a certain other river there, called Charles river, being in the bottom of a certain bay, there called Massachusetts, alias Mattachusetts, alias Massactusetts bay; and, also, all and singular those lands and hereditaments whatsoever, lying within the space of three English miles, on the south part of the said river, called Charles river, or of any or every part thereof; and, also, all and singular the lands and hereditaments whatsoever, lying and being within the space of three English miles to the southward of the southernmost parts of the said bay, called Massachusetts, alias Mattachusetts, alias Massactusetts bay; and, also, all those lands and hereditaments whatsoever, which lie and be within the space of three English miles to the northward of the said river called Morromack, alias Merrimack; or to the northward of any and every part thereof; and all lands and hereditaments whatsover, lying within the limits aforesaid, north and south, in latitude and in breadth, and in length and longitude of, and within all the breadth aforesaid, throughout the main lands there, from the Atlantic and Western sea and ocean, on the east part, to the South sea on the west part, with a proviso not to extend to lands possessed by a Christian prince, or within the limits of the southern colony."

In the year 1631, on the 19th of March, the Earl of Warwick granted to Lord Say and Seal, and others, all that part of New England in America, which lies and extends itself from a river there called Narraganset river, the space of forty leagues, upon a straight line near the sea shore, towards the southwest, west, and by south or west, as the coast lieth towards Virginia, accounting three English miles to the league; and, also, all and singular the lands and hereditaments whatsoever, lying and being within the lands aforesaid, north and south, in latitude and in breadth, and in length and longitude of, and within all the breadth aforesaid, throughout the main lands there, from the Western ocean to the south sea, &c.; and, also, all the islands, lying in America, aforesaid in said seas, or either of them, on the western or eastern coasts, &c. The territory aforesaid having been in the year preceding, by the council of Plymouth, granted to said Earl of Warwick.

In 1635, the 7th of June, the council of Plymouth, after having made sundry other grants, surrendered their charter to the Crown.

In the year 1635, Lord Say and Seal, and other associates, appointed John Winthrop their governor and agent, to enter upon and take possession of their territory, which he accordingly did, and began a settlement near the mouth of Connecticut river. About the same time, a number of English colonists emigrated from the Massachusetts to the Connecticut river, and after having found themselves to be without the patent of that colony, formed into a political association by the name of the Colony of Connecticut, and purchased of Lord Say and Seal, and others, their grant from the Earl of Warwick, made in 1631; and, in 1664, petitioned King Charles II, setting forth their colonization, their adoption of a voluntary form of government, their grant from Lord Say and Seal, and others, and their acquisition by purchase and conquest, and praying him to give them a charter of government, agreeably to the system they had adopted, with power equal to those conferred on Massachusetts, or the lords and gentlemen whose jurisdiction right they had purchased, and to confirm the grant or patent which they had obtained as aforesaid, of the assigns of the Plymouth council, according to the tenor of a draft or instrument, which they say was ready to be tendered at his gracious order.

King Charles II, referring to the facts stated in the petition aforesaid, granted a charter, dated the 23d of April, 1662, in which he constituted and declared John Winthrop and others his associates, a body corporate and politic, by the name of the Governor and Company of the English Colony of Connecticut in New England, in America, with privileges and powers of government, and granted and confirmed to the said Governor and Company and their successors, all that part of his dominions in New England in America, bounded on the east by Narraganset river, commonly called Narraganset bay, where the said river falls into the sea; and on the north by the line of Massachusetts plantation, and on the south by the sea, and in longitude as the line of Massachusetts colony, running from east to west, that is to say, from the said Narraganset bay on the east, to the South sea on the west, with the islands thereto adjoining; (which is the present charter of Connecticut.)

On the 23d of April, 1664, King Charles addressed a letter to the Governor and Company of Connecticut, in which, among other things, he speaks of having renewed their charter.

On the 12th of March, 1664, Charles II granted to James, Duke of York, "all that part of the main land in New England, beginning at a certain place called and known by the name of St. Croix, next adjoining to New Scotland, in America, and from thence extending along the sea coast, unto a place called Pemaquine, or Pennequid, and so up the river thereof unto the furthermost head of the same, as it tendeth northward, and extending from thence unto the River Kennebequie, and upwards, by the shortest course, to the river called Canada, northward; and, also, all that island or islands called by the several name or names of Mattawacks, or Long Island, situate, lying, and being towards the west of Cape Cod and the Narragansets, abutting on the main lands, between the two rivers there called and known by the names of Connecticut and Hudson's river; together, also, with the said river called Hudson's river, and all the lands from the west side of Connecticut river to the east side of Delaware bay, and all the several islands, &c.

As the charter to the Duke of York covered part of the lands included in the charter of Connecticut, and as a part of the country had been settled by Christian nations prior to the charter of Connecticut, for which an exception had been made in the charter to the council of Plymouth, though not in that to Connecticut, a dispute arose between the Duke of York and the people of Connecticut, respecting the bounds of their respective grants. King Charles II having appointed Richard Nicholls and others commissioners to visit the New England colonies, with power to hear and determine all complaints and appeals, and proceed in all things for providing for and settling the peace of the said country.

On the 13th October, 1664, the General Assembly of the colony of Connecticut appointed agents to wait on said commissioners, which appointment was expressed in the following terms, to wit: Mr. Allen, &c., are de-

sired to accompany the governor to New York to congratulate his majesty's honorable commissioners, and, if an opportunity offers itself, that they can issue the bounds between the Duke's patent and ours, (so as in their judgment may be for the satisfaction of the court,) they are empowered to attend the same, &c. Said commissioners undertook the settlement of said bounds, and on the 30th November, 1664, determined as follows:

"By virtue of his majesty's commission, we have heard the difference about the bounds of the patent granted to the Duke of York and the colony of Connecticut, and having considered the same, &c., we do declare and order, the southern bound of his majesty's colony is the sea, and that Long Island is to be under the government of his royal highness the Duke of York, as is expressed by plain words in said charters respectively; and, also, by virtue of his majesty's commission, and by consent of both the governors and gentlemen above named, we do also order and declare that the creek or river which is called Monoromock, which is reputed to be about twelve miles to the east of Westchester and a line to be drawn from the east point or side where the fresh water falls into the salt, at high-water mark, north northwest to the line of the Massachusetts, be the western bound of said colony of Connecticut, and all plantations lying westward of that creek and line so drawn shall be under his royal highness's government; and all plantations lying eastward of that creek and line to be under the government of Connecticut."

