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**337 N.W.2d 322**  
**STATE of Michigan ex rel. ALLEGAN**  
**PROSECUTOR,**  
**Plaintiff-Appellant,**

**v.**

**The SUMMER SCHOOL OF PAINTING AT**  
**SAUGATUCK, INC., and Mary**  
**Kay Bettles, Defendants-Appellees.**

**Docket No. 70123.**

**126 Mich.App. 81, 337 N.W.2d 322**

**Court of Appeals of Michigan.**

**Submitted March 16, 1983.**

**Decided May 18, 1983.**

**Released for Publication Aug. 1, 1983.**

[126 MICHAPP 82] Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., Fred R. Hunter, III, Pros. Atty., and Kirby J. Goodwin, Chief Asst. Pros., for plaintiff-appellant.

Hoffman & Watts by John A. Watts, Allegan, and Garrett J. Troff & Associates, P.C., Kalamazoo, for defendants-appellees.

ON REMAND

Before MACKENZIE, P.J., and T.M. BURNS and ALLEN, JJ.

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PER CURIAM.

On August 20, 1979, the trial court rendered judgment for plaintiff. Defendants appealed as of right. On April 21, 1981, this Court held that the trial court had not erred in ruling [126 MICHAPP 83] that the swamp or channel between the Kalamazoo River and Oxbow Lake is navigable. The Court also ruled that defendants' ownership extended to the middle of the lake. 105 Mich.App. 550, 307 N.W.2d 87 (1981). Both parties appealed to the Supreme Court. On March 9, 1983, the Supreme Court issued the following order:

"Leave to appeal and leave to cross-appeal considered March 9, 1983, and, pursuant to GCR

1963, 853.2(4), in lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of Bott v Natural Resources Comm, 415 Mich 45 [327 N.W.2d 838] (1982)." See 417 Mich. 914, 330 N.W.2d 854 (1983).

Both the trial court and this Court assumed that a body of water is navigable "if it is useful for recreational purposes". 105 Mich.App. 552, 307 N.W.2d 87. See Nicholas v. McDaniel, 88 Mich.App. 120, 124, 276 N.W.2d 538 (1979), rev'd. 415 Mich. 45, 327 N.W.2d 838 (1982); Attorney General ex rel. Director of the Dep't of Natural Resources v. Hallden, 51 Mich.App. 176, 214 N.W.2d 856 (1974). This Court stated:

"Defendants accept as the test for navigability the recreational use test, although they claim that the recreational use must be a reasonable one. The trial judge visited the site of the swamp and inspected it. Based upon his observations, and the evidence at trial, the judge concluded that the channels or 'cuts' in the swamp occurred naturally, although there existed some evidence of some chopping or cutting of brush. In light of the fact that there is uncontested evidence in the record that several persons had travelled in their boats between the Kalamazoo River and Oxbow Lake via this swamp, we cannot say that the lower court erred in ruling that the swamp or channel is navigable." 105 Mich.App. 553, 307 N.W.2d 87.

However, in Bott v. Natural Resources Comm., 415 [126 MICHAPP 84] Mich. 45, 327 N.W.2d 838 (1982), the Supreme Court rejected the recreational use test.

Before 1909, Oxbow Lake had been a part of the Kalamazoo River. However, between 1909 and 1911, the United States government changed the mouth of the Kalamazoo River. Over time, the western part of the old channel (now Oxbow Lake) connecting it to Lake Michigan and the northern part connecting it to the Kalamazoo River naturally closed.

Only private owners own the land around Oxbow Lake. Defendants are two of those private

owners. The only ingress or egress into or out of Oxbow Lake is on the northeast side through a swamp owned by defendant Summer School. This swamp was not a part of the old Kalamazoo River. One can gain access to the lake through the swamp through three natural cuts. On August 12, 1978, the trial judge viewed the three cuts. He found that the north cut was the most navigable:

"[I]t was a clearly discernible way of approximately 450-500 yards in meandering length, having a depth varying from 25 inches to 3 1/2 inches. On this cut, at the point it meets the Kalamazoo River, its width was more than sufficient for the normal rowboat propelled by oars to pass and had a depth of 7-9 inches; within 25 yards, it shallowed to 3 1/2 inches and its width narrowed to approximately seven feet and at this point a flatbottom rowboat with one 150 pound person aboard bottomed out (the boat bottom rested on the bed of the channel) and one could not pass through without poling. For approximately the next 200 yards, the depth of the water in this cut did not exceed 12 inches and the weeds gradually became so thick that poling was an easier method of propulsion than rowing. The boat in question was a flatbottom boat, as previously mentioned, approximately 12 feet in length and 3 1/2 feet in width drawing approximately 2 to 3 inches of water without passengers. The bottom of this cut was sandy from the point it intersects

be navigable, it must be sufficiently wide and deep to permit use for commercial purposes. 415 Mich. 63, 327 N.W.2d 838. In *Moore*, the Supreme Court held that the test is whether or not a stream inherently and by its own nature is capable of being used for commerce to float vessels, boats, rafts, or logs. In *Bott*, the one plaintiff owned all the land around a lake. The only outlet was a stream eight inches deep. The other plaintiff owned most of the land around another lake. The stream in question there was only six inches deep. The Supreme Court held that neither stream was legally navigable. In the present case, the stream is at one point 3 1/2 inches deep. A fortiori, the stream in the present case is not legally navigable.

Furthermore, the Supreme Court upheld the rule that a dead-end private lake cannot be used as a highway. 415 Mich. 60, 70, 327 N.W.2d 838; *Winans v. Willetts*, 197 Mich. 512, 163 N.W. 993 (1917). In our original opinion, this Court stated: "Oxbow Lake is a dead-end private lake." 105 Mich.App. 555, 307 N.W.2d 87. Therefore, defendants have the right to exclude the public from it.

Because *Bott* did not address the second issue in the present case, we presently see no reason to change our position on that issue.

Reversed and remanded with instructions to proceed according to this opinion.

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with the River and then traveling westerly towards Oxbow for approximately 50 [126 MICHAPP 85] to 75 yards. Upon inspection, there was little or no evidence that this cut was made artificially. At the time of inspection by the Court, there did not appear to be a flow of water in this cut."

After reconsidering the first issue after reading *Bott*, we feel constrained to reverse our prior decision. While rejecting the recreational use test, *Bott* reaffirmed the log-flotation test first enunciated in *Moore v. Sanborne*, 2 Mich. 519, 59 Am.Dec. 209 (1853). Thus, in order for a creek to