LANDS UNDER WATER IN NEW YORK

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The question to be considered is the title of the beds of non-tidal streams, rivers, ponds and lakes. Is it in the state, or is it in the riparian proprietors? Questions as to the Mohawk and the Hudson, to which special rules apply¹ and as to boundary lakes and rivers are omitted. The answer may have practical importance in questions of property rights. At least in streams not navigable in fact, the sole right to fisheries is in the owner of the soil beneath.² Probably so as to navigable streams as well.³ Likewise, such owner has the right to shoot⁴ and the right to take ice,⁵ and to him belong sand, gravel and ore beneath the surface⁶ and newly formed islands.⁷ Again, in certain cases of reliction a determination of the title is important.⁸ Then also there is the right to erect dams and other structures on one's land.⁹ And while all these rights in waters navigable in fact are subject to an easement in favor of the public for navigation and commerce; while for such purposes the stream or lake may be improved without compensation to the owner of the bed, still they are property rights protected by the Constitution.¹⁰ Over some waters this easement of navigation rests in the United States by virtue of the commerce clause of the Constitution. These waters have been defined as all waters which are navigable and accessible from a state other than that in which they lie. Over others, in fact navigable, New York has the

¹Former Associate Judge of the New York Court of Appeals.
²Smith v. Rochester, 92 N. Y. 463 (1883).
³People v. Platt, 7 Johns. 195 (N. Y. 1819).
⁵Robins v. Ackerly, 91 N. Y. 98 (1883).
⁸Trustees v. McClure, 167 Ill. 23, 47 N. E. 72 (1897).
¹⁰Clinton v. Myers, 46 N. Y. 511 (1871).
like jurisdiction. For the purposes of this article no distinction need be made, for in either case the public rights are limited to this one object. As the owner of the fee of a highway may object to its use for other than highway purposes, so may the owner of the bed of a stream object to its use for purposes other than navigation.11

When Europeans first came to America they found the land within the present limits of New York in the actual occupation of various Indian tribes. Here whether title came to the Crown by virtue of original discovery or by conquest from the Dutch, it did come to it, after the treaties of Breda and Westminster under one theory or the other. More or less completely the common law became the law of the land. Under it, the Indians were held to have no ownership of the territories occupied by them. Sovereignty over them and the ultimate ownership of the lands they were on was vested in the Crown. Such lands were held not as part of the King’s private domain but for the benefit of the nation. Still the ill-defined right of occupation was respected. Only when lost to the Indians by conquest or by contract might the King or his grantees enter into full and unobstructed possession.

Whatever rights passed to the Duke of York under the patents of 1664 and 1674 are unimportant now. Whatever they may have been, they became merged when James was crowned in 1685, and on the American revolution all title, rights, dominion, sovereignty possessed theretofore by the Crown, or by the King and Parliament passed to the state.

The boundary between the several states and Canada was fixed by the Treaty of Paris. It reached the St. Lawrence River at the mouth of the St. Regis. Thence it ran towards the west through the center of that river and the Niagara and through the center of Lakes Ontario and Erie. But as to the lines between the states themselves there was still question. Charters or grants of territory extended from the Atlantic to the unknown “south sea” or “southern ocean” gave room for conflict. Such was the quarrel between New York and Massachusetts. The latter claimed sovereignty, jurisdiction, title to much of the present New York.

New York protested vigorously. Probably it was right. For years it had exercised sovereignty over the territory. Control over the Iroquois, so far as there was control, rested in its government. The arms of the Duke had been placed in their villages. Treaties had been made with them and intercourse with them regulated. Still

the claim of Massachusetts existed and it was not merely frivolous. So when application was made to the congress of the Confederation to arbitrate the matter, the two states decided to settle the quarrel without outside interference. The result was the Treaty of Hartford (1786)—essentially a compromise.

By it Massachusetts ceded to New York "all the claim, right and Title" which it "hath to the Government, Sovereignty and Jurisdiction" of lands within New York's present boundaries and all claims to lands east of the so-called preemption line. In return New York ceded to Massachusetts and its grantees "the right of preemption of the Soil from the native Indians and all other the Estate, Right, Title and Property" of a tract of about six million acres, beginning at a point in the Pennsylvanian line at the present south east corner of Steuben County and running thence due north to Lake Ontario at Sodus Bay. This line ran through Seneca Lake. From Sodus Bay the line was continued to the Canadian boundary. Thence it followed that boundary (with the exception of a mile strip along the Niagara River) to the state's western boundary. Thence south and east to the place of beginning. The territory so ceded contained a number of large and small lakes, and some streams and rivers, the largest of which was the Genesee River. It was unsettled country.