To this the commissioners from Connecticut subscribed in the following manner, viz.:

"We, the underwritten, on behalf of the colony of Connecticut, have assented unto the determination of his majesty's commissioners in relation to the bounds and limits of his royal highness the Duke's patent and the patent of Connecticut."

This was a settlement of boundary between the interfering charter of Connecticut and that to the Duke of York, as it respected the eastern extent of the latter.

New York being, in June, 1673, recovered by the Dutch, and their government revived, was, in 1674, ceded on a treaty of peace. The duke obtained a renewal of his patent, and claimed a re-settlement of the same, which was finally effected in 1730, when Byram river, the present line, was established.

Charles the Second, on the 4th day of March, 1681, granted to William Penn, the first proprietary and governor of Pennsylvania, all that tract or part of land in America, with the islands therein contained, as the same is bounded on the east by Delaware river, from twelve miles distance, northward of Newcastle town, unto the three-and-fortieth degree of northern latitude, if said river doth extend so far northward; but if the said river shall not extend so far northward, then, by the said river, so far as it doth extend, and from the head of the said river, the eastern bounds are to be determined by a meridian line, to be drawn from the head of said river, unto the said forty-third degree; the said land to extend westward five degrees in longitude, to be computed from the said eastern bounds; and the said lands to be bounded on the north by the beginning of the three-and-fortieth degree of northern latitude; and on the south by a circle drawn at twelve miles distance from Newcastle, northward and westward, unto the beginning of the fortieth degree of northern latitude; and then, by a straight line westward, to the limits of longitude above mentioned.

On the 27th of November, 1779, the Legislature of Pennsylvania vested the estate of the proprietaries in the Commonwealth.

The charter of Pennsylvania comprehended a part of the land included in the charter of Connecticut, viz.: between the forty-first and forty-second degrees of north latitude, in consequence of which a dispute arose respecting the right of soil and jurisdiction.

This dispute came to a final decision before a court of commissioners appointed pursuant to the articles of confederation, on the 30th day of December, 1782, when it was determined that the State of Connecticut had no right to the lands included in the charter of Pennsylvania; and that the State of Pennsylvania had the right of jurisdiction and pre-emption.

The State of Connecticut acquiesced in the decision aforesaid, respecting the lands claimed by Pennsylvania; and the court of commissioners having final jurisdiction, the claim of Connecticut respecting both soil and jurisdiction, is conclusively settled. But Connecticut did not abandon her claim to lands west of Pennsylvania; and at a General Assembly, holden at New Haven on the second Thursday of October, 1783, the following act was passed, viz.: "Whereas this State has the undoubted and exclusive right of jurisdiction and pre-emption to all the lands lying west of the western limits of the State of Pennsylvania, and east of the River Mississippi, and extending throughout from the latitude 41° to latitude 42° and 2' north, by virtue of the charter granted by King Charles the Second to the late colony, now State of Connecticut, bearing date the 23d day of April, A. D. 1662, which claim and title to make known, for the information of all, to the end that they may conform themselves therein.

"*Resolved*, That his excellency the Governor be desired to issue his proclamation, declaring and asserting the right of this State to all the lands within the limits aforesaid; and strictly forbidding all persons to enter or settle thereon, without special license and authority first obtained from the General Assembly of this State."

Pursuant to this resolution, Governor Trumbull issued a proclamation bearing date the 15th day of November, 1783, making known the determination of the State to maintain their claim to said territory, and forbidding all persons to enter thereon, or settle within the limits of the same.

On the 29th of April, 1784, Congress adopted the following resolution:

Congress, by their resolution of September 6th, 1780, having thought it advisable to press upon the States having claims to the western country, a liberal surrender of a portion of their territorial claims; by that of the 10th of October in the same year, having fixed conditions to which the Union should be bound on receiving such cessions; and having again proposed the same subject to those States in their address of April the 18th, 1783, wherein, stating the national debt, and expressing their reliance for its discharge, on the prospect of vacant territory, in aid of other resources, they, for that purpose, as well as to obviate disagreeable controversies and confusions, included in the same recommendations a renewal of those of September 6th, and of October the 10th, 1780, which several recommendations have not yet been fully complied with.

Resolved, That the same subject be again presented to the said States; that they be urged to consider, that the war being now brought to a happy termination, by the personal services of our soldiers, the supplies of property by our citizens, and loans of money from them as well as foreigners, these several creditors have a right to expect that funds will be provided, on which they may rely for indemnification; that Congress still consider vacant territory as an important resource; and that, therefore, said States be earnestly pressed by immediate and liberal cessions to forward these necessary ends, and to promote the harmony of the Union.

