Property-Wharfing Out-Riparian Owner Permitted to Use Filled-In Swamp as a Wharf to Reach Navigable Water. Burns v. Forbes (3rd. Cir. 1969)

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RECENT CASES

PROPERTY—WHARFING OUT—RIPARIAN OWNER PERMITTED TO USE FILLED-IN SWAMP AS A WHARF TO REACH NAVIGABLE WATER. Burns v. Forbes (3rd Cir. 1969).

The plaintiff, a riparian land owner, to improve his access to the navigable waters of the lagoon bordering his property and to abate a mosquito problem, contracted to have a grove of trees growing in the swampy edges of the lagoon crushed and the area filled with dirt. Subsequently the defendant, the plaintiff’s neighbor to the south and west, built a fence from his land in a northerly direction across the newly filled land cutting off the plaintiff’s access over the new land to the lagoon. The plaintiff brought suit to enjoin the defendant from maintaining the fence. The trial court found the plaintiff did not have title to the filled land and denied the injunction. On appeal the United States Court of Appeals, Third Circuit, reversed and remanded with directions to vacate the judgment and to enter a judgment enjoining the defendant from maintaining the fence. Held: While the plaintiff did not have title to the land, he had a right to use the land for access to the lagoon subject to appropriate regulation by the United States government. Burns v. Forbes, 412 F.2d 995 (3rd Cir. 1969).

At common law one whose boundary was fixed by a stream or body of water became the owner of any new land created by accretion or reliction.3 In a long unbroken line of cases beginning

1. At trial the plaintiff argued that the contested area had become fast land by accretion but the trial court found that the plaintiff had caused the land to be filled. See text accompany notes 4-11 infra.
2. In 1949 defendant conveyed to the plaintiff a parcel of land bordering on the lagoon. At the time mangrove trees were growing at the edge of the lagoon—some of the trees growing in the water creating a swamp-like condition. The defendant retained land bordering on the lagoon and adjacent to the land conveyed to the plaintiff on the south and west.
3. American Law of Property defines accretion and reliction as follows:
   Accretions or accreted lands are additions to the area of realty from gradual deposit by water of solid material, whether mud, sand, or sediment, producing dry land which before was covered by water, along banks of navigable or unnavigable bodies of water.
   Reliction is the term applied to land that has been covered by water, but which has been uncovered by the imperceptible recession of the water.

with *Jones v. Johnston* the Supreme Court has consistently upheld the right of a riparian land owner to land created by accretion or reliction. In *County of St. Clair v. Lovingston*, the Court traced the history of the right from Roman times through its common law development. The process of accretion must be so slow that a person observing it is unaware that it is occurring. If the process should occur suddenly, such as during a storm, the change in boundaries cannot properly be considered accretion and the boundaries remain the same as before the event. The process need not be caused by natural phenomenon so long as it is not the riparian owner who caused the process to begin. Whether the new land is the result of accretion is a question of fact.

At trial the plaintiff contended that the land had become fast by natural accretion between 1949 and 1965. The defendant

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5. *See*, e.g., *Hughes v. Washington*, 389 U.S. 290, 293 (1967), where the Court said: "A long and unbroken line of decisions of the Court establishes that the grantee of land bounded by navigable water acquires the right to any natural and gradual accretion formed along the shore."
6. 90 U.S. (23 Wall.) 46 (1874).
7. The Court, tracing the development of the concept of accretion, states:
   The law in cases of alluvion is well settled.
   In the Institutes of Justinian it is said:
   "Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase, and that is added by alluvion which is added so gradually that no one can perceive how much is added at any one moment of time."
8. Id. at 66-67.
9. Id. at 67. *See also*, *Harrison County v. Guice*, 244 Miss. 95, 140 So.2d 838 (1962).
10. "Whether the flow of water was natural or affected by artificial means is immaterial." 90 U.S. (23 Wall.) at 66.
11. The evidence was conflicting but an admission by one of the witnesses for the plaintiff acknowledged that some of the trees were growing in the water at the time of the fill. 412 F.2d 995, 996 (3rd Cir. 1969). *See note 2 supra.*
asserted that the plaintiff had filled in the tidelands of the lagoon to create the new land. As such he contended that the plaintiff had no title to the new land and should therefore have no right to challenge the fence. Despite conflicting evidence the trial court found that the plaintiff had caused the swampy edge of the lagoon to be filled and that accretion had not taken place.\textsuperscript{12}