Briefly to complete the story, Massachusetts agreed to sell the whole tract, with the preemption rights, to a Mr. Phelps and a Mr. Gorham. These gentlemen extinguished the Indian rights to about two million acres lying west of the preemption line. This was conveyed to them by Massachusetts. As to the balance of the contract they failed. Title to the remaining four million acres was therefore in large part conveyed by the state to Robert Morris and ultimately vested in the Holland Land Company.

All title therefore to lands west of the preemption line are to be traced back to Massachusetts and thence back to New York. No one claims that we may ignore the Treaty of Hartford and referring to the royal charters decide anew whether title to this territory was originally in Massachusetts. Situated as these lands are in New York subject to the jurisdiction of our courts, controlled by the political action of our government, we must hold that title comes to the present owners through the grant from New York to Massachusetts. Massachusetts itself makes no other claim. The act passed November 21st, 1788, deeding the two million acres to Phelps and Gorham refers to the lands "ceded by the State of New York." In a recent

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the Supreme Court makes no such suggestion. And that Court speaks of title to these lands as acquired by Massachusetts through the treaty.

East of the preemption line, all titles are to be traced back either to grants by the Dutch, the Crown, or the state. Dutch grants, so far as we are concerned, were along the Hudson or Mohawk rivers, and their effect, as has been said, will not be considered here. We have to do only with Crown or state grants to individuals and the cession of property rights to the State of Massachusetts.

Under the English common law, waters where the tide ebbed and flowed were called "navigable". Considered as arms of the sea, it was held that presumptively title to the soil beneath was held by the Crown for the public good. Any alleged private ownership must be strictly proved. As to non-tidal waters the presumption was to the contrary. The beds were presumed to belong to the riparian proprietors, although here again it might be shown that title to the shores and to the land under water had been separated. This presumption has governed even as to such lakes as Lough Neagh (eighteen miles by eleven) or Lough Erne (slightly smaller).

We adopted the common law so far as it was applicable to our own conditions. It has been argued that the English theory because of our greater rivers and larger lakes is not practical here. It has even been said that writers have been mistaken as to what in truth the English theory was. Such seems to be the view of the Supreme Court of the United States. Whatever is held elsewhere, however, there can be little doubt that the rule in New York as to non-tidal rivers is settled. With us the word "navigable" has a purely technical meaning. Rightly or wrongly that meaning has been adopted and is now too firmly fixed to be questioned. And the ownership of the beds of waters lying wholly within the state, is to be determined by the laws of that state.

The New York rule as to the beds of small unnavigable streams and ponds may be briefly stated. As to it there is no dispute. Except in

130 Johnston v. Bloomfield, 8 Ir. R. C. L. 68 (1868).
132 People v. Canal Appraisers, 33 N. Y. 461 (1865).
unusual cases where title has been reserved, it rests in the riparian proprietors. Instances where the rule applies are Copake lake,\(^{20}\) Cromwell lake,\(^{21}\) Fish lake,\(^{22}\) Lime lake,\(^{23}\) Silver lake,\(^{24}\) Croton lake,\(^{25}\) and Spring lake.\(^{26}\) All these are comparatively small bodies of water. And the same rule would apply both east and west of the cession line. For the cession to Massachusetts was equivalent to a grant to an individual. What a patentee might claim under it, Massachusetts may claim. It held these lands not as a sovereign but as a private proprietor.\(^{27}\)

The same thing may be said of larger streams even where they are navigable in fact. A grant of land bordering upon them carries title to the center unless their bed is excluded by the terms of the instrument.\(^{28}\)

Wholly within the State, however, are a number of lakes of considerable size. Many are east of the cession line; many west. Again, I think the same rule, whatever it may be applies to both. The only doubt might arise because of a few sentences in *Massachusetts v. New York.*\(^{29}\) That case had to do with the claim of Massachusetts to title to the bed of Lake Ontario under the language of the Hartford treaty. "It is a principle" the court says "that the title to the soil under navigable waters is in the sovereign, except so far as private rights in it have been acquired by express grant or prescription... The dominion over navigable waters and property in the soil under them, are so identified with the exercise of the sovereign powers of government that a presumption against their separation from sovereignty must be indulged, in construing all grants by the sovereign, of lands to be held

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\(^{27}\) *Massachusetts v. New York,* *supra* note 12a; *Burbank v. Fay,* 65 N. Y. 57 (1875).