The State of Connecticut, prior to the decree of Trenton, offered to make a cession of western territory, but under such restrictions that Congress refused to accept the same. In consequence of the above recommendation of Congress, the Legislature of Connecticut resumed the consideration of a cession of their western territory; and, at a General Assembly of the State, on the second Thursday of May, 1786, passed the following act:

"*Be it enacted by the Governor, Council, and Representatives, in General Court assembled, and by the authority of the same*, That the delegates of this State, or any two of them, who shall be attending the Congress of the United States, be, and they are hereby directed, authorized, and fully empowered, in the name and behalf of this State, to make, execute, and deliver, under their hands and seals, an ample deed of release and cession of all the right, title, interest, jurisdiction, and claim of the State of Connecticut, to certain western lands, beginning at the completion of the forty-first degree of north latitude, one hundred and twenty miles west of the western boundary line of the Commonwealth of Pennsylvania, as now claimed by said Commonwealth; and from thence by a line to be drawn north parallel to, and one hundred and twenty miles west of the said west line of Pennsylvania, and to continue north until it comes to 42° and 2' north latitude: whereby all the right, title, interest, jurisdiction, and claim of the State of Connecticut to the lands lying west of the said line, to be drawn, as aforementioned, one hundred and twenty miles west of the western boundary line of the Commonwealth of Pennsylvania, as now claimed by said Commonwealth, shall be included, released, and ceded to the United States in Congress assembled, for the common use and benefit of said States, Connecticut inclusive."

On the 26th of May, 1786, Congress resolved, "that Congress, in behalf of the United States, are ready to accept all the right, title, interest, jurisdiction, and

claim of the State of Connecticut to certain western lands, beginning at the completion of the forty-first degree of north latitude, one hundred and twenty miles west of the western boundary line of the Commonwealth of Pennsylvania, as now claimed by said Commonwealth, and from thence, by a line to be drawn north parallel to, and one hundred and twenty miles west of the said west line of Pennsylvania, and to continue north until it comes to forty-two degrees two minutes north latitude, whenever the delegates of Connecticut shall be furnished with full powers, and shall execute a deed for that purpose."

On the 14th of September, 1786, the delegates from Connecticut executed a deed of cession agreeably to the above resolution, and it was resolved "that Congress accept the said deed of cession, and that the same be recorded and enrolled among the acts of the United States in Congress assembled."

The cession from Connecticut was accepted by Congress in the same manner and form as the cessions from Virginia, New York, and Massachusetts.

The Legislature of Connecticut, on the second Thursday of October, 1788, passed an act directing the survey of that part of their western territory not ceded to Congress, lying west of Pennsylvania, and east of the River Cayahoga, to which the Indian right had been extinguished; and by the same act, opened a land office for the sale thereof. Under this act, a part of said tract was sold.

The Legislature of Connecticut, in 1792, granted five hundred thousand acres of said territory, being the west part thereof, to certain citizens of the State, as a compensation for property burned and destroyed in the towns of New London, New Haven, Fairfield, and Norwalk, by the British troops in the war between the United States of America and Great Britain. Many transfers of parts of this land have been made for valuable considerations.

In May, 1795, the Legislature of Connecticut passed a resolve in the words following:

"*Resolved by the Assembly*, That a committee be appointed to receive any proposals that may be made by any person or persons, whether inhabitants of the United States, or others, for the purchase of the lands belonging to this State lying west of the west line of Pennsylvania, as claimed by said State. And the said committee are hereby fully authorized and empowered, in the name and behalf of this State, to negotiate with any such person or persons, on the subject of any such proposals, and also to form and complete any contract or contracts for the sale of the said lands, and to make and execute, under their hands and seals, to the purchaser or purchasers, a deed or deeds, duly authenticated, quitting, in behalf of this State, all right, title, and interest, juridical and territorial, in and to said lands to him or them, and to his and their heirs forever.

"That before the executing of such deed or deeds, the purchaser or purchasers shall give their personal note or bond, payable to the treasurer of this State, for the purchase money, carrying an interest of six per centum per annum, payable annually, to commence from the date thereof, or from such future period, not exceeding two years from the date, as circumstances, in the opinion of the committee, may require, and as may be agreed on between them and the said purchaser or purchasers, with good and sufficient sureties, inhabitants of this State; or with a sufficient deposite of bank stock, or other stock of the United States, or the particular States; which note or bond shall be taken, payable at a period not more remote than five years from the date, or if by annual instalments, so that the last instalment be made payable within ten years from the date, either in specie, or six per cent., three per cent., or deferred stock of the United States, at the discretion of the committee.

"That if the said committee shall find that it will be most beneficial to the State or its citizens, to form several contracts for the sale of the said lands, they shall not consummate any of the said contracts apart by themselves, while the others lie in a train of negotiation only; but all the contracts, which, taken together, shall comprise the whole of the quantity of the said lands, shall be consummated together, and the purchasers shall hold their respective parts, or proportions, as tenants in common of the whole tract, or territory, and not in severalty.

"That the said committee, in whatever manner they shall find it best to sell the said lands, shall, in no case, be at liberty to sell the whole quantity for a principal sum less than one million of dollars in specie, with interest at six per cent. per annum from the time of such sale."

The Legislature, at the same time, appointed a committee to sell said lands, who advertised the same in various newspapers of the United States, and particularly in the Gazette of the United States published in Philadelphia.

Said committee sold said lands to sundry citizens of Connecticut, and of other States, for the sum of one million two hundred thousand dollars; and on the 9th day of September, 1795, executed to the several purchasers, deeds quitting to them and their heirs forever, all right, title, and interest, juridical and territorial of the State of Connecticut, to lands belonging to said State, lying west of the west line of Pennsylvania, as claimed by said State.

The Legislature of Connecticut have appropriated the money arising on the sale of the said lands, for the support of schools, and have pledged the annual interest as a perpetual fund for that purpose. The proprietors have paid the principal part of two years' interest to the State, making about the sum of one hundred thousand dollars.

The purchasers have surveyed into townships of five miles square, the whole of said tract lying east of the river Cayahoga, and to which the Indian right has been extinguished; they have made divisions thereof according to their respective proportions; commenced settlements in thirty-five of said townships; and there are actually settled therein about one thousand inhabitants. A number of mills have been built, and roads cut in various directions through said territory, to the extent of about seven hundred miles; numerous sales and transfers of the land have been made, and the proprietors, in addition to the payments of interest aforesaid, have already expended about the sum of eighty thousand dollars.