After finding that the plaintiff was responsible for creating the new land area the trial court refused to grant the injunction and in effect denied the plaintiff access to the lagoon over the contested area. The appellate court, however, began its consideration of the case where the trial court ended its examination. Accepting the finding of fact that no accretion had taken place, the appellate court reasoned that the boundaries remained the same as before the fill.\textsuperscript{13} Consequently it determined that the new land was public property.\textsuperscript{14} The land had taken on a new character—what had before been submerged public land was now dry, fast public land. That determination and the trial court’s decision which allowed the defendant to take possession of and block off the plaintiff's access to what was in fact public land was untenable.

At common law the riparian owner had rights superior to the general public in publicly owned submerged lands in so far as use of the submerged land was necessary to make full use of his riparian rights.\textsuperscript{15} One of the fundamental rights of a riparian owner is the right of access to navigable water.\textsuperscript{16} The right of the riparian owner to use public lands for access to navigable water developed into a common law right to wharf out to navigable water over submerged public land.\textsuperscript{17} The Supreme Court has consistently and emphatically upheld the right to wharf out over all federally owned submerged land.\textsuperscript{18} It is a vested property right not subject to the condition that the owner obtain permission from the proper authorities.\textsuperscript{19} The right is subject only to valid and

\textsuperscript{12} 412 F.2d at 997-98.
\textsuperscript{13} Id.
\textsuperscript{14} Id. at 998.
\textsuperscript{15} Id.; County of St. Clair v. Lovingston, 90 U.S. (23 Wall.) 46 (1874); cf. United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).
\textsuperscript{16} 269 U.S. at 411.
\textsuperscript{17} Id.
\textsuperscript{19} United States v. River Rouge Improvement Co., 269 U.S. 411 (1926).
reasonable regulation for the general public good.\footnote{Id.} If the public interest requires a taking of the owner's riparian rights he is entitled to adequate compensation.\footnote{Hughes v. Washington, 389 U.S. 290 (1967).}

Not all tidelands are federally owned. The states own submerged lands within their respective boundaries\footnote{22. See, e.g., Port of Seattle v. Oregon & Washington R. Co., 255 U.S. 56 (1921).} and some states have chosen to statutorily deny the riparian owner a vested right to wharf out.\footnote{23. The constitution of the state of Washington, as interpreted by the state's supreme court, limits a riparian owner's common law right to accretion and wharfing out as well. Hughes v. Washington, 389 U.S. 290 (1967); Port of Seattle v. Oregon & Washington R. Co., 255 U.S. at 56.} The Supreme Court has held, however, that, if title can be traced to a federal grant prior to statehood, federal rules apply.\footnote{24. Hughes v. Washington, 389 U.S. 290 (1967).}

In \textit{Burns} no evidence was presented to challenge the fact that the submerged land in question was not property of the United States and under the control of the Secretary of the Interior.\footnote{25. The land in question is located in the Virgin Islands but in the absence of evidence that the United States had conveyed this particular tract of land to the Government of the Virgin Islands the \textit{Burns} court presumed that the land was property under the control of the Secretary of the Interior by the Convention of 1916 between Denmark and the United States. 412 F.2d at 997-98.} The court therefore applied the federal rule permitting wharfing out, by extending the definition of a wharf and holding that the filled-in land constituted a permissible wharf for access to the navigable waters of the lagoon.\footnote{26. \textit{Id.} at 998.}

