Riparian Boundary issues – Common Law & Statute

New York Presentation

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Five common classes of Dispute:

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

Email from Bruce S. Flushman.

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

Three misconceptions:

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

Email from Bruce S. Flushman.

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

Waters of the State – Property in Virginia (1931)

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

Wall Street Journal: April 10, 2013
By Cameron McWhirter

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

What property was originally conveyed??

Significance of Common Law: Wis.
City of Milwaukee v. State:

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

Intent of the Deed: New York (1)
Egelhoff v. Simpson:

- When the description in a deed or devise is clear and explicit, and without ambiguity, there is no room for construction or for the admission of parol evidence to prove that the parties intended something different.
- where there is no ambiguity in a description referring to a monument, the location of which is not in doubt, parol evidence is not competent to show the intention of the parties adopting the monument, but such intention is to be determined as a legal proposition.
- …when the description of lands in the conveyance refers to any artificial monument as the boundary, such monument is controlling.

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

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

Intent and Watercourse: New York (1)
Guilderland v. Swanson:
29 A.D.2d 717; 286 N.Y.S.2d 425; 1968

- The parties are in general agreement as to the principle involved, which within recent years has been reiterated thus:
- "The early New York cases of *Luce v. Carley (24 Wend. 451, 453 [1840])* and *Child v. Starr (4 Hill 369, 373 [1842])* restate the holdings of the English cases and texts that a grant runs to the middle of a river when the granted land in terms touches the water and when there is no express inclusion or exclusion of the bed.
- All the cases mean this: that a grant of the stream bed is ordinarily presumed

Shoreline Case Study: New York (1)

Dolphin Lane v. Southampton:

- We hold that it was error as a matter of law for the lower courts in this case to ground determination of the location of the high-water line along the southern shore of Shinnecock Bay and thus the location of the northern boundary of appellant's property in the Town of Southampton by reference to the type-of-grass test introduced by respondent town.

Shoreline Case Study: New York (2)

Dolphin Lane v. Southampton:
37 N.Y.2d 292; 333 N.E.2d 358; 1975

- It is not seriously disputed in formulation that the northern boundary line of appellant's property facing on Shinnecock Bay is the high-water line.
- The lower courts so held and we concur.
- The sharp dispute between the parties, joined by others asserting a broad interest in the outcome, is as to the method or proof by which the high-water mark shall be precisely located on the land.

Shoreline Case Study: New York (3)

Dolphin Lane v. Southampton:
37 N.Y.2d 292; 333 N.E.2d 358; 1975

- Attaching real significance as we do to the importance of **stability and predictability in matters involving title to real property,** we hold that the location of the boundary to this shore-side property depends on a combination of the verbal formulation of the boundary line
- -- i.e., the high-water line -- and the application of the **traditional and customary method** by which that verbal formulation has been put in practice in the past to locate the boundary line along the shore.

Shoreline Case Study: New York (4)

Dolphin Lane v. Southampton:
37 N.Y.2d 292; 333 N.E.2d 358; 1975

- To accept the linguistic definition but then to employ an entirely new technique, however intellectually fascinating, for the application of that definition, …
- …with the result that the on-the-site line would be significantly differently located, would do violence to the expectations of the parties and introduce factors never reasonably within their contemplation.

Shoreline Case Study: New York (5)

Dolphin Lane v. Southampton:

- Thus, to recognize, as the town's argument must, that the type-of-grass test for location of the high-water mark may one day be replaced by an even more sophisticated and refined test for determining the high-water line, …
- …with a consequent shift again in the on-the-site location of a northern boundary line, …
- …is to introduce an element of uncertainty and unpredictability quite foreign to the law of conveyancing.

Shoreline Case Study: New York (6)

Dolphin Lane v. Southampton:
37 N.Y.2d 292; 333 N.E.2d 358; 1975

- There was uncontroverted testimony here that it was the long-standing practice of surveyors in the Town of Southampton to locate shore-line boundaries by reference to the line of vegetation.
- To give effect to such uniform practice is not, as the town contends, to delegate arbitrary powers to surveyors to determine property lines; rather it is the obverse,…
- … namely, to recognize that property lines are fixed by reference to longtime surveying practice.

Shoreline Case Study: New York (7)

Dolphin Lane v. Southampton:
37 N.Y.2d 292; 333 N.E.2d 358; 1975

- 'Courts should not undertake to reverse the action and tradition of centuries, and change titles which have become vested under contrary views'."
- The controlling principle here is that of which we wrote in *Heyert v Orange & Rockland Utilities (17 NY2d 352, 363)*:

Creek as a Monument: Maryland (2)

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

Shoreline Case Study: New York (8)

Dolphin Lane v. Southampton:

- "Whatever the rule might be if this were a case of first impression, it is certain that thousands of deeds conveying rights of way between private parties and instruments of dedication of public highways have been made on this rule, …
- …which has existed since the common law began in this State and which received its most recent expression unequivocally in this court in 1959.
- It has ripened into a rule of property which cannot be changed retrospectively without altering the substance of prior land grants."

Public Trust Doctrine Early Considerations

Creek as a Monument: Maryland (1)

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

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

Public Trust Doctrine: New York (1)

Landmark West! v. New York:

- Rooted in Roman and English law, "**the public trust doctrine is based on the notion that the public holds inviolable rights in certain lands and resources**, and that regardless of title ownership, the state retains certain rights in such lands and resources in trust for the public."
- **Historically, the doctrine applied to natural resources such as tidelands, bottoms of seas and oceans,** and to navigable waters of lakes and streams.
- …New York courts have extended the public trust doctrine beyond the waters to include parkland.

Public Trust Doctrine: New York (1)

Lupo v. Town of Huron:
10 Misc.3d 473 (2005) 799 N.Y.S.2d 405

- "Under the public trust doctrine the State holds **lands under navigable waters and the foreshore** in its sovereign capacity as trustee for the beneficial use and enjoyment of the public.
- **The doctrine grows out of the common law concept of the jus publicum, the public right of navigation** and fishery."

Public Trust Doctrine: Early Ruling (3)

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

although the **king is the owner of this great coast, and, as a consequent of his propriety,** hath the primary right of fishing in the sea and creeks, and arms thereof,

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

Public Trust Doctrine: Early Ruling (1)

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

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

Great Lakes: Technical issues: Michigan (1)

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

Public Trust Doctrine: Early Ruling (2)

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

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

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

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

Great Lakes: Technical Issues: Michigan (2)

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

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

Public Trust Doctrine: Great Lakes (1)

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

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

Public Trust Doctrine: Great Lakes (2)

Illinois Central Railroad v. Illinois

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

Public Trust Doctrine: Great Lakes (3)

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

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown,

…**But it is a title different in character from that which the State holds in lands intended for sale.** It is different from the title which the United States hold in the **public lands which are open to preemption and sale.** It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.

Public Trust Doctrine: Great Lakes (4)

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

But the **decisions are numerous** which declare that such property is held by the State, by virtue of its sovereignty, **in trust for the public**. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State.

The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

Low Water Mark or… High Water Mark??

Mean High Water Mark: New York (1)

Berens v. Sands Point:

- Upon review of the record, it is clear that the Planning Board's determination herein was not illegal but rather was based upon a **reasonable interpretation of the term "high water mark"**, that is, the mean of all the high tides over a certain period of time …

Mean High Water Mark: New York (2)

Berens v. Sands Point:
101 A.D.2d 838; 475 N.Y.S.2d 297; 1984

- Moreover, the record indicates that the **customary surveying practice in the Village of Sands Point** was to **calculate the location of the high-water mark by reference to the mean high-water line.**
- "To give effect to such uniform practice is not * * * to delegate arbitrary powers to surveyors to determine property lines; rather it is the obverse, namely, to recognize that property lines are fixed by reference to long-time surveying practice" *(Dolphin Lane Assoc. v Town of Southampton, 37 NY2d 292, 297).*

Public Trust Doctrine Expanded?: Md. (1)

Clickner v. Magothy River Assn:

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

Delaware – Low Water Mark State: (3)

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

- **In 1851**, in ***Bickel v. Polk, 5 Harr. 325***, Chief Justice Booth, speaking for the Delaware Superior Court, recognized that the title of an owner of land adjoining tide water **"runs to low water mark."**
- Three years later, the Delaware Court of General Sessions stated in ***State v. Reybold, 5 Harr. 484 (1854)***, that "a riparian proprietor, or owner of land fronting on a navigable river, holds to the law water mark."
- These early decisions of the various Trial Courts of our State have **been neither criticized in any later decision nor challenged** by appeal over the years,

Public Trust Doctrine: Md. (2)

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

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

Delaware – Low Water Mark State: (4)

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

- The State attempts to demonstrate that the rule announced in ***Bickel, Reybold***, and ***Harlan*** is dictum; that it is historically and legally contrary to the common law of England and colonial Delaware; and that it is not the majority rule prevailing elsewhere.
- **We do not enter into a discussion** of **these interesting historical and legal questions.** Assuming, arguendo, that the State's contentions are technically and historically correct, our conclusion is unchanged.

Some States: Low water mark: Virginia (1)

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

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

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

Low Water by Legislative act: Virginia (2)

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

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

Colonies contest River use – Ohio (2)

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

Part II
Rivers and Streams: Early History

Some early Definitions Of Navigability

Colonies contest River use – Ohio (1)

Hutchinson V. Thompson: 9 Ohio 52; 1839

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

NJ Riparian – Ebb and Flow Tide Test

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

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

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

Pa: Delaware River Status (1)

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

Technical vs. Popular Navigabliity: Ohio (1)

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

Selecting Criteria for Navigablity (1)

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

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

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

Significance of Fall Line

Navigable in "popular sense": Maryland (1)

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

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

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

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

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

By John Filson. Published in 1784. (1)

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

Two Different Tests: Maryland (1)

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

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

 (2)

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

Tide Test Modified: New York (1)

People v. Canal Appraisers: 33 N.Y. 461; 1865

- the great fresh water streams of this country are not subject to the principle of individual appropriation allowed by the common law of England.
- That the common law doctrine that fresh rivers of what kind soever do of common right belong to the owners of the soil adjacent, is not of universal application in this State.

