Communication

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The New York Law of the Foreshore at the Beginning of the 18th Century

In an able and learned article on "The Seashore and the People," Mr. Winthrop Taylor (10 CORNELL LAW QUARTERLY 303) urges that up to the time of the American Revolution "the common law of England (always excepting the unreported Philpot case) was that the title of the upland owner carried to low water mark." He further quotes from a New Jersey case¹ as follows:

"There is no evidence that the jus privatum, the right of private property in the shore to low water mark was ever asserted in the colony as a right of the crown."

It can be demonstrated that in the Colony of New York in the early years of the 18th century it was accepted law that:

1. The *jus privatum* was in the Crown.
2. Title to the foreshore was *prima facie* in the Crown.
3. A grant of land upon a river or sound extended only to high water mark.
4. The foreshore was not considered as appurtenant to the upland.

These views are supported by two of the Crown's real estate transactions, one with a humble pipe maker, the other with the City of New York.

In colonial times the City of New York was limited to Manhattan Island to the east of which is the East River. On the east of the East River was the Town of Brooklyn which is upon Long Island. The Town of Brooklyn, according to the patent granted by Governor Nicolls in 1667, was bounded by the river. In 1702-3 the Mayor, Aldermen and Commonalty of the City of New York presented their petition to Viscount Cornbury, the then Governor, for a grant of "all the vacant land from high water mark to low water mark, fronting the harbor of this city, from the east side of the Red Hook, upon Nassau Island² aforesaid to the east side of Wallabout aforesaid.³"

The trustees for the Town of Brooklyn entered a *caveat* "against the City of New York, or any particular person for having a patent for any land between high water and low water mark, from Kickout and the Wallabout to Red Hook in said township till they be heard etc."⁴

¹Bell v. Gough, 23 N. J. L. 624, 661 (1852)
²Nassau Island was the old name for Long Island.
⁴Ibid. p. 48.
Six years later, in 1708, Viscount Cornbury in the name of Queen Anne granted to the Mayor, Aldermen and Commonalty of the City of New York "all that the aforesaid vacant and unappropriated ground lying and being on the said Nassau Island (alias Long Island) from high-water-mark to low-water-mark aforesaid, contiguous and fronting the said City of New York, from the aforesaid place called the Wallabout to Red Hook aforesaid."

The Wallabout and Red Hook were well identified localities in Brooklyn on the East River.

Here we have a grant to Brooklyn bounded by East River so clearly understood as extending only to highwater mark that years later the Crown grants the foreshore to the City of New York. It seems certain that Viscount Cornbury would not have made this grant to the City of New York over the protest of the Town of Brooklyn if the same premises had been granted by his predecessor to the Town of Brooklyn. The Cornbury charter is a plain assertion by the Crown of the *jus privatum* and of the *prima facie* theory.

Further proof of the position taken herein is to be gathered from the unpublished papers relating to Thomas Worden, pipemaker. These papers are among the Colonial Manuscripts still preserved in the State Library in Albany, New York. They consist of a petition by Thomas Worden to Viscount Cornbury, Governor in Council, and a report by the three members of the Council to whom the Petition was referred by the Governor.

Thomas Worden, a pipemaker, of the City of New York, had discovered a vein of pipe clay located on Long Island (then known as Nassau Island) between highwater and low water mark. His information was that this land between high and low water was the property of her Majesty (i.e. good Queen Anne). Accordingly he presented to the Governor in Council the following petition:

"To his Excellency Edward Viscount Cornbury Captain Generall and Governor in Chief in and over the Province of New York the Province of New Jersey and territories depending thereon in America and Vice admiral of the same etc. in Council.

"The humble petition of Thomas Worden of the City of New York pipemaker

"SHEWETH

"That your Excellencies petitioner hath already been at charges and expenses in Discovering of Clay fitt for the making of pipes and hath at last found out a veine of such clay as is proper for that use, but the same lying between high water and low water mark on the Island Nassau which your Excellencies petitioner is Informed belongs to her Majesty."
"Your petitioner humbly prays that your Lordship in Council will please to grant unto yo' petitioner your Excellencies License for the use of the same untill your Lordships pleasure shall be signified to the Contrary.

"And yo' petitioner shall ever pray etc. "Tho' Worden"

"March rst, 1703"

The Governor on March 24th referred the matter to three of the members of the Council. These apparently found that the clay in question lay within the Town of Flushing, or rather in the foreshore along said Town. Accordingly they sought to determine the ownership of the premises by an examination of the Patent to the Town of Flushing. There were three patents to the Town of Flushing but presumably the Councillors examined the latest, that granted by Governor Dongan in 1685. They report that they "do not find any express words contained in the said bounds whereby the lands between high and low water mark have been granted to the freeholders and inhabitants of the said Town of Flushing." They proceed to state that they do not know whether the premises "be upon the Main River [i.e. Long Island Sound or the East River, for in those days the Sound was frequently called the East River or Main River] or within some creek or harbour which we observe to be within the Patent of said Town." The reference here is obviously to the appurtenances clause of the Dongan Patent which reads as follows:

"together with all and singular the houses, messuages, tenements, fencings, buildings, gardens, orchards, trees, woods, underwoods, pastures, feeding, common of pastures, meadows, marshes, lakes, ponds, creeks, harbors, rivers, rivoletts, brooks, streams, highways, and easements, whatsoever, belonging or in any wise appertaining to any of the aforesaid tract, parcel or neck of land, divisions, allotments and settlements made and appropriated before the day of the date hereof."

Accordingly they suggest proper inquiry as to whether the premises "do ly open to the Sound or Main River or be within land within the bounds of Flushing Patent."

A full copy of the report of the Councillors follows. (It should be noted that as the legal year did not at that time begin until March 25th, the dates of the Petition and Report are but a month and three days apart.)

"MY LORD:

"In obedience to your Excellency's orders of the four and twentieth day of March, last past, we have examined into the allegations contained in the within petition and have perused the bounds of the Patent granted to the Town of Flushing in Queens County, in the Island Nassau, and do not find any express
words contained in the said bounds whereby the lands between high and low water mark have been granted to the freeholders and inhabitants of the said Town of Flushing. But it being doubtful to us whether the place the petitioner desired to dig clay in, be upon the Main River or within some creek or harbour, which, we observe to be within the Patent of the said Town. We humbly consider it necessary that the neighboring Justices of the Peace to the said Town of Flushing, be desired to inquire into the truth of the said matter and to certify to your Excellency, whether the said vein of clay, mentioned by the petitioner in the petition proffered to Excellency in Council do ly open to the Sound or Main River or be within land within the bounds of Flushing Patent.

"All of which is nevertheless humbly submitted to your Excellency, by, My Lord, your Excellency's Most Obedient Servants. "SA. SH. BROUGHTON

MATHEW LING

S. V. RENSLAER"

"New York, 4th April, 1704."

From these Worden papers and facts as to the New York City Charter granted by Cornbury there is easily to be gathered a complete notion of the law of the foreshore as at that time it was understood in the Colony of New York. The foreshore was, *prima facie*, the property of the Crown. It would not pass without express words of grant. It was not appurtenant to the upland and the Crown might grant it in direct hostility to the obvious wishes and needs of the upland owners.

These principles were insufficiently supported by authority in England, have been shown to be historically and legally erroneous, and need not have been accepted in New York. Nevertheless they were accepted as law in New York.

New York

Harry Percy David