While the State of Connecticut was making a disposition of said territory, the following acts took place in the Government of the United States.

In the report of the Secretary of State, respecting the quantity and situation of the lands not claimed by the Indians, nor granted to, nor claimed by any of the citizens of the United States within the territory ceded to the United States by the State of North Carolina, and within the Territory of the United States Northwest of the River Ohio, are the following clauses:

Under the head of lands reserved by States in their deeds of cession, it is said, "that the tract of country presents itself from the completion of the forty-first degree to forty-second degree two minutes of north latitude, and extending to the Pennsylvania line before mentioned, one hundred and twenty miles westward, not mentioned in the deed of Connecticut, while all the country westward thereof was mentioned to be ceded; about two and a half millions of acres of this may perhaps be without the Indian lines before mentioned."

In the act of Congress passed May 18th, 1796, entitled "An act providing for the sale of the lands of the United States Northwest of the River Ohio, and above the mouth of the Kentucky river," is the following section:

SEC. 4. *Be it further enacted*, That whenever seven ranges of townships shall have been surveyed below the Great Miami, or between the Scioto river and the Ohio Company's purchase, or between the southern boundary of the Connecticut claims, and the ranges already laid off, beginning upon the Ohio river, and extending westwardly; and the plats thereof made and transmitted, in conformity to the provisions of this act, the said section of six hundred and forty acres (excluding those hereby reserved) shall be offered for sale at public vendue, under the direction of the Governor, or Secretary of the Western Territory, and the surveyor general; such of them as lie below the Great Miami, shall be sold at Cincinnati; those of them that lie between the Scioto and the Ohio Company's purchase, at Pittsburg; and those between the Connecticut claim and seven ranges at Pittsburg, &c.*

At a meeting of commissioners from sundry of the then colonies at Albany, on Tuesday the 9th of July, 1754, it was, among other things, agreed and resolved, as follows:

That his majesty's title to the northern continent of America appears to be founded on the discovery thereof first made, and the possession thereof first taken in 1497, under a commission from Henry VII, of England, to Sebastian Cabot. That the French have possessed themselves of several parts of this continent, which, by treaties have been ceded and confirmed to them.

* On the 21st January, 1799, Mr. Read, from a committee to which was referred a bill to accept a cession from Connecticut of the Western Reserve, made a report to the Senate, of which the preceding is a transcript.

That the right of the English to the whole sea coast from Georgia on the south, to the River St. Lawrence on the north, excepting the island of Cape Breton, and the islands in the Bay of St. Lawrence, remains indisputable.

That all the lands or countries westward from the Atlantic ocean to the South sea, between 48° and 34° north latitude, was expressly included in the grant of King Charles I to divers of his subjects, so long since as the year 1606, and afterwards confirmed in 1620, and under this grant the colony of Virginia claims extent as far west as the South sea; and the ancient colonies of the Massachusetts Bay and Connecticut were by their respective charters made to extend to the said South sea: so that not only the right of the sea coast, but to all the inland countries from sea to sea, has, at all times, been asserted by the Crown of England.

In 1754, some settlements were made from Connecticut on lands on the Susquehanna, about Wyoming, within the chartered limits of Pennsylvania, and also within the chartered limits claimed by Connecticut, which produced a letter from the Governor of Connecticut to the Governor of Pennsylvania of which the following is an extract:

WINDSOR, *March* 13, 1754.

"There being now no unappropriated lands with us, some of our inhabitants, hearing of this land at Susquehanna, and that it was north of the grant made to Mr. Penn and that to Virginia, are upon a design of making a purchase from the Indians, and hope to obtain a grant of it from the Crown. But Mr. Armstrong informs me that this land is certainly within Mr. Penn's grant. If so, I don't suppose our people had any purpose to quarrel with Pennsylvania. Indeed, I don't know the mind of every private man, but I never heard our leading men express themselves so inclined."

On the same day Lieutenant Governor Fitch wrote from Hartford a letter on the same subject, of which the following is an extract:

"I do well approve of the notice you take of the attempt some of the people of this colony are making, and the concern you manifest for the general peace, &c. I know nothing of any thing done by the Government to countenance such a procedure as you intimate, and, I conclude, is going on among some of our people. I shall, in all proper ways, use my interest to prevent every thing that may tend to prejudice the general good of these governments, and am inclined to believe that this wild scheme of our people will come to nothing, though I can't certainly say."

At a General Assembly for Connecticut, holden in May, 1755, the Susquehanna Company, as were styled those who were seating lands on that river west of New York, and within the boundaries claimed by Pennsylvania and Connecticut, presented a petition praying the assent of the Legislature to a petition to his majesty for a new colony within the chartered limits of Connecticut, and describing the lands lying west of New York; whereupon, the Assembly of Connecticut, after reciting the said petition, came to the following resolution:

Resolved by this Assembly, That they are of opinion that the peaceably and orderly erecting and carrying on some new and well regulated colony or plantation on the lands above mentioned would tend to fix and secure said Indian nations in allegiance to his majesty and friendship with his subjects; and accordingly hereby manifest their ready acquiescence therein, if it should be his majesty's royal pleasure to grant said land to said petitioners, and thereon erect and settle a new colony in such form and under such regulations as might be consistent with his royal wisdom; and also take leave humbly to recommend the said petitioners to his royal favor in the premises.

On the 31st of August, 1779, an agreement was concluded between commissioners duly appointed for that purpose by the States of Virginia and Pennsylvania, respectively, whereby it was agreed "That the line commonly called Mason and Dixon's line be extended due west five degrees of longitude, to be computed from the River Delaware, for the southern boundary of Pennsylvania; and that a meridian drawn from the western extremity thereof to the northern limits of the said States, respectively, be the western boundary of Pennsylvania forever;" which agreement was ratified and finally confirmed by the Legislature of Pennsylvania, by a resolution bearing date the 3d day of September, 1780, and by the State of Virginia on the —— day of 17--. See Journals of Pennsylvania Assembly, vol. I. page 519.