Lunar Tide Test

Tide Test Modified: New York (2)

- That the reason of the rules assigning proprietorship of the bed of a river to the owners of the adjacent shores, wholly fails in reference to the large navigable rivers of this country.
- That the long continued practice in this State of granting islands in rivers subsequent to patents covering the adjacent shores, contradicts the assumed application of the common law rule of riparian ownership as applied to the great rivers of this State.
- That the Mohawk river, having immemorially been used for the purposes of navigation, is a public river

Subsequent Legislation

Changes by Legislation in Ohio: (1)

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

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

Legislative Actions: New York (1)

Palmer v. Mulligan: 3 Cai. R. 307; 1805

- The act declaring certain waters highways not extending to this river, has been considered as impliedly sanctioning the idea that it is not public property;
- I should draw the contrary inference; for if the **Legislature have declared such rivers as the Conhocton, the Unadilla, the east branch of the Chenango**, and the great variety of other inland waters, **public highways, as necessary to the public convenience**, …
- …it must have been taken for granted that the Hudson River was already a public highway, and needed not an act declaring it to be so.

Changes by Legislation in Ohio : (2)

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

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

Prescription & Dams: New York (2)

- Twenty years' occupation of the land of another by flowing it with water, affords a presumption of a grant of the use of it in that particular manner, and for the damages sustained thereafter no action lies; …
- …but if, after flowing the land of another for ten years, by means of a dam of a particular height, the party by a new constructed dam raises the water higher and flows more land than he originally did, although …
- …he will be justified after twenty years in flowing the land to the extent originally covered, he will be answerable in damages for the increased quantity he flows.

Changes by Legislation in Ohio: (3)

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

Ownership of the Bed

Title vs. Right to Navigate: New York (1)
Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- The respondent company, as its name indicates, is a corporation, engaged in the business of manufacturing and supplying gas, electricity and steam, for producing light, heat and power, to the city of Fulton and to other cities, towns and villages.
- Its power plant and other properties, as affected by this litigation, are situated at the city of Fulton, on the easterly side of the Oswego river.

Barge Canal Act: New York (2)
Fulton Light Heat & Power v. New York:

- Under the provisions of chapter 147 of the Laws of 1903, generally known as the Barge Canal Act, …
- …the state had appropriated certain of the land properties and riparian rights of the claimants and …
- …this claim was filed and prosecuted in the Court of Claims, as provided for by the act, to recover compensation therefor.

The State Claims…: New York (3)
Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- **The state disputes its liability upon the grounds**, in substance, **that the Oswego river is a navigable river, the ownership of the bed of which is by law in the state;**
- …that, the land affected being in the bed of the river, the claimants never acquired title to it by grant, or otherwise, and, upon the assumption that the title is in them, the work undertaken being for the improvement of navigation, that the state …
- …can use the bed and waters of the river without coming under any liability to make compensation…

River of Limited Use: New York (4)
Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- The Oswego river is a fresh-water stream, of some twenty-five miles in length, flowing in a northerly direction, through the city of Fulton, into Lake Ontario.
- At the part where the claimant's properties are situated, the river is not navigable for some distance to the north and the south; but, above and below, it has been used for purposes of navigation and commerce.
- Its navigability is not, in any wise, affected by any of the claimant's structures.

History of River Use: New York (5)
Fulton Light Heat & Power v. New York:

- Prior to 1819, the then owners of the premises, Hubbard and Falley, had, at a short distance southerly from the present power plant, constructed a wing dam, …
- …extending into the river, and a sawmill, which was operated thereafter by water supplied from the dam through a flume upon their lands.

Claim under Color of Title: New York (6)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- It is found that ever since 1827, until the present appropriation by the state, the claimants and their predecessors in title have been "in the actual, undisputed and open possession, …
- …claiming under and by virtue of written instruments, title, ownership and rights of possession," of the properties in question and have drawn from the river, through the openings in the dam pier, so much of the water as has been needed for their purposes.

Compensation Required: New York (9)

Fulton Light Heat & Power v. New York:

- The act provides that, from the time of the service of such notice, the entry upon, and the appropriation by the state of, the real property therein described should be deemed complete; that such notices should be conclusive evidence of such entry and appropriation, and of the quantities and boundaries of lands appropriated, and that the Court of Claims should have **jurisdiction to determine the amount of compensation for lands,** structures and waters so appropriated, or damages caused by the work of improvement.

History of River Use: New York (7)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- The possession and occupation for upwards of sixty years, prior to the filing and service of the appropriation maps, are found to have been "adverse to any claim by the State to any part thereof, except as to the construction and maintenance of the said State dam and the use of the waters of the Oswego River by the State."

Not Question of Authority: New York (10)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- There is no serious dispute with respect to what the state has appropriated of the claimants' lands and water rights,
- and the question is whether, upon the facts, the claimants were invested with that lawful ownership of these lands and waters within the banks of the Oswego river,
- It must, finally, be noted as a material fact, that the proposed barge canal, where it crosses the claimants' property, is wholly outside the channel of the Oswego river, as it existed at the time of the service of the notices of appropriation and as it was at the time of the grant by the state to Stene in 1793.

Barge Canal Act: New York (8)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- In this situation, in 1906, the state engineer took the requisite action under the provisions of the Barge Canal Act to appropriate the lands, structures and waters of the claimants, in question.
- By the terms of that act it was, among other things, provided that that official should be authorized to "enter upon, take possession of and use lands, structures and waters, the appropriation of which for the use of the improved canals and for the purposes of the work and improvement authorized by this act, shall in his judgment be necessary."

As it was in 1819…: New York (11)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- Whether the ownership of the bed of the Oswego river was, or was not, in law, in the state and whether, or not, its grant to Stene conveyed to him the land in the bed to the center of the stream, the claimants stand in the shoes of the owners of the tract of 200 acres, as they were in 1819, under the title derived from Stene; …
- …except so far as the state has exercised its paramount, or sovereign, right to improve the navigation of the river by the construction of the old Oswego canal and of the dam and other works incidental thereto.

Is the Oswego Navigable? : New York (12)

Fulton Light Heat & Power v. New York:

- It is argued in behalf of the state that the Oswego river is a public navigable river and that, under the rule of the common law, it was vested with the ownership of its bed.
- The fact is that this river is not navigable for any purpose at the city of Fulton, for some distance north and south; although in other portions it is used for navigation and commerce.
- But were it altogether navigable in its course, the question of its ownership would be settled by the common-law rule relating to the title to beds of non-tidal, or fresh water, streams.

English Law Antecedent: New York (13)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- In law, the term "navigable river" has received a technical application to rivers, or arms of the sea, in which the tide ebbs and flows.
- The common law of England regarded all fresh water rivers as non-navigable.
- \Under its rule the title to the soil of the sea, or of the arms of the sea, or of tidal rivers, was in the crown, subject to an easement in favor of the public for passage, or transportation; while fresh water rivers belonged to the owners of their banks, also, subject to the use of the public as navigable highways.

English Law Antecedent : New York (14)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- This public right was not affected by the situation of the title, whether in the crown, or in the riparian owner.
- Whether salt, or fresh, water streams, if they were large enough to be capable of common passage and thus, in fact, were navigable, they were regarded as common highways, which might not be impeded. *(See Lord Hale's Tract de Jure Maris…*
- The navigability, in fact, of the stream had no relevancy to the question of the title to its bed; it was relevant solely to the public right to pass,

English Law Modified by NY: New York (15)

Fulton Light Heat & Power v. New York:

- In adopting the common law of England, the people of this state took over such of its rules as were applicable to, and consistent with, their condition and circumstances.
- We have but to contrast the situation of Great Britain, an island, with short rivers, navigable, ordinarily, only so far as the tide ebbed and flowed, to perceive the extent to which modifications of those rules became essential.

Hudson, Mohawk Rivers: New York (16)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- in the other case, as I understand the result of the decisions, two of our rivers formed exceptions to the general rule.
- The part of the Hudson river above the ebb and flow of the tide and the Mohawk river, a fresh-water stream, in grants made to settlers under the Dutch government, were excepted and, upon the English succession, the beds of those waters, never having been conveyed, vested in the crown, as lands not theretofore granted.
- As to those rivers, the people of this state have ever asserted title, as to unappropriated lands.

Effect of Legislation: New York (17)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- In *Chenango Bridge Co. v. Paige, (83 N. Y. 178)*, which involved the riparian rights of owners upon the Chenango river, a freshwater stream, it was held that, …
- …though navigable as a highway, it was a private river; that they owned the bed and banks, subject to the public easement of navigation, and …
- …that the legislature, except under the power of eminent domain, upon making compensation, could not interfere further than for the purpose of regulating, preserving and protecting the public easement.

Right of Access: New York (18)

Fulton Light Heat & Power v. New York:

- I know of no exceptions in this state to the common-law rule of riparian ownership of the beds of freshwater streams, where not constituting boundary lines, other than the two rivers referred to.
- If not affected by situation, or by derived title, there is no good reason why the common-law rule should not obtain with respect to our fresh-water rivers,
  To meet differing political institutions and usages, it has been somewhat enlarged, or extended, with respect to the riparian owner's right of access and of use on tide waters.