\(^{28}\) *Ex parte Jennings,* 6 Cow. 518 (N. Y. 1826) (Chittenango Creek); *Commissioners of Canal Fund v. Kumpsall,* 26 Wend. 404 (N. Y. 1841) (The Genesee); *Chenango Bridge Co. v. Paige,* 83 N. Y. 178 (1880) (The Chenango); *Fulton L., H. & P. Co. v. New York,* *supra* note 15 (The Oswego).

\(^{29}\) *Supra* note 12a.
in private ownership."30 It follows that a grant of government and sovereignty from one state to another carries, as an incident, title to land under navigable waters.

"[T]he Treaty of Hartford . . . gave to New York, as incident to its sovereignty, title to all lands under navigable waters."31

These statements are properly applicable to boundary lakes of great size like Ontario and Erie where conflicts of jurisdiction might be the result of divided ownership and where the interests of a foreign nation are involved. And in this case there were various circumstances which corroborated the construction given to the treaty. The Supreme Court, however, certainly did not intend to pass upon the title to the bed of the Genesee River or the land under Hemlock Lake, both waters navigable in fact, which belong to the riparian proprietors. As pointed out above, the grant to Massachusetts must be construed in the light of the settled law of New York. It is so conceded in Massachusetts v. New York.32

We must consider, therefore, these larger lakes. Lake George is thirty-three miles long by a mile and a quarter in breadth. There are Oneida, Skaneateles, Cayuga, Seneca comparable in size. There are Otsego, Onondaga, Chautauqua, Keuka, others, smaller, but all of which are navigable in fact. On all, boats have plied carrying passengers and freight. There is a lake like Cazenovia, five miles by three-quarters, used probably only by pleasure boats.

I can point to no case where the Court of Appeals has decided what rule is to be applied to these situations. Nor earlier is there anything decisive. We are told that the law as to lakes is derived from the law as to rivers.33 Yet there is slight resemblance between a lake of the size and shape of Oneida and the Oneida river.

The construction of grants is based largely on the assumed intent of the parties. And the assumption that the state by the grant of one hundred square feet bordering on Oneida Lake intended as attached to it to grant a strip of land under water two miles in length, is a violent one. In such cases the rule is impractical. We feel so instinctively. Our common sense revolts in the case of such a body of water. The argument ab inconvenienti may often be insufficient to justify an exception to settled rules.34 "This is true where the law is clear. Where it is unsettled the result of a proposed rule may turn the

30Ibid. 89, 46 Sup. Ct. at 361.
31Ibid. 90, 46 Sup. Ct. at 361.
32Ibid. 93, 46 Sup. Ct. at 362.
And when it comes to Lake Michigan, the Supreme Court itself gives weight to this consideration. As has been said, we have no controlling decision, but our courts have touched upon the question. What was said in Commissions v. People that the common law rule does not embrace our large fresh water lakes or inland seas was purely dictum. In City of Geneva v. Henson the court felt bound by certain findings of fact with regard to Seneca Lake. In Sweet v. City of Syracuse that the common law rule does not embrace our large fresh water lakes or inland seas was purely dictum. In City of Geneva v. Henson the court felt bound by certain findings of fact with regard to Seneca Lake. In Sweet v. City of Syracuse while the court noticed the contention that the bed of Skaneateles Lake was in the state, it did not pass upon the finding of the General Term to that effect. In Smith v. Rochester there is a dictum of the Chief Judge "in passing" that the doctrine that the bed of fresh water streams where the tide does not ebb and flow belongs in common right to the owners of the soil adjacent is inapplicable to the "vast" fresh water lakes and streams of this country. Finally in Stewart v. Turney the court said "Were it necessary we would hold, however, that with regard to a grant of land on Cayuga Lake an exception should be made to the common-law rule." Again a dictum, but apparently made with deliberation.

With regard to these largest lakes, therefore, I believe we may fairly conclude that should the matter ever arise the Court of Appeals would hold that the fee of their beds was in the state and that title of the riparian proprietor extended but to low water mark.

Then come lakes smaller in size, but still useful for commerce—Otsego, Onondaga, Canandaigua, Keuka and others. Is the exception to be applied here also? As to this there may be more difficulty.