On the 6th day of June, 1788, Congress directed the geographer of the United States to ascertain the boundary line between the United States and the States of New York and Massachusetts, agreeably to the deeds of cession of the said States, and also directed that the meridian line between Lake Erie and the State of Pennsylvania being run, the land lying west of the said line, and between the State of Pennsylvania and Lake Erie, should be surveyed, and return thereof made to the Board of Treasury, who were authorized to make sale thereof.

The said land having been sold, in conformity with the above mentioned resolution, to the State of Pennsylvania, Congress, on the 3d of September, 1788, passed a resolution relinquishing and transferring all the right, title, and claim, of the United States to the government and jurisdiction of the said tract of land, to the State of Pennsylvania forever.

As the purchasers of the land commonly called the Connecticut Reserve hold their title under the State of Connecticut, they cannot submit to the Government established by the United States in the Northwestern Territory, without endangering their titles, and the jurisdiction of Connecticut could not be extended over them without much inconvenience. Finding themselves in this situation, they have applied to the Legislature of Connecticut to cede the jurisdiction of the said territory to the United States. In pursuance of such application, the Legislature of Connecticut, in the month of October, 1797, passed an act authorizing the Senators of the said State in Congress to execute a deed of release in behalf of said State to the United States of the jurisdiction of said territory.

The committee are of opinion that the cession of jurisdiction offered by the State of Connecticut ought to be accepted by the United States, on the terms and conditions specified in the bill which accompanies this report.

6th CONGRESS. No. 52. 1st SESSION.

LAND CLAIMANTS IN THE MISSISSIPPI TERRITORY.

COMMUNICATED TO THE HOUSE OF REPRESENTATIVES APRIL 2, 1800.

Mr. SEWALL, from the committee to which were referred the memorials of Thomas Burling and others, of John Collier and others, and of Cato West and others, made the following report:

On so much thereof as respects the uncertainties and interfering claims, to which the rights and locations of land in the Mississippi Territory are liable, and as to rewarding and encouraging actual settlers by allowances of land to be made to them in consideration of their improvements.

In considering this part of the subjects referred to them, the committee have thought it necessary to examine by whom, and in what manner, the general rights of soil and jurisdiction in the Mississippi Territory, have been heretofore claimed and exercised. They have particularly consulted, for this purpose, the report of the Attorney General to Congress, containing a collection of charters, treaties, and other documents, relative to, and explanatory of, the titles to the lands situate in the southwestern parts of the United States;* and a digest of the laws of the State of Georgia, lately published, and submit the following brief statement of the most material circumstances which have occurred to them in this inquiry.

A contest between England and Spain, respecting the boundaries of their territories in this part of America, commenced with the earliest settlements or colonies which the English attempted in Carolina, and the Spaniards in Florida. At that period, England claimed as far south as the twenty-ninth degree of north latitude.

* See No. 21.

From Court Record of *East Bay Sporting Club v. Miller* (1928), 118 Ohio St. 360, – Plaintiff's Exhibit 20, Description of Cedar Point from Sufferers' Record

PLAINTIFF'S EXHIBIT No. 20.

Transcript of Record.

Classification record, volume 1, page 47.

Classification No. 4.

Original Grantees.	Amt.	Loss.	
Samuel Lattimer	910	19	5
Richard Potter	382	2	3
Thos. Bowhay, or Boyd	49	17	1
Ann Hancock	140	3	6
Richard Strond	23	15	.
Eben Way	15	16	1
W. Austus Piner	48	0	.
Bathsheba Skinner	180	0	.
Jacob Fenk	130	8	10
Ichabod Powers	620	8	.
Jeremiah Miller	2535	18	10
Classified by	Amt.	Classed.	
Heirs of Wm. Stewart, N. London	391	5	11
	262	11	1
	49	17	1
	93	9	.
Heirs of Richard Wm. Parkin, deceased	23	15	.
	15	16	1
	48	0	.
	60	0	.
	130	8	10
	206	16	.
Wm. Winthrop, N. York	62	8	.
Footing of Class No. 4	1344	7	,

Section No. 4, in township No. 6, in the twenty-second range, was drawn according to the mode of partition by the directors, and is now apparted to and among the owners and proprietors of the original rights and losses, which constitute classification No. 4, here recorded; and is situated next west of section No. 3, and is adjoining the same, bounded south on the south line of the town, east on section No. 3, north on the shore of the lake, and west on the west side of said town No. 6, so that said section No. 4 shall contain one equal fourth part of said township; and that this section No. 4 shall be construed so as to include the whole of the sand bar or beach lying easterly of the outlet of Sandusky bay, but not to extend east of the east line of said section.

Found in classification record, volume 1, page 47.

PLAINTIFF'S EXHIBIT No. 21.