Description to centerline?: New York (19)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- Those by which Stene took, in 1793, granted a tract of 200 acres *"on the east side of the river below the Falls,"* by a description, which ran from *"a white ash sapling * * * standing on the east shore of the Oswego River"* by courses to the east, to the north and to the west *"to the said river and then up and along the same to the place of beginning."*
- This grant should be construed as to its descriptive language, as would be any ordinary grant of property.

Monument on the Bank: New York (20)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- As a boundary of the grant is on a fresh-water river, the location of the monument for the starting point in the sapling is not a delimitation of the westerly boundary line.
- As the monument could not conveniently, or properly, be placed in the channel of the river, in placing it on the bank it merely fixed a point in the south line; to which line the course from the northerly boundary returned along the river.
- Such a monument indicates the place of the line, or of its intersection with the stream, and not the end of it.

River Bed could be excepted: New York (21)

Fulton Light Heat & Power v. New York:

- It is an old and well-settled rule where the grant has no other boundary on the river side but the stream itself, that the legal presumption is that it was intended to convey to the middle of such stream.
- A boundary line, which is described as "along the shore," or "along the bank," of a fresh-water stream would not extend the grant to the center; for there would be a prescribed limitation of the line to the shore, or bank.
- But where, as here, the line, when it reaches the river, is then described as running "along the same," it will be construed as following the thread of the stream.

Right to improve the Bed: New York (22)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- The right of the state to make improvements in the river for the benefit of the public, in facilitating navigation and transportation thereon, must be fully conceded.
- It may do so without regard to the private ownership of the bed of the river.
- The proprietary interest of the riparian owner is subordinate to the public easement of passage and the state may be regarded as the trustee of a special public servitude

Limits to State Authority: New York (23)

Fulton Light Heat & Power v. New York:
200 N.Y. 400; 94 N.E. 199; 1911

- When, however, it is not the channel, or bed, of the river, which is to be regulated, and land is taken and the river waters are diverted for the purpose of constructing and operating some other channel distinct from that of the river, then the limit of the state's authority freely to intrude upon the riparian owner's rights has been reached.

Justice Cooley comments: Michigan (4)

Richardson v. Prentiss:

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

Three Types of Rivers: New York (1)

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

Justice Cooley comments: Michigan (5)

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

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

Three Types of Rivers: New York (2)

People v. Platt: 17 Johns. 195; 1819

- We perceive, then, that some rivers and streams are wholly and absolutely private property, and that …
- …others are private property, subject, nevertheless, to the servitude of the public interest, and in that sense are to be regarded common highways, by water.
- The distinguishing test between those rivers which are entirely private property, and those which are private property subject to the public use and enjoyment, consists in the fact, whether they are susceptible or not of use as a common passage for the public.

How Many Types of Navigable Waterways

Right to Fish: New York (1)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- Plaintiff-appellant, Douglaston Manor, Inc., owns approximately one-mile-long sections of both shorelines of the Salmon River in Oswego County and the riverbed in between.
- It traces its title back to a conveyance from the pristine State of New York in 1792.
- The issue is whether Douglaston's ownership entitles it to exclude the public from fishing in, though not from navigating through, its portion of the river.
- It pays taxes upon the entire property, including riverbed land.

Public Trust v. Non-tidal: New York (2)

Douglaston Manor v. Bahrakis:

- the settled law of New York continues to recognize the **common-law distinction** concerning the rights which a private owner may acquire and retain in **nontidal, navigable-in-fact rivers and streams.**
- These rights are **distinguishable from public trust protections generally associated with waters deemed navigable-in-law or tidal navigable-in-fact** waters, neither of which classification is before us in this case.

More than 1 definition: New York (5)

Douglaston Manor v. Bahrakis:

- The guides claim that the general classification of navigability alone defeats Douglaston's claim to exclusive fishing rights.
- Their argument fails to credit **the more nuanced concerns and complicated analysis** pertaining to…
- …differences in private ownership rights between rivers navigable as a matter of common law …
- …and those navigable as a matter of fact, recognized for centuries as having distinct historical characteristics and legal consequences.

Contentions of the Parties: New York (3)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- Douglaston rests its claim of exclusive fishing rights solely on its record ownership of the bed and the banks of the Salmon River, derived from the State's 1792 conveyance, classified as within the Macomb Patent.
- The defendants counter that because the Salmon River is navigable, the State irrevocably holds a public trust easement that protects anyone's navigation of the river, which includes a right of public fishery.

Common Law v. "in Fact": New York (6)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- A river is defined as "navigable in its natural or unimproved condition, affording a channel for useful commerce of a substantial and permanent character conducted in the customary mode of trade and travel on water ... hav[ing] practical usefulness to the public as a highway for transportation"
- The common law more particularly distinguishes and "considers a river, in which the tide ebbs and flows, an arm of the sea, and as navigable, and devoted to the public use, for all purposes, as well for navigation as for fishing.

Contentions of the Parties: New York (4)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- We must decide, therefore, whether New York State, under these circumstances, has the power to transfer exclusive fishing rights to private parties in a nontidal, navigable-in-fact river, as part of a conveyance of property ownership, …
- …and whether the State in fact did so in the 205-year-old Macomb Patent, derivatively at issue here.

Public Trust vs. Easement: New York (7)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- It, also, considers other rivers, in which the tide does not ebb and flow, as navigable, but not so far belonging to the public as to divest the owners of the adjacent banks of their exclusive rights to the fisheries therein"
- A distinction has also been recognized between public trust interests, presumptively retained by the State in navigable-in-law and tidal waters, and navigational servitudes

Sale of Non-tidal river: New York (8)

Douglaston Manor v. Bahrakis:

- A first premise for the analysis of this case is that this Court has long held that grants by the State to private owners of land under navigable-in-fact rivers remain subject to an implied, reserved public easement of navigation …

What is easement for?: New York (9)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- This Court more fully elucidated the principle in ***Smith v Odell (234 NY 267):***
- "T]here is no necessary conflict between the reservation to the public of the right of navigation and the recognition of the exclusive privilege expressly granted to the owner. The public right, whatever it might otherwise be, must be held limited in such a situation to the right to use the waters for the purposes of a public highway. ...
- [T]he **easement of passage over navigable waters** does not involve a surrender of other privileges which are capable of enjoyment without interference with the navigator"

What is easement for?: New York (10)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- Thus, this Court has maintained that the long-standing public easement of navigation in navigable-in-fact rivers does not sweep away or displace other rights accompanying the private ownership of the bed of a navigable-in-fact river, including that of exclusive fishery

Stability is a key issue: New York (11)

Douglaston Manor v. Bahrakis:

- Defendants, instead, urge a definitive landmark ruling from this Court, through the instrumentality of this case, that New York State has abandoned the common-law property distinction between rivers navigable-in-fact and those navigable-in-law.
- As a result, they claim a public right of fishery in all "navigable" waters.
- **This is not so and is too simplistic an approach**, which **would precipitate serious destabilizing effects on property ownership principles and precedents.**

Case law is not monolithic: New York (12)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- also overlooked by defendants, is another key ingredient and observation of the Court in Smith that [HN7] the "preponderance of judicial authority in the State favors the application of the common-law rule to the navigable waters of this State. ...
- These decisions show a course of authority extending from an early period of our history to the most recent times, and although they do not constitute an unbroken chain, yet they are fortified by a wealth of learning, reason and illustration that render them irresistible as authority"

Public Trust is limited: New York (13)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- We see no reason in this circumstance to curtail the State's general authority to convey property and property rights, nor to countenance the view that the State has been expending public moneys unnecessarily on rights, according to defendants' theory, the State already irrevocably holds in public trust.

Don't de-stabilize titles: New York (14)

Douglaston Manor v. Bahrakis:

- Indeed, when pursuant to this Court's precedents, the State, "the plaintiffs, and perhaps others, have since possessed and enjoyed rights of property under the protection of its authority, …
- …it would require a much plainer demonstration than can be made of the point involved, to justify this court in overruling [them]"
- We similarly reject defendants' unsettling theory.

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

Wadsworth v. Smith: 11 Me. 278; 1834

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

Right of Fishery included: New York (15)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- This Court has previously held that when land under rivers is included within the boundaries of a grant, the general language of conveyance is sufficient to transfer to the grantee the bed of the river and associated exclusive right of fishery
- Moreover, the State's reservation of designated mineral rights and specific public rights of way, without reserving to the public a right of fishery, additionally supports our analysis and conclusion that Douglaston enjoys a duly conveyed exclusive right of fishery .

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

Wadsworth v. Smith: 11 Me. 278; 1834

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

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

Stability of Property Rights: New York (16)

Douglaston Manor v. Bahrakis:
N.E.2d 201; 655 N.Y.S.2d 745; 1997

- In sum, the **desirable definiteness** attendant upon **discrete property rights and principles, …**
- **…along with reliable, predictable expectations** built upon centuries of precedent, ought not be sacrificed to the vicissitudes of unsupportable legal theories…

General: 3 Categories – North Carolina (1)

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

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

General: 3 Categories – North Carolina (2)

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

Bay Linked with Canals: New York (2)

Southampton v. Heilner:

- Shinnecock Bay was a land-locked body of water of uncertain dimensions at some time in the obscured past, bounded on the south by the narrow barrier beach separating it from the waters of the Atlantic Ocean; on the west by a swampy wetlands through which a canal was dug giving access to the bays further to the west; on the north and east by land.
- There came times when the inhabitants tried to dig an inlet to the south to the ocean, and did prior to 1919 dig Shinnecock Canal through the narrow land barrier to the north to the tidal waters of Peconic Bay,

General: 3 Categories – North Carolina (3)

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

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

Bay Linked with Canals: New York (3)

Southampton v. Heilner:
84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- The fact of a submergence has been well established by the testimony. Stumps of trees were found well into the bay, some of hundreds of years of age and some of thousands.
- It was stated by expert testimony that these trees could not have grown in salt water.
- Testimony also disclosed that the strata under the present water are all marine, and that there was no known source of salt in the area which could make the bay saline except the ocean.