Hemlock Lake is seven miles long and one-half mile wide, forming part of the navigable waters of the state. Rochester diverted its waters for municipal purposes to the injury of proprietors along its outlet. This was a wrongful act. Ownership of the bed of the lake was unimportant. This the Court of Appeals recognized. Yet in a long discussion Judge Ruger reaches the conclusion that title to its bed was not in the state but passed to Massachusetts under the treaty of Hartford.

Title to the bed of Keuka Lake was discussed by Judge Haight, later of the Court of Appeals, while sitting at Special Term. He as-

375 Wend. 423 (N. Y. 1830).
38Supra note 12.
39129 N. Y. 316, 29 N. E. 289 (1891).
40Supra note 1.
41Supra note 35.
42Ibid. 123, 142 N. E. at 439.
43Ibid.
sumed that it belonged to the riparian proprietors. Very lately, however, the Appellate Division has taken the opposite view with regard to Canandaigua Lake. The case was tried before a referee who wrote an able and exhaustive opinion— with whose reasoning, however, I disagree. There was a simple affirmance on appeal. Otsego Lake is much the same size. The state has assumed to own its bed and has made grants of land under water.

Next we have Cazenovia, never used for commercial traffic. Its outlet is a small creek. The old General Term held that title to its bed was in the riparian owners.

The chief difficulty seems to come, therefore, with regard to these lakes of moderate size—Onondaga, Otsego, Keuka or Canandaigua—smaller than Cayuga, larger than Croton. What are the probabilities here, we can only prophecy. The bed of Cayuga belongs to the state—of Croton, to the adjoining proprietors. Where is the line to be drawn? What test applied?

An interesting article on this subject by Mr. Colson appeared in the CORNELL LAW QUARTERLY. He states the rule as to small lakes and ponds as it is well understood. As to larger waters he says truly that the question has never been determined by the Court of Appeals. But lakes like Hemlock and Keuka, in fact navigated by common carriers but whose navigation is confined within their own boundaries, he distinguishes from lakes still longer, which "are connected by navigable water with other navigable waters of the state, so that commerce is not restricted to their own shores." Such a lake is Seneca. In the one case the cession treaty or a patent from the State carried title to their beds. In the other it did not.

Ingenious as this theory is, apparently no support for it is found in the adjudged cases. In most dicta mere size seems to be the prevailing factor. However, it had little influence in regard to Hemlock Lake. Here shape may be important. Seven miles long by half a mile wide, on the map it appears like a broadened river, and, as has been said, the law as to lakes is based on the law of rivers. It may be that width is of more importance than length. The same rule might not be applied to a lake forty miles long and a quarter of a mile wide and to one ten miles by one.

46Ledyard v. Ten Eyck, 36 Barb. 102 (N. Y. 1862).
47Colson, Title to Beds of Lakes in New York (1924) 9 CORNELL LAW QUARTERLY 159, 288.
47aIbid. 310.
In *Ledyard v. Ten Eyck*\textsuperscript{48} stress is laid on the fact that Cazenovia Lake is not used for commercial navigation, a matter not thought decisive in the Hemlock Lake case. The opinion of the old General Term was apparently written without adequate thought or study, and should such a question again arise, it is far from certain that it would be followed by the Court of Appeals.

The result is unsatisfactory. No rule can be laid down always and everywhere applicable. Every case will have to be considered on its own special facts. This, however, is no new experience. We may define negligence in general terms. Whether a certain act is negligent depends on many considerations.

We cannot say what the Court of Appeals will do in specific instances. It will doubtless consider size as of great importance. Probably it will consider shape and navigability. Probably evidence bearing on practical construction of the grants under which title is claimed will be received. Dominion and control of the state, acquiesced in by riparian proprietors and claims and acts of the latter may be considered. The court may endeavor to interpret the attitude of the parties when the grant was made. It certainly will treat the cession to Massachusetts as it would if made to an individual.

The guess of the writer is that as to such lakes as Canandaigua, Keuka and Chautauqua it will decide the fee in the bed is in the state. So as to lakes the size and shape of Onondaga. So, very likely as to a lake like Cazenovia. The bed of a lake like Hemlock—riverlike in shape—will go to riparian owners. Somewhere a line will be drawn between the "vast" inland seas spoken of by Judge Ruger, and the small lakes and ponds — whose bed admittedly the state has not retained.

\textsuperscript{48}Supra note 46.