RIPARIAN RIGHTS

NEW JERSEY. DEPARTMENT
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& Development. Bur. of Navigation.

BUREAU OF NAVIGATION
~~NEWARK, N. J.~~
State of New Jersey
Bureau of Navigation
137 East State Street
Trenton 25, New Jersey

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By PETER J. GANNON
Chief, Bureau of Navigation

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THE PURPOSE OF THIS REVIEW is to attempt, within limited space, to cover riparian rights, a complex subject so interesting that one could write unceasingly about it; also to show the importance of riparian receipts to the Public School System of New Jersey. We will try to keep our summations within tolerable length.

The riparian laws of New Jersey are now administered by the Department of Conservation and Economic Development, Division of Planning and Development, Bureau of Navigation.

A Planning and Development Council composed of twelve members pass on riparian instruments. Grants and leases must be signed by not less than seven members of the Council and then approved by the Commissioner of Conservation and Economic Development, the Attorney General, and the Governor.

The Navigation Bureau has offices at ~~106 Bank Street, Newark, New Jersey~~, where records are maintained.

State's Title to Riparian Lands[1]

A very good outline of the State's chain of title to riparian lands is contained in a Legislative Report submitted in 1907. It follows in toto below except for occasional interpolations; we have omitted quotes.

Formerly the common or popular idea was that the owner of the abutting upland was also the owner of the land under water adjacent thereto, subject only to the public right of navigation. Consequently, there was much objection and some litigation on the part of the owners of the water-front lands when the state through its appointed agents, by reclamation and construction of docks and wharves, took absolute and notorious control of its lands under

[1] For a complete judicial statement of the historical background of title to lands below the high-water line in New Jersey see *Arnold* vs. *Mundy*, 6 N. J. L. 1. See also *Gough* vs. *Bell*, 21 N. J. L. 156, 22 N. J. L. 441, 23 N. J. L. 624.

water from the line of mean high water out to such limits as were fixed for the improvement.

The title to the State is founded in the ancient doctrine of the sovereignty of the King. The first diversion of the title of the King is that of the grant of March 12, 1663, from Charles II to James, the Duke of York. This grant covered much of the land along the coast, from Maryland to Maine, and on June 24, 1664, James, the Duke of York sold to Berkely and Carteret that part of the grant of March 12, 1663, from King Charles II, now known as New Jersey. In 1676 New Jersey was divided into East and West Jersey and was held by the Lords Proprietors.

In the year 1702 these Proprietors surrendered to Queen Anne all the rights of the Government held by them reserving, however, the rights of property. The title to the soil of the tidal waters was not within the reservation, and passed by the surrender of the Government of the Proprietors to the Crown of England.

Thus the title to the lands under water was vested in the King of Great Britain at the time of the Revolution of 1776. By the law of nations and the right of conquest incident to the successful War of Independence this title became vested in the people of the Colony, now State, of New Jersey.

No general supervision of control seems to have been exercised by the State over its lands under water until 1851, when the Legislature passed what is known as the Wharf Act, entitled "An Act to Authorize the Owners of Lands upon Tide Waters to Build Wharves in Front of the same" (P. L. 1851, p. 335). The Legislature did, however, from time to time, by special acts, make grants of riparian lands to different persons.[2]

The Wharf Act gave to the Freeholders of the various riparian counties the authority to license, *under certain conditions,* riparian owners to build wharves out into the tidal waters of the State.

In 1864 (P. L. 1864, p. 681), the Legislature appointed a Commission to look into the subject of the riparian rights of the State, and in 1865 this Commission made a report. In 1869 (P. L. 1869, p. 1017), the act was passed creating the Riparian Commission and repealing the Wharf Act as to the Hudson River, New York Bay and Kill von Kull. At this time if holders of Legislative grants along the Hudson River wanted a paper capable of being recorded they were

[2] Under the Act of 1869 authority of the riparian commissioners to make grants of tidal lands was limited to the tidewaters of Hudson River, New York Bay and Kill von Kull, lying between Enyard's Dock on the Kill von kull and the State of New York. *Fitzgerald* vs. *Faunce,* 46 N. J. L. 536. Under the Act of 1871 the authority was extended to include all lands under tidewater, but the right to a grant was limited to the owner of the ripa. Any grant to one except such riparian owner is ultra vires. *Polhemus* vs. *Bateman,* 60 N. J. L. 163. The right to grant to a person other than to the riparian owner was subsequently enacted into law. However, such pre-emptive right is a property right. *Pomrapau Corporation* vs. *City of Bayonne,* 126 N. J. E. 479.

required to pay for it at a rate of $50.00 per foot front of riparian lands occupied. In 1891 (P. L. 1891, p. 216), the Wharf Act was repealed as to the rest of the tidal waters of the State, and thereafter the Riparian Commission was the only source through which riparian grants were made. The Riparian Commission was succeeded in 1914 by the Board of Commerce and Navigation and the Board by the Department of Conservation in 1945 and in 1949 by the Department of Conservation and Economic Development.