Technical v. Popular navigation: New York (1)

Southampton v. Heilner:
84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- One fact first to be determined is whether Shinnecock Bay is or was **navigable in law**, for if it was navigable in law, ownership of the upland would run to high-water mark …and if it was nonnavigable in law, it ran at least to low-water mark as the defendants contend.
- The early English rule was that all waters which had a change of tide were navigable and all others were nonnavigable.
- It added that **navigable in fact,** generally speaking, was meant to connote streams on which boats, lighters, or rafts might be floated to market. This definition has been continually broadened,

Bay Linked with Canals: New York (4)

Southampton v. Heilner:
84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- The opinion was expressed that the sea level had substantially increased over the years, inundating at least some ground which had been in the form of islands.
- The actual increase of the tide between 1898 and 1972 was about three and a half feet according to the testimony and was caused by two factors.
- One was the original opening and subsequent improving of the Shinnecock Canal to Peconic Bay.
- The other was the natural break in the barrier beach in 1938 and its attempted stabilization

Shinnecock Bay non-tidal: New York (5)
Southampton v. Heilner:

- it must suffice to say that in 1898 the determination was made that Shinnecock Bay was nontidal and treat the subsequent changes on an ad hoc basis.
- …the court, pointing out that the common-law rule defined navigability in terms of tidality, affirmed the holding of the lower court that the waters leading into Shinnecock Bay from the west had no ebb and flow, …
- …and that there was no continuous highway through the waters and various bays by natural channels east of the point which would include Shinnecock Bay.

Terms of Grant at the time: New York (6)
Southampton v. Heilner:
84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- The court also pointed out that the lower court had found that the waters were then navigable in fact at that point, but held that this had no bearing on the legal issues in the case because it felt that the status of the bay at the time of the granting of the early patents would also control its current status.
- Under the common law of tidality, it then resulted in a finding of nonnavigability in law because of nontidality.

Changes subsequent to grant: New York (7)
Southampton v. Heilner:
84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- The defendants argue that since the **bay was determined to have been nontidal** and thus nonnavigable in law when the patents were issued, **the upland owner had title to low-water mark**, the usual line of demarcation in nonnavigable waters where someone else owned the water bottom.
- …The trustees in the present case have title to the bay bottom and the defendants make no claim to this property.
- They then argue that if some of their land was **submerged due to the action of the trustees** in opening Shinnecock Canal or any inlet, title to the submerged land was not affected. **This is true.**

Changes subsequent to grant: New York (8)
Southampton v. Heilner:

- A case directly on point with the matter at bar as alleged by defendants, is ***Wheeler v Spinola (54 NY 377).*** A fresh water pond was connected to sea water without the upland owner's consent, resulting in a rise and fall of tide.
- The court stated (pp 384-385): "Those who owned the bed of the pond, as well as the riparian owners, must have had the same rights afterward as before.

Changes subsequent to grant: New York (9)
Southampton v. Heilner:
84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- The owners of the bed of a fresh-water pond certainly cannot, by letting into it the water of the ocean, extend their right of ownership to the high-water mark of flood tide. The boundaries between them and the riparian owners must remain the same.
- The proprietors of land bordering upon streams and waters in which the tide ebbs and flows, own only to high-water mark, and the land below that belongs, in this country, to the people.
- But this rule of ownership cannot apply to this pond.
- It must be treated for all the purposes of this case as if it had remained a fresh-water pond.

Changes subsequent to grant: New York (10)
Southampton v. Heilner:
84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- The owners of the bed of a fresh-water pond certainly cannot, by letting into it the water of the ocean, extend their right of ownership to the high-water mark of flood tide. The boundaries between them and the riparian owners must remain the same.
- The proprietors of land bordering upon streams and waters in which the tide ebbs and flows, own only to high-water mark, and the land below that belongs, in this country, to the people.
- But this rule of ownership cannot apply to this pond.
- It must be treated for all the purposes of this case as if it had remained a fresh-water pond.

Three Categories of navigability: Maryland (1)

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

Public Right of Navigation

Three categories of Waterways Ohio (1)

Hutchinson V. Thompson: 9 Ohio 52; 1839

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

Limited right of Navigation: Michigan (1)

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

NJ Riparian – Early Ruling (1)

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

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

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

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

New Hampshire case

Connecticut R. v. Olcott Falls: (1)

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

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

New Hampshire case
Connecticut R. v. Olcott Falls: (2)
65 N.H. 290; 21 A. 1090; 1889

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

Navigable-in-Fact Test: New York (1)
Adirondack League v. Sierra Club:
706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- This case presents the Court with the opportunity to decide to what extent recreational use can be considered in deter-mining whether a river is navigable-in-fact.
- The river at issue is the **South Branch of the Moose River** (the South Branch), 12 miles of which run through property owned by plaintiff Adirondack League Club, Inc. (ALC).
- On June 15, 1991, the individual defendants traveled down this portion of the South Branch in two canoes and a kayak, an endeavor **that required several portages around various obstacles in the river.**

Navigable-in-Fact Test: New York (2)
Adirondack League v. Sierra Club:

- ALC claims that this section of the South Branch is its private property. Defendants counter that because the South Branch is navigable-in-fact, they were entitled to use the easement reserved to the public in all such waterways.
- The State of New York and the Adirondack Mountain Club, Inc. intervened as defendants and along with the other defendants moved for summary judgment on the issue of navigability of this portion of the South Branch.

Navigable-in-Fact Test: New York (3)
Adirondack League v. Sierra Club:
706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- The parties differ regarding the type of evidence that will suffice to satisfy the standard of navigability-in-fact.
- Specifically, the parties differ on the extent to which recreational use should enter into the analysis.
- Appellant ALC contends that navigability references only commercial utility and that the focus thus should be on the South Branch's use as a logging river during the first half of this century.

Navigable-in-Fact Test: New York (4)
Adirondack League v. Sierra Club:
706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- Reliance on recreational uses, ALC asserts, would disrupt settled expectations regarding private property and would expand the common-law rule beyond its traditional foundation.
- Defendants argue that recreational and commercial use are both properly part of the analysis.

Navigable-in-Fact Test: New York (5)
Adirondack League v. Sierra Club:

- As a general principle, if a river is not navigable-in-fact, it is the private property of the adjacent landowner. If, how-ever, a river is navigable-in-fact, it is considered a public highway, notwithstanding the fact that its banks and bed are in private hands ***(Morgan v King, 35 NY 454).***
- This rule is longstanding and recognizes that some waterways are of such practical utility that private ownership from the time of the original grant from the State or sovereign is subject to an easement for public travel
- Typically, such utility implicated commerce.

Use for Commerce: New York (6)

Adirondack League v. Sierra Club:
706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- "[A] river is, in fact, navigable, on which boats, lighters or rafts may be floated to market ...
- [Additionally,] the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks.

Use for Commerce: New York (7)

Adirondack League v. Sierra Club:
706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- It is not essential to the right, that the property to be transported should be carried in vessels, or in some other mode, whereby it can be guided by the agency of man, provided it can, ordinarily, be carried safely, without such guidance ....
- If it is so far navigable or floatable, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported"

Floating Timber Test: New York (8)

Adirondack League v. Sierra Club:

- Inasmuch as the English common-law rule was "but an outgrowth or product of the peculiar circumstances and necessities of the people with whom it originated," the New York rule found its basis in New York
- Because "valuable products", namely timber, "would have no avenue to market" the public easement could not be restricted, as in England, to those streams navigable by boats or rafts. Instead, those "capable of floating to market single logs or sticks of timber" could be also deemed navigable-in-fact

Use changes over time: New York (9)

Adirondack League v. Sierra Club:
706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- The fact that before the middle of the 20th century a river's practical utility was measured by its capacity for getting materials to market does not restrict the concept of usefulness for transport to the movement of commodities.
- Although evolving necessities and circumstances may warrant a different emphasis regarding a river's usefulness, the central premise of the common-law rule remains the same--in order to be navigable-in-fact, a river must provide practical utility to the public as a means for transportation.

Less commercial use...: New York (10)

Adirondack League v. Sierra Club:
706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- Thus, while the purpose or type of use remains important, of paramount concern is the capacity of the river for transport, whether for trade or travel ...
- More importantly, however, unlike the circumstances presented to this Court when Morgan was decided in 1866, the necessity of using the South Branch as a means of moving goods in commerce has waned. Once one of the five busiest rivers in New York for the transport of logs, it appears that the South Branch has not again been used for that purpose since 1948, and the possibility of such use in the future is unlikely. Today logs are transported by truck.

Use is not ownership: New York (11)

Adirondack League v. Sierra Club:

- Appellant's fear that consideration of recreational use unduly broadens the common-law standard and threatens private property rights is unfounded.
- We do not broaden the standard for navigability-in-fact, but merely recognize that recreational use fits within it.
- Many cases, ...support the view that a river navigable by small boat, raft or skiff is subject to the public easement ...
- Furthermore, property rights are not materially altered by this holding. Riparian owners retain their full panoply of rights, subject only to the long-recognized navigational servitude.

Easement vs. Title: New York (12)
Adirondack League v. Sierra Club: 706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- "[T]here is no necessary conflict between the reservation to the public of the right of navigation and the recognition of the exclusive privilege expressly granted to the owner.
- The public right, whatever it might otherwise be, must be held limited in such a situation to the right to use the waters for the purposes of a public highway. ...
- [T]he easement of passage over navigable waters does not involve a surrender of other privileges which are capable of enjoyment without interference with the navigator."