\textit{Burns} is not the first case to extend the definition of a wharf to filled land. In \textit{City of New York v. Third Avenue Railway Company}\footnote{27. 294 N.Y. 238, 62 N.E.2d 52 (1945).} a New York court approved the filling in of shallow water and the construction of some small buildings on the land. New York City had argued that it was improper to allow a private company to fill in public tidelands to construct privately owned buildings. The court found, however, that the small buildings in no way interfered with navigation or the interest of the City at the time of the suit. Further, it determined that the buildings related directly to the use of riparian land in the access...
to the navigable waters of the river. The importance placed by the
decision on the finding that the buildings related to use of the
water is interesting because it implies that if the use of the filled-
in land had not directly related to that purpose, the court would
have enjoined the filling of the shallows.28

In State v. George C. Stafford & Sons29 the same
determination that filled-in shallow water constituted a wharf was
made. The decision referred to the “reasonable private right of
using this public land”30 to explain the concept of the riparian
owner’s rights in public land. But the opinion warned that the
owner who fills in public tidelands is subject to regulation for the
public welfare and it is possible that a fill may be judged an
abatable nuisance if it interferes with public use of the water.31

Inherent in the decision to allow the riparian owner to use
filled in tidelands as a wharf to provide access to the water is a
holding that the riparian owner remains exactly that, a riparian
owner, even though the land to which he holds title is no longer
bounded by water. The implications of that holding are that the
riparian owner’s rights in the new land are superior to the public
at large,32 but clearly subject to public regulation for the general
good.33 Evident in Burns and other similar decisions is a policy
of protection of riparian rights if at all possible. Arguably, the
court could simply have declared that the land was now public
beach and that both parties had the same rights to use the land
as the public at large. But such a decision would have effectively
operated as a declaration that the plaintiff was no longer a
riparian owner with the accompanying rights.

While reflecting a strong desire to protect riparian rights, the
decision at the same time demonstrates a policy of adhering
strictly to the common law doctrines regarding accretion, reliction
and the rights accompanying riparian ownership such as wharfing
out. This policy can also have the effect, as it did in Burns, of
protecting the public’s rights as well. Even though the land filled
was a shallow mosquito breeding swamp, it was public property
and the Burns court recognized the public’s rights in it.

28. Id. at 242-44, 62 N.E.2d at 54.
30. Id. at 98, 105 A.2d at 573.
31. Id.
32. 412 F.2d at 998. See also, text accompanying note 18 supra.
Thus both the public and the plaintiff benefited from the plaintiff's action and the court's decision. At some point, however, a court may have to complete the delineation, begun in Burns, of the rights of various parties. The court mentioned that the plaintiff is subject to public regulation, but it deliberately declined to set forth to what extent and for what purposes the plaintiff's beach/wharf may be regulated. Undoubtedly the plaintiff's right to due process must be observed if authorities seek to regulate his beach/wharf. But will he have to share his beach/wharf with the public to a greater extent than if he had built a conventional dock? Can others make use of his beach/wharf for their own boating, swimming or camping purposes? Is it possible that the government might take over the new land as public beach to such an extent that the plaintiff's use of the land as a wharf might become impracticable if not impossible?

The case has interesting facts and an imaginative solution. The court went a long way to protect the plaintiff's rights as a riparian owner. It also protected the public's rights in what had been submerged land. In so doing it reached a result that seems fair and legally sound but which leaves some interesting questions unanswered. These questions may require future decisions giving preference to either the public or the private owner, when those rights become incompatible.

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MAINTENANCE AND CURE—JONES ACT—SEAMAN GOING AND COMING FROM SHIP HELD IN SERVICE OF SHIP—SHIPOWNER HELD TO ACCEPT DUTY FOR SAFE TRANSPORTATION IN PROVIDING TRAVEL PAY AND ATTEMPTING TO CONTROL TRANSPORTATION. Williamson v. Western-Pacific Dredging Corporation (D. Ore. 1969).

Maintenance and cure and damages for wrongful death under the Jones Act were the counts involved in an action brought by

33. 412 F.2d at 998. See also, text accompanying note 23 supra.
34. 412 F.2d at 998.
35. See text accompanying notes 22-24 supra.
37. Id.
38. Id.; see also, text accompanying notes 22-24 supra.