Attention is here called to the fact, that until 1891 the Freeholders of the riparian counties of the State also had authority to grant licenses to build docks, excepting as to the Hudson River, New York Bay and Kill von Kull.[3]

It can be added here that Freeholder's licenses are still of record in the North Jersey Counties and some allowance is made in terms of Riparian grants provided provisions of the 1851 (Wharf Act) Law have been complied with.

Brief summaries of the "Wharf Act" and the repeal of same are given below:

The 1851 Wharf Act requires that (1) License must be recorded in Book of Deeds of County; (2) Construction must be accomplished within five years of the date of issuance of license and (3) The license is not assignable and passes in title with the upland. (P. L. 1851, p. 335.)

The 1891 Repeal of the Wharf Act of 1851, states that it does not affect any license issued prior to July 1, 1891, or any construction made under such license, provided such construction was completed by July 1, 1891. It stipulated that no construction was to be done after the date of July 1, 1891 (P. L. 1891, Chapter 124, p. 216).

Federal vs. State Jurisdiction

By the Federal Constitution the States ceded to the United States Government the right to regulate commerce among the States. No title to lands under water was conferred upon the Federal Government by the Constitution;[4] the States retaining title to be disposed of as they saw fit.

Over a period of 100 years the Supreme Court of the United States in 54 decisions held that the ownership of lands beneath navigable water lies in the States and in those to whom the States have given

[3] It is to be observed that in order for the license to be effective, the wharf must have been completed before January 1, 1892. Some time ago, the Harbor Commission refused to rely on an affidavit furnished to prove the completion of the wharf before that date. All doubts as to whether a wharf now existing was completed before January 1, 1892, were resolved by the Attorney General in favor of the State.

[4] *Pollard* vs. *Hagan,* 3 How. 212.

grants.[5] According to a report by the United States Senate Committee on the Judiciary (1946), there is no decision to the contrary by any court in the nation.

However, in 1946, because of a reversal of Federal policy and continual sniping at the States' title by certain Federal Agencies, a "crop" of resolutions were introduced in both Houses of Congress to remove once and for all any claim that the Federal Government might have to lands under water. A composite measure known as H. J. R. 225, constituting a quitclaim by the Federal Government emerged from the "crop" and had the endorsement of 46 Attorneys General and many others.

The measure passed both Houses, but was vetoed by the President, who referring to a suit against the State of California by the Government, stated that Congress was not the proper forum to decide a matter that was then pending in the Courts. This temporarily quieted the legislation but not the title.

The question "oil" and accusations of "grab" crept into the deliberations on H. J. R. 225, but the United States Supreme Court decided that the United States had "Paramount Rights" and then it remained for Congress to decide what these rights were. The issue remained in Congress becoming a high-priority question in the 1952 Presidential Campaign. Finally on May 22, 1953, President Eisenhower signed and approved P. L. 31, 83d Congress, Chapter 65, First Session (H. R. 4198) the "Submerged Lands Act"; "To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural resources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries."

The definition of "lands beneath navigable waters" as included in this law follows:

"(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;

[5] Chief Justice Hughes, in *Borax Consolidated* vs. *City of Los Angeles,* 296 U. S. 10, 56 S. Ct. 23, said:

"The controversy is limited by settled principles governing the title to tidelands. The soils under tidewaters within the original States were reserved to them respectively, and the States since admitted to the Union have the same sovereignty and jurisdiction in relation to such lands within their borders as the original States possessed. This doctrine applies to tidelands in California. . . . It follows that if the land in question was tideland, the title passed to California at the time of her admission."

In this case the City of Los Angeles brought suit to quiet title to land claimed to be tideland of Mormon Island situate in the inner bay of San Pedro now known as Los Angeles Harbor.

(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."

The law is too long to include in this summary but there should be little doubt now as to State's title.

As far as New Jersey is concerned, on April 11, 1783, the final treaty of peace was executed with the British Crown acknowledging the 13 original States by name to be free, sovereign and independent States and relinquished unto them all claims to the government, proprietary and territorial rights of the same and part thereof. Article 2 of the treaty established the boundary of these original States into the Atlantic Ocean, comprehending all islands within 20 leagues of any part of the shores of the United States.