Rights Incident to Riparian Ownership

Natural State vs. Improved: New York (13)
Adirondack League v. Sierra Club: 706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- Central to this Court's holding in Morgan was the fact that the portion of the Raquette River there held to be nonnavigable **could be used for logging only with the aid of artificial improvements** (Morgan v King, supra, at 460). The standard requires that navigability be determined by the river **"in its natural state and its ordinary volume"**
- Nor is it essential to the easement, that the capacity of the stream, ... should be continuous, or, in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable.

Public Trust Doctrine: Virginia (7)

- **...the riparian owner has certain rights...**
- "First. The right to be and remain a riparian proprietor and to enjoy the **natural advantages** thereby conferred upon the land by its adjacency to the water.
- "Second. The **right of access** to the water, including a right of way **to and from the navigable part.**
- "Third. The right to **build a pier** or wharf out to navigable water, **subject to any regulations of the State.**
- "Fourth. The right to **accretions** or alluvium.
- "Fifth. The right to make a **reasonable use of the water** as it flows past or laves the land."

Right to Portage: New York (14)
Adirondack League v. Sierra Club: 706 N.E.2d 1192; 684 N.Y.S.2d 168; 1998

- Defendants are correct, however, that the existence of occasional natural obstructions do not destroy the navigability of a river ...
- Following naturally from this proposition is that in order to circumvent these occasional obstacles, the right to navigate carries with it the incidental privilege to make use, when absolutely necessary, of the bed and banks, including the right to portage on riparian lands

What was the crime?: New York (1)
New York v. Waite: 103 Misc. 2d 204; 425 N.Y.S.2d 462; 1979

- It is important to note that the conviction was based upon a determination by the local criminal court that the stream had been lawfully posted, and therefore, ...
- ...that appellant had no right to be upon the stream in the posted area; or, stated in other terms, there was no finding ...that the offense was committed by reason of the tethering of the boat to some brush.
- This court, therefore, renders its opinion herein without regard to the question whether appellant committed a trespass by tying a line from the boat to the brush,

Perpendicular or Proportional?: New York (2)

New York v. Waite:
103 Misc. 2d 204; 425 N.Y.S.2d 462; 1979

- A riparian proprietor is one who owns land on the bank of a river.
- The bed of nonnavigable streams, or other bodies of water, is subject to private ownership, and the title thereto, as a general rule, is vested in the proprietors of the adjoining uplands. *(People v Platt, 17 Johns 195.)*
- The general rule in New York is that **each owner takes title in proportion to his line** on the margin in front of his upland according to straight lines drawn at right angles between the sidelines of his land on the shore and the thread, or centerline, of the stream.

"Navigable" and rights incident: New York (2)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- The upland owner's right to build out so as to gain access to navigable waters is not premised on the water's salinity or considerations of tide, but is more a function of shape of the shoreline…
- The term "navigable" is related to depth of water and draft of vessel.
- It is not disputed that all along the relevant shoreline, the water depth even at low tide is sufficient to render the bay navigable at or near the bulkheadings as the water is not graduated but is four feet deep.

Qualified Interest in Bed: New York (3)

New York v. Waite:
103 Misc. 2d 204; 425 N.Y.S.2d 462; 1979

- The ownership of a stream bed does not of itself impart to the riparian owner an exclusive right to the waters flowing over the bed. Each riparian owner may be entitled by virtue of his rights in the bed to the reasonable use of the water for domestic and other purposes, as it passes his premises, but his use thereof cannot be inconsistent with a like reasonable use of the water by owners above and below him.
- It is seen, then, that a riparian owner's interest in the stream is qualified rather than absolute

The Argument…: New York (3)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- Seizing upon the language in White, Gratwick & Mitchell (supra), that a riparian owner's rights over the water extend to the navigable part "but there the right ends and he must go no farther," …
- …defendants Meyerowitz and Newman urge this court to effectively declare that the parties enjoy no riparian rights beyond those already granted by the Town as the owner of the underwater land because the depth of water at the bulkheads is four feet, …
- …a navigable depth according to the Town Code.

Incidental Riparian Rights: New York (1)

Muraca v. Meyerowitz:

- "[a] riparian owner has the right to build wharves and piers from the upland out to the navigable part of the stream, but there the right ends, and he must go no farther.
- "In other words, the riparian owner has the right of access to the navigable portion of a stream as an incident to his ownership of the upland.
- The lands under water are subservient to this right of the riparian owner, and structures to enable him to reach the navigable portion of a stream are not nuisances or purprestures."

The Court responds…: New York (4)

Muraca v. Meyerowitz:

- This court does not agree.
- The right of a riparian owner to access to navigable waters includes the right to make such access "a practical reality"
- "[N]either the riparian owner nor the underwater landowner has an unfettered veto over reasonable land uses necessary to the other's acknowledged rights, …
- …and where the rights conflict the courts must strike the correct balance"

Docks don't impede public: New York (5)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- Clearly then, the riparian rights of property owners include the right to such use of the underwater lands extending into navigable waters as are necessary to provide practical access to those waters by a reasonably sized watercraft
- Since it is undisputed that none of the existing docks or watercraft in use by the parties impedes the public's general navigability upon Merrick Bay,

Acquiescence & Town Regulations: New York (7)

Muraca v. Meyerowitz:

- Neither defendants Meyerowitz nor their predecessor has been shown to have acquiesced to a riparian boundary line between lots 60 and 61 measured at a 63-degree arc from the bulkhead of lot 61.
- The town permit allowing Meyerowitz' piling at a 63-degree arc from Newman's bulkhead is not demonstrative of any "voluntary demeanor or conduct" and any compliance with that permit merely constitutes deference and submission to the municipal authority which owns the underwater land.

Acquiescence & Riparian rights: New York (5)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- Equally unpersuasive is the claim by defendants Newman that defendants Meyerowitz or Meyerowitz' predecessor in ownership of lot 60, or both, acquiesced in recognition of the 63-degree arc as the appropriate lateral boundary line between the riparian rights of defendants Meyerowitz and Newman.
- That parties may acquiesce to certain riparian boundary lines was established in 1852 by the Court of Appeals in *O'Donnell v Kelsey*

Determining Lateral Lines: New York (8)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- 'Lateral boundary determinations in New York are a composite of general propositions tempered by often repeated statements to the effect that no set of general rules will suffice to provide acceptable solutions in all cases.
- On the one hand, the adoption of mechanical rules applicable to all situations is renounced. On the other hand, the courts have not been loath to establish preliminary rules and to subject these rules to review in order to achieve equitable apportionment of frontage and access rights

Acquiescence & Riparian rights: New York (6)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- "The doctrine of acquiescence is well recognized in the law as an admission by the party.
- But to have that effect, it must exhibit some act of the mind and amount to voluntary demeanor or conduct of the party, and whether it is acquiescence in the conduct or language of others, it must plainly appear that such conduct was fully known or the language fully understood by the party, before any inference can be drawn from his passiveness or silence.
- But where those ingredients are found the acquiescence becomes as binding as any other admission of a party."

2 Formulas for Lateral Lines: New York (9)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- " 'The overriding concern of the New York courts in extending lateral boundaries appears to be the equitable or ratable allocation of the waterfront area . . . The right of access is dependent upon the frontage available to the proprietor . . . ' (footnoting omitted)
- "Two principal formulas have been derived for establishing lateral boundaries depending on the nature of the shoreline and waters.

First option – Lateral Lines: New York (10)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- "The most oft cited general rule for fixing the lateral boundaries of a landowner's riparian rights is to extend the lateral onshore boundaries of his property out into the navigable body of water, by lines which are perpendicular to the general course of the shoreline…
- The more minor the shoreline irregularities, the more equitable the application of this rule.

2nd & 3rd Options–Lateral Lines: New York (11)

Muraca v. Meyerowitz:

- "The other principal rule is known as the proportional method and is designed to ascribe a path between the onshore property boundaries to the navigable channel that is proportionate to the amount of frontage the landowner enjoys.
- This method is often considered to better address circumstances involving the more irregular shoreline formed by a cove . . .
- "Absent from favorable consideration is, perhaps, the simplest method of delineating offshore boundaries--continue the direction of the onshore boundaries outward from the shoreline.

Difficult Math problem: New York (12)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- Equity will not countenance such a result.
- Modification of the perpendicular rule is therefore warranted to
- (1) afford defendants Meyerowitz a corridor of riparian access not less than the width of this corridor of land access, and
- (2) mitigate against the overly harsh loss of riparian rights to defendants Newman as the property owners with a shoreline greater than the combined shoreline of plaintiff and defendants Meyerowitz.

Difficult Math problem: New York (13)

Muraca v. Meyerowitz:
13 Misc. 3d 348; 818 N.Y.S.2d 450; 2006

- Accordingly, and under the particular circumstances herein, the court **adopts a modified version of the generally disfavored approach** of extending outshore the property boundaries between lots 59 and 60, and 60 and 61, to fix the lateral riparian boundaries between the parcels as follows: The lateral riparian boundary line between lots 60 and 61 shall be determined by extending the land boundary between these properties outshore for a distance of 30 feet from the bulkhead between these lots (lateral line 1).

Difficult Math problem: New York (14)

Muraca v. Meyerowitz:

- The boundary between lots 59 and 60 shall be determined in part by drawing a line exactly parallel to lateral line 1 but on the northerly side so as to allow a 10-foot riparian corridor (lateral line 2).
- A line (lateral line 3) shall then be drawn from the boundary line between lots 59 and 60 outshore to the closest (and western most) point on lateral line 2.