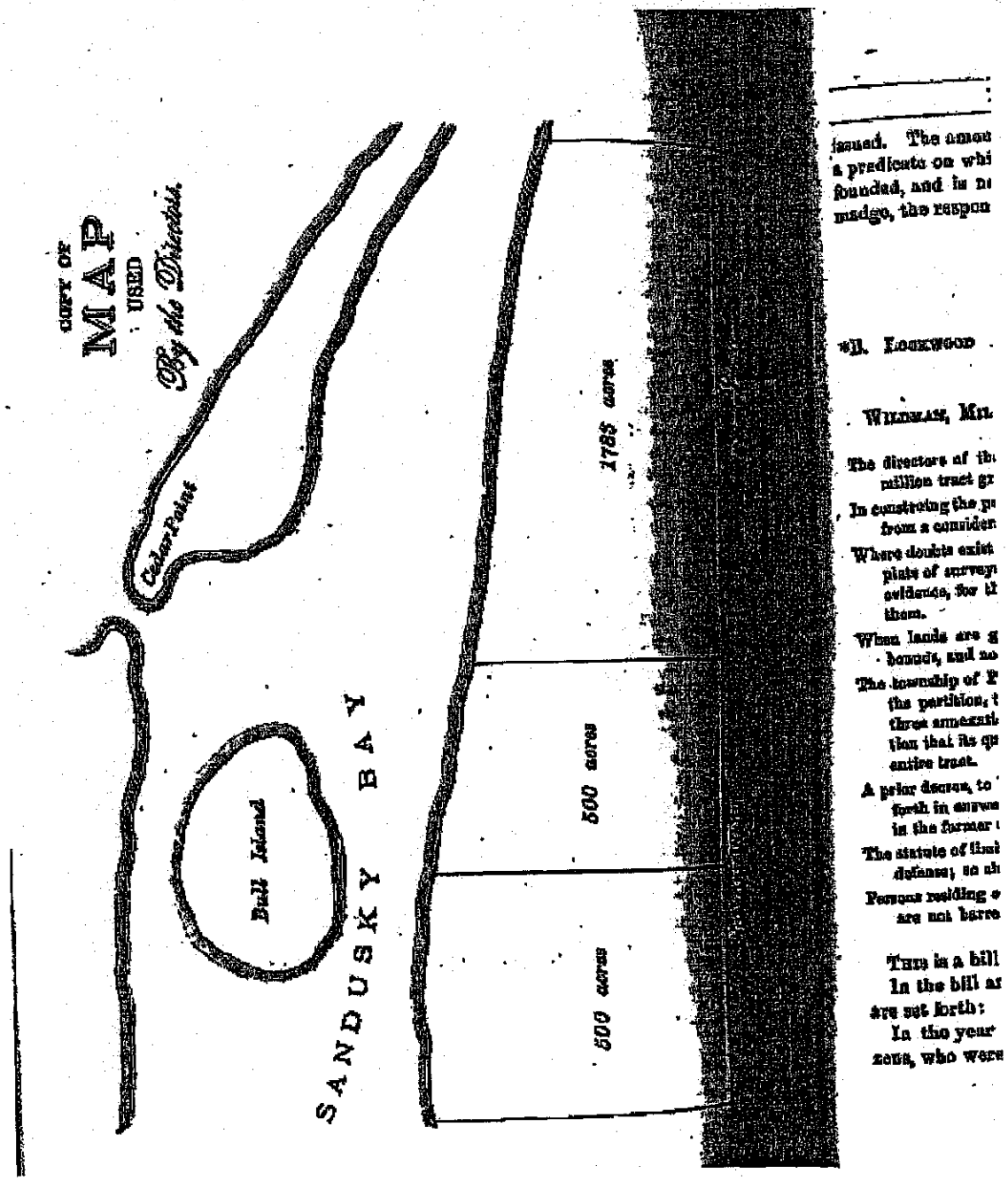
Transcript of Record.

Vol. B, pages 248 and 249, Huron county records.

Allef Meloy to Richard W. Parkin.

To all people to whom these presents shall come. Greeting: 'Know ye that I, Allef Meloy, of New London, in New London county, for the consideration of ten pound, four shillings lawful money received to my satisfaction, of Richard William Parkin of said New London, I do give, grant, bargain, sell and confirm unto the said Richard William Parkin all my right in or to certain lands commonly called the western donation lands granted by the general assembly of this state, May sessions, 1792, to the sufferers from the enemy in the late

From Court Record of *Lockwood v. Wildman* (1844), 13 Ohio 430,
Two maps included with decision