Advocates of Federal ownership of tidelands contend that the boundaries of the original States were not fixed at 20 leagues in the Atlantic Ocean, but that the treaty only relinquished ownership of the British Crown to the islands within that distance from shore.

However, a map accompanying the treaty shows a solid line paralleling the shore of the 13 original States 20 leagues or 60 miles off shore and is labeled "An accurate map of the United States of America according to the Treaty of Peace, 1783."

It appears that the Federal Government concerns itself primarily with the free flow of navigation, establishment and maintenance of channels by United States Engineer Corps, policing of the waters by the Coast Guard and the supervising of the various ports.

While on the subject of jurisdiction it might be well to mention here a treaty between the States of New York and New Jersey ratified in 1834 by the Twenty-Third Congress, First Session. The treaty provided that the State of New York "shall have and enjoy exclusive jurisdiction of and over ALL of the waters of Hudson River lying west of Manhattan Island." There are certain exceptions such as lands under water west of the center of the Hudson River, water front structures, grounded vessels, of which there are plenty now around Edgewater, or vessels fastened to a water front structure. Practically the same provision applies through Kill von Kull and Staten Island Sound to Woodbridge Creek.

For all this New Jersey acquired similar jurisdiction on Staten Island Sound and Raritan Bay south of Woodbridge Creek and west

of a line drawn from the lighthouse at Prince's Bay to the mouth of "Mattavan" Creek.

Clarification of Terms

In every field of specialized knowledge certain terms take on definite meanings that have practically universal acceptance. There are therefore fundamental concepts of riparian law and certain definitions that are well established. The terms set forth below are not exhaustive, but in setting them forth the reader will, I believe, gain some insight into the extent of the function of the Department.

Basic, of course, is the term "Title." This as we have seen above is the ownership of riparian lands which is vested in the State until the State divests itself of that title in accordance with statutory mandates.[6]

In speaking of riparian lands we must take cognizance of the "Ripa"—the bank of lands bordering on the mean high-water line of a tidal waterway beyond which the waters at the mean high tide stage do not overflow. The owner of the ripa becomes an important person as we shall see.[7]

The "Riparian Rights" affect the lands under the tidewater between the mean high-water line and the exterior line for bulkheads or piers which may be acquired or may have been acquired from the State by grant or rented by lease, easement or license. But it must be borne in mind that the owner of the ripa has a "pre-emptive" right—the first or prior right vested in the owner of the upland property (ripa) bordering on the mean high-water line to apply and receive from the State a grant for the lands under water abutting the ripa. A

[6] An instructive case is *City of Hoboken* vs. *Pennsylvania Railroad,* 124 U. S. 656, 31 L. Ed. 543. Supreme Court construing riparian laws in the State of New Jersey:

"In the examination of the effect to be given to the riparian laws of the State of New Jersey by the Act of April 11, 1864, in connection with the supplementary Act of March 31, 1869, it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the State, were, according to its laws, the property of the State as Sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce. . . .

"The intent of this legislation is therefore manifest to treat the title and interest of the State in these shore lands as a distinct and separate estate, to be dealt with and disposed of in accordance with the terms of the statutes; first, by a sale and conveyance to the riparian owner himself, or to his assignees; and, second, in case of his neglect to take from the State its grant on the terms offered, then to a stranger, who, succeeding to the State's title, would have no relation to the adjacent riparian owner, except that of a common boundary. The title acquired by such a grantee, therefore, differs in every respect from that of a riparian owner to the alluvial accretions made by the changes in a shifting stream which constitutes the boundary of his possessions. The latter comes to him by virtue of his title to land bounded by a stream, and belongs to him because it is within the description of his original grant; but the title under the New Jersey grants is not only of a new estate, but in a new subject divided from the upland or riparian property by a fixed and permanent boundary."

[7] It must be observed that the "ripa" is not to be confused with the "shore." The shore is that strip of land that lies along tidewater over which the tide flows between the line of ordinary high water and the line of ordinary low water. See Farnham on "Water and Water Rights," Volume 1, page 227. See *Amos* vs. *Norcross,* 58 N. J. E. 256.

person other than the owner of the ripa can make application for the acquisition of riparian rights and acquire them provided he has given the owner of the ripa six months' notice, and such pre-emptive right is not exercised by the owner of the ripa before the expiration of the six-month period.[8]

The State may convey the fee or a lesser interest in the tidal lands. It may give a "Grant," a conveyance in fee simple of such riparian lands. The price and terms of the grant are made by the council.[9] The State may lease. Such leases usually run for a term of 15 years. The yearly rentals on a lease are computed on 7% of the capital sum; the capital sum being the frontage multiplied by the foot front price. The annual payments do not accrue to the benefit of the lessee and do not apply to the capital sum should a grant be desired.