Significant U.S. Supreme Court Decisions

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

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

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

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

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

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

The Montello: 87 U.S. 430, 441-42 (1874)

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

The Daniel Ball: U.S. Supreme Court.

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

State Right to Regulate: New York (1)

Van Cortlandt v. New York Central R.R.

- What the form and character of the bridges should be, that is to say, of what height they should be erected, and of what materials constructed, and whether with or without draws, were matters for the regulation of the State, subject only to the paramount authority of Congress to prevent any unnecessary obstruction to the free navigation of the streams.
- Until Congress intervenes in such cases, and exercises its authority, the power of the State is plenary.

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

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

Montana PPL V. Montana: U.S.A.C.E. (1)

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

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

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

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

Montana PPL V. Montana: U.S.A.C.E. (2)

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

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

U.S.A.C.E and Private Ownership: Section 329.11 – Geographic and © Copyright 2016, Kristopher M. Kline 2Point, Inc.

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

Montana PPL V. Montana: U.S.A.C.E. (3)

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

Montana PPL V. Montana: U.S.A.C.E. (4)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Accretion Definition: New York (1)

RE: Triborough Bridge:

- To vest title by accretion in an upland owner, the accretion must take place by imperceptible degrees
- It must originate from natural causes.
- The filling in of land under water does not constitute such land an accretion.
- In *Tiffany v. Town of Oyster Bay (234 N. Y. 15)* it was held that fill did not change the title of land under water and that in a proper case the land remained water.

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

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

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

Intent and State Grants: New York (1)

Rockaway Pacific Corp. v. New York
122 Misc. 503; 203 N.Y.S. 279; 1924

- 'Although no distinct thing or right will pass by implication, yet I do not mean to question that the words used should be construed in their most natural and obvious sense, and that whatever is essential to the enjoyment of the thing granted will be necessarily implied in the grant.' * * *
- …in doubtful cases it seemed to him 'a sound and wholesome rule of construction to interpret public grants most favorably to the public interest, and that they are not to be enlarged by doubtful implication;'

Accretion, Erosion And Avulsion

Accretion & Erosion: New York (2)

Rockaway Pacific Corp. v. New York
122 Misc. 503; 203 N.Y.S. 279; 1924

- The second question …is whether the growth of Rockaway point to the westward since 1887 has been by the gradual process of accretion or whether it has been by avulsion and the annexation of islands.
- The city and the state contend that its growth since 1887 has been by the latter method. They contend that what was known as the "East Way" channel of Rockaway inlet in 1887 was about in the same relative position as the center of the appropriated parcel from east to west; that said "East Way" filled up with sand and connected the westerly point of Rockaway peninsula with Duck Bar island

Accretion & Erosion: New York (3)

Rockaway Pacific Corp. v. New York

- We believe that the overwhelming preponderance of evidence in this case is against such contention.
- We are firmly impressed not only by the witnesses who testified on that subject, but also by the vast amount of documentary evidence introduced, including maps and charts of all kinds, that for a considerable period of time before the state released its claim, the growth of Rockaway peninsula to the west had been by the continual and gradual process of accretion.

Avulsion and Title: New York (1)

Southampton v. Heilner:

84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- In Matter of City of New York … the court states that a private owner is not divested of title by avulsion, and that the right to regain land rests on the principle that the title to it remains in the riparian owner.
- The court goes further, and holds that title is not presumed to have been lost by abandonment even when the land has been submerged for more than 30 years, pointing out that when one acquires title by deed it will not be affected by nonuser.
- If natural avulsion causing submergence does not cause a change in title, certainly submergences caused by man's actions would not either.

Accretion & Erosion: New York (4)

Rockaway Pacific Corp. v. New York

122 Misc. 503; 203 N.Y.S. 279; 1924

- …we are thoroughly convinced that the following facts are established:
- "First. * * * that complainant's predecessors owned Rockaway Point.
- "Second. From 1685 to the date of the trial Rockaway Point has been gradually and imperceptibly working to the west and south. This has been by accretion and not by avulsion, …

Erosion and Identity: New York (2)

Southampton v. Heilner:

- It is not, however, every disappearance of land by erosion or submergence that destroys the title of the true owner, or enables another to acquire it, for the **erosion must be accompanied by a transportation of the land beyond the owner's boundary** to effect that result, or the submergence followed by **such a lapse of time as will preclude the identity of the property from being established** upon its reliction.
- Land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, upon which the ownership temporarily lost will be regained.

Accretion & Government Lines: New York (1)

Lawkins v. New York:

272 A.D. 920; 71 N.Y.S.2d 112; 1947

- It is established that variable governmental boundaries, running along tidal waters, are affected by the rules of avulsion, erosion and accretion. ***(Nebraska v. Iowa, 143 U.S. 359; Arkansas v. Tennessee, 246 U.S. 158, 173; Kansas v. Missouri, 322 U.S. 213, 215.)***
- Subsequent accretions, not to lands within the city's boundaries, but to the island of Long Beach, did not serve to advance the city's boundaries to include such accretions.

Erosion and Identity: New York (3)

Southampton v. Heilner:

84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- When portions of the mainland have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, …
- …the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them in case of its permanent acquisition by the sea.

Erosion and Identity: New York (4)

Southampton v. Heilner:
84 Misc. 2d 318; 375 N.Y.S.2d 761; 1975

- It is equally true, however, that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners.
- Neither does the lapse of time during which the submergence continues bar the right of such owner to enter upon the land reclaimed, and assert his proprietorship.

Accretion and Avulsion – Ohio (2)

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

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

Rationale behind Accretion/Erosion Md.

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

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

Accretion and Avulsion – Ohio (3)

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

Accretion and Avulsion – Ohio (1)

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

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

Accretion and Avulsion – Ohio (4)

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

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

Accretion and Avulsion – Ohio (5)

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

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

Monument Controls: New York (1)

- The rule is well settled, that when a creek, not navigable, and which is beyond the ebb and flow of the tide, forms a boundary, the line must be so run."
- when a deed, patent or grant, describes a boundary from a certain point down a river, creek, or the like, mentioning also course and distance; should the latter be found not to agree with the course of the river, creek, &c., it ought to be disregarded, and the river considered the true boundary.
- where a grant, either actually or constructively, goes to the water's edge, the grantee is the owner to the center of the river, if it be above tide-water. Lastly, he is the owner.

Accretion and Avulsion – Ohio (6)

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

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

Virginia: Strip & Gore Doctrine

French v. Bankhead: 52 Va. 136; 1854

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

Strip & Gore Doctrine Riparian Boundaries

Strip and Gore Doctrine (NY) (1)

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

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

Strip and Gore Doctrine (NY) (2)

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

Non-navigable lake: New York (2)

Smith v. Rochester: 92 N.Y. 463; 1883

- The plaintiffs have shown title to the several premises occupied and enjoyed by them as mill-owners upon the banks of a non-navigable stream, which entitles them to the uninterrupted flow of its waters in the channel of the stream contiguous to their respective premises as it had been accustomed to flow.

Inland Lake: Case Study

Non-navigable lake: New York (3)

Smith v. Rochester: 92 N.Y. 463; 1883

- Honeoye creek, upon which the mill privileges of the several plaintiffs are situated, is a fresh-water, non-navigable stream, formed by the junction of the…
- … surplus **waters of the Hemlock, Canadice and Honeoye lakes flowing through their respective outlets** and affords valuable water privileges, which have been used and enjoyed by the respective owners of lands on the creek for a long series of years.
- It is not claimed that the creek was ever made a public highway, or that it is capable of navigation…

Right Incident to Water: New York (1)

Smith v. Rochester: 92 N.Y. 463; 1883

- The State by virtue of its sovereignty is deemed the original grantor of all titles to real estate, and a conveyance by it of riparian rights upon non-navigable streams vests its grantees, both mediate and remote, with all the rights which such owners can acquire against any grantor.
- The riparian owners of lands adjoining fresh water, non-navigable streams, take title, "ad usque filum aquoe," to the thread of the stream, and thereby acquire the right as incident to such title to the usufructuary enjoyment of the undiminished and undisturbed flow of such water.

Conduit authorized by state: New York (4)

Smith v. Rochester: 92 N.Y. 463; 1883

- This action is brought to restrain the continued diversion by the defendant of the surplus water of Hemlock lake from this creek, such diversion being effected by means of a conduit constructed by the city of Rochester from the lake to the city, and which now draws from the lake four million gallons of water and has the capacity for carrying upward of nine million gallons daily.
- The conduit was constructed about the year 1875 …and was authorized by chapter 754 of the Laws of 1873.

The Arguments: New York (5)
Smith v. Rochester: 92 N.Y. 463; 1883

- The defense proceeds upon the theory that Hemlock lake being a navigable body of water, as such with its bed belongs to the State, and that the State possessed the consequent right of authorizing the appropriation of the water …
- The proofs and the finding of the court below establish that this lake was to a certain extent navigable, and that for many years it had in a limited way and for local purposes been actually navigated by those living upon its shores. It was a small inland lake, about seven miles in length and one-half mile in width

The Arguments: New York (6)
Smith v. Rochester: 92 N.Y. 463; 1883

- It seemed to be assumed upon the argument that the rights of the State in the waters of Hemlock lake **depended upon the ownership of the soil under its bed,** and…
- … **the question whether the title of riparian owners by the rules of common law included the land to the center of the bed** of the adjoining navigable body, …
- …**or was restricted to the water's edge.** We do not think this is necessarily so, but conceding the claim for the present let us examine that position.