issued. The answ
a predicate on whi
founded, and is n
nudge, the respon

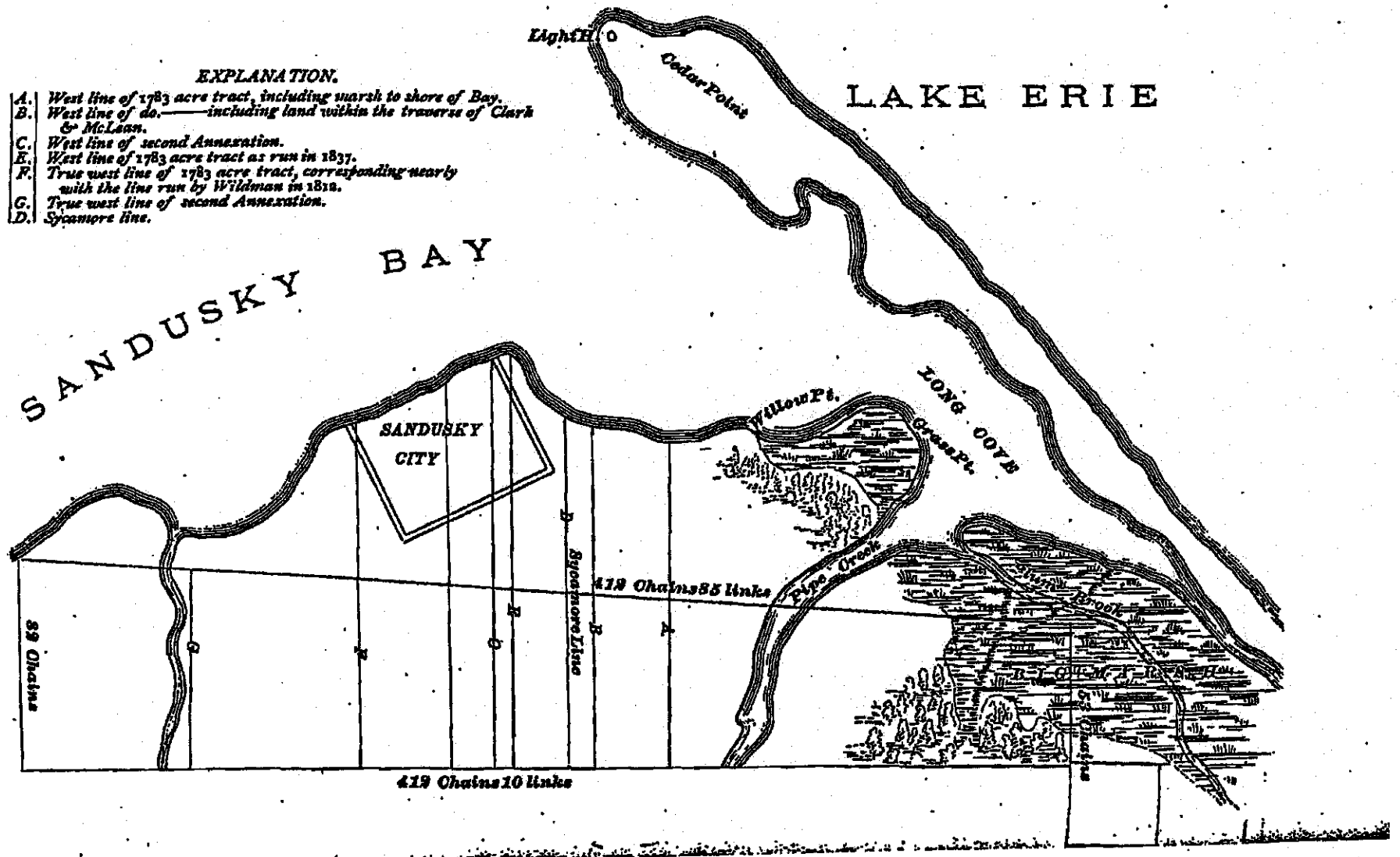
will. Lockwood

Wildman, Mis

The directors of th
million tract gr
In construing the pr
from a consider
Where doubts exist
plats of survey
evidence, for th
them.
When lands are g
bounds, and no
The township of P
the partition, t
three amendat
tion that its qu
entire tract.
A prior decree, to
forth in survey
in the former
The statute of limi
defense; no ab
Persons residing o
are not barre

This is a bill
In the bill as
are set forth:
In the year
zens, who were

Exhibit 13 (1 of 2)



A-37

Exhibit 13 (2 of 2)

From Court Record of *East Bay Sporting Club v. Miller* (1928),118 Ohio St. 360,
Plat of Survey of Lands North of Sections 3 & 4 in Huron Township, Erie County Ohio made for the East Bay Sporting Club by C. A. Judson, February, 1926 (Title block and full survey)

PLAT OF SURVEY

—OF—

LANDS NORTH OF SECTIONS 3 & 4

—IN—

HURON TOWNSHIP-ERIE COUNTY O.

—MADE FOR—

THE EAST BAY SPORTING CLUB

C.A. JUDSON - CIVIL ENGINEER & SURVEYOR - SANDUSKY O.

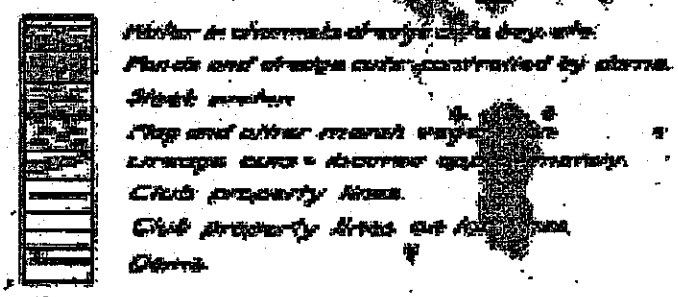
SCALE:- 1" = 300'

FEBRUARY 1926.

● INDICATES IRON PIPE MONUMENT

■ INDICATES LOCATION OF BOUNDARY STAKE

INDICATES DEPTH OF WATER IN FEET AS CONTROLLED BY GUNS



DATUM TO WHICH SOUNDINGS ETC. REFER = ELEVATION 570.27 FEET ABOVE SEA LEVEL

From Court Record of *East Bay Sporting Club v. Miller* (1928),118 Ohio St. 360, Plat of Survey of Lands North of Sections 3 & 4 in Huron Township, Erie County Ohio made for the East Bay Sporting Club by C. A. Judson, February, 1926 (Title block and full survey)