The State may grant a "License." The license is issued by the Department for the maintenance of a structure and is issued usually when such structure extends beyond the pierhead and bulkhead line; or for underwater utility crossings. "Easements" are sometimes issued for public roads.

The grant made by the State to the owner of the ripa usually extends to the pierhead and bulkhead line. The "Bulkhead Line" is the line established by the Secretary of War, sometimes adopted by the State of New Jersey, on which a structure may be built and to which structure solid fill may be deposited. The "Pierhead Line" is also established by the Secretary of War and sometimes adopted by the State of New Jersey, to which an open structure may be built, on which, however, a tide can ebb and flow. The term "Pierhead-Bulkhead Line" is a combined line and the solid fill may be extended thereto.

There are other terms which are constantly being used in connection with streams and riparian rights. The "channel" of a stream is a natural or artificially dredged bed of a waterway as followed by navigation through which the main stream of the waterway flows. The "Fairway" is the deep water of a stream which must be left unobstructed for free and uninterrupted navigation.

As stated above, sometimes the owner of the ripa has rights which cannot be pre-empted and it is important to determine who actually is the owner of the ripa with respect to the waterway line and this difficulty arises through recession and accretion. Recession occurs where the ripa is cut back from the normal position by erosion. Where

[8] See Note 2 *supra.*

[9] Observe that by force of the statute a riparian owner when he extends his shore front must, if the high-water line is substantially a straight line, so extend his side lines so as to make them rectangular with the high-water line. When the high-water line is not straight the extension of the shore front must be divided proportionately among the riparian owners. See *Delaware, Lackawanna & Western Railroad* vs. *Hannon,* 37 N. J. L. 276. See also *Manufacturers Land & Improvement Co.* vs. *Board of Commerce & Navigation,* 98 N. J. L. 638.

the lands are eroded by natural causes the owner of the ripa loses that area. It becomes part of the lands under tidewater.[10] Title thereto becomes vested in the State of New Jersey.[11] There may be an accretion which occurs where the ripa extends seaward or riverward by natural deposits and building of beach lands. Land so extended by natural causes accrues to the owner of the ripa.[12]

There are also "Construction Permits" which are allowed by the Council. The necessity of obtaining construction permits for water front improvements from the Navigation Bureau to comply with Revised Statutes 12:5-3 to 12:5-6, inclusive, was recently emphasized when a purchaser required that the seller submit proof that the water front construction, undertaken some 25 years ago, was completed under permission from the State so as to remove any possibility of abatement proceedings under Revised Statutes 12:5-6. Construction permits are a legal necessity.

Value to the School Fund

The proceeds from riparian sales are used for the support of the free public schools. To establish the benefit that riparian sales have been to the State, the writer had prepared a memorandum outlining the history of riparian moneys. About 96 per cent of the School Fund principal is the result of riparian sales.

The review disclosed that the Trustees of the School Fund were organized on February 12, 1818, when Abraham Lincoln was nine

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[10] In *Harz* vs. *Board of Commerce and Navigation,* 126 N. J. E. 9, Vice-Chancellor Fielder stated:

"When what was once fast land has been lost by gradual erosion and is entirely submerged at high tide, title to the submerged soil is in the state so long as submergence continues. The principle is that in conveyances of land on tidewater, the grantee takes with knowledge of changes to which the shore is subject. He takes no fixed freehold but one that shifts with the changes. He is subject to loss by the same means that may add to his lands and as he is without remedy for his loss, so is he entitled to gain accretions."

Thus it was held that where a lot granted by the City was formerly riparian lands but became submerged and was wholly under tidewater and the high-water line was on an individual's lot at the date of conveyance to the City, the City never became a riparian owner and was not entitled to a riparian grant.

[11] The exclusion of the high-water line of the tide by artificial means as far as the State is concerned does not change the question of the title. Title of the lands under the ordinary high-water line as existed prior to such change remains the same. See *Kirk* vs. *Dempsey,* 85 N. J. L. 304.

[12] *Ocean City Association* vs. *Shriver,* 64 N. J. L. 550. The right to alluvion depends upon the fact of the contiguity of the estate to the waters. The theory of accretion and title again is predicated upon the theory of compensation, in view of the fact that the owners of riparian lands are subject to loss by erosion.

An interesting and instructive case will be found in *Dewey Land Company* vs. *Stevens,* 83 N. J. E. 314, decided by the Court of Errors and Appeals. This case presents the problem of erosion and accretion at the same time. The headnote in this same case will give a summary of the problem.

"Land bounded by the ocean was conveyed in 1856; subsequently the ocean encroached on the beach and the land in dispute was under water; while that condition existed, a grant was made by the riparian commissioners to the defendant's predecessor in title; subsequently the ocean receded and the former owners made grants, under which alone the plaintiffs claimed land embraced in the State's riparian grant; no claim was made by complainants as riparian owner to the land in question by accretion.—Held, that complainants could not sustain their claim to the land under the grants from the former owners as against the State's riparian grant."

years old. The original Trustees were: Governor Isaac H. Williamson (Federalist); the Vice-President of the "Council"; the Speaker of the House of Assembly; the Attorney General, and the Secretary of State.

The present members of the School Fund Trustees are: the Governor; the Secretary of State; the Attorney General; the State Comptroller; the State Treasurer, and the Commissioner of Education.

The act of 1818 appropriated certain funds to make up the principal of the School Fund and contains such interesting items as 250 shares of stock in the Newark Turnpike Company; shares in the Trenton Banking Company; sale of banking house and lot in Jersey City; shares in the Sussex Bank at Newton; proceeds of taxes on banking transactions, etc.

Under the act of 1849, the distribution for the support of the free public schools was increased from $30,000.00 to $40,000.00; the additional $10,000.00 to be paid from the State Treasury. However, it appears that the State Treasurer of that day did not contribute his $10,000.00.

The Fund appeared to be in a state of flux until 1869 when the old Riparian Commission was appointed as a result of an 1864 Commission reporting to the Legislature on the subject of riparian rights and their interest to the State. By 1871 the Fund appears to have become stabilized and the principal at that time amounted to $566,000.00. It increased progressively until in 1928 the principal was about $10,000,000.00 and in 1954 the principal was slightly in excess of $16,000,000.00.

Frugal management and investments by the trustees allowed disbursements from the Fund for the support of the free public schools as follows: 1873-1895, $100,000.00 per annum; 1896-1913, $200,000.00; 1914-1920, $250,000.00; 1921-1922, $300,000.00; 1923, $400,000.00; 1924, $450,000.00; 1925-1930, $500,000.00; 1931-1933, $600,000.00; 1934-1945, $500,000.00. Transfers to the General Treasury are now at the approximate rate of $400,000.00 per annum.

Periodically, during the early life of riparian collections, diversion was made into the general State Treasury until 1894, when the Legislature passed a measure dedicating riparian moneys to the School Fund. Now the money derived from that source is used entirely for the support of the school system and can be used for no other purpose. (See Sec. IV, Article VIII, State Constitution, 1947.)

PARTIAL LIST OF COURT DECISIONS FOR REFERENCE NOT OTHERWISE REFERRED TO HEREIN

Simpson vs. *Moorhead,* 65 N. J. Eq. 623, 56 A. 887.

Bacon vs. *Mulford,* 41 N. J. L. 59.

Stevens vs. *Paterson & N. R. Co.,* 34 N. J. L. 532, 3 Am. Rep. 269.

Ocean City Ass'n. vs. *Shriver,* 64 N. J. L. 550, 46 A. 690, 51 L. R. A. 425.

Keyport & M. P. Steamboat Co. vs. *Farmers' Transp. Co. of Keyport,* 18 N. J. Eq. 13, affirmed 18 N. J. Eq. 511.

McCarter vs. *Lehigh Valley R. Co.,* 78 N. J. Eq. 346, 79 A. 93.

American Dock & Improvement Co. vs. *Trustees for Support of Public Schools,* 39 N. J. Eq. 409.

Harz vs. *Board of Commerce and Navigation,* 119 N. J. L. 305, 196 A. 678.

State vs. *Owen,* 41 A. (2d) 809, 23 N. J. Misc. 123.

Leonard vs. *State Highway Dept.,* 24 N. J. Super. 376, 94 A. (2d) 530, affirmed 102 A. (2d) 97, 29 N. J. Super. 188.

Attorney General vs. *Goetchius,* 142 N. J. Eq. 636, 61 A. (2d) 64.

City of Passaic vs. *State, by Com'r. of Conservation and Economic Development,* 30 N. J. Super. 32, 103 A. (2d) 174.

Bailey vs. *Driscoll, Governor of State of N. J., et al.,* reversed 34 N. J. Super. 228.