Some rulings contradictory: New York (7)
Smith v. Rochester: 92 N.Y. 463; 1883

- This question has occasioned some diversity of opinion in this country and has led to conflicting and apparently irreconcilable decisions in our courts.
- It would be a vain and useless effort to attempt to harmonize the divergent views on the subject, but we believe that a doctrine may be evolved from the authorities which will **accord with the great weight of judicial opinion** in this country, and still **preserve such property rights as have been acquired** and have grown up under the authority of diverse decisions

The Arguments: New York (8)
Smith v. Rochester: 92 N.Y. 463; 1883

- We have arrived at the conclusion that all rights of property to the soil under the waters of Hemlock lake were acquired by and belong to its riparian owners, while such rights only over its waters belong to the State as pertain to sovereignty alone.

This region is unusual: New York (9)
Smith v. Rochester: 92 N.Y. 463; 1883

- The ownership and jurisdiction over the lands in the southwestern part of the State in which Hemlock lake is located, were, in the earlier history of this country, the subject of much controversy between the sovereign States of Massachusetts and New York.
- The settlers in this territory derive the title to their lands from the Commonwealth of Massachusetts and have become possessed of all of the rights which that State acquired in such lands by virtue of the treaty of cession or otherwise.

Regulatory authority: New York (10)
Smith v. Rochester: 92 N.Y. 463; 1883

- Among other rights which pertain to sovereignty is that of using, regulating and controlling for special purposes the waters of all navigable lakes or streams, whether fresh or salt, and without regard to the ownership of the soil beneath the water. This right is known as the **jus publici and is deemed to be inalienable.**

Public vs. Private Capacity: New York (11)
Smith v. Rochester: 92 N.Y. 463; 1883

- When regarding the rights of the State in respect to lands, we must not be unmindful that it has two interests, one governmental and the other proprietary.
- Or as it is divided by M. Prudhon in his Traite du Domain Public, **the public domain,** which is that kind of property which the government holds as mere trustee for the use of the public, such as **public highways, navigable rivers, salt springs, etc., and which are not, of course, alienable;**
- and the **domain of the State**, which applies only to things in which the State has the same absolute property as an individual would have in like cases.

Hudson & Mohawk Rivers: New York (14)

- their alleged inapplicability to the larger bodies of water possessed by our people and the action of the legislature in assuming the ownership of the lands under the waters of the **Mohawk and the Hudson rivers above tide-water.**
- **Peculiar reasons have governed the action of the State as to the lands under the Mohawk and Hudson rivers** as we shall see hereafter.
- We do not think the reasons given justify the court in disregarding the positive requirements of the fundamental law to the extent claimed by some of the cases.

De Jure Maris relevant: New York (12)
Smith v. Rochester: 92 N.Y. 463; 1883

- In the examination of any of the numerous questions relating to water-courses that may arise, no discussion would be complete which failed to refer to the ancient and learned treatise **De jure Maris, by Sir Matthew Hale**, and which, after the lapse of two centuries, remains the **most concise, comprehensive and reliable work on the subject** of which it treats.
- The doctrines of this treatise so far as relate to the jurisdiction of the sovereign over navigable waters, have been **frequently cited with approval in our reports and are now indisputable.**

Dutch Grants, Hudson & Mohawk: New York (15)
Smith v. Rochester: 92 N.Y. 463; 1883

- The Mohawk river is a navigable stream, and the title to the bed of the river is in the people of the State. Riparian owners along the stream are not entitled to damages for any diversion or use of the waters of the Mohawk by the State."
- It will be observed that the case relates to the Mohawk river and an appropriation of its water for the purpose of navigation alone--that being one of the uses which universally pertain to the rights of the sovereign in all navigable streams. The case is not, therefore, an authority for the appropriation of navigable waters for other public uses.

Tide Test & "Great Waters": New York (13)
Smith v. Rochester: 92 N.Y. 463; 1883

- Rivers not navigable, that is, fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent to the extent of their land in length. But salt rivers, where the tide ebbs and flows, belong of common right to the State. That this ownership of the citizen is of the whole river, …the soil and the water of the river, except that in his river where boats, rafts, etc., may be floated to market, the public have a right of way or easement."
- It may, however, be stated in passing, that it is generally conceded that this doctrine is inapplicable to the vast freshwater lakes or inland seas of this country or the streams forming the boundary line of States.

Dutch Grants, Hudson & Mohawk: New York (16)
Smith v. Rochester: 92 N.Y. 463; 1883

- We think this and similar cases might properly have been decided for reasons peculiar to the Mohawk and Hudson rivers upon the grounds stated in the Commissioners v. Kempshall (supra), by Senator Verplanck and by the chancellor and Senator Beardsley in Canal Appraisers v. People (17 Wend. 571).
- The titles granted to the original settlers in the Hudson and Mohawk valleys, as construed by the rules of the civil law prevailing in the Netherlands, from whose government they were derived, did not convey to their riparian owners the banks or beds of navigable streams.

Dutch Grants, Hudson & Mohawk: New York (17)

- Upon the surrender of this territory the guaranty assured by the English authorities to its inhabitants of the peaceable enjoyment of their possessions simply confirmed the right already possessed, and the beds of navigable streams, never having been conveyed, became, by virtue of the right of eminent domain, vested in the English government as ungranted lands, and the State of New York, as a consequence of the Revolution, succeeded to the rights of the mother country.
- We think the authority of these cases should be confined to the waters of the Hudson and Mohawk rivers…

Odd Cases…

Government taking vested right: New York (18)

Smith v. Rochester: 92 N.Y. 463; 1883

- It is said by the court …that "individual property cannot be taken, or which is the same thing, individual rights impaired for the benefit of the public without just compensation."
- The public right is one of passage and nothing more, as in a common highway. It is called by the cases an easement…
- The legislature, except under the power of eminent domain, upon making compensation can interfere with such streams only for the purpose of regulating, preserving and protecting the public easement.
- Further than that it has no more power over the fresh-water streams than over other private property.

Dutch Grants : New York (1)

Cortelyou v. Van Brundt: 2 Johns. 357; 1807

- For the defendant it was contended…
- That the highest point to which the spring tide rises is the true boundary of the patent. (Justinian's Institutes, lib. 2, tit. 1, cap. 3.)
- That the rule of the civil law ought to be adopted here, because it was a grant under the Dutch government, and the civil law prevailed, at the time, in the seven United Provinces.

Government taking vested right: New York (19)

- The evidence in this case tended to show that the plaintiffs were injured by the act of the defendant in diverting the water of Honeoye creek, which had theretofore been accustomed to flow in its channel to the benefit of the mill-owners on that stream.
- This court must assume that some damage occurred to the parties who were illegally deprived of their property. The extent of this injury has not been tried and determined.
- This has been refused them, and for that reason a new trial must be ordered.

Court Applies Common Law: New York (2)

Cortelyou v. Van Brundt: 2 Johns. 357; 1807

- The patent under which the plaintiff claims, is described as stretching along the bay, and the rule of the common law carries it down to ordinary high water-mark.
- This is the settled rule, as appears from Lord Hale's Treatise de Jure Maris. (Hargrave's Law Tracts, 12.)
- The doctrine of the civil law is, therefore, not our rule, and the direction to the jury in this respect, was correct.
- The patents introduced by the defendant gave no right of fishing, except what was comprehended within the bounds of those patents.

Clear and Unequivocal Grant: New York (3)

Cortelyou v. Van Brundt: 2 Johns. 357; 1807

- There cannot be any real pretense for an authority under them, to encroach on ad-joining patents.
- The usage offered to be proved was inadmissible, as a rule for the construction of those patents, because, …
- …when the language of a deed admits of but one construction, and is clear and pertinent, …
- …it cannot be controlled by any different exposition to be derived from the practice under it.

Bridges vs. Navigation: New York (1)

New York v. Lehigh Valley Railway:

- We think the maintenance of a bridge by a public service corporation across navigable waters involves the enjoyment of a special franchise subject to taxation, though the bed is in private ownership and the bridge is at such a height that navigation is unobstructed.

Small Craft: New York (1)

New York v. New York Central Railroad

258 A.D. 356; 16 N.Y.S.2d 812; 1940

- Streams so shallow as to accommodate small size craft only are now determined to be navigable in fact. …
- "'The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation.
- If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway.

Bridge rights vs. Fee Title: New York (2)

New York v. Lehigh Valley Railway:

247 N.Y. 9; 159 N.E. 703; 1928

- The power of the State to regulate or prohibit bridges or other structures above a navigable stream is not at all dependent upon the ownership of the soil below. It is an incident to the public duty to maintain for the public benefit waterways that supply the natural avenues of commerce.
- Title to the bed of most of the rivers of the State is in the owners of the uplands
- The Hudson and the Mohawk may be exceptions, but the exceptions have their roots in the antiquities of history

Bridges & Navigation: New York (2)

New York v. New York Central Railroad

258 A.D. 356; 16 N.Y.S.2d 812; 1940

- When the bridges at Doodletown bight and Popolopen creek were originally constructed they contained draws to permit the passage of boats.
- The board of supervisors of Rockland county in consenting to the erection of such bridges required that draws opening to a full width of thirty feet be maintained in the bridges so that there would be no interference with navigation.
- The drawbridges were subsequently removed about 1910 and fixed spans thirty-five feet in width substituted in place thereof.

Bridge rights vs. Fee Title: New York (3)

New York v. Lehigh Valley Railway:

247 N.Y. 9; 159 N.E. 703; 1928

- The truth indeed is that a bridge, however placed across a navigable stream, is a potential interference with navigation in such a sense and to such a degree as to preclude its construction by force of common right or without the license or approval of the appropriate agencies of government.
- Cascadilla creek and Six Mile creek are navigable waters within the accepted definition

Bridge rights vs. Fee Title: New York (4)

New York v. Lehigh Valley Railway:

- We have said that a bridge over a navigable stream is subject in its construction to the veto of the State since it involves a menace, at least potential, to the unobstructed flow of commerce. Interference with navigation can come from piers or other obstacles narrowing the channel. It can come from the elevation of the structure, as where the bridges are so low that boats cannot go under them.