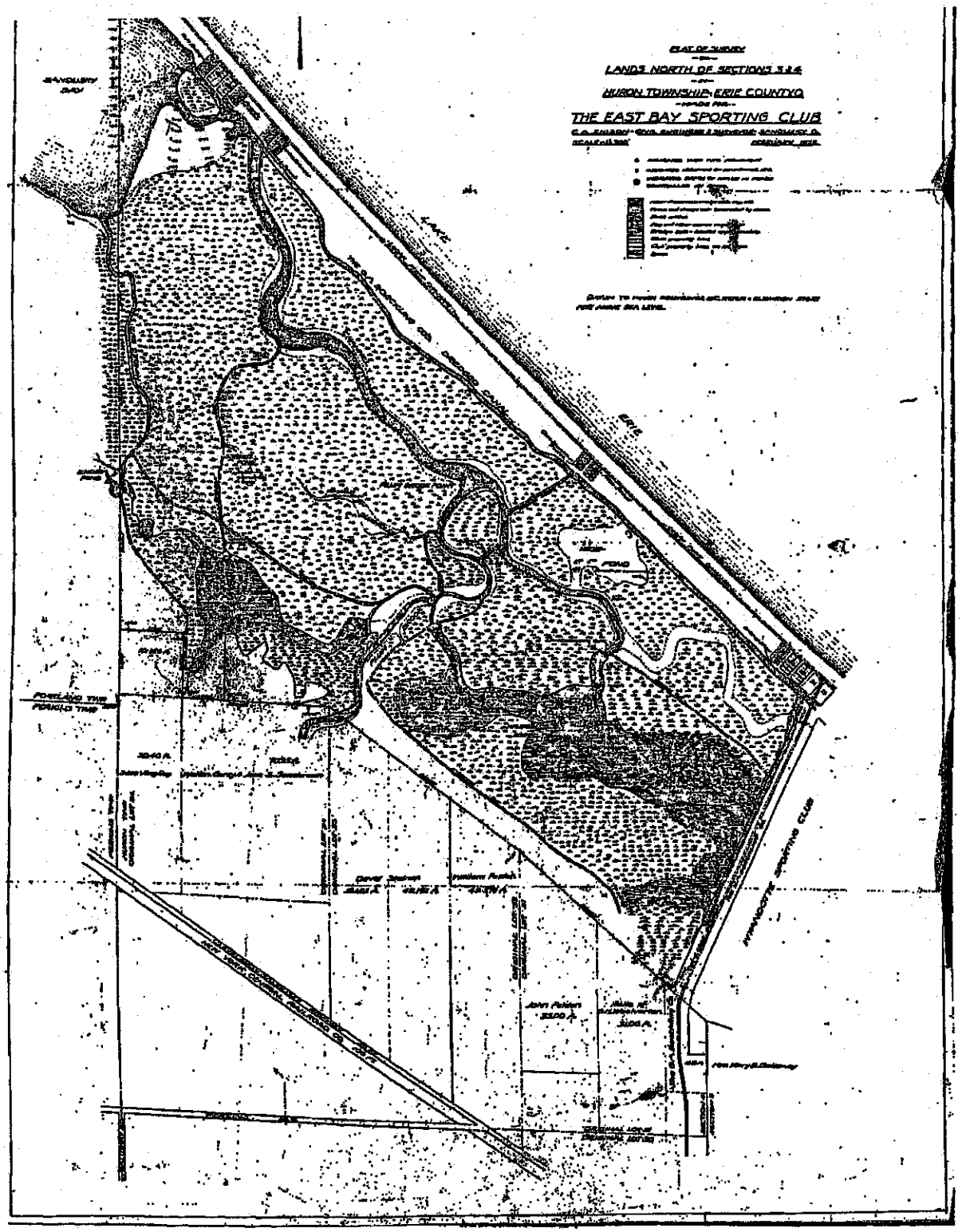


Exhibit 14 (2 of 2)

In the Supreme Court of Ohio

THE STATE OF OHIO,
Plaintiff in Error,

vs.

THE CLEVELAND AND PITTSBURG R. R. COMPANY, THE LAKE SHORE AND MICHIGAN SOUTHERN R. R. COMPANY, PENNSYLVANIA COMPANY, and THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendants in Error,

BRIEF OF PLAINTIFF IN ERROR.

EDWARD C. TURNER,
Attorney General of the State of Ohio,
Attorney for Plaintiff in Error.

Of Counsel:
ROBT. M. MORGAN,
CLARENCE D. LAYLIN.

INDEX.

APPENDIX.

gation" was the shore line. Has the right of the property owner from that time to the present grown according to his guess as to what the point of navigation is?

The rule contended for by the other side would tend to obliterate the original shore line, so that if the State should desire to possess itself of the dockage facilities of a port, the private and public lines of ownership would be a matter of dispute that might involve millions of dollars in a harbor such as Cleveland. Illustrations of this very situation are found in the cases of Jersey City vs. Washburn Brothers, 87 Atlantic, 639, and Weiberger vs. Passaic, 86 At., 59.

This Court cannot safely assume to take judicial notice of all the facts that should be considered by it before establishing a general rule constituting a departure from the common law, if the Court has any power to make such a departure. Could the court have justly appreciated the possibility of harm resulting from ownership of boat lines by railroads as shown by "The Lake Line Application" case before the Interstate Commerce Commission, supra?

The present laws of the state permit practically unlimited concentration of private property in the hands of a single interest. It is probable that the adoption as law of the theories of opposing counsel would mean that practically all of the water frontage of the City of Cleveland is now in the control of the defendants in error, except that controlled by the City itself. Such a monopoly was exactly the thing condemned in the case of Illinois vs. Railway Co., 146 U. S., 387.

The common law rule of tidal waters limited the rights of the littoral owner to high water mark. On the Lakes where the rise of the mean tides is from twenty

to thirty feet (see Whitaker's Almanac, 1911); on the Atlantic coast around Boston, about nine feet; in New York harbor between four and five feet; and on the Gulf Coast between one and two feet (see World Almanac, 1915). The tidal water rule when applied to Lake Erie is conceding more than giving the littoral owner on tidal waters rights to the high water mark, because the water level on all the Great Lakes is practically stationary and the littoral owner's land always in contact with the water. In most of the Western States, as in Iowa, contrary to the doctrine of Gavit vs. Chambers, 3 Ohio, 496, the rights of riparian owners are found limited, except as modified by legislation, to the high-water mark, and yet the court will take judicial notice of the long stretch of sloping bank between the high-water mark of such rivers and the low-water mark. If the assertion of such right by these states was conducive to the public interest, should we not hesitate to further surrender the public rights?

The theory of the other side permits a single owner, holding only six inches of dry land around the rim of any harbor on Lake Erie to control all the wharfage facilities of that harbor. Can any rule of property that would work such a result, be a good law? The mere statement of such a possibility is a complete answer in the negative.

It will be said that the need of wharves in the various harbors is imperative and the state has not provided any system for licensing the erection thereof, and therefore, the establishment of the common law rule as contended for by the state, would be calamitous. This is a plausible argument, but when it is analyzed there is very little depth to it. It is true that, if we are right, the State has been neglectful of the public interest in permitting some