United States v. Appalachian Elec. Power Co.

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

Right of Congress to Regulate: New York (5)

New York v. Lehigh Valley Railway:
247 N.Y. 9; 159 N.E. 703; 1928

- Support is found for this conclusion in decisions that define the regulatory power of Congress in respect of navigable streams. The United States is not the owner of the beds of such streams within the limits of the States.
- Whatever power belongs to Congress to control the course of navigation is a branch of its power to regulate interstate and foreign commerce, and is limited thereby. The law is settled, none the less, that its power to prohibit or control the erection of bridges over navigable waters is as broad as any that would belong to it if it had title to the bed.

Navigable has many meanings: New York (1)

Shaw v. Crawford: 10 Johns. 236; 1813

- …a river **not navigable in the common law sense of the term**, and though the fee of it belongs to the owners of the adjoining banks, may still be liable to the public uses of rafting and boat navigation, as a public highway.
- Though the Battenkill be omitted in the statute declaring certain rivers and streams public highways, this omission cannot prejudice or impair the right which the public may have acquired by usage. The object of the Act was not to release any public right, but to ascertain and declare it, in cases where it otherwise might have been doubtful, or liable to dispute and interruption.

United States v. Appalachian Elec. Power Co.

311 U.S. 377; 61 S. Ct. 291; 85 L. Ed. 243 (1940) (1)

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

Prescriptive Easement?: New York (2)

- When a river is so far navigable as to be of public use in the transportation of property, the public claim to such navigation ought to be liberally supported.
- The Battenkill has been used for rafting for twenty-six years and upwards.
- A usage of this length of time will, of itself, grow into a public right, and especially where the public interest, or public convenience, is essentially promoted.
- Thus a private passage leading from one part of a public street to another, and being open to all the world, for a great number of years, was held by Lord Ellenborough to grow into a public right, which could not be interrupted

Statutes don't control Title: New York (1)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- Where, as here, a waterway passes through privately-owned property, a common-law standard is applicable in determining its navigability.
- While the Navigation Law contains a definition of navigability-in-fact, that legislation applies to the "navigable waters of the state," a term that is statutorily defined to exclude privately-owned bodies of water (Navigation Law § 1; …
- …see Navigation Law § 2 [4] [5]; People v System Props., Inc., 281 App Div 433, 443-444, 120 NYS2d 269 [1953]).

Navigable over Private Land: New York (2)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- In addition to this statutory distinction, the common law differentiates between the navigability of waterways on private property …
- …and those passing over land owned by the State in its sovereign capacity, such as tidal waters, the Great Lakes, boundary rivers and certain other rivers and lakes

Recreational Use: New York (3)

Friends of Thayer Lake v. Brown

- …the Court of Appeals clarified that commercial use is not the only relevant factor, and that a waterway's capacity for recreational use is also significant in determining its navigability.
- "[W]hile the purpose or type of use remains important, of paramount concern is the capacity of the river for transport, whether for trade or travel*" (Adirondack League Club v Sierra Club, 92 NY2d at 603).* …
- …that this holding neither altered nor enlarged the applicable common-law analysis and was "in line with the traditional test of navigability, that is, whether a river has a practical utility for trade or travel"

Portage doesn't negate use: New York (4)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- Potter testified that although the Waterway is shallow in some areas and narrow, tortuous and crowded with plant growth in others, it is "generally floatable by canoe" during periods of ordinary water.
- The rapids below Mud Pond are an exception; Potter testified that this part of the Waterway is never canoeable and must be avoided by use of a 500-foot carry trail that his family constructed and maintains.
- neither the portage around the relatively short Mud Pond rapids nor the presence in the Waterway of other incidental obstacles such as beaver dams and fallen trees renders the Waterway nonnavigable,

Trade "OR" Travel: New York (5)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- Contrary to plaintiffs' argument, the fact that the Waterway's use has been almost exclusively private and recreational rather than commercial does not preclude a determination that it is navigable-in-fact. The standard is phrased in the disjunctive, looking to the stream's practical utility for "trade or travel"
- The landowners' longstanding use of the Waterway to transport goods and materials for private use reveals that it has the capacity to transport similar goods for commercial purposes.

Dissenting Opinion: New York (6)

Friends of Thayer Lake v. Brown

- In our view, the Mud Pond Waterway (hereinafter the Waterway) does not meet the navigable-in-fact test under common law and, therefore, we respectfully dissent.
- The Waterway is defined by the parties to include the Narrows of Lilypad Pond, Mud Pond, the Mud Pond Outlet Rapids, the Mud Pond Outlet Brook and the Shingle Shanty Brook from the junction of the Mud Pond Outlet Brook until it reaches publicly-owned land.
- Mud Pond itself is shallow and narrow, and the rapids at the outlet are approximately 500 feet in length.

Dissenting Opinion: New York (7)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- Given the rocky terrain and shallowness of the water, the rapids are impassable, even by canoe.
- The Mud Pond Outlet Brook and Shingle Shanty Brook are so narrow in spots that a rowboat cannot navigate them because its oars will hit the banks, and the water course meanders, twists and turns back upon itself, …
- …with beaver dams, downed trees and dense vegetation growing out from the banks and up from the bed.
- It is only through plaintiffs' efforts that the Waterway is cleared of natural debris that would otherwise render it impassable.

Description of the Route: New York (8)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- the Lila Traverse begins … with a **4.19-mile paddle** across the lake, followed by an additional **1.3 miles by water** to the first **portage of .1 miles.** From there, travel by **water for another 1.18 miles on Rock Pond** is possible until the **next portage, which is 1.75 miles** to Hardigan Pond. This portage has been described as difficult, with the path oftentimes submerged or muddy. The **water travel on Hardigan Pond is .61 miles,** followed by another **portage of .4 miles** to the Salmon Lake Outlet. From there, **water travel of .92** miles on the Salmon Lake Outlet followed by **.36 miles on the Little Salmon Lake** leads to another portage of .**4 miles to Lilypad Pond**,

Description of the Route: New York (9)

Friends of Thayer Lake v. Brown

- **one mile of water travel over plaintiffs' private property** before reaching the Mud Pond Outlet Rapids. **A short portage around the Mud Pond Rapids** is required before following the Mud Pond Outlet to the **Shingle Shanty Brook for 1.28 miles** until it exits plaintiffs' property and reenters the publicly-owned Whitney Wilderness Area. From there, the public-owned portion of **Shingle Shanty Brook leads for 2.14 miles to publicly-owned Lake Lila,** which requires another **2.14 miles of water travel** to the public beach. Yet another .**3-mile portage** is required to the nearest publicly accessible road,

No Navigable Inlet/Outlet: New York (9)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- While the majority correctly states that a body of water with no inlet, outlet or public access is not navigable-in-fact … it seems clear enough to us that the converse of this statement is not true …

No Navigable Inlet/Outlet: New York (10)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- The majority's reliance on the existence of two public access points from Lake Lila and Little Tupper Lake, both of which are unpopulated, as proof sustaining navigability, overlooks the distance from these access points to the Waterway and the effort required to reach it.
- Given the Waterway's remote nature and the number and length of the carries required to reach it, only a strained reading of the navigability standard would suggest that these two access points are enough to give it any practical utility for common usage as a public highway for travel or transport.

Is there a Limit?: New York (11)

Friends of Thayer Lake v. Brown

- Indeed, the evidence in ***Morgan*** established that logs were capable of being floated through the privately owned portion of the Raquette River in question.
- Nevertheless, the available season only lasted two months, workers were required to aid the passage of the logs and the resulting damage to the logs caused by the rapids and rocks led to the conclusion that
- "[i]t would be going beyond the warrant of either principle or precedent to hold that a floatable capacity, so temporary, precarious and unprofitable, constituted the stream a public highway"

Is there a Limit?: New York (12)

Friends of Thayer Lake v. Brown
126 A.D.3d 22; 1 N.Y.S.3d 504; 2015

- In summary, we cannot agree that the feasibility of using the Waterway for recreation and the fact that the public is capable of reaching it through a series of lakes, ponds, streams and portages render it a practical means of transportation so as to be navigable-in-fact. To conclude that they do would, in our view, unnecessarily expand our navigability-in-fact doctrine and destabilize settled expectations of private property ownership by opening up remote, unpopulated, privately owned bodies of water as long as the public has some way, however arduous and recently acquired, of gaining access to them.

Possibilities are many…: New York (1)

Hawkins v. New York

- The State's sovereign title to the bed of Lake Ontario, its bays and inlets was finally and fully established under the treaty of Hartford (Massachusetts v. New York, 271 U.S. 65); that East Bay forms a part of Lake Ontario, which fact has been taken cognizance of by the New York State Legislature (Black River Bay, L. 1886, ch. 141; Great Sodus Bay, L. 1879, ch. 534) and by the State courts
- The cases dealing with ownership of the bays and inlets of Long Island Sound are governed by the provisions of ancient colonial charters and patents which ran to the towns of Long Island and not to the State

Closing Comments

Three Categories – recent: New York (1)

Friends of Thayer Lake v. Brown
27 N.Y.3d 1039; 2016

- As a general principle, if a waterway is not navigable-in-fact, "it is the private property of the adjacent landowner" *(Adirondack League Club v Sierra Club, 92 NY2d 591, 601, 706 N.E.2d 1192, 684 N.Y.S.2d 168 [1998])*.
- A waterway that is navigable-in-fact, however, "is considered a public highway, notwithstanding the fact that its banks and bed are in private hands" (id., citing *Morgan v King, 35 NY 454 [1